Genesis Energy Limited
Level 6
155 Fanshawe Street
PO Box 90477
Victoria St West
Auckland 1142
New Zealand

T. 09 580 2094

18 November 2022

Commerce Commission
Email: misuseofmarketpower@comcom.govt.nz

Submission on the Draft Misuse of Market Power Guidelines

Genesis Energy (**Genesis**) welcomes the opportunity to provide comment on the Commerce Commission's Draft Misuse of Market Power Guidelines.

We support the proposed guidelines but urge the Commission to consider some areas in which the guidelines could give rise to unintended consequences.

The guidelines must remain flexible in the short-term

Genesis understands that the proposed guidelines are based on Australia's Competition and Consumer Commission (**ACCC**) guidelines, which are currently four years old. Therefore, we strongly support the continued evolution of New Zealand's guidelines so that they may reflect any future changes to our markets as they evolve.

This will be particularly important for the energy market, which faces challenges related to the pandemic, the global financial crisis, and decarbonisation. Guidelines must remain flexible to accommodate and reflect changes necessary to adapt to these challenges. Genesis recommends that the guidelines are reviewed every two years after they are published.

Legitimate business justification

During consultation on the amending legislation, it was suggested a clause was inserted to explicitly provide for conduct that would not be considered to breach s36 because it was undertaken for a 'legitimate business purpose' (or similar). These suggestions were not accepted, and it has instead been left to the regulator to exercise reasonable discretion when assessing conduct or claims.

As a consequence, Genesis considers the guidelines should highlight examples of trade practices and conduct when this discretion could reasonably be expected to be

applied. The list of examples could not and should not be exhaustive, but providing guidance in this way would provide some protection against meritless or vexatious claims from spurned competitors in some cases.

Refusing supply for legitimate business purposes is one example that arises in the energy sector that may be highlighted. Genesis understands that competition can be undermined when generators refuse to supply downstream firm(s) in certain circumstances, particularly when they themselves have substantial market power. The Act should and rightly does provide tools to address behaviour of this nature.

However, as the guidelines currently stand, Genesis considers there is potential for erroneous or vexatious claims to be taken against a business when they have genuine reason to refuse supply. Reasons are numerous but common examples include situations where stock is held/available for a supplier's own legitimate use rather than for the purposes of trade.

Consequently, we encourage the Commerce Commission to provide case studies on what activity is considered exempt and legitimate conduct for refusal of supply under the Commerce Amendment Act. This will ensure clarity of provision and safeguard against competitors bringing meritless (or, at worst) vexatious claims that tie up resource.

Similar issues arise in respect of credit security requirements that are required by energy wholesalers (and, indeed, in numerous other industries). To ensure our own financial stability, gentailers like ourselves require retailers to provide credit security to avoid any potential commercial loss during our auction process. It also ensures that other parties/retailers do not miss out on an opportunity to purchase supply at a reasonable time and at a reasonable price. Consequently, if a counterparty does not wish to provide credit security, then a supplier should not be held liable for refusing to supply as this would be unfair to the supplier and ultimately produce an inefficient outcome for the market at large.

Both the scenarios outlined above are not examples of anti-competitive behaviour or abuse of market power. It is well-understood and legitimate conduct that is ordinary in a commercial environment that subsequently should not be penalised. Identifying them (and other common examples) in the guidelines would provide some protection against meritless claims, by improving the economy-wide understanding of how the legislation is likely to be applied.

Self-assessments can be difficult and costly for businesses

Self-assessments as described in the guidance can be challenging and costly, particularly for smaller businesses. Compliance is often technical, and it can be difficult for businesses, even those with more resources, to understand what is required at an operational level.

A self-assessment toolkit for businesses could address this. A toolkit or quick guide that explained in plain language what is required to comply would deliver cost and efficiency benefits. This is also likely to be beneficial in terms of improved compliance.

Areas that the guide or toolkit could explain to make assessments easier could include risk identification, risk assessment, mitigation, when to self-assess and what is required from key people such as directors during the process. An example of where this has been helpful for businesses is in the United Kingdom with their 'Quick Guide

to Complying with Competition Law',[1] which sits alongside and supports their overarching guidance: Competition law - abuse of a dominant position.

The regulatory intervention threshold must be reasonable

Genesis supports the proposed guidelines and agrees that businesses with substantial market power should have the onus of 'special responsibility'. We consider the guidelines could be improved by explicitly setting out the reasonable threshold for intervention.

The new section 36 prohibition under the Commerce Amendment Act will make it easier for the Commission to take action on conduct that is referred to under the proposed guidelines. This is appropriate, but the guidelines should be very clear that investigations will only be undertaken when the behaviour in question meets a certain threshold that warrants intervention. By way of providing a clear understanding of what the threshold for investigation should be, we recommend providing key examples of precedent where businesses have breached conduct in the past.

For example, we understand that in Australia there was a significant increase in private legal action when the ACCC removed the 'taking advantage' element from the Competition and Consumer Act 2010 and guidelines. This was considered by some to have lowered the bar for establishing a contravention.[2] This ambiguity led to costly and time-consuming regulatory processes for many businesses and the regulator. It also led to increased pressure being placed onto the courts.

Providing clear examples of precedent behaviour could prevent the same pattern emerging in New Zealand and save the courts dealing with unnecessary cases.

Further, cases and complaints could be recorded and displayed via an online dashboard on the Commission's website to improve transparency and clarity. This has worked well in the financial sector, where the Banking Ombudsman takes this approach[3]. Something similar would be beneficial in a broader business context in New Zealand.

Please do not hesitate to contact me if you have any questions about our submission.

Yours sincerely,

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/306899/CMA19.pdf
[2] https://www.gtlaw.com.au/knowledge/dominance-australia-2022
[3] https://bankomb.org.nz/complaints-dashboard/