



18 July 2018

GTAC Shippers
Level 8, The Todd Building
95 Customhouse Quay
PO Box 10-646
Wellington 6143

Trustpower Limited

Head Office
108 Durham Street
Tauranga

Postal Address:
Private Bag 12023
Tauranga Mail Centre
Tauranga 3143

F 0800 32 93 02

Offices in
Auckland
Wellington
Christchurch
Oamaru

Freephone
0800 87 87 87

trustpower.co.nz

Open letter: Proposal for shippers to collectively seek advice on Commerce Act risk associated with new Gas Transmission Access Code (GTAC)

Trustpower's open letter to the Gas Industry Company (GIC) dated 24 November 2017 highlighted the potential Commerce Act risks of the GTAC and suggested that these risks could be mitigated by:

- The GIC regulating the terms of access - as they would be deemed authorised under the Commerce Act (s43ZZR of the Gas Act (2002)); or
- The GIC or First Gas seeking authorisation of the GTAC, or an exemption from authorisation, on behalf of industry.

The GIC's response to our open letter confirms that:

- The GIC does not see itself as having any role in seeking authorisation of the GTAC, or an exemption from authorisation, on behalf of industry; and
- Compliance with the Commerce Act, both when signing up to the GTAC via a Transmission Services Agreement and in relation to any future code changes, is the responsibility of each individual signatory.

We note that the GIC is not a party to the GTAC. This means

- It is not likely to be in the potential position of finding itself party to an arrangement which is likely to have the effect of substantially lessening competition; and
- GTAC parties cannot take any comfort from the GIC's role when considering if the GTAC complies with the Commerce Act.

Clearly the assessment of whether individual provisions in GTAC amount to an arrangement which is likely to have the effect of substantially lessening competition in a market will need to be considered when the rules are completed. Going forward there will also be a need to consider the Commerce Act implications of future code changes.



The most relevant markets where competition could be affected are likely to be the wholesale and retail gas markets. We note that there can be no substantial lessening of competition in a market where there is no competition such as the provision of access to transmission pipelines.

When assessing the impact on market competition, a key factor will be what the counterfactual is. For example:

- if the counterfactual is an identical clause regulated by the GIC there is unlikely to be any *lessening of competition*
- however, if the counterfactual is a more competitive clause then the issue may turn on whether any lessening of competition is *substantial*.

First Gas's approach of seeking advice from the Commerce Commission on the proposed park and loan arrangements under the GTAC indicates that this is one of the areas of the new arrangements where it has identified some risk associated with the Commerce Act. However the main risk is with shippers.

As discussed at the 12 July 2018 GTAC workshop, we propose that all shippers:

- Collectively seek advice from a Commerce Act legal expert (and if necessary economic experts) on the final form of GTAC before signing up to the arrangements. This would reduce transaction costs; and
- Jointly support a change to the GTAC's proposed code change process to insert a requirement for a code change proponent to provide independent advice from relevant expert(s) on any Commerce Act implications of a proposed change.

If, as a shipper, your company would like to be involved in this collective initiative could be you please let me know directly prior to 3 August 2018, including details of who the main contact at your organisation will be.

A discussion around next steps for engaging a Commerce Act expert to provide advice will be arranged for mid-August.

For any questions relating to the material in this open letter, please contact me on 027 549 9330.

Regards,

A handwritten signature in cursive script that reads "Fiona Wiseman".

FIONA WISEMAN
SENIOR ADVISOR STRATEGY AND REGULATION