

Commerce Commission

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FROM **Bell Gully**
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Submission on Consultation Document - Changes to Merger and Authorisation Forms

1. Introduction

- 1.1 Bell Gully welcomes the opportunity to submit on the Commerce Commission's consultation document, which was released publicly on 11 December 2025 (the **Consultation Document**). The Consultation Document proposes significant changes to the merger clearance and authorisation forms (the **Proposed Forms**).
- 1.2 The proposed changes seek to provide greater certainty and transparency for merger parties, reduce the need for further information requests and assist in the efficiency and timeliness of Commission decision making. Bell Gully is supportive of these objectives. We recognise the benefit in implementing measures that clarify merger parties' obligations and minimise the need for further information requests. However, we have concerns that some of the proposed changes are overly prescriptive and may be unnecessary in many cases. This could unduly burden merger parties and delay lodgement of applications.

2. Changes to Required Information

- 2.1 Bell Gully recognises the Commission frequently requires further information in its assessment process. This can prolong assessment timeframes and create uncertainty for merger parties. Bell Gully is therefore supportive of the intent behind the Commission's changes.
- 2.2 However, there is a danger that taking an overly prescriptive, 'one-size-fits-all' approach will create unnecessary work for the Commission and unnecessarily burden merger parties. Bell Gully submits that, in some areas, an appropriate middle ground could be found that recognises the unique characteristics of discrete merger and acquisition scenarios. Requests for further information relevant to a specific case can be made during the pre-notification stage.
- 2.3 The need to strike the right balance is particularly acute given New Zealand's lack of turnover thresholds or de minimis exemptions for merger clearances. This means that clearance is often sought for mergers between parties with limited financial resources. Increases to the amount of required information and internal documents will be especially burdensome on such parties, particularly as much of the newly required information might not be relevant to the merger at issue.

Market share ranges

- 2.4 The requirement for the applicant to provide market share ranges in the public version of applications¹ could be problematic in some circumstances.
- 2.5 Market share estimates are often derived from commercially sensitive internal data or third-party reports. Even when expressed in a 10% range, these public disclosures may reveal sensitive information about a firm's relative market position and pricing power. There may also be limitations on publishing any materials sourced from third party data sources depending on the terms and conditions that attach to those.
- 2.6 We consider that it is appropriate for applicants to redact market share estimates from the public version of applications in situations where disclosure would be commercially sensitive or would potentially breach third party terms. Allowance for these situations should therefore be reflected in the application forms. Importantly, we note that the Commission has tools to balance transparency and commercial sensitivity on a case-by-case basis under the Official Information Act 1982.

Requirement to outline all possible counterfactuals

- 2.7 The Consultation Document recommends requiring applicants to discuss all possible relevant scenarios for each merger party if the merger does not proceed, rather than focusing on the most likely counterfactuals.² Both parties to the merger are also required to provide internal documents that discuss what would, or might, happen absent the merger.³
- 2.8 This requirement appears overly prescriptive and burdensome. It is rare that a merger case hinges on the precise counterfactual being determined and assessed. Most merger applications (and decisions) simply take a conservative "status quo" approach to counterfactuals, as this is usually an effective baseline against which to measure competition. It would be highly unusual to assess a range of bids and consider the likely competitive state if each were the successful purchaser.
- 2.9 Requiring applicants to articulate and assess all possible scenarios, however remote those scenarios might be (e.g. to evaluate many different bidders in a competitive bid scenario, whether those bidders are likely purchasers or not), would require speculative and hypothetical analysis with limited value. This would risk the Commission needing to evaluate situations that might be remote possibilities and would substantially increase the complexity (and length) of applications and potentially lengthen the Commission's decision timeframes.
- 2.10 We submit that the Forms should instead require applicants to continue to identify and justify the most likely counterfactual(s), with additional scenarios addressed only where they are genuinely plausible and materially different in their potential competitive effects. We note that the Commission can interrogate further counterfactuals as needed through its information gathering process after discussing with other market participants throughout the decision process.

Market Definition

- 2.11 The Consultation Document proposes an overly prescriptive approach to market definition, including by requiring merging parties to provide information on (for example), details of the

¹ At [44].

² At Q7.

³ At Q22.

time, costs and resources required for a supplier to move to a different part of the supply chain, and differences in supply or pricing to different types of customers.⁴

- 2.12 Market definition is a useful analytical tool but is not an end in itself. At the application stage, much of this information could be speculative or very burdensome to collate, and may not be relevant information for the specific market dynamics at issue. There is a real risk that requiring this level of upfront detail will delay the submission of the application, while advancing the assessment of the merger to only a limited extent (if at all).
- 2.13 We therefore submit that the Forms should retain their focus on a more principles-based approach, allowing applicants to describe the relevant market in appropriate detail, with a focus on the competitive dynamics relevant to that market. This can be tested by the Commission through further engagement and evidence gathering. If market definition is critical to a particular case, the applicant can dedicate more resource to assessing these additional factors as required by the Commission.

