Bell Gully

SUBMISSION ON THE COMMERCE (PROMOTING COMPETITION AND OTHER MATTERS) AMENDMENT BILL

1. Introduction

1.1 Bell Gully is a leading competition law practice, advising major New Zealand and overseas companies on a range of issues, including merger control, cartels, contractual arrangements, misuse of market power and access issues. We welcome the opportunity to make submissions to the Government on the Commerce (Promoting Competition and Other Matters) Amendment Bill (the **Bill**).

1.2 For any queries on the matters raised in this submission, please contact Torrin Crowther and Glenn Shewan. Torrin and Glenn welcome the opportunity to present Bell Gully's views on the Bill to the Economic Development, Science and Innovation Committee.

1.3 We refer to our previous submission on the Ministry of Business, Innovation and Employment's discussion document titled 'Promoting competition in New Zealand - A targeted review of the Commerce Act 1986' (our **Previous Submission**).[1]

1.4 For completeness, this submission does not comment on every amendment in the Bill. Rather, this submission is focussed on the amendments which, in our view, are either of particular importance, or which we do not see a clear or compelling reason to implement.

2. Mergers

The substantial lessening of competition test – burden of proof

2.1 As a preliminary point, we noted in our Previous Submission that New Zealand's approach to burden of proof is out of step with that in other countries and should be aligned with equivalent regimes overseas before any further restrictions on mergers are implemented. While we recognise that there are instances where a merger may result in anti-competitive effects, mergers are market responses and are generally efficiency enhancing. In our view, merger control law should not be designed in such a way as to presume mergers are anticompetitive.

2.2 It is disappointing that changes to this effect have not been reflected in the Bill. We reiterate our view that New Zealand's approach to burden of proof should be aligned with the long-standing Australian approach – i.e., the starting position should be that a merger will not substantially lessen competition (**SLC**), placing the onus on the regulators to prove, on the balance of probabilities, otherwise. This change is necessary to ensure that New Zealand is not seen as an overly restrictive place to do business. It is particularly important in light of the proposed extension of the Commerce Commission's (the **Commission's**) functions to include mandatory notification powers, which would effectively undermine the voluntary nature of New Zealand's merger regime and which we discuss below.

2.3 As set out in our previous submission, the Competition Taskforce in Australia characterised this approach to the burden of proof as amounting to a "presumptive ban on mergers", and noted it would put Australia out of step with international peers. We consider there is no justification for continuing to take a more restrictive approach in New Zealand.

The substantial lessening of competition test – specific reforms

2.4 We comment on the specific amendments to the merger control test below.

(a) **Creeping acquisitions:** As set out in our Previous Submission, we do not see a compelling reason to make this change to the merger control test. We are not aware

[1] See: https://www.mbie.govt.nz/dmsdocument/30640-bell-gully-promoting-competition-in-nz-discussion-document-submission-pdf.

of any analysis as to whether serial acquisitions currently result in unchecked competition concerns. As practitioners, we approach creeping acquisitions with the view that at some point during the chain of transactions, the acquirer will reach a tipping point, after which further acquisition will result in a "substantial" lessening of competition. We do not (and nor was there any evidence or example provided in the supporting reports and materials foreshadowing the Bill) consider that an acquisition would not SLC simply because of its small size. Ultimately, a market will reach a level of concentration after which even a small acquisition could SLC. Accordingly, we propose to strike out clause 5(2) of the Bill.

(b) **Entrenchment of market power:** As set out in our Previous Submission, we do not agree that the entrenchment of market power needs to be changed. There is clear authority from the Court of Appeal in relation to the entrenchment of market power.[2] Codifying authority regarding entrenchment of market power may result in a meaning being adopted which is inconsistent with the meaning adopted by the Court of Appeal, which could lead to further uncertainty. Accordingly, we propose to strike out clause 5(1) of the Bill.

We noted in our Previous Submission that if New Zealand were to make this change, it must be accompanied by a change to the burden of proof as set out above, otherwise New Zealand would have a much more restrictive regime than Australia and other international peers. This could adversely affect New Zealand's international image. We reiterate the need to align the burden of proof with equivalent regimes overseas to avoid New Zealand being seen as an overly restrictive place to do business.

Behavioural undertakings

2.5 We strongly support the introduction of behavioural undertakings. As outlined in our Previous Submission, behavioural undertakings provide the flexibility for potentially efficiency enhancing mergers to proceed that would not otherwise be possible where structural remedies are the only remedies available.

2.6 However, in our view it is not necessary to limit the application of behavioural remedies to cases where structural remedies are deemed insufficient or where they are necessary to give effect to a structural remedy. Given their potential breadth and flexibility, behavioural remedies can provide an alternative to, or supplement, structural remedies. Indeed, the CMA in its recently updated merger remedies guidance accepted that there is academic evidence that behavioural remedies may be more appropriate in certain cases involving vertical / conglomerate theories of harm.[3] That is, behavioural remedies might prove a more suitable remedy, even where structural remedies would be available.

