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The Chairman
Productivity Commission

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Matter no. 02-285-8289

17 November 2004

Dear Sir

Submission on Productivity Commission 2004, *Australia New Zealand Competition and Consumer Protection Regimes*, Draft Research Report

Thank you for the opportunity to participate in the roundtable discussion in relation to the Productivity Commission's (**Commission**) Draft Research Report held in Auckland on Thursday 4 November 2004.

As noted in our initial submission, Bell Gully considers that there are potential benefits arising from further *harmonising* Australia and New Zealand's competition and consumer protection regimes.

However, like the Commission, we consider that there are constitutional and other issues that would impede any move towards either full integration (Option 1) or partial integration (Option 2). These issues would outweigh the potential benefits of *integration* absent a true single economic and fully harmonised Australasian market. In effect, we consider that (at this stage) integration would :

- increase the regulatory, transactional, and general business costs for New Zealand businesses;
- increase the costs for New Zealand consumers associated with raising concerns with the relevant competition authority, which would decrease consumers' ability to fully participate in the regulatory process; and
- impede New Zealand's ability to make regulatory decisions that enhance the welfare and efficiency of the New Zealand economy as a whole.

Accordingly, we endorse the Commission's Draft Findings 5.1, 5.2 and 5.3. As a result, the remainder of this submission focuses on the Commission's Draft Recommendations.

Draft Recommendation 5.4: greater co-operation and co-ordination between NZCC and ACCC

Bell Gully supports allowing and promoting further co-operation between the Australian Competition and Consumer Commission (**ACCC**) and the New Zealand Commerce Commission (**NZCC**) and, supports the policy intention behind the Commission's Draft Recommendation 5.4.

However, in our view, it is important to ensure that closer co-operation and sharing of staff and expertise between the ACCC and the NZCC should not lead to the inadvertent disclosure of confidential information between the two regulators where such an exchange

has not consented to by the relevant parties or is not allowed by the Trade Practices Act and Commerce Act.

Draft Recommendation 5.1 – 5.3: information gathering and information sharing

The Commission has recommended that the Trade Practices Act and the Commerce Act be amended to allow the ACCC and the NZCC to:

- use their respective investigative powers for the purposes of gathering information at the request of the other party (Draft Recommendation 5.1); and
- exchange information obtained through their respective information gathering powers (Draft Recommendation 5.2), subject to adequate safeguards being built in to the Acts to prevent unauthorised use or disclosure of confidential information (Draft Recommendation 5.3).

As the Commission is aware, the New Zealand Ministry of Economic Development (**MED**) recently released a discussion paper entitled "Information Sharing by the Commerce Commission" (**MED Paper**). Bell Gully made a submission to the MED on the MED Paper, which is attached as Appendix I. This submission sets out Bell Gully's view in relation to Draft Recommendations 5.1, 5.2 and 5.3 and should be read in that context.

Yours faithfully
Bell Gully

Phil Taylor
Partner

Appendix 1: Bell Gully Submission to MED, 10 November 2004

Submission on Ministry of Economic Development discussion paper: *Information sharing by the Commerce Commission*

Bell Gully

10 November 2004

Introduction

1. The Ministry of Economic Development has asked for comments on the issues outlined in its discussion paper of September 2004 entitled "Information sharing by the Commerce Commission" (the paper).

2. This submission addresses two of the main issues discussed in the paper, namely:

   (a) whether the Commerce Commission (the Commission) should be entitled to release commercially sensitive information, gathered pursuant to its Commerce Act 1986 (the Act) powers, to overseas competition authorities, to other domestic enforcement agencies and to its other divisions; and

   (b) whether the Commission's investigative powers under the Act should be extended to allow it to assist an overseas competition authority with an investigation.

3. The Productivity Commission's draft research report on *Australia New Zealand Competition and Consumer Protection Regimes* (the report), which was released after the paper, is relevant to these issues in so far as it relates to arrangements that New Zealand may adopt in dealing with the Australian Competition and Consumer Commission (the ACCC). The draft recommendations of the report are that the Act and Australia's Trade Practices Act should be amended:

   (a) to enable the ACCC and the Commission to use their information gathering powers for the purposes of acting on a request for investigative assistance from each other (draft recommendation 5.1);

   (b) to allow the ACCC and the Commission to exchange information that has been obtained through their information gathering powers (draft recommendation 5.2); and

   (c) to build in safeguards to ensure against the unauthorised use and disclosure of confidential or protected information (draft recommendation 5.3).

