



29 October 2019

Keston Ruxton  
Commerce Commission  
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Attention Keston Ruxton (by email: [keston.ruxton@comcom.govt.nz](mailto:keston.ruxton@comcom.govt.nz))

**Re: Fuel market study-possible further information from affected retailers**

As you are aware, following the recent public consultation round of the Fuel Market Study it came to MTA's attention in strict confidence that, provided that their concerns about confidentiality could be addressed satisfactorily, a small number of Member retailers might be prepared to provide to the Commission (through the MTA) some important insights regarding retailer contracts and the effect of discounting. In broad terms these independent retailers:

- [REDACTED];
- [REDACTED]
- [REDACTED].

There appears to be very little information before the Market Study that has been provided by retailers, or more particularly independent retailers (as opposed to reseller or wholesalers that are also involved in retailing). The MTA, and these Members, would like to be in a position to put further details of those arrangements before the Commission and the Fuel Market Study. However, the Commission will appreciate and understand that there is considerable reluctance amongst independent retailers to "stick their necks out" given their position in the fuel market:

- As the Commission has already identified, the market is dominated by vertically integrated wholesale and retail suppliers which routinely impose one-sided contractual terms, giving those suppliers considerable power over independent retailers. Typically, retailer supply contract terms will include confidentiality provisions which, despite the public interest and the relevance of retailer accounts to the Fuel Market Study, could make retailers vulnerable if they speak out.

- Independent retailers receive their fuel, at the end of the commercial supply chain, directly from one of the vertically integrated majors or indirectly from a vertically integrated major from a reseller (that will take its fuel from a vertically integrated major and which in some cases will also be vertically integrated reseller). These retailers operate at the mercy of their wholesale suppliers (direct and indirect), with whom they are also competing in a retail market.
- Any independent retailer that might be prepared to tell their story would in some respects be seen as a whistle-blower – they would, in a sense, be blowing the whistle about issues in the only supply chain that is available to them.
- A retailer that gets offside with their supplier could find that counts against them in terms of future supply (particularly if there are shortages), future supply terms (in terms of the one-sided contracts already identified) or an increase in the nett price paid for supplied fuel (which in some cases could be above the local retail market price), or in future negotiations.
- Even if a retailer's legal rights were clearly infringed, in the absence of a clear regulatory regime or regulatory oversight, they are likely to be significantly outgunned in any dispute with a fuel firm (particularly a major or a significant reseller).

For those reasons, MTA has indicated to the Commission that for those Members to come forward they would need concrete assurances that their identities would be adequately protected, and that their accounts would be anonymised, if they were to come forward. In response, your first email of 18 October 2019 notes that:

- if the Commission agrees that content marked as confidential is confidential and you think it is important to include it in your report, you may anonymise the information before publishing it, with any testing of such information to be done in a way that would not disclose the retailer's identity (subject to consultation with the retailer); and
- the Commission is still subject to the OIA, which would include information from MTA/such retailers, but there are potentially relevant OIA grounds for withholding information in specified circumstances, including if it would be likely to: (i) unreasonably prejudice the relevant retailers' commercial positions; (ii) disclose a trade secret; or (iii) prejudice the supply of similar information or information from those retailers in the future - and the public interest in disclosure does not outweigh the reason to withhold the information.

The Commission's response outlines what *could* happen, not what *will* happen if a member is prepared to come forward. One retailer that had been considering stepping forward initially has made it clear to the MTA that they will not come forward to provide their account of events unless the Commission can give "*an iron clad guarantee of protection*". The others agree that more is required. At the very least these independent retailers would have required:

- (1) Assurances that the Commission/Fuel Study accepts that any information, including the identity or any identifying details regarding the retailer (which would include details of their supply chains/arrangements) *is* commercially sensitive confidential information, *and* that: it would be received by and treated by the Commission/Fuel Market Study as strictly confidential; any verification steps would not include steps that might identify the retailers; and any reporting of their

accounts would not disclose any identifying details and would be sufficiently and entirely anonymised.

- (2) For the purposes of any OIA request, assurances that the Commission/Fuel Market Study will resist any request for disclosure on the basis of reasons (i) and (iii) above for withholding disclosure and concurring that the public interest in disclosure does not outweigh the reason to withhold the information. It would be expected that the Commission would only release any such information if and to the extent that, having taken all reasonable steps (including any available appeal processes), it is ordered to do by a Court with jurisdiction over the issue.

In the absence of such assurances from the Commission/Fuel Market Study, MTA can only address the issues raised by the independent retailers in general, anonymised terms<sup>1</sup>, and without being in a position to provide more detailed accounts or copies of supporting documents. In that context the key points the MTA wishes to make (or in some respects reiterate) are that:

- One-sided take it or leave it contract terms apply as between wholesalers/resellers and independent retailers too. MTA presumes that the Commission has accessed copies of these sorts of retailer contracts, as well as contracts involving other participants in the wholesale markets. But, to be clear (although it should be so obvious it goes without saying) MTA maintains that the Commission's conclusions regarding one-sided contract terms dictated by suppliers apply to contract for supply to independent retailers.
- Similar one-sided take it or leave it contract terms apply in relation to discount/fuel cards. Whether participation is expressly or impliedly required by the supplier, or simply commercially necessary given other market constraints, these discount schemes not only obscure market price for consumers they are also a powerful mechanism for wholesalers/resellers to pass on costs to independent retailers, and thus to erode independent retailer margins.
- It is perceived that this sort of "retailer margin erosion through supplier arranged discounting" is just one of many mechanisms being used by wholesalers and resellers to ensure that available margins are captured further up the supply chain, and that costs are passed on down the supply chain. With little to no ability to negotiate terms and being locked into lengthy contract timelines (10-15 years), it is impossible for independent retailers to commercially navigate their way out of these one-sided arrangements into a more mutually beneficial contractual relationship.
- MTA maintains that such arrangements are problematic where vertically integrated suppliers use their market positions to effectively render independent retailer competition uneconomic and squeeze independent retailer competitors out of the market, as the effect would be to concentrate market power further in the hands of the surviving vertically integrated firms and erode retailer competition.
- In that context, again, MTA urges the Commission to focus not just on freeing up competition in the wholesale market itself and reseller contracting/market access, but also on freeing up the arrangements involving retailers (particularly

independent retailers) in much the same way – to enable them too to engage with the wholesale market and continue to compete in the retail market.

- Finally – if the Fuel Market Study has not been able to delve into all of the market forces impacting more directly on retailers’ ability to continue to engage in this market (along the lines identified or otherwise) – it might be appropriate for the final report and recommendations to identify the need for further work in that area, and the need for a mechanism to enable vulnerable retailers to come forward anonymously to ensure those issues can be addressed in any reforms that follow.

As always, we are happy to discuss if you think that would assist.

Yours sincerely

A handwritten signature in black ink, appearing to read 'I. Baggott', with a long horizontal stroke extending to the right.

Ian Baggott  
**Sector Manager – Energy & Environment**