

Submission information

(Please note we require responses to all questions marked with an *)

Release of information

Please let us know if you would like any part of your submission to be kept confidential.

☐ I would like my submission (or identified parts of my submission) to be kept confidential, and **have stated below** my reasons and grounds under the Official Information Act that I believe apply, for consideration by MBIE.

I would like my submission (or identified parts of my submission) to be kept confidential because
[Insert text](#)

[To check the boxes above: Double click on box, then select 'checked']

Personal details and privacy	
1.	<p>I have read and understand the Privacy Statement above. Please tick Yes if you wish to continue*</p> <p>[To check the boxes below Double click on box, then select 'checked']</p> <p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p>
2.	<p>What is your name?*</p> <p></p>
3.	<p>Do you consent to your name being published with your submission?*</p> <p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p>
4.	<p>What is your email address? Please note this will not be published with your submission.*</p> <p>Privacy of natural persons</p>
5.	<p>What is your contact number? Please note this will not be published with your submission.*</p> <p>Privacy of natural persons</p>
6.	<p>Are you submitting as an individual or on behalf of an organisation?*</p> <p><input type="checkbox"/> Individual (skip to 8) <input checked="" type="checkbox"/> Organisation</p>
7.	<p>If on behalf of an organisation, we require confirmation you are authorised to make a submission on behalf of this organisation.</p> <p>x <input type="checkbox"/> Yes, I am authorised to make a submission on behalf of my organisation</p>
8.	<p>If you are submitting on behalf of an organisation, what is your organisation's name? Please note this will be published with your submission.</p> <p></p>

	Electric Kiwi Limited
9.	<p>If you are submitting on behalf of an organisation, which of these best describes your organisation? Please tick one.</p> <p> <input type="checkbox"/> Law Firm <input type="checkbox"/> Consumer organization <input type="checkbox"/> Consultancy <input type="checkbox"/> Think-Tank <input type="checkbox"/> Advocacy group <input type="checkbox"/> Business/Private Firm <input type="checkbox"/> Contractor/SME <input type="checkbox"/> Registered charity <input type="checkbox"/> Non-governmental organisation <input type="checkbox"/> Academic Institution <input type="checkbox"/> Central government <input type="checkbox"/> Iwi, hapū or Māori organisation <input type="checkbox"/> Academic/Research <input type="checkbox"/> Other. Please describe: </p>

Responses to questions

Introductory comments

1. Electric Kiwi is an independently owned electricity provider that is focused on disrupting competition with innovative solutions to provide New Zealanders (and their businesses) reduced power bills in an enduring cost of living crisis.
2. We understand that MBIE is separately undertaking work within the electricity industry and commend MBIE staff for their work thus far.
3. We welcome this opportunity to comment on broader potential competition law reforms which we consider would help address the persistent underlying issues plaguing the electricity industry.

Our key points

4. Electric Kiwi agrees with the need for greater scrutiny of parties with substantial market power (particularly established oligopolies in uncompetitive concentrated industries such as the electricity sector).
5. The electricity sector lacks competition due to the textbook oligopolistic behaviour of the four vertically integrated incumbent gentailers (Contact, Mercury, Meridian and Genesis). Indeed, the Commerce Commission (**Commission**) found all four gentailers have substantial market power (**SMP**) in 2009¹ and the Electricity Authority (**EA**) has accepted more recently in its 2021 wholesale market review that the gentailers may have been exercising market power.²
6. No good evidence has been found to suggest such market conditions have substantively changed with gentailers maintaining control over c.86% of total electricity generation and c.85%³ of retail. Despite this and many other independent findings to this effect, this issue of SMP keeps being revisited, including in the EA's recent issues paper on its Risk Management Review. Electric Kiwi submits that MBIE should consider reform so that this SMP is deemed so that the focus (including resources) is on anti-competitive effects and consumer harm.
7. Electric Kiwi and other independent electricity retailers (**IERs**) have experienced (from gentailers):
 - a. price margin squeeze / predation where wholesale price remains above retail price;
 - b. actual and constructive refusal to supply (eg shaped hedge products);
 - c. terms less favourable than self-supply (contrary to established law requiring "comparative parity" (non-discrimination));⁴ and

¹ NZCC [May 2009 Investigation Report](#), at para ii.

