

11 March 2014

Productivity Commission
Level 15, Fujitsu Tower, 141 The Terrace
Wellington 6011

By email: info@productivity.govt.nz

Boosting Productivity in the Services Sector: Submission on the Second Interim Report – Competition and ICT topics

Thank you for the opportunity to comment on the Productivity Commission's second interim report (January 2014) on boosting productivity in the services section – Competition and ICT topics (the **Report**).

ANZ Bank New Zealand Limited (**ANZ**) has a keen interest in the Productivity Commission's work. We made a submission and met with the Productivity Commission in late 2013 as part of the Productivity Commission's enquiry into Regulatory Institutions and Practices.

As the largest financial institution in New Zealand, ANZ has direct experience operating under New Zealand's competition laws and practices and our activities are regulated by the Commerce Act 1986 (the **Act**). ANZ is, therefore, interested in participating in debate about the Act. We support in-depth analysis on how best to ensure that the Act strikes an appropriate balance between maintaining competition without unduly increasing business compliance costs.

ANZ's submission is limited to chapter 4 of the Report ("*Improving competition law*") Our key messages are set out below. We discuss each of these key messages in detail in Schedule 1 of this letter.

KEY MESSAGES

- 1. Proposals for competition law reform should only be made following a wide-ranging review of the impact on, and in-depth consultation with, affected stakeholders as any such reform would have a substantial impact on businesses across New Zealand, not just the services sector.**
- 2. Further investigation, including a complete cost/benefit analysis, should be undertaken before the Commerce Commission is empowered to undertake market studies.**

Contact for submission

ANZ welcomes the opportunity to discuss any of our submissions directly with the Productivity Commission's officials. Contact details for ANZ, if required, are:

Craig Mulholland
General Counsel & Company Secretary
(09) 252 6392
craig.mulholland@anz.com

Yours sincerely



Craig Mulholland
General Counsel & Company Secretary

SCHEDULE 1

KEY MESSAGES

Proposals for competition law reform should only be made following a wide-ranging review of the impact on, and in-depth consultation with, affected stakeholders as any such reform would have a substantial impact on businesses across New Zealand, not just the services sector.

The Report has been issued in the specific context of a review of the New Zealand services sector. ANZ is concerned that the Report makes recommendations for reform of the Act that would have far-reaching implications across New Zealand and would not be limited to the services sector. In particular, the Report recommends that the section 36 market power provision of the Act:

- move away from its existing counterfactual test; or
- incorporate an "effects" based approach.

Reform of New Zealand's abuse of market power (monopolisation) provision would have far-reaching and significant consequences for all businesses. ANZ suggests that before substantive recommendations for reform of the Act are made, it is necessary to undertake a robust consultation process. This process should include the ability for all affected stakeholders (and not just those in the services sector) to have the opportunity to comment and submit. There are a wide range of stakeholders, including businesses across all sectors, trade and industry associations, legal practitioners, economists, competition experts, consumer groups, the Commerce Commission and others. Appropriate time should be allowed for all views to be considered.

Framing an appropriate and workable "market power" prohibition is recognised as an inherently complex issue worldwide. A relevant analogy is the recent Ministry of Business Innovation and Employment's (MBIE) consultation on the Commerce (Cartels and Other Matters) Amendment Bill. This legislation was referred to in international antitrust forums as a market leading consultation exercise and generated a significant number of submissions from a range of different industry sectors.

ANZ is also concerned that, in reaching its conclusion, the Productivity Commission has:

- Reiterated the Commerce Commission's (publicly expressed) views, which are skewed toward a legal standard that may be more readily prosecuted and lead to more rather than less regulation. The Commerce Commission's view should be balanced against the views of businesses that will have to incur increased compliance costs from additional regulation; and
- Given undue weight to the presentation of Professor Gavil at the 2013 Competition Matters Conference (October 2013) when the presentation was delivered for the purpose of generating debate and outside of direct experience of New Zealand competition law. The Productivity Commission does not appear to have given any weight to the New Zealand Supreme Court's view that New Zealand's current

approach to section 36 of the Act is consistent with Australia's when making its arguments for reform of section 36.¹

Accordingly, if the Productivity Commission's view is that productivity in the services sector could potentially be enhanced through reforms to the Act, the Productivity Commission's recommendation should simply be that a specific review be undertaken of the aspects of the Act that the Productivity Commission identifies as potentially problematic.

The Productivity Commission's specific recommendation favours a particular type of reform (i.e. a new effects based test). This is premature as there has not been sufficient opportunity to benefit from wide-ranging consultation on the topic.

Further consultation will ensure that:

- The review starts on a level playing field in terms of problem identification - and that a "preferred position" does not skew the problem identification analysis at the outset; and
- All business sectors, not just the services sector, would have sufficient time to consider the implications of any reform for business, and make substantive submissions on any proposals for reform.

ANZ suggests that MBIE, as part of its competition policy function, may be best placed to manage this consultation process.

¹ *Commerce Commission v Telecom Corporation of New Zealand Ltd* [2011] 1 NZLR 577 at [31]

Further investigation, including a complete cost/benefit analysis, should be undertaken before the Commerce Commission is empowered to undertake market studies due to the significant impact on businesses

Before the Productivity Commission decides to recommend that the Commerce Commission be empowered to conduct market studies in New Zealand, ANZ submits that further investigation and a robust consultation process (with submissions from all affected parties) should be carried out.

ANZ notes:

- Market studies are likely to significantly increase compliance costs for any business that becomes the subject of such a study;
- On conclusion of a market study, the reasons for recommendations and findings are often not made public; and
- Achieving efficiency and effectiveness of inquiries under market studies is likely to be difficult.

Before a market study is undertaken, there should be a requirement for clear evidence that the benefits of the inquiries are likely to outweigh the detriments (including the high costs to individual businesses). Rigorous merits-based tests conducted before a market study is initiated would help to ensure consistency and meaningful accountability across New Zealand businesses.

ANZ notes that both the Australian Parliament and Australian Productivity Commission have previously expressed concerns about the costs and benefits of these types of inquiries. For example, despite the significant time and cost involved in preparing the reports, recent prominent studies in Australia have resulted in little material change for consumers:

- An inquiry into petrol prices concluded that price changes were largely driven by international price movements. There was little that could be done domestically to change this; and
- An inquiry into the supermarket industry found there was nothing demonstrably wrong with the grocery supply chain.

There have been similar experiences in the United Kingdom with prolonged market inquiries that have not demonstrated a clear overall cost/benefit.

In New Zealand, the nearest equivalent to a market inquiry was the Commerce Commission's four year investigation into the electricity sector. This investigation was the most expensive investigation in the Commerce Commission's history (with costs understood to be in the millions). No evidence of breaches of the Act were found and only one warning was issued regarding the risk of a breach.

ANZ Bank New Zealand Limited
11 March 2014