2.7 Furthermore, limiting the application of behavioural remedies in the way proposed in the Bill would also put New Zealand out of step with other jurisdictions. For example, the equivalent legislative provisions in Australia, the UK and Europe do not restrict the relevant authorities' scope to consider behavioural remedies in this way. In fact, the CMA's recent updates to its merger remedies guidance removed the presumption against behavioural remedies at phase 1.[4] The previous guidance noted that the CMA would generally only use behavioural remedies as a primary remedy where structural remedies were not feasible, the SLC was expected to have a short duration or there were substantial relevant customers benefits.[5] The updated guidance provides that, while the CMA considers a structural remedy is more

[2] See, for example: *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* (2005) 2 NZCCLR 759; *NZME Ltd v Commerce Commission* [2019] NZCCLR 1 *Commerce Commission v Woolworths Ltd* [2009] NZCCLR 12; *New Zealand Bus Ltd v Commerce Commission* [2008] 3 NZLR 433.

[3] See: https://assets.publishing.service.gov.uk/media/6944062e501cdd438f4cf5f8/merger_remedies.pdf at [7.20].

[4] See: https://assets.publishing.service.gov.uk/media/68f0a40f82670806f9d5e140/CMA_87_Merger_remedies_guidance.pdf.

[5] See: https://assets.publishing.service.gov.uk/media/5c12349c40f0b60bbee0d7be/Merger_remedies_guidance.pdf at [7.2].

likely to be effective than a behavioural remedy, it will consider behavioural remedy proposals in phase 1 and assess their effectiveness on a case-by-case basis.[6]

2.8 As set out in our Previous Submission, the Government does not need to prescribe the circumstances in which it would be appropriate for the Commission to administer behavioural undertakings. The proposed statutory test would only allow the Commission to accept a behavioural undertaking if a structural undertaking would be insufficient. However, the Commission should be free to accept a behavioural undertaking where it would involve lower cost, or would be more effective or proportionate than a structural remedy (including based on the likely duration of any expected SLC). This should be left to the Commission to determine based on the specific circumstances, not prescribed by legislation. The Commission, in its analysis of the specific factual context of each merger, is best placed to consider the appropriate remedies for a transaction.

2.9 Accordingly, we propose that clause 27(2) of the Bill be struck out.

Definition of "assets of a business"

2.10 As set out in our previous submission, we are not aware of any instances where the definition of the "assets of a business" has raised uncertainty in practice. Even if section 47 did not cover the acquisition of certain assets, section 27 would cover such situations, as a transfer of assets would involve a contract, arrangement or understanding.

2.11 We understand that the intention behind removing the qualifier in section 47(1) of the Commerce Act is to ensure the prohibition applies to the acquisition of *any* assets. However, removing this qualifier outright is likely to broaden the scope of section 47 unnecessarily and could have unintended consequences. Recent experience in Australia is telling in this regard.

2.12 Australia's new merger regime originally captured leases and other acquisitions of land interests. However, the Australian Government subsequently amended the regime ahead of its commencement on 1 January 2026. These amendments included the introduction of an exemption for land interests acquired in the ordinary course of business.[7]

2.13 Accordingly, we propose that clause 9(1) of the Bill be struck out.

Substantial degree of influence

2.14 As set out in our Previous Submission, there is no evidence that the current framework for the substantial degree of influence is problematic. The benefit of the current approach is that the focus remains on whether a transaction will SLC, rather than applying rigid rules around the degree of control over a target. While there may be scope for some uncertainty, the Commission's guidance and decisional practice means situations of uncertainty are infrequent. We do not think there is a need to provide further clarity in the Commerce Act as to the meaning of a substantial degree of influence, and there is a risk of unintended consequences by a narrow focus on the new listed factors.

2.15 Accordingly, we propose that clause 9(2) of the Bill be struck out.

Mergers outside the clearance process

2.16 Proposed section 47F grants the Commission power to *require* that merging parties apply for clearance if it has reasonable grounds to believe a proposed acquisition may breach section 47. This is a major departure from the existing regime in that it effectively reverses the onus of proof and undermines the voluntary nature of New Zealand's merger regime. We see no

[6] See: https://assets.publishing.service.gov.uk/media/68f0a40f82670806f9d5e140/CMA_87_Merger_remedies_guidance.pdf at [7.5].
[7] See: https://www.legislation.gov.au/F2025L01603/asmade/text.

proper basis on which to make this fundamental change. In our view, the current merger control regime is broadly effective. Indeed, in its discussion document, MBIE stated that a change to a mandatory and suspensory merger regime in New Zealand is not required as the current voluntary merger regime is working well.[8] In practical terms, the Commission's ability to seek undertakings from parties not to complete until it has investigated (given the Commission's ability to seek an injunction from the court) means that it already has, in practice, a call-in power. Accordingly, we propose that proposed section 47F (contained in clause 10 of the Bill) be struck out.

