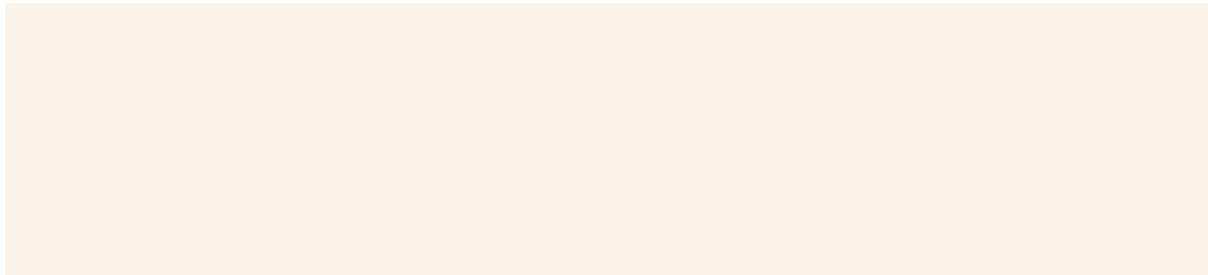


SUBMISSION ON DRAFT GUIDELINES ON THE APPLICATION OF COMPETITION LAW TO INTELLECTUAL PROPERTY RIGHTS

1. Introduction

- 1.1 Bell Gully welcomes the opportunity to make submissions to the New Zealand Commerce Commission (**Commission**) on its draft Guidelines on the Application of Competition Law to Intellectual Property Rights (the **Draft Guidelines**).
- 1.2 We would be happy to discuss our views further with the Commission. Please contact:



2. Assessment of the Guidelines

- 2.1 Bell Gully supports the Commission's development of guidelines to assist the business community to understand the implications of the removal of the three Intellectual Property (**IP**) exceptions from the Commerce Act (**the Act**).
- 2.2 There is a strong need for businesses to understand what conduct in relation to their IP rights will be capable of breaching the Act's provisions prohibiting anti-competitive conduct. Overall, the Draft Guidelines do a good job of covering areas of potential competitive harm arising from a firm's possession or exercise of IP rights. This submission raises a small number of points where we consider additional clarification would be useful.

3. Interactions with Other Regulatory Regimes/Laws

Enforcement of IP Rights

- 3.1 The Guidelines should be clear that a party engaging in court proceedings to enforce its IP rights is not in breach of the Act. For example, the law grants a patent holder a legally sanctioned monopoly over the patented product. If another party acts in breach of that patent, it should be clear that the patent-holder can take genuine enforcement action against such breach without breaching the Commerce Act.
- 3.2 Relevant to this matter is section 43 of the Act, which states that nothing in Part 2 of the Act applies in respect of "any act, matter, or thing that is, or is of a kind, specifically authorised by any enactment or Order in Council made under any Act." Accordingly, the Guidelines should include a discussion of the relevance of section 43 and explicitly state that a party genuinely trying to enforce its statutory IP rights in court will not breach the Commerce Act. This would include, for example, bringing infringement proceedings under the Patents Act 2013.

Patents Act Compulsory Licence Regime

- 3.3 It would be helpful for the Guidelines to include more detail on the interaction between patent law and competition law. Specifically, there are existing protections under section 169 of the Patents Act 2013. Section 169 provides for compulsory licences of patents where "a market for the patented invention – (a) is not being supplied in New Zealand; or (b) is not being

supplied on reasonable terms in New