BELL GULLY

Bell Gully submission to Productivity Commission – Second Interim Report on Boosting Productivity in the Services Sector

1. Bell Gully is a leading New Zealand law firm, advising major New Zealand and overseas clients on all aspects of commercial law (including securities, competition, and regulatory law). We frequently advise both corporate and individual clients in relation to a range of competition matters.

2. We are grateful for this opportunity to submit on the Productivity Commission's Second Interim Report on Boosting Productivity in the Services Sector. Rather than try to address the Interim Report in full in this submission, we have focused on the Commission's comments in Chapter 4 of the Interim Report in relation to potential changes to New Zealand's competition laws.

3. We would be happy to discuss our views further with the Commission. Please contact:

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Section 36

4. We acknowledge that there is currently a keen debate as to whether section 36 of the Commerce Act 1986 is fit for purpose. However, abuse of dominance/misuse of market power laws are notoriously complex and getting the law "wrong" in this area can be very costly for businesses, consumers and ultimately detrimental to the economy as a whole. Accordingly, should a review of section 36 go ahead, the best course would be for the Government to establish a small, independent review panel consisting of senior business-people, regulators, economists and lawyers (similar perhaps to the Ministerial Inquiry into Telecommunications). That panel should be able to conduct workshops with interested parties, as well as receive written submissions.

5. We agree with the Commission that any review of section 36 should take account of developments in Australia as a result of its 'root and branch' review of the Competition and Consumer Act 2010 (Cth) (**CCA**). However, while there are benefits to harmonising section 36 with the CCA, it remains important to ensure that any amendments are tailored to New Zealand's particular circumstances (primarily its small size).

6. The Commission has also suggested in R4.3 that any review should consider specific changes to remove reliance on the counterfactual test, and introduce an "effects" approach. It is unhelpful to prejudge the outcome of any review by tailoring the terms of reference towards a particular outcome. In our view, the better course would be (assuming a review were to occur) to simply ask the review panel to consider whether section 36 is currently fit for purpose and, if not, what changes should be made.

Collaboration

7. We agree with the Commission that it is difficult to ascertain now what effect the Commerce (Cartels and Other Matters) Amendment Bill (**Bill**) will have on competition and collaboration in the services sector. Clearly, any rule which has the effect of restricting competition or innovation in New Zealand's small markets is undesirable. In our view, the proper course

may be to revisit this issue once the effect of the Bill (and the outcome of the Australian review) is known.

Market studies

8. We are not persuaded that it is necessary for New Zealand to make greater use of market studies. As the Commission notes, such exercises are likely to be very costly for Government and for business and do not produce outcomes that could not be realised through traditional policy development mechanisms.

9. If it is thought that such market studies should be used more frequently, we consider that they should be conducted as required by MBIE rather than the Commerce Commission. To impose a further research function upon the Commission could distract it from its other roles, and would present obvious difficulties with reference to its separate enforcement roles (particularly its role in criminal enforcement matters following passage of the Bill). MBIE has the requisite skillset and experience in conducting such studies, which have not in the past been detrimentally affected by any lack of 'independence' from Government or compulsory information-gathering powers.

10. We note that in Box 4.6 the Commission comments that ministerial inquiries do not have powers to summon witnesses or compel evidence to be provided. Although that was true historically, our understanding is that such powers are now available to public and government inquiries under section 20 and 23 of the Inquiries Act 2013.

Bell Gully
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