2.17 Proposed section 47E grants the Commission the power to suspend an acquisition for a period of up to 40 working days if it considers that is necessary to protect competition while it investigates the acquisition. We note that a suspension of 40 working days could result in significant delays to a transaction and therefore potentially detrimental commercial consequences, particularly where that period falls over the Commission's statutory shutdown period. Accordingly, we propose that section 47E is struck out, or a shorter suspension period is adopted.

Repeal of section 46

2.18 Section 46 provides a safeguard to protect contracts, arrangements or understandings giving effect to business acquisitions from the prohibition on restrictive trade practices outlined in Part 2 of the Act. This section is necessary to ensure that merging parties are not exposed to a cartel investigation and/or liability simply by entering into an arrangement to enter into a transaction to buy or sell business assets or shares. In our view, not only is there no benefit in repealing this provision, its proposed repeal would create uncertainty for parties to a merger in relation to their potential liability under Part 2 of the Commerce Act.

2.19 Part 1 of the Bill states that section 46 is "no longer necessary given section 83(6) already provides that a person will not be liable to a pecuniary penalty under both Parts 2 and 3". However, section 83(6) only protects merging parties against liability for a *pecuniary penalty* under both Parts 2 and 3 of the Commerce Act. It does not protect merging parties against a potential investigation into cartel conduct by the Commission, or against other types of liability (including criminal liability). Against that background, section 83(6) does not render section 46 unnecessary.

2.20 More generally, section 46 is necessary to retain certainty as to which rules which are applicable to a given action. Having a bright line test improves certainty by clearly delineating which conduct falls within the merger control or behavioural regimes. This is commonplace amongst other advanced competition law regimes.[9]

2.21 Accordingly, we propose that clause 8 of the Bill be struck out.

3. Anti-competitive conduct

Facilitating beneficial collaboration

3.1 As set out in our Previous Submission, we have not encountered circumstances where uncertainty under the current regime has deterred a beneficial arrangement; parties can receive advice and seek clearance or authorisation if needed. However, our view is that the proposals to introduce a new statutory notification regime for resale price maintenance and small business collective bargaining, along with a streamlined collaborative activities clearance process, are positive developments.

[8] See: https://www.mbie.govt.nz/dmsdocument/29866-discussion-document-promoting-competition-in-new-zealand-a-targeted-review-of-the-commerce-act-1986-pdf at p18.
[9] See: https://www.legislation.gov.au/C2004A00109/latest/text (section 45AT), https://eur-lex.europa.eu/eli/reg/2004/139/oj/eng (clause 6 and Article 2(4)), and https://www.legislation.gov.uk/ukpga/1998/41/section/19.

3.2 We expect these proposals will be particularly welcomed by firms with more limited resources. Furthermore, we expect the implementation of these proposals will improve the previously limited uptake in respect of the current collaborative activities clearance regime.

Predatory pricing

No need to codify the definition of predatory pricing

3.3 While we recognise the desire to improve certainty, the application of a codified definition of predatory pricing is likely to cause real difficulties in practice. The cost measures set out in the Bill are fairly well established. In our experience, it is not the choice of cost measures themselves that create the complexity (and therefore uncertainty) but rather the inherent complexities in applying them. For example, it is not clear how these concepts would apply to genuine responses to competitive pricing, particularly given the nuances between different industries in relation to these concepts. The uncertainties that currently exist are not rectified by the proposals.

3.4 Very few of the established competition law regimes globally have a statutory definition of predatory pricing. In fact, in 2017, the Australian legislature repealed its previous misuse of market power provision which explicitly prohibited below-cost pricing. That provision was subject to several criticisms, including that it was difficult to apply in practice and may have inadvertently captured genuine competitive pricing. The Australian provision now reflects the position in the UK, Europe and Singapore (i.e., there is no codified definition of predatory pricing). Our view is that introducing a codified definition of predatory pricing which is more prescriptive than the previous Australian clause would further exacerbate, rather than remedy, the uncertainties that already exist.

3.5 In Canada, while the relevant legislative provision defines an anti-competitive act as including "selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor", it does not seek to codify the relevant cost standard.[10] Indeed, in its abuse of dominance enforcement guidelines, the Competition Bureau (the **Bureau**) recognises that there are "difficulties inherent in applying a price-cost test to identify predatory pricing, all other things being equal" and notes that it generally uses various "screens" before conducting an avoidable cost analysis. For example, the Bureau will consider whether the alleged predatory price can be matched by competitors and whether it is in fact simply genuine competitive pricing.[11]

3.6 Further uncertainty is likely to arise in applying the concept of a "sustained period", which is not defined in the Bill.

