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BELL GULLY

SUBMISSION ON PROMOTING COMPETITION IN NEW ZEALAND - A TARGETED REVIEW OF THE COMMERCE ACT 1986

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 Ministry of Business, Innovation and Employment (the **MBIE**) on its discussion document for the proposed reform of New Zealand's merger regime (and other matters) as set out in the discussion document titled 'Promoting competition in New Zealand - A targeted review of the Commerce Act 1986' (the **Discussion Document**).

1.2 We would be happy to discuss our views further with the MBIE. Please contact:

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2. Mergers

The substantial lessening of competition test – burden of proof

2.1 We consider the current merger control regime in the Commerce Act 1986 (the **Commerce Act**) is broadly effective. However, there are some beneficial changes that could be made to the regime to bring it into line with equivalent regimes overseas, in particular by addressing the burden of proof and introducing the ability for the Commerce Commission (the **Commission**) to accept behavioural undertakings.

2.2 Our starting position is that mergers are market responses and are generally efficiency-enhancing. Mergers can create synergies, allow for economies of scale and improve innovation. There are instances where a merger may result in anti-competitive effects, but these instances are relatively infrequent. Accordingly, merger control law should not be designed in such a way as to presume mergers are anticompetitive.

2.3 Against this background, a key aspect of merger control reform that must be considered is the current position around burden of proof. New Zealand's approach to burden of proof is out of step with that in other countries. The Australian legislature, when considering Australia's most recent merger control reforms, specifically considered whether to adopt a higher burden of proof for merging parties that would be akin to the New Zealand position. However, the legislature explicitly rejected this on the basis that *"disproving the existence of substantial lessening of competition may be difficult and impractical for businesses to satisfy, particularly those in emerging markets"* and *"this change is currently hard to justify given the lack of rigorous evidence showing that a significant number of past mergers have in fact substantially lessened competition."*[1]

[1] Australian Treasury Ministerial Submission (MS23-001712) "Competition Taskforce – merger reform" [the **Ministerial Submission**] (available here).

2.4 The same is also true in New Zealand. Accordingly, it is critical that the burden of proof issue is assessed as part of this reform process. To add any *further* restrictions on mergers, such as those adopted in Australia, without aligning the burden of proof, will put New Zealand completely out of step with other jurisdictions, with a risk that New Zealand is seen as an overly restrictive place to do business.

2.5 New Zealand's current approach to the burden of proof is to require an applicant for merger clearance to prove, to a standard well beyond the balance of probabilities, that the merger will not substantially lessen competition (**SLC**). Specifically, the merger applicant must be able to remove any doubt that the Commission may have that a merger will SLC. Accordingly, if the Commission is "unable to exclude a real chance of a SLC", it must decline the clearance.[2] This can result in a particularly high burden on an applicant, resulting in the Commission erring too frequently on the side of intervention notwithstanding an SLC is not "likely" were the balance of probabilities standard to be applied.

2.6 The benefit of the Australian approach is that the starting position is that a merger will not SLC, placing the onus on the regulators to prove, on the balance of probabilities, otherwise. This keeps Australia in line with overseas jurisdictions by not assuming that mergers are intrinsically anti-competitive.

2.7 Recently, the Australian Government rejected the proposal by the Australian Competition and Consumer Commission (the **ACCC**) to place the onus on the merging parties (a position currently adopted by the Commission). In making the decision, the Australian Treasury relied on stakeholder feedback the Competition Taskforce received as part of its consultation process on the proposed merger reforms in Australia (set to come into force on 1 January 2026). The Competition Taskforce concluded that reversing the onus of proof was difficult to justify given stakeholder views, including significant opposition from business and their advisors, technology and property groups, superannuation funds and international groups to place the onus on the merger parties.[3] Key risks and concerns cited by stakeholders were that the reversal:

(a) would effectively introduce a presumptive "ban" on mergers;[4]

(b) could increase the burden on the businesses, impacting business dynamism, investment and flow of capital to Australia;[5]

(c) would be especially challenging for new and emerging businesses in nascent, innovative industries;[6]