² [Promoting competition in the wholesale electricity market in the transition toward a renewables-based electricity system – Decision Paper \(May 2023\)](#), p.i.

³ [Electricity Authority - EMI \(market statistics and tools\)](#)

⁴ The Privy Council in *Telecom v Clear* (1994) 6 TCLR 138 affirmed Kahn's "principle of comparative parity" stating: "in considering whether competition would be deterred by [the incumbent's] charges, what is pertinent is not the absolute level of those charges but whether [the incumbent] is charging [access seeker] more for the service it provides to [access seeker] than it charges its own customers for the same component of its own services."

- d. other exercises of market power (eg lack of generation investment and gentailers restricting supply during peak demand by spilling hydro).
8. Despite its concerns with the electricity sector, the Commission concluded it did not have the ex ante tools contemplated by the Minister to address the issues (many of which have been raised for years) and passed on this work to the EA on a “*whole-of-Government*” approach. This was based on its view that the EA:
 - a. has the “*avenue by which optimal intervention may be implemented more **quickly**. This is particularly relevant to the extent that there may be **a risk that one or more independent retailers may exit the market** to the detriment of competition*”;⁵ and
 - b. “*likely [has] the **depth and breadth of expertise relating to the electricity sector** to effectively engage with these competition issues at a policy and/or law reform level.*”⁶
 9. Electric Kiwi supports the Discussion Paper (DP) drawing attention to the issues raised by oligopolistic markets and the need for broader ex ante powers to intervene. We agree with the Minister’s concerns that “*Over recent years reforms to promote competition have focused on sector-specific investigations followed by complex sectoral interventions in matters such as retail groceries, retail fuel, and residential building supplies.*” and “*More effective competition settings can avoid the need for future complex regulatory interventions after harm to competition and the economy has already been done.*”⁷
 10. Electric Kiwi (alongside other electricity retailers both separately and together) has been consistently advocating for the need for effective regulatory intervention in the electricity sector for a number of years both to the EA and Commission. Despite the Commission passing the work to the EA because of its sector specific tools and efficiency, we continue to see “*complex sectoral interventions*” by the EA with each of the EA’s ‘projects’ showing complexity (which is also flawed by ignoring critical factual and legal context and incorrect framing of issues) and time duration comparable to (or often more) that of a Commission market study despite being targeted reviews and the EA being the industry specific regulator.
 11. Therefore, Electric Kiwi supports an increase in broadening the regulatory tools available such that the Commission could move quickly and decisively. In particular, Electric Kiwi is in favour of giving the Commission powers (to step in when necessary) that align with international best practice such as market conduct rules (eg non discrimination and arms length rules), monitoring & enforcement and notably the ability to structurally separate (ie vertical disaggregation).⁸

⁵ NZCC document received under OIA request 23.224 – *Electricity complaints: reasons for decision not to open investigation under section 36 of the Commerce Act* – Summary Paper (7 February 2024).

⁶ NZCC document received under OIA request 23.224 – *Updated background paper including preliminary views on potential relevant markets and information relevant to section 36 assessment* (25 October 2023).

⁷ 25 September 2024 Cabinet paper [*Competition Settings – Opportunity to Review New Zealand's Competition Settings to Lift Productivity*](#) paragraphs 8 & 9.

⁸ We have seen structural separation and divestments in a number of jurisdictions, including: UK (electricity, airports BAA-horizontal and BT); Australia telco (Telstra); EU (unbundling provisions of Gas & Electricity Directives); US (Standard Oil (1911), American Tobacco Trust, Paramount movies / theatres (1948) & AT&T (1982)); COFECE (Mexican Competition Commission) made preliminary recommendations for the divestment of cornflour plants by Gruma.