Predatory pricing should not be a per se infringement

3.7 The Bill removes the requirement that a purpose, effect, or likely effect of an SLC is required to establish predatory pricing, effectively making predatory pricing a 'per se' infringement. This would result in a potentially pro-competitive pricing measure being prohibited where it is carried out for a "sustained period".

3.8 As the Australian Competition and Consumer Commission notes in its misuse of market power guidelines, low pricing is beneficial for consumers in almost all circumstances and is part of the competitive process. Making predatory pricing a per se offence is likely to have a chilling effect on firms engaging in genuine competitive pricing for fear of liability. Indeed, it is commonplace amongst established competition law regimes globally for the relevant regulator to have regard to the purpose and/or effect of the relevant conduct when determining whether it is predatory. For example:

[10] See: https://laws-lois.justice.gc.ca/eng/acts/C-34/page-15.html#docCont.
[11] See: https://competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/abuse-dominance-enforcement-guidelines at [61].

(a) in Australia, the test is whether the conduct has the purpose, effect or likely effect of substantially lessening competition in a market;

(b) in Canada, where the firm's pricing of a product does not cover its own average avoidable costs, the Bureau will consider the pricing to be predatory in the absence of evidence that the overriding purpose of the conduct was in furtherance of a credible efficiency or pro-competitive rationale.[12] For example, the Bureau may find it is reasonable for a firm to sell excess, obsolete or perishable products at below-cost prices, or use below-cost promotional pricing to induce customers to try a new product;

(c) in Singapore, the Competition and Consumer Commission will consider any evidence that the firm's behaviour may be objectively justified;[13]

(d) in Europe, the European Commission (**EC**) may consider claims that the low pricing enables the dominant firm to achieve economies of scale or efficiencies related to expanding the market.[14] The EC's draft updated guidance notes that if the dominant undertaking submits evidence that the conduct is not capable of producing exclusionary effects, the EC will assess that evidence.[15]

Recoupment of costs is a necessary element of predatory pricing

3.9 While there are differing views amongst competition law regulators globally, our view is that recoupment of costs is necessary to establish predatory pricing. Where a firm engages in low pricing without recouping the losses it incurs, there is no harm to competition – in fact, consumers are better off.

3.10 Indeed, as the Privy Council stated in *Carter Holt Harvey Building Products Group Ltd v Commerce Commission*:[16]

> *There must … be a causal connection between the dominant position and the conduct which is alleged to have breached s 36. That will not be so unless the conduct has given the dominant firm some advantage that it would not have had in the absence of its dominance. It is the ability to recoup losses because its price cutting has removed competition and allows it to charge supracompetitive prices that harms consumers. Treating recoupment as a fundamental element in determining a claim of predatory pricing provides a simple means of applying the section without affecting the object of protecting consumer interests.*

3.11 While that case was decided under a different version of section 36, a causal connection between the relevant firm's dominant position and the conduct will be particularly important if predatory pricing becomes a per se offence to ensure genuine competitive pricing is not inadvertently prohibited (ultimately harming consumers).

3.12 Accordingly, we propose that Clause 8 of the Bill should be struck out.

4. Other

Confidentiality

4.1 As stated in our Previous Submission, the Commission's current approach to protecting commercially sensitive information and providing information to third parties under the

[12] See: https://competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/abuse-dominance-enforcement-guidelines at [60].
[13] See: https://isomer-user-content.by.gov.sg/45/1654f332-1435-4dad-830b-dc4a1edbb961/CCCS%20Guidelines%202022_Interactive.pdf at [11.6].
[14] See: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01) at [74].
[15] See: *Draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings* at [112], available at: https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en.
[16] *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* [2006] 1 NZLR 145 at [67-69].

Official Information Act (**OIA**) is skewed too heavily towards sharing information. The process involved in disclosing information to third parties is time-consuming and burdensome. Furthermore, disclosure is often excessive and unnecessary given the Commission, as the decision-maker, has full access to the information. Accordingly, we support the proposed introduction of section 100AA, which provides protections against the disclosure of information to third parties.

4.2 We also recognise that there is an important balance to be struck between protecting commercially sensitive information and ensuring transparency. In particular, where a party is subject to an investigation by the Commission, that party should be given access to the information which formed the basis of the investigation so that it can properly respond. In our view, section 100AA, which prescribes the circumstances in which the Commission may release information, appears to appropriately strike this balance. We note that section 100AA(2)(e), which allows for information to be published or disclosed where the person has a 'proper interest' in receiving the information, will be an important safeguard to ensure that information disclosure is limited to where it is justified (for example, in the context of an investigation as described above).

Bell Gully