(d) could introduce systematic bias, increasing the number of rejected mergers each year, with the ACCC's default decision on deals being disapproval, without needing to prove anything itself;[7]

(e) may undermine the use of the detailed legal and economic analysis required to assess the inherent risks and uncertainty associated with a merger; and

[2] See, for example, *Vodafone Europe B.V. and Sky Network Television Limited* [2017] NZCC 1; *Sky Network Television Limited and Vodafone New Zealand Limited* [2017] NZCC 2 at [28]; *The Commerce Commission v Woolworths Limited & Ors* [2008] NZCA 276 at [98].
[3] *Ibid*.
[4] Australian Treasury Consultation Paper: *Merger Reform: A Faster, Stronger and Simpler System for a More Competitive Economy* (10 April 2024) [the **Treasury Consultation Paper**] (available here).
[5] Australian Treasury Ministerial Submission, above n 1.
[6] *Ibid*.
[7] *Ibid*.

(f) would ultimately place Australia out-of-step with international peers.[8]

2.8 Accordingly, in our view MBIE should not look to introduce other changes made in Australia without aligning this core part of the merger clearance test.

The substantial lessening of competition test – comments on specific proposals

2.9 When considering the proposed changes, MBIE is correct to consider the implications for New Zealand consumers of blocking mergers. Where the Commission blocks a merger, there can be resulting material adverse effects.

2.10 Furthermore, while there are benefits to aligning with Australia, changes should only be made where there is a clear and compelling reason to do so. New Zealand has on multiple occasions chosen not to align its competition law with the equivalent Australian provisions, which has served us well (e.g. New Zealand's collaborative activities exemption to cartel conduct). While, all things equal, an alignment with Australian law is preferable, alignment simply for alignment's sake is both burdensome and increases uncertainty – and thus comes at a real cost.

2.11 Against this background, and taking into account the burden of proof issue set out above, we set out our views on each of MBIE's proposals below.

(a) With regard to creeping acquisitions, while we agree that there have been instances of serial acquisitions, we are not aware of any analysis as to whether these kinds of acquisitions 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 is any evidence or example provided) 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 do not see a compelling reason to make this change to the merger control test.

(b) We do not agree that the entrenchment of market power needs to be changed. There is very clear authority from the Court of Appeal in relation to the entrenchment of market power.[9] Further, the risk of 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. However, if New Zealand were to make this change in order to align with Australia, 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.

Issue 2 – Substantial degree of influence

2.12 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 can be 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 substantial degree of influence.

[8] *Ibid*.
[9] 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.

Issue 3 – Assets of a business

2.13 We are agnostic as to this change. We are not aware of any instances in practice where this definition has raised uncertainty. Even if section 47 did not cover acquisition of certain assets, section 27 would cover such situations as a transfer of assets would involve a contract, arrangement or understanding.

Issue 4 – Mergers outside the clearance process

2.14 New Zealand's voluntary merger regime has been effective thus far. Of the number of mergers occurring annually, there tend to only be a handful of investigations – a testament to the current regime.

2.15 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. Furthermore, MBIE notes that the current functions of the Commission, such as its mergers intelligence function and well-developed informal 'courtesy letter' process, are successful.

2.16 We do not consider that non-notified mergers are an issue in New Zealand given the existing functions and powers of the Commission. Accordingly, our view is that there is no need for the already effective functions of the Commission to be extended.

Issue 5 – Behavioural undertakings

2.17 We strongly support the introduction of behavioural undertakings. The Commission's inability to accept behavioural undertakings by merging parties risks prohibiting potentially valuable mergers. Global experience shows that regulators are judicious in their use of behavioural remedies, such that a total statutory ban is arbitrary and comes at a real cost.