4. The report also recommends that the ACCC and the Commission further enhance their cooperation and coordination, including operational, enforcement and research activities (draft recommendation 5.4).

Summary of submission

5. Bell Gully is a leading supplier of competition law services and advises many major New Zealand and overseas businesses on competition and consumer protection law issues (details of our experience are contained on our website http://www.bellgully.com/areas/competition.html).

6. Bell Gully made a submission to the Productivity Commission in support of greater harmonisation and coordination of the procedures followed by the Commission and the ACCC when they are both asked to consider the competition effects of a transaction. Bell Gully remains of the view that this would be desirable and endorses the policy intention behind the Productivity Commission's draft recommendation 5.4.

7. Bell Gully is not opposed to the general concept of potentially going further than draft recommendation 5.4 by extending the Commission's powers to allow it to share confidential information and/or give investigative assistance to other agencies. In

particular, Bell Gully considers that there should be no impediments to an information exchange when a party has consented to that exchange. Such an exchange may be desirable when, for example, a party has made concurrent applications for clearance of a merger transaction in more than one country.

8. However, the Ministry should be aware of some of the risks that could arise from the Commission gaining more expansive information sharing powers. Importantly, we query whether information provided to the Commission on a voluntary basis for which confidentiality is sought should be excluded from any information sharing proposal. In our experience, when businesses are asked to provide information to the Commission they tend to adopt a cooperative approach and respond to that request freely and much more expansively than they are legally required to do. These businesses are comfortable that the Commission has the appropriate incentives to protect the confidentiality of information supplied to it. This approach could change if the Commission's information sharing powers were extended, which may have a detrimental impact on the Commission's knowledge base and its ability to efficiently perform its investigatory function.

9. If the Commission was to be empowered to perform additional functions, it would need to be adequately resourced to perform those functions. If the Commission was not adequately funded, the Commission's limited resources would be diverted away from its core function of promoting competition in markets for the benefit of New Zealand consumers.

Information sharing

10. Bell Gully has no concerns with the continued practice of the Commission sharing publicly available information with other agencies. Further, Bell Gully considers there may be benefits in reducing the impediments to the Commission and the ACCC (or any other overseas competition authority) sharing commercially sensitive information in certain contexts. An appropriate context for information sharing may be where a party has made concurrent applications for clearance or authorisation in more than one country and the relevant party has consented to the information exchange. In such a case information sharing may lead to a more efficient process. A recent example of this occurred in the context of the Air New Zealand / Qantas authorisation application, when the Applicants authorised both the Commission and the ACCC to share all information and indeed facilitated that process.

11. However, the Ministry should be aware of some potential risks to the investigatory process associated with greater information sharing. In Bell Gully's experience, clients are often prepared, even in the context of investigations by the Commission into alleged restrictive trade practices, to adopt a cooperative approach to the investigation. An example of this approach is where parties provide information voluntarily to assist with Commission investigations.

12. For businesses with interests outside New Zealand, the risk that information voluntarily provided to the Commission on a confidential basis could be passed to overseas regulators, would influence how and the extent to which they would choose to respond to information requests from the Commission. For example, this concern could be particularly pronounced where a business had a relatively small market share in New Zealand but a much larger market share in another country such as Australia. The company may be reluctant to adopt a cooperative approach with the Commission in case the information were passed to the ACCC in the course of a separate investigation in Australia.

13. Businesses are often prepared to adopt a cooperative and open approach with the Commission as they have confidence that the Commission has the appropriate incentives to protect the confidentiality of information supplied to it. If confidential information is shared with overseas authorities, the party to whom the information relates would have difficulty taking action against that authority should it disclose the information. The Commission may seek to put in place safeguards to maintain the confidentiality of a New Zealand business's information, for example, by seeking an enforceable undertaking from the receiving agency. However, even with such safeguards, an overseas authority will not have the same incentives as the Commission to maintain confidentiality of information supplied by the Commission. If there is a disclosure, either intentionally or inadvertently, the potential damage to a company's business interests may be irreparable. The threat of termination of the information sharing agreement as between the two sharing agencies would provide little comfort to the affected business.