12. We note that the DP is currently silent on divestment/divestitures except in the context of anti-competitive mergers. OECD in its most recent Economic Outlook states “[government and regulator] reviews should reexamine separating the generation and retail operations of large electricity companies to boost competition”.⁹ In line with the OECD recommendation, Electric Kiwi considers that more intrusive powers such as divestment (eg structural separation in the electricity sector) should be actively considered as part of broadening the regulatory tools available to the Commission.
13. While previous EPR¹⁰, MDAG¹¹ reports have suggested vertical disaggregation as a potential mechanism to be considered, the EA has defaulted to the status quo (ie a concentrated market with only the four gentailers ‘competing’ with independent retailers at the fringes). As you know, we think the EA has favoured efficiency within the current market structure over increasing the overall supply.
14. If the government is serious about enhancing competition, then more weight needs to be placed on opening up markets to effective competition. For the electricity industry, enhancing competition also means addressing issues of the reliable future supply of electricity. There has not been sufficient investment in the additional generation needed to supply forecasted demand growth¹² and the gentailers do not have incentives to expand generation (and are in fact incentivised to keep generation low to inflate prices) to keep pace with the increasing demand (from electrification by consumers and businesses).

⁹ [OECD Economic Outlook, Volume 2024 Issue 2: New Zealand | OECD](#) at p.215.

¹⁰ P.43 of Electricity Price Review (EPR) First Report for discussion (30 August 2018). See also footnote 7 which states: “See our options paper for these options, which included retail price caps, splitting vertically integrated companies and requiring small distributors to amalgamate”.

¹¹ [Appendix A2 - Final recommendations report.pdf \(ea.govt.nz\)](#)

¹² Demand is estimated to grow between c.50% (MDAG) to 81%(MBIE) by 2050.

The Competition Policy team welcomes your feedback on as many sections as you wish to respond to, please note you do not need to answer every question.

Mergers

Issue 1 – the substantial lessening of competition test

1.

What are your views on the effectiveness of the current merger regime in the Commerce Act? Please provide reasons.

While the Commission has been on the right track in preventing further consolidation and increases in market power in oligopolistic markets (eg Foodstuffs decline and the recent SOI showing SLC concerns in the Contact / Manawa Energy proposed acquisition) the ability to scrutinise and change entrenched market structures already in place are limited.

Electric Kiwi understands that the government, Commission, and MBIE concerns appear to be in relation to oligopolistic markets.

We consider that there are a number of concentrated industries where concerns arise due to both conduct and acquisitions by market players.¹³ We note that, due to our economy's concentrated nature, oligopolistic market structures are common. However, not all of these markets are anti-competitive or create concerns.

The electricity sector is one of those problematic "concentrated industries" and shows clear signs of a lack of competition with:

- Insufficient investment in additional generation despite anticipated demand with incumbent gentailers not incentivised to expand generation to keep pace with demand. As a result, there is declining security of supply.
- A lack of liquidity in hedge markets which results in:
 - disincentivising independent generators from building new generation assets or entering the generation market.
 - Independent retailers being forced to limit customer base growth, and as result losing (or stagnating in) market share.
- Barriers to entry for generation are high.
- Wholesale prices have increased rapidly since 2018 and remained well above the long run marginal cost of generation.
- Retail prices are below wholesale prices.
- The incumbent gentailers have reported high or record profitability for their wholesale businesses and losses for their retail businesses.¹⁴
- IERs are unable to expand or compete in the way you would expect to see under a workable or effective competition.

¹³ For example, the OECD has recognised that NZ markets with weak competition include retail grocery, banking and electricity markets. See [OECD Economic Surveys: New Zealand 2024](#).

¹⁴ See for example, for the 6 months ended 31 December 2023: [Meridian Condensed Interim Financial Statements 2024](#) shows an EBITDAF of \$-43mil for retail and \$534mil for wholesale respectively; [Genesis Interim Report 2024](#) shows an EBITDAF of \$-34.8mil for retail and \$245.9mil for wholesale respectively; [Mercury Interim Report 2024](#) shows an EBITDAF of \$-20mil for retail and \$454mil for wholesale respectively; and [Contact 2024 Interim Financial Statements](#) shows an EBITDAF of \$-1mil for retail and \$383mil for wholesale respectively.