2.18 Whilst the enforcement and drafting of behavioural remedies can be costly and complex, they offer significant flexibility. This flexibility allows mergers to proceed that would not otherwise be possible under purely structural remedies. We agree with the examples provided by MBIE of *Reckitt Benckiser Group Plc / Johnson & Johnson* and *Sky / Vodafone* as cases where behavioural remedies could have been considered to address potential competition law issues while allowing the benefits of the mergers to arise.[10]

2.19 We are also of the view that behavioural remedies:

(a) have a potentially broader scope of application, since they can be structured specifically to preserve deal synergies and work as alternatives when structural remedies may not be feasible or proportionate. In cases where competition concerns may dissolve quickly (e.g. fast-developing sectors, such as the digital space), a "permanent" divestiture may be disproportionate or not suitable in the long term; behavioural remedies for a prescribed period may suit better; and

(b) are useful supplements to ensure the effectiveness of structural remedies. For example, behavioural remedies, when imposed in connection with structural remedies, ensure that the purchaser can operate the divestiture business viably and competitively. In these cases, behavioural remedies are interim in nature and not themselves the

[10] *Benckiser Group Plc and Johnson & Johnson* [2015] NZCC 12; *Sky Network Television Limited and Vodafone New Zealand Limited,* above n 2.

solution to the harm identified, but rather act as safeguards to ensure that the solution (i.e. divestiture) is implemented effectively.

2.20 Regulators globally, including the ACCC, are increasingly willing to accept behavioural undertakings and remedies in appropriate circumstances, as evidenced by recent decisions:

(a) In June 2023, the ACCC authorised the merger of *Linfox Armaguard and Prosegur Australia*, contingent on a court-enforceable undertaking, including requiring the merged entity to continue to offer cash-in-transit services at all locations currently serviced.[11]

(b) In October 2023, the ACCC authorised the (now abandoned) *Brookfield and MidOcean acquisition of Origin*, subject to behavioural undertakings, including ensuring compliance with ringfencing and reporting obligations.[12]

(c) In October 2024, the ACCC announced that it was seeking market feedback on *Qube's* proposed behavioural undertakings regarding its acquisition of *Melbourne International RoRo & Auto Terminal*, including obligations on Qube's wholly owned subsidiary AAT not to discriminate in favour of its own interests.[13]

(d) In November 2024, the ACCC cleared the *Sigma Healthcare / Chemist Warehouse* merger after accepting a behavioural undertaking from Sigma, including not enforce restrictive contractual exit clauses on pharmacies.[14]

2.21 The MBIE does not need to provide the circumstances in which it would be appropriate for the Commission to administer behavioural undertakings. The Commission, in its analysis of the specific factual context of each merger, is best placed to consider the appropriate remedies in a transaction.

3. Anti-competitive conduct

Issue 6: Facilitating beneficial collaboration

3.1 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. Further, there is great difficulty in trying to categorise arrangements into whether they are beneficial or not.

3.2 With regard to the merits of the potential regulatory options, the Commission already has the ability to appear in front of the court. Parliament is tasked with making the law, and as stated, the Commission has the ability to go through the judiciary where they deem necessary. We do not think that introducing regulatory options that extend further than this is necessary or appropriate.

3.3 We would accept the introduction of some binding 'green lights', but would not want an adverse inference to be taken from the fact that one is outside of them. We are comfortable with the statutory notification regime, and with class exemptions.

[11] ACCC "Reasons for Determination Application for merger authorisation lodged by Armaguard and Prosegur in respect of the merger of their respective cash-in-transit and device monitoring and maintenance and ATM businesses Merger authorisation number: MA1000022" (13 June 2023) (available here).
[12] ACCC "Reasons for Determination Application for merger authorisation lodged by Brookfield LP and MidOcean in respect of the proposed acquisition of Origin Energy Merger authorisation number: MA1000024" (10 October 2023) (available here).
[13] See, for example, ACCC "Variation to section 87B undertaking to the ACCC*: Qube Holdings Limited (Qube) - Melbourne International RoRo & Auto Terminal Pty Ltd (MIRRAT)"* (October 2023) (available here).
[14] See, for example, ACCC "Section 87B Undertaking to the ACCC: *Sigma Healthcare - Chemist Warehouse Group*" (November, 2024) (available here).

