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7 February 2025

To whom it may concern,

Promoting competition in New Zealand – A targeted review of the Commerce Act 1986

Thank you for the opportunity to submit on the Ministry of Business, Innovation and Employment (MBIE) review of the Commerce Act 1986.

We are supportive of the Commerce Act providing additional powers to the Commerce Commission to impose pro-competitive regulation. We think this would be a valuable addition to New Zealand's competition law framework by allowing the Commerce Commission to swiftly address competition problems that are costing consumers. This change would also reflect the practical reality that the Commerce Commission has significant competition expertise that isn't easily replicated in sector regulators because oftalent and resource limitations.

Octopus Energy's experience in the New Zealand electricity market
Octopus Energy Group operates in electricity markets around the world. We have established a reputation for providing excellent customer service and delivering market leading innovations that will enable a decarbonised energy future and keep prices down for consumers.

Electricity is a necessity that contributes to every household's cost of living, it is also an increasingly essential ingredient in New Zealand's economy as we work to decarbonise it. As a result, it is critical that competition in the electricity market is effective. Competition plays a vital role in keeping prices down for end consumers and spurring innovation in the electricity sector.

We have established an electricity retailer in the New Zealand market, however in the three years we have been in New Zealand we have observed that the interface between competition policy and market regulation does not appear to be operating effectively. We consider the current settings result in gaps which can be exploited by firms, or groups of firms, to harm competition.

Octopus supports powers to impose pro-competitive regulation under the Commerce Act

Octopus agrees with the OECD and MBIE that New Zealand requires a more flexible and proportionate response to addressing competition concerns. We agree that there is a gap that could be filled by industry codes or rules to promote competition.

As an entrant to the New Zealand market, it is quickly apparent that the New Zealand competition policy toolkit lacks tools available in other countries including the UK and Australia.

Octopus notes, as an example, that competition concerns are being 'bounced' between the Commerce Commission and Electricity Authority without being coherently considered and addressed:

- When market participants raised concerns about anti-competitive behaviour in wholesale markets, the Electricity Authority invited them to raise the issue with the Commerce Commission.
- Following complaints, the Commission undertook an investigation but concluded that any competition issue was better dealt with by regulation, something that only the Electricity Authority could do. The Commission did not see a lengthy court proceeding to impose a large civil pecuniary penalty as an effective tool for this type of ongoing competition problem.
- The Electricity Authority lacks the focus on competition, and experience with pro-competitive regulation that is found in the Commerce Commission. But the Commerce Commission lacks the tools to intervene (even if the Electricity Authority might have them). When the Commerce Commission recommended the Electricity Authority use their regulatory toolkit to address systemic issues identified by the Commerce Commission, the Electricity Authority assumed away problems identified by the Commerce Commission.
- Recently a Competition Taskforce was set up between the Electricity Authority and Commerce Commission however the Commerce Commission has no legal status in progressing electricity industry Code changes.

Octopus also notes that at present New Zealand lacks a clear and efficient framework for pro-competitive regulation. Various statutes have been enacted on

an ad-hoc basis to promote competition.[1] As a result, they provide different powers, different review mechanisms, and often very different tools, depending on when the legislation was enacted and amended. While regulation must be customised to the circumstances, re-inventing the wheel on a regular basis will result in greater uncertainty, cost and delay compared with a more standardised approach.

As MBIE has noted that industry codes and rules might be used:

- To influence/address business conduct or market features that have been identified in a market study; or
- For intervention in sectors that may not justify a full market study.

Octopus agrees that such tools should not be limited to markets subject to a market study. In particular, it considers that industry codes or rules might also be used where:

- Work by another regulator or government agency, or an ad hoc inquiry for that purpose,[2] raise concerns about competition that may justify intervention; or
- A competition investigation has been conducted which identifies concerns that may justify intervention but are not appropriately dealt with via court proceedings.

MBIE has identified a number of ways in which industry codes or rules can promote competition, which it describes as classes. Octopus notes that market-making and non-discrimination/neutrality rules would be other important examples. Other examples would include rules that provided for the accounting or operational separation of business units in a vertically integrated firm. It would, however, be impossible to exhaustively list the ways in which competition may be promoted, and any empowering provision should remain relatively broad for this reason.