	<p>We submit that these concerns would be better addressed through a targeted, ex ante set of more general powers that empower the Commission to enact the change necessary to undo entrenched market structure such as that found in the electricity sector.</p> <p>We note that the Commerce Act previously considered ‘sensitive industries’ and imposed a higher standard (ie clearance/authorisation was mandatory for any merger or takeover proposal within a specified class of activities).¹⁵</p> <p>Electric Kiwi considers that if such a classification of ‘sensitive industries’ were to return today, it would be widely accepted that the electricity industry would fall within this class given the state of competition.</p>
2.	<p>What is the likely impact of the Commission blocking a merger (either historically, or if the test is strengthened) on consumers in New Zealand? Please provide examples or reasons.</p>
	<p>The likely impact of the Commission blocking a merger (in the electricity context) is that it helps combat the already existing entrenched market structure and benefits consumers by ensuring gentailers’ market power is not further exacerbated (increasing concentration in an already concentrated market).</p> <p>Electric Kiwi agrees with the concerns raised by the Commission in recent SOI on the Contact proposed acquisition of 100% of the shares in Manawa Energy¹⁶ [NB Electric Kiwi submitted on this], as the acquisition would:</p> <ul style="list-style-type: none"> • increase concentration in an already concentrated market (resulting in the 4 gentailers accounting for more than 90% of generation) and further entrench the market power of the gentailers, by removing the largest independent generator from the market; • likely enhance barriers to entry and make it more difficult for independent generators to enter the market, or non-vertically integrated players to compete; • likely result in a decrease, rather than an increase, in generation capacity and reduce incentives to invest in new generation; • increase the risk of tacit collusion, as incentives among the 4 gentailers are similar; and • make it even more difficult for independent retailers to obtain appropriately shaped hedge products, thereby reducing the ability of independent retailers to compete in retail market(s). Electric Kiwi does not believe that the proposed acquisition will result in more hedge products being available, and this is not consistent with current market dynamics or Contact’s previous behaviour.

¹⁵ See s 50 and Schedule 1 of the [1986 version](#) of the Commerce Act.

¹⁶ <https://comcom.govt.nz/case-register/case-register-entries/contact-energy-limited-manawa-energy-limited>

3.	<p>Has the ‘substantial lessening of competition’ test been effective in practice in preventing mergers that harm competition? Please provide examples of where it has, or has not, been effective.</p> <p>Electric Kiwi share the concerns about oligopolistic industries as highlighted by the OECD, government, Commerce Commission & MBIE. We agree with the Commission’s concerns raised in relation to the Contact / Manawa Energy proposed acquisition.</p> <p>Electric Kiwi would like to challenge the effectiveness of the current SLC test (or at least the application of the test) which allowed for the clearance for Mercury to acquire Trustpower’s retail business¹⁷ (which Electric Kiwi submitted on).</p> <p>In hindsight, it is likely we would not see the same issues with acquisitions by generators had the decision-making for deregulation of electricity in 1993 (including the removal of the obligation to supply) had more scrutiny.</p>
4.	<p>Should the ‘substantial lessening of competition’ test be amended or clarified, including for:</p> <ol style="list-style-type: none"> Creeping acquisitions? If so, should a three-year period be applied to assessing the cumulative effect of a series of acquisitions for the same goods or services? Entrenchment of market power (eg including acquisitions relating to small or nascent competitors)? In relation to just the merger provisions or wherever the test applies in the Commerce Act? <p>If so, how? Please provide reasons.</p>
	<p>As you are aware, as a starting point all mergers reduce competition but the SLC test is about whether this lessening in competition is ‘substantial’.</p> <p>Electric Kiwi considers that it should be up to the oligopolies (ie the gentailers) to clearly demonstrate that there is no long term harm to consumers (for both acquisitions and conduct more generally).</p> <p>In uncompetitive concentrated industries, such as the electricity sector, the oligopolies should not be permitted to engage in further acquisitions (even more so for gentailers given the concerns of vertical integration and SMP) unless there are clear benefits to consumers without the risk of harm (especially potential long-term harms). We view that the onus should be on the oligopolies (ie the gentailers) to prove (and satisfy the Commission of) any such benefits and disprove any potential risk of consumer harms.</p> <p>This approach is analogous with the finding in <i>NZ Bus & Infratil v Commerce Commission</i> where the competitive impact was “minor” but was still considered to be a substantial lessening of competition.¹⁸</p>

¹⁷ <https://comcom.govt.nz/case-register/case-register-entries/mercury-nz-limited-trustpower-limiteds-retail-business>

¹⁸ *New Zealand Bus Limited & Infratil Limited v Commerce Commission* [2007] NZCA 502, at [270]-[272].