Expanded customer information and contact requirements

- 2.14 The Proposed Form significantly expands the scope of customer information required to be provided, including requiring merging parties to identify and provide contact details for their top 10 customers by median spend.⁵
- 2.15 While we understand the Commission's interest in obtaining representative customer feedback, the proposed requirements impose substantial practical and commercial burdens on merging parties. Identifying customers by reference to median spend is not straight forward for many businesses and will often require bespoke analysis. This will increase preparation time and compliance costs without a clear corresponding benefit. Further, there are many markets where the top five customers will sufficiently represent the customer position. We note that New Zealand is a smaller market than other jurisdictions (e.g., Australia) that have introduced equivalent requirements.
- 2.16 Customer disclosure requirements should remain focused on key or strategically significant customers (i.e., top five by revenue), with flexibility for the Commission to seek additional information following its consultation process depending on the specific market dynamics. The benefit of having a public clearance process is that interested third parties have plenty of opportunities to provide input to the Commission if they consider it possible that they will be adversely affected by a merger or have other relevant input to give.

Requirement to provide speculative information about future entry and expansion.

- 2.17 The Proposed Forms require applicants to provide detailed information about potential future entry and expansion, including identification of likely entrants, barriers to entry, timeframes, and costs.⁶
- 2.18 In many cases this information will not be known to the applicant. Entry decisions are made by third parties based on information and incentives that are not observable to incumbents. Requiring applicants to provide detailed responses in these circumstances risks encouraging speculative analysis that may add little to the Commission's assessment of the competitive dynamics in the relevant markets.

⁴ At Q12.4-12.5.

⁵ At 14.

⁶ At Q14-15.

2.19 We submit that the Proposed Form could instead be amended to require applicants to provide information on entry and expansion to the extent supported by evidence reasonably available to them, rather than mandating speculative assessments of future market behaviour.

3. Changes to Required Documents

3.1 The Consultation Document increases the breadth of internal documents that merger parties must proactively supply to the Commission. Though recognising the desire to minimise information requests and improve assessment timeframes, the requirements risk creating unworkable obligations on merging parties.

Requirement to provide detailed internal documents

3.2 The Consultation Document proposes to introduce a new requirement that all merger parties, among other things:

- discuss what might or would likely happen absent the merger; and
- provide business documents from the past two years outlining how each of the merger parties determines its pricing for the relevant products or services, including discussions of pricing strategies.

3.3 We consider these requirements to be excessively broad and disproportionate.

3.4 The cost and burden of identifying, reviewing and producing such documents, particularly where additional review is required to manage out of scope information and privilege, is substantial and may be prohibitive for some transactions. The potential scope of what 'might' happen absent the merger is nearly limitless.

3.5 We submit that the Commission would be better served to adopt a narrower, more targeted document requirement seeking documents that are genuinely informative of competitive effects and the merger at hand.

Upfront target information expectations

3.6 The Consultation Document seeks to materially increase the amount of information and documentation applicants are expected to provide in relation to the target business at the time of the application, including internal strategic and competitive materials.

3.7 While we accept that access to target information is sometimes useful, the Consultation Document assumes that such access will generally be available and that any inability to provide information is exceptional.

3.8 The new forms risk placing applicants in a difficult position, by forcing them to either delay filing until access is obtained (which may not be possible particularly in large international transactions) or proceed with an application that risks being treated as unregistrable.

3.9 This change also represents a significant shift to the Commission's existing pragmatic approach. At present, information asymmetries are acknowledged and managed through targeted follow up requests and engagement, rather than used as a threshold barrier to registration. We consider that this is a more appropriate balance and submit that the Proposed Forms should make clear that applicants are required to provide target information only to the extent it is reasonably available. The lack of access to target materials should not prevent registration of an application.

4. **Conclusion**

- 4.1 Bell Gully appreciates the positive intent behind the Commission's proposed changes. However, we consider that some of the changes would be contrary to the Commission's stated goals of improving certainty, efficiency and timeliness. By forcing merging parties to front-load vast quantities of information – much of which is unlikely to be relevant to the Commission's assessment for the particular merger – there is a risk that the process will be delayed by the provision and analysis of unhelpful or speculative information.

Yours faithfully
Bell Gully