In relation to the form and process of industry codes or rules:

- Octopus agrees that any industry codes or rules should be in secondary legislation. This is a more timely, efficient and appropriate response to addressing sector-specific competition issues rather than developing primary legislation.
    - Regulation to promote competition must be imposed, reviewed, and removed in a timely fashion if it is to be successful. It generally moves

[1] There are significant pro-competitive regulatory frameworks in each of the Telecommunications Act 2001, Dairy Industry Restructuring Act 2001, Electricity Industry Act 2010, Fuel Industry Act 2020, Retail Payment Systems Act 2022 Grocery Industry Competition Act 2023.

[2] The Telecommunications Act 2001 and Electricity Industry Act 2010 both followed independent sectoral reviews.

on a faster timeframe than other economic regulation, such as that under Part 4 of the Commerce Act.

- Repeatedly passing regulation, amendments, and repeals is not necessarily a good use of the time of Parliament and its members. The technical complexity regulation to promote competition is not well suited to primary legislation.

- Primary legislation inevitably results in a bespoke regulatory intervention that, as noted above, results in greater uncertainty, cost and delay compared with a more standardised approach.

- Octopus agrees that consultation and process obligations are required, although these obligations should vary depending on the significance of the regulatory intervention proposed. The Electricity Industry Act 2010 provides a model for consultation that has proven workable and could easily be adapted to the Commerce Act.

- Octopus submits that any threshold for intervention should not be unduly high.

    - The complexity of forward-looking competition analysis means there will always be a degree of uncertainty on any intervention.

    - The imposition of such regulation should not require findings that the Commerce Act has or may have been contravened, nor should the threshold incorporate the statutory prohibitions on anticompetitive conduct.

        - The imposition of regulation should not carry with an implication of wrongdoing, nor are firms subject to regulation being punished.

        - Regulation is a public interest intervention to promote a socially desirable outcome (competition). It is not a punitive remedy arising from a contravention of the law.

    - Any industry codes or rules should be the subject of monitoring and regular review. It should not be difficult to amend or revoke, to enable a quick response to unintended or undesirable consequences, or if they are not achieving their objectives.

Better interface between regulators

Octopus submits that, in addition to providing for greater powers to impose industry codes or rules, MBIE should consider how the Commerce Commission's functions and powers will operate in sectors where there is an existing regulator. This could include a significant public entity, such as the FMA, RBNZ or Electricity Authority, a smaller public entity with an industry function (such as the REAA), or an industry body that exercises regulatory powers (for example, Gas Industry Company or the New Zealand Law Society).

Where there are multiple regulators, there is a greater tendency for gaps to open up, with each body viewing the work as the responsibility of the other. Octopus considers that to improve co-ordination between regulators:

- There should be no impediment to the sharing of information, or the conduct of joint investigations or inquiries, between competent regulatory bodies for the purpose of improving competition;
- The Commerce Act and the Commerce Commission should have the primary responsibility for competition issues;
- Other regulatory bodies should be required to have regard to the promotion of competition and be required to give effect to the Commerce Commission's views on measures to improve competition.

In the case of the Electricity Industry, it may be that the best approach is to enable the Commerce Commission to make rule changes, using the process under that Act. The Act currently provides for the Minister to make changes in some circumstances, if the Electricity Authority has not done so. A similar approach might be taken where the Commission has competition concerns that are unaddressed.

Other suggestions - general monitoring and reporting power

We support initiatives, such as the Customer and Product Data Bill, that make consumer data more accessible. Additionally, we advocate for increased transparency in consumer pricing to discourage pricing practices that harm consumers.

For example, "tease and squeeze" pricing strategies are common in industries like energy, insurance, banking, and telecommunications, where consumers face substantial switching and search costs. These strategies essentially "tax" customers for their loyalty. Reporting and publishing the extent of price discrimination would empower consumers to make informed decisions about their service providers and foster better price competition for all customers.

At present the Commerce Commission has industry specific powers of monitoring and reporting that vary depending on each sector's regulation. The Commission should instead be given a general power and function of monitoring and reporting that enables it to publish information for industry and consumers.

It could, for example, publish a league table highlighting the degree of "tease and squeeze"/price discrimination across the services covered by the Customer and Product Data Bill. This could be quite effective in drawing consumers attention, and ensuring they exercise their consumer power to change market behaviour.

Conclusion

Octopus Energy supports the Commerce Act providing additional powers to impose pro-competitive regulation under the Commerce Act.

We have engaged with the Electricity Authority and the Commerce Commission on improving competition. We have found that the Commerce Commission lacks the tools it needs to improve competition in New Zealand with the agility and efficacy necessary to effect change.

If you have any questions about this, please contact me.

Yours faithfully,

Margaret Cooney
Chief Customer Officer

Privacy of natural persons