14. A company may be justifiably apprehensive that information disclosed in the course of an unsuccessful application for authorisation might later fall into the public domain, which could affect their ongoing business relationships with competitors and customers. We note that the UK's Office of Fair Trading has powers to disclose information to overseas competition authorities in certain circumstances (under section 243 of the UK's Enterprise Act 2002). However, this power does not extend to information the Office of Fair Trading obtains as part of some investigations including a merger investigation (see section 243(3)). This limitation is presumably to ensure the benefits of full and frank disclosure in the course of a merger investigation are maintained.

15. The paper also discusses whether the Act should be amended to allow the Commission to share confidential information with other domestic enforcement agencies, including the Commission's other divisions. The concerns set out above regarding the potential detrimental impact on the free flow of information with the Commission apply equally in this context. Further, there would be a concern if the right to silence in a criminal context was eroded by the Commission sharing confidential information obtained from a person under compulsion under the Act. At present section 106(5) of the Act prohibits statements made under compulsion from being used in a criminal prosecution against the person who made the statement. This prohibition does not extend to information provided voluntarily, nor could it be enforced if the information was shared with another agency.

Safeguards for information sharing

16. If the Commission is to be empowered to release commercially sensitive information or information voluntarily provided on a confidential basis, we consider that the circumstances in which it would be appropriate to exercise those powers will be relatively limited. A proportional response to a request would be required taking into account, amongst the things set out on pages seven and eight of the paper, the Commission's available resources, its current priorities, the potential benefit (if any) to New Zealand consumers and the likelihood of reciprocity from the requesting agency. Further, if information is requested by another agency, the response should be no wider than is necessary to address the precise request made. It is not open for the Commission to determine what may be relevant to the enforcement of another country's laws.

17. Bell Gully considers that further consideration should be given to excluding certain information from the regime. This includes information obtained as part of a leniency proposal, which it is understood is the case in other jurisdictions, and privileged

information (referred to on page eight of the paper). It may also be that information obtained as part of a merger investigation should be excluded (as is the situation in the UK). For the reasons set out above, the Ministry may also want to consider whether information provided voluntarily to the Commission on a confidential basis also should be excluded.

18. If a decision is ultimately taken to release information, New Zealand business will need to have confidence that the safeguards in place will adequately protect the ongoing confidentiality of that information.

Investigative assistance

19. We have also identified some potential concerns with the proposal that the Commission be empowered to exercise its information gathering powers under the Act on behalf of an overseas competition authority (or another domestic agency). Particular areas of concern are that:

    (a) such an obligation may have a disproportionate effect on the Commission, as a smaller agency with fewer resources, than on overseas competition authorities such as the ACCC and on other domestic agencies such as the Inland Revenue Department or the Police. To ensure that the Commission's scarce resources are not diverted away from its official statutory function, the full cost of satisfying such a request would need to be borne by the agency requesting the collection of information; and

    (b) the exercise of these functions may be difficult to justify in circumstances where no New Zealand markets are affected and where no corresponding benefits accrue to the Commission or New Zealand consumers.

20. If this option were to be pursued, we think that further consideration would need to be given to the circumstances in which the power would be exercised. For example, it may be that the power should only be exercised if the conduct being investigated would be a breach of the Act if the conduct were occurring in New Zealand and if the potential penalties imposed were aligned with New Zealand law. For example, Australia has a number of per se offences which are not provided for in New Zealand. The agency being requested to collect information should be entitled to refuse to collect that information if specified criteria are not satisfied.

21. Finally, the paper refers to some information sharing regimes requiring Ministerial approval to action information requests (page seven of the paper). The Productivity Commission's report recommends that Ministerial approval be obtained before the Commission or the ACCC comply with a request for investigative assistance (page 88 of the report). In our view the requirement to gain Ministerial approval in both of these contexts would be a desirable additional feature. Such approval would ensure that appropriate regard is had to the wider New Zealand public interest in responding to requests from other agencies.

Bell Gully
10 November 2004