Issue 7 – Anti-competitive concerted practices

3.4 We do not see a compelling reason to include the "concerted practices" concept in our anticompetitive conduct rules. The concept of a "concerted practice" is vague. Codifying the concept is likely to result in a high degree of interpretive uncertainty. Further, as the MBIE correctly points out, it would be difficult to draft what a prohibition of this type would encompass. We think it is premature that an explicit prohibition be introduced absent any well-founded evidence as to a problem.

3.5 In particular, introducing a concerted practices element could stifle beneficial conduct encouraging price discovery and market transparency. In general, markets function better when market participants have more information, particularly around prices. Questions arise as to whether certain conduct around issuing price lists or displaying prices for genuine reasons could contribute to allegations of concerted practices, which could have adverse effects for markets and consumers. To the extent there is a residual concern, we think the better approach would be to defer any decision until the Australian changes have had some time to play out.

4. Code or rule-making powers and other matters

Issue 8: Industry Codes or Rules

4.1 Implementing industry codes or rules would be unnecessary and burdensome. To date, industry practices and codes have been developed on the back of market studies which have taken place over 12 to 18 month periods and involved detailed evidence-gathering and analysis.

4.2 We would expect to see, if implemented, lengthy consultations processes carried out before industry codes are introduced into the sectors which do not warrant full market studies. This could end being as burdensome as carrying out a market study. However, introduction of codes without such lengthy consultation and consideration could lead to poor regulation and adverse effects on markets and consumers. Accordingly, unless there is clear evidence to support any clear effectiveness of such rules, the potential for regulatory compliance burden on those companies affected would seem to outweigh any benefits.

Issue 9: Modernising court injunction powers

4.3 We do not support the introduction of a new power for the courts to issue performance injunctions in relation to anticipated contraventions of Parts 2 or 3 of the Act. There is no problem identified with the current regime that would require this change. The proposed justification is that courts have greater powers under different legislation, but that in itself is not a reason to enlarge the courts powers under the Act.

4.4 The example that is given (section 49 of the Retail Payment System Act 2022) is not analogous to the Act. That statute, and standards or directions under it, may require a firm to take positive steps in order to comply with the law. It makes sense for the court to be able to issue a performance injunction to require a firm to comply with those positive obligations. That is not the case for Parts 2 or 3 of the Act, which only requires firms *not* to do certain things. Injunctions to enforce Parts 2 or 3 of the Act should remain prohibitive only.

Issue 10: Protecting confidential information

4.5 We are of the view that the balance struck by the Commission with regard to protecting commercially sensitive information and providing information to third parties under the Official Information Act (the **OIA**) is skewed too heavily toward sharing information. For example,

granting third party opponents' advisors access to highly confidential internal documents of merging parties is excessive and unnecessary when the Commission, as the decision-maker has full access to such information. It is also time-consuming and burdensome for parties to deal with frequent requests for disclosure to third parties during (often highly time-sensitive) merger assessment processes.

4.6 Accordingly, we recommend limiting the period in which OIA requests can be made to exclude the period prior to a merger application being decided. Sufficient transparency is offered to third parties by the Commission's process, including publishing the clearance application, Statement of Preliminary Issues and, if needed, Statements of Issues and/or Unresolved Issues.

Issue 11: Minor and technical amendments to Commerce Act

4.7 Our preliminary views on the proposed technical amendments to the Commerce Act are summarised in the table below.

#	Provision	Bell Gully views
1.	**Section 65A-D** – addressing shortcomings in the collaborative activity clearance regime.	We are supportive of this change
2.	**Sections 98A(1) and (2)** – modernising search warrant powers	We are supportive of this change.
3.	**Sections 62(6) and 69B** – clarifying conferences can be held online across multiple dates.	We are supportive of this change
4.	**Section 102** – extending power to serve notices in accordance with Court directions.	We are supportive of this change

4.8 In addition, we also recommend that the price fixing exemption for collective acquisitions in section 33 be broadened to protect against all cartel provisions, which would broaden its practical application in appropriate cases. It's worth noting here that competitive outcomes would still be protected, because such arrangements remain subject to the broad prohibition in section 27.

Bell Gully