

31 October 2022

Andy Doube
General Manager Market Policy
Electricity Authority
By email to inefficientpricediscrimination@ea.govt.nz

Dear Andy

Consultation Paper – Inefficient Price Discrimination

1. This is a submission from the Major Electricity Users' Group (MEUG) on the Electricity Authority consultation paper "Inefficient Price Discrimination in very large electricity contracts – Proposed Code Amendment," 18 August 2022.¹
2. MEUG members have been consulted in the preparation of this submission. This submission is not confidential. Members may lodge separate submissions.
3. MEUG does not support the proposed Code amendment to replace the existing urgent code amendment "Electricity Industry Participation Code Amendment (Restrictions on Materially Large Contracts) 2022" gazetted 17 August 2022 that will expire mid-May 2023.
4. MEUG does not support the proposal because:

- a) We disagree with the problem definition.

There is no prior or existing contract that has been proven to be an inefficient price discrimination arrangement that has the purpose of or an outcome that is anti-competitive. That includes the current short-term Tiwai contract that expires end of 2024. With more demand and supply competition expected, then the risk of a contract for the Tiwai load (be it by the aluminium smelter and or other loads) post 2024 being inefficient price discriminatory is less than the status quo. Accordingly, there is little risk of a future problem occurring.

- b) The proposed solution is disproportionately heavy-handed compared to the risk.

The permanent Code change proposes a level of intrusion into negotiations and contracts between private parties that is extremely heavy-handed. As noted above the risk of an inefficient price discrimination arrangement being in place post 2024 is less than current, and there is no proven case such exists currently that has an anti-competitive effect. The main risks are described in the following bullet points.

¹ Document URL <https://www.ea.govt.nz/assets/dms-assets/30/Inefficient-Price-Discrimination-in-very-large-electricity-contracts-Consultation-paper-v2.pdf> at <https://www.ea.govt.nz/monitoring/enquiries-reviews-and-investigations/2022/wholesale-market-competition-review-oct2022/consultations-2/#c19257>

- c) Confidence will be undermined.

The first risk is an undermining of confidence. The Code amendment will be seen as a heavy-handed intervention for a problem that is unlikely to exist. Market participants will start factoring in if there is a risk and or opportunity of further unwarranted heavy-handed interventions. First the uncertainty premia for investment will increase. Second opportunists will lobby for populist interventions because the Authority will be considered open to such irrespective of the merits of the case. Confidence in the market and by investors will be undermined.

- d) The Authority is not equipped to be a heavy-handed regulator

Heavy-handed regulation of competitively inefficient discriminatory pricing arising from the exercise of market power and intrusion into private contracting to prevent it should be part of the Commerce Act generic competition regime governed by the Commerce Commission. The Commission has the resources and experience in governing Part 2 of the Commerce Act to conduct investigations into private contacts. The Authority does not have that experience or resources. If there is an issue, then it should be brought to the attention of the Commerce Commission rather than build a duplicate specialist regulatory team to intervene in private contracts at the Authority.

- e) Unintended consequences and risk of incremental regulatory creep.

Apart from the Aluminium Smelter, other MEUG members have raised concerns about whether the proposed amendment might apply to them. Those members use close to or more than the 150 MW threshold, albeit for part of the year and not all year. There is also a concern the 150 MW threshold might be reviewed to a lower level and thereby affect many large industrial sites and enterprises with many dispersed medium sized sites.

5. The second Wholesale Market Review issues paper published 12 October lists completion of the inefficient price discrimination workstream as one of five steps being taken to constrain the exercise of market power (refer Table 6, pp30-31). If as the issues paper infers there is an existing market power problem, then MEUG is concerned the Authority in deciding as a first priority to pursue the topic of potential arrangements with inefficient price discrimination based on the exercise of market power, has prematurely foreclosed considering more evidence to assist define the level of market power and hence allow consideration of a wider range of mitigation strategies.

Yours sincerely



Ralph Matthes
Executive Director