

18 July 2023

s9(2)(a)

[REDACTED]

[REDACTED]

Dear s9(2)(a)

Commerce Act 1986 complaint in respect of alleged misuse of market power by gentailers

1. We write in respect of the Commission's enquiries into your complaint of alleged misuse of market power by the four vertically integrated electricity generators/retailers (gentailers) under section 36 of the Commerce Act 1986 (the Act).
2. We appreciate the time [REDACTED] has taken to engage with the Commission on this complaint, including our meeting with you on 8 May 2023.
3. We assessed your complaint under the 'old' and 'new' section 36 of the Act.¹ The new prohibition took effect on 5 April 2023 and applies to all conduct from that date onward. The old prohibition applies to conduct prior to that date.
4. The evidence we hold does not suggest that the gentailers (individually or together) have breached section 36 of the Act. We have therefore decided to close this enquiry and to take no further action in respect of this matter at this point in time. We set out our reasoning below.
5. As you know, the Commission takes an interest in competition issues in the electricity sector. We invite you and other independent retailers to keep the Commission informed of any significant developments in the sector that may affect our conclusions in this letter or may raise other competition issues.

¹ Section 36 was substantially amended on 5 April 2023 by the Commerce Amendment Act 2022. Section 36 previously prohibited a firm with a substantial degree of market power from taking advantage of that market power for certain prohibited purposes. Section 36 now prohibits a firm with a substantial degree of market power from engaging in conduct that has the purpose, effect, or likely effect of substantially lessening competition in certain markets. The Commission's *Misuse of Market Power Guidelines* (March 2023) explain our approach to the new section 36, see [here](#) and summary [fact sheet](#).

Outcome of our enquiries

6. Our enquiries related to your complaint, set out in your letter dated 23 March 2023 and subsequent emails and as explained further to us at our meeting on 8 May 2023. Your complaint alleged that:
 - 6.1 The pricing offered by gentailers to new retail customers is allegedly too low for [REDACTED] (and other independents) to compete for these customers; and
 - 6.2 Based on your independent assessment of gentailers' public information, you alleged that some gentailers' retail businesses are running at a loss, inhibiting competition from independent retailers.
7. We assessed this complaint as both a complaint of predatory pricing and of a margin squeeze by the gentailers directed at independent retailers.
8. We obtained information from you and other sources, and discussed the matter with both MBIE and the Electricity Authority (EA). The evidence we hold does not suggest that the gentailers (individually or together) have breached section 36 of the Act.

Section 36 of the Act

9. For a business to breach section 36 of the Act:
 - 9.1 It must have a substantial degree of market power; and
 - 9.2 It must:
 - 9.2.1 For old section 36, have 'taken advantage'² of that power for a prohibited purpose;³ or
 - 9.2.2 For new section 36, have engaged in conduct that has the purpose, effect or likely effect of substantially lessening competition in certain markets.
10. We have considered whether one or multiple gentailers have a substantial degree of market power in a relevant market. For a business to have a substantial degree of market power, it needs to be substantially unconstrained by competitive pressures in the relevant market. We consider that the evidence currently before us does not support any one individual gentailer, or multiple gentailers, likely having a substantial degree of market power in either a wholesale or retail electricity market (however those markets may be defined). However, given our conclusions below, we have not needed to form a settled view on this matter.

² A business 'takes advantage' of its market power when it acts in a manner inconsistent with how a business without market power, but otherwise in the same circumstances, would act.

³ The prohibited purposes are set out in section 36(2) of the Act, as it read before 5 April 2023.

11. In terms of section 36 of the Act:

11.1 In respect of the effect or likely effect of the conduct, and whether the gentailers have 'taken advantage' of any market power they may have, we have considered the information you submitted to us, and we have also considered further information made available by the EA as to the gentailers' retail gross margins⁴ and have discussed this information with the EA. We also acknowledge the EA's public conclusions that, *"...a new entrant entering the market in 2021 or 2022 faced high hedge prices and would likely have struggled to remain competitive against incumbent retailers while maintaining a positive retail margin."*

11.2 Nonetheless, we do not consider that the evidence currently supports an allegation that the gentailers' retail businesses are, overall, making losses. Instead, EA data indicates that gentailers and independent retailers' gross margins were similar, and positive, *"suggesting a competitive market"*. Similarly, we note that the EA's retail gross margin data also reports relevant input costs, which also appear relatively similar across both gentailers and independent retailers. In our view, this data does not provide sufficient indication that a market-wide margin squeeze is occurring to necessitate a full investigation.

11.3 We understand that electricity retailers may well engage in some form of price discrimination. Where there are price-sensitive customers willing to switch retailer, in a competitive market we would expect retailers to offer lower prices to those customers to maximise their total margins. Acknowledging the EA's comments regarding recent hedge pricing, at this stage we do not consider that the gentailers' pricing strategies directed towards new customers:

11.3.1 constitute a 'taking advantage' of any market power they may have;
or

11.3.2 have the likely effect of substantially lessening competition in a relevant market.

11.4 Further, we do not consider that the evidence before us supports the gentailers having acted for an anticompetitive purpose (under either old or new s 36) in engaging in the relevant conduct.

12. Ultimately, we do not consider that the evidence available to us indicates that one (or multiple) gentailers has engaged in conduct of the type described in your

⁴ Electricity Authority, 'New Zealand's electricity retail market: retail gross margins' (12 May 2023): <https://www.ea.govt.nz/news/general-news/new-zealands-electricity-retail-market-retail-gross-margins/>

13. For the reasons set out above, we have decided not to open an investigation into one or more gentailers' conduct at this time.
14. However, as you know, the Commission takes an interest in competition issues in the electricity sector. We welcome any further information that you (or other independent retailers) may be able to provide us as to significant developments in the sector, including conduct by the gentailers or other firms that you consider may raise competition issues.
15. We also note that [REDACTED] generally contends that broader structural reform of the electricity market is required.⁵ The Commission's role in the electricity sector is limited to enforcing Parts 2 and 3 of the Act in the sector as well as applying Part 4 of the Act to the relevant regulated sectors. Other entities such as MBIE and the EA have different regulatory remits. Those regulators regularly consult on policy proposals which affect competition in the electricity sector; and [REDACTED] may wish to submit on those proposals.
16. We direct you to our *Misuse of Market Power Guidelines*⁶ for information about the types of conduct that can breach section 36 when undertaken by a firm with a substantial degree of market power.
17. Our decision to take no further action in respect of this matter does not prevent you or any other person from taking action under the Act in respect of the gentailers' conduct.

18. Only the courts can decide if there has been a breach of the Act. This letter does not constitute a ruling of law.
19. Breaches of the Act can have serious consequences for both organisations and individuals. A court can impose penalties where it finds the law has been broken. For breaches of section 36 of the Act:

5 s9(2)(b)(ii) & s9(2)(ba)(i)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

s9(2)(b)(ii) & s9(2)(ba)(i)

[REDACTED]

[REDACTED]

6 Available online [here](#).

19.2 a body corporate can be fined the greater of \$10 million or three times the commercial gain from the contravention (or, if this cannot be easily established, 10% of turnover).

20. Every separate breach of the Act may incur a penalty.

Further information

21. Thank you again for the information you have provided to the Commission during our enquiries.

22. If you have any questions or would like to discuss further, please contact Luke Archer at s9(2)(a) or Ritchie Hutton at s9(2)(a)

Yours sincerely

s9(2)(a)

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