5.	How important is it for the ‘substantial lessening of competition’ test in the Commerce Act to be aligned with the merger test in Australian competition law, for example, to provide certainty for businesses operating across the Tasman and promote a Single Economic Market? Please provide reasons and examples.
	<p>NZ has greater concentrated markets than Australia (due to our smaller economy).</p> <p>We would expect that this would also reflect in our competition law rules being more strict (both in monitoring and enforcement of conduct) on parties with market power.</p>
6.	How effective do you consider the current merger regime is in balancing the risk of not enough versus too much intervention in markets?
	<p>Electric Kiwi considers that the Commerce Act has not been effective in addressing issues in the electricity market(s).</p> <p>As mentioned, Electric Kiwi and other IERs face strategic conduct from the gentailers such as: margin squeeze, refusals to supply and discriminatory supply terms. The Commerce Act has been unable to address these issues despite its publicity in media and awareness (and harms identified) both at a consumer and political level.</p>
Issue 2 – Substantial degree of influence	
7.	Do you consider that the current test of ‘substantial degree of influence’ captures all the circumstances in which a firm may influence the activities of another? If not, please provide examples.
	<p>The Commerce Act is inconsistent with international jurisdictions regarding “collective dominance” (ie when more than one parties have SMP, which is the case for the four gentailers). Legislation in Australia, the EU, the UK and Canada all explicitly contemplate that more than one party may possess market power, while section 36 of the Commerce Act does not.¹⁹ This has however been acknowledged in the Commerce Commission’s Misuse of Market Power Guidelines.²⁰</p> <p>Our concern is that there are certain uncompetitive concentrated industries where parties argue they cannot have market power because they are constrained by one or two strong competitors. Rather than explicitly legislating for collective dominance, we wonder about deeming market players in certain uncompetitive concentrated industries to have designated substantial market power (SMP). This could potentially allow the Commission to focus on the conduct of those competitors (including acquisitions and relevant contracts) rather than SMP arguments.</p>
8.	Should the Commerce Act be amended to provide relevant criteria or further clarify how to assess effective control? If so, how should it be amended? Please provide reasons.

¹⁹ Australia: Section 46(7), Competition and Consumer Act 2010, EU: Article 102, Treaty on the Functioning of the European Union, UK: Section 18, Competition Act 1998, Canada: Section 79(1)(a) Competition Act R.S.C., 1985, c. C-34.

We note that the definition of “person” under the Commerce Act is quite broad and is defined as including “any association of persons whether incorporated or not”. See section 2 (Interpretation), [Commerce Act 1986](#).

²⁰ [Commerce Commission, Misuse of Market Power Guidelines, March 2023](#) at [41].

Issue 3 – Assets of a business	
9.	Do you consider the term “assets of a business” in section 47 of the Commerce Act is unclear or unduly narrows the application of the merger review provisions in the Act?
10.	<p>If you consider there is a problem, how should the phrase be amended? For example, by:</p> <ul style="list-style-type: none"> a. referring simply to “assets”? or b. should the definition of “assets” in the Commerce Act be further refined?
Issue 4 – Mergers outside the clearance process	
11.	What are your views on how effectively New Zealand’s voluntary merger regime is working?
12.	Do you consider non-notified mergers to be an issue in New Zealand? Please provide reasons.
13.	What are your views on amending the Act to confer additional powers on the Commission to strengthen its ability to investigate and stop potentially anti-competitive mergers? In responding, please consider the merits of each of the options:

	<ul style="list-style-type: none"> a. A stay and/or hold separate power b. A call-in power c. A mandatory notification power for designated companies.
	Electric Kiwi is in support of granting the Commission additional powers as per above.
Issue 5 – Behavioural undertakings	
14.	Should the Commerce Commission be able to accept behavioural undertakings to address concerns with proposed mergers? If so, in what circumstances?
Anticompetitive conduct	
Issue 6 – Facilitating beneficial collaboration	
15.	Has uncertainty regarding the application of the Commerce Act deterred arrangements that you consider to be beneficial? Please provide examples.
16.	What are your views on whether further clarity could be provided in the Commerce Act to allow for classes of beneficial collaboration without risking breaching the Commerce Act?
17.	What are your views on the merits of possible regulatory options outlined in this paper to mitigate this issue?

