

18 November 2022

Antonia Horrocks
General Manager Competition
Commerce Commission
By email to misuseofmarketpower@comcom.govt.nz

Dear Antonia

Misuse of Market Power Guidelines

1. This is a submission from the Major Electricity Users' Group (MEUG) on the Commerce Commission consultation draft "Misuse of Market Power Guidelines," published 18 October 2022.¹
2. MEUG members have been consulted in the preparation of this submission. This submission is not confidential. Members may lodge separate submissions.

Understanding s.36 in the continuum with market studies and Part 4 regulation

3. Missing from the guidelines is a commentary on how enforcement of s.36 is part of a continuum that overlaps with market studies and in turn with Part 4 regulation. Adding such a commentary would assist businesses gain a broader view of the issues they might need to consider if the competitive process in their sector changes.
4. Market studies use the same approach to defining the market and market structure metrics as indicators of potential market power as proposed in the guidelines. Market studies also use estimates of sustained economic profit over time using Economic Value Added (EVA) or similar approaches such as ROACE, whereby accounting information is transformed to economic cost and income flows and the opportunity cost of capital employed is taken into account. Part 4 Regulation also uses the EVA framework to determine ex ante regulated price paths and to monitor actual performance ex post.
5. An enterprise being investigated for a breach of s.36 could provide an economic profit analysis as evidence that the company has not earned economic profits and therefore had not misused market power. Hence the value of including in the guidelines a reference to regulatory tools, such as estimating economic profit, that are used in the overall regulatory continuum because they may in some instances be useful for considering a possible breach of s.36.

¹ Document URL https://comcom.govt.nz/data/assets/pdf_file/0023/295160/Draft-Misuse-of-Market-Power-Guidelines-October-2022.pdf at <https://comcom.govt.nz/business/business-consultations/draft-misuse-of-market-power-guidelines/nocache>

Elaborating on “exploitative conduct” and inefficient price discrimination

6. Further explanation and examples of when the new s.36 provisions do not apply would be useful.
7. For example, paragraph [80.2] states "The prohibition does not cover “exploitative conduct,” where existing market power is used against customers." Some examples of “exploitative conduct” in the New Zealand context would be helpful. The term “exploitative conduct” might cover conduct and be treated quite differently in overseas jurisdictions such as Europe or America. More clarity in the guidelines would avert misinterpretation by both overseas and domestic investors.
8. A specific example of the uncertainty around what is or isn’t “exploitative conduct” in New Zealand is the topic of inefficient price discrimination. The Electricity Authority has raised this issue in the electricity sector and proposes pre-emptive interventions to mitigate the risk of large volume contracts leading to inefficient price discrimination. The Misuse of Market Power Guidelines should discuss whether inefficient price discrimination is or is not covered by the change to s.36 to avoid uncertainty in other sectors of the economy that the precedent for interventions proposed by the Electricity Authority might also be considered by the Commission. To be clear MEUG does not support the proposed interventions by the Electricity Authority and is concerned at the precedent it may set for other sectors of the economy.

Yours sincerely



Ralph Matthes
Executive Director