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By e-mail: misuseofmarketpower@comcom.govt.nz

Misuse of Market Power Guidelines

Electric Kiwi, Flick and Haast Energy Trading (Haast) welcome the reform of s 36 of the Commerce Act,[1] and Commerce Commission's development of Misuse of Market Power Guidelines. We consider it appropriate the Guidelines have been based on the Australian equivalent. Our comments on the draft Guidelines are equally applicable to the Australian version.

Access to wholesale inputs isn't just a monopoly or network access issue

The draft Guidelines make it clear access issues are not just limited to monopolists (e.g. airports, Chorus and energy networks) and are also applicable to oligopolistic suppliers with substantial market power e.g. the large, incumbent gentailers.[2]

It is important suppliers with substantial market power understand:

- "conduct may be harmful to competition when undertaken by a firm with substantial market power, but not when undertaken by a firm without";
- Their conduct can substantially lesson competition in closely-related and downstream markets (the Guidelines use the term "indirect supply"). The European Union similarly recognises that "Where [a supplier] has significant market power on a specific market, it may also be deemed to have significant market power on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the [supplier]".[3]
- They have obligations to do certain things (e.g. "supply a wholesale input to a downstream competitor" where it is needed by the competitor to compete), and not just obligations not to do certain things e.g. avoid predatory pricing for anti-competitive purpose.

The Guidelines would benefit from a 'deeper dive' in relation to the "Types of Conduct That May Substantially Lessen Competition"

It would be useful for the Guidelines to delve deeper into the types of conduct that may substantially lesson competition e.g.:

- the Commission's expectations where there is more than one supplier with substantial market power that could supply a wholesale or essential input. In these types of situations there may be "alternative sources of … supply of the input", but not "alternative sources of <u>competitive</u> supply of the input" [emphasis added];
- what is meant by an "essential" input;[4]

[1] The independents support Electric Kiwi and Haast's previous submissions on the changes to the Commerce Act: https://www.mbie.govt.nz/dmsdocument/7072-electric-kiwi-and-haast-energy-trading-review-of-section-36-of-the-commerce-act-and-other-matters-submission-pdf

[2] We note "The Commission considers that each of the four largest gentailers - Contact, Genesis, Meridian and Mighty River Power - is likely to have held substantial market power on a recurring basis, particularly during dry years …": https://comcom.govt.nz/news-and-media/media-releases/archive/commerce-commission-finds-that-electricity-companies-have-not-breached-the-commerce-act

[3] Article 14(3) of Directive 2002/21/EC: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32002L0021

[4] The ACCC Guidelines on Misuse of Market Power refers to "essential inputs" and defines these as "non-substitutable resources which are indispensable for the provision of goods and services."

- the types of tests that could be used to establish the threshold for the "no competitor would reasonably be willing to accept" e.g. one electricity sector example is a demand for credit terms with unlimited liability;

- the types of tests that might be used to identify price squeezes;[5] and

- more specific examples of potentially anti-competitive conduct. For example, one potential example of conduct that may substantially lesson competition is where the access seeker has made reasonable attempts to negotiate/has negotiated in good-faith the terms of supply for the service with the access provider but the access provider has not reciprocated. In circumstances like this, the negotiations could drag on indefinitely with little progress and no resolution. This example overlaps: (i) refusal to supply, (ii) making it clear a request for supply will be refused and (iii) hindering competition by delaying it.

Suppliers with substantial market power should consider what compliance policies and processes they have in place to prevent breach of the Commerce Act

The removal of the requirement that conduct has anti-competitive purpose will mean some breaches of section 36 could be inadvertent or unintentional.

The Guidelines could usefully explore what it would be prudent for suppliers with substantial market power to consider doing to ensure compliance with the new section 36. Suppliers with substantial market power, for example, could undertake imputation testing to ensure there is sufficient margin between wholesale and retail prices to avoid price squeezes when setting retail tariffs.[6]

Concluding remarks

Based on our experience with entry into the electricity retail market there are substantial market power and competition issues which are holding back the electricity sector, and harming consumers. These issues have been well telegraphed in submissions we have made, individually and collectively, for example, to the Electricity Authority and the Electricity Price Review. We would be happy to discuss our experiences with the Commerce Commission.

The commentary in the Guidelines that high wholesale prices can reduce margins in downstream markets and result in price squeezes is particularly relevant to the electricity industry given wholesale electricity prices have been elevated for an extended period of time.[7]

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[5] This is a matter that some previous Commerce Commission investigations have looked into e.g. https://comcom.govt.nz/news-and-media/media-releases/archive/telecomsaturn-report-part-1.

[6] An imputation test can be used to assist in detecting an anti-competitive price squeeze in a retail market. A price squeeze could occur where a vertically-integrated supplier reduces the margin between retail and wholesale prices to a level that inhibits competition.

[7] "A firm with substantial market power in the supply of an important input can disadvantage its competitors in downstream markets by charging a high wholesale price that reduces the margin available to these competitors in the downstream market.

"Where competitors in the downstream market require the input and have limited alternative sources of competitive supply, a margin or price squeeze has the potential to prevent efficient competitors in the downstream market from competing with the firm in that market on their merits, or prevent competing firms from gaining sufficient size and scale to achieve an equal footing with existing participants in the market."

Yours sincerely,

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