18.	If relevant, what do you consider should be the key design features of your preferred option to facilitate beneficial collaboration?
Issue 7 – Anti-competitive concerted practices	
19.	What are your views on whether the Commerce Act adequately deters forms of ‘tacit collusion’ between firms that is designed to lessen competition between them?
20.	Should ‘concerted practices’ (eg, when firms coordinate with each other for the purpose or effect of harming competition) be explicitly prohibited? What would be the best way to do this?
	We do not consider that this would address the harm of uncompetitive oligopolistic markets for the reasons discussed above in Questions 4, 6 and 7.
Code or rule-making powers and other matters	
Issue 8 – Industry Codes or Rules	
21.	<p>Do you consider that industry codes or rules could either:</p> <ul style="list-style-type: none"> a. Fill a gap in the competition regulation regime or b. Prove a more efficient and appropriate response to addressing sector-specified competition issues rather than developing primary legislation? Please provide reasons.
	Yes, the Electricity Industry Participation Code (Code) provides under Part 6A and Schedule 6A for both corporate separation and arms-length rules that apply to separate distribution businesses from generation and retail businesses and these

	could easily be amended to apply to separate generation and retail businesses (thereby, effectively address issues persisting in the electricity sector).
22.	If you think that industry codes or rules could fill a gap, what class of matters or rules could be included in an industry code or rules?
	We would expand the Commission's (and/or the EA) powers to include tools that would allow the regulator to consider various separation options (accounting separation, operational separation, legal separation and ownership separation etc) and divestment of businesses/assets.
23.	If the Commerce Act is amended to provide for the making of industry codes or rules, what matters would be important to consider in the design of the empowering provisions in the Act?
	We would expect a greater focus on efficiency and speed of final outcomes with limited rights of appeal.
Issue 9 – Modernising court injunction powers	
24.	Should the injunctions powers in the Commerce Act be updated to allow the court to set performance requirements? Please provide reasons
	Yes, as this could mandate supply.
Issue 10 – Protecting confidential information	
25.	Do you consider that the Commission effectively maintains the balance between protecting commercially sensitive information and meeting its legal obligations, including the principle of public availability? Please provide reasons or examples.
	No, it favours larger entities (such as the gentailers). The current core counterfactual in the Contact / Manawa proposed acquisition SOI is redacted. Conversely, Electric Kiwi's information is more sensitive and identifiable given our size yet this has been disclosed.

	This is inequitable as larger entities will generally hold crucial information (informational asymmetries) which are required for outside parties to make informed objections.
26.	What additional regulatory changes may be desirable relating to commercially sensitive information? Please provide reasons.
27.	What are your views on strengthening the confidentiality order provisions in s 100 of the Act?
	<p>At present smaller parties (who are objectors) need greater protections and they need to know in advance that their confidential information will be protected before they give such information.</p> <p>We remain concerned about the fact that the disclosure of confidential information provided to the Commission is determined by the Commission without proper weight to protecting smaller parties (which often lead to over-disclosure and leads to sensitive information being disclosed and parties becoming identifiable).</p> <p>It is our understanding that independent generators are not making statements in relation to the Contact / Manawa proposed acquisition given the potential repercussions / retaliation (where Contact could refuse to supply firming contracts for variable renewable generation). The fact that this information has not been received by the Commission should not be treated as the information not existing and further investigations by Commission should be encouraged and strengthened (in this and similar situations).</p>
Issue 11 – Minor and technical amendments to the Commerce Act	
28.	What are your views on these proposed technical amendments to the Commerce Act?
29.	Are there any other minor or technical changes you consider could be made to improve the functioning of New Zealand’s competition law?

Any other issues	
30.	Are there any other issues that you would like to raise?
General Comments:	

Thank you

We appreciate you sharing your thoughts with us. Please find all instructions for how to return this form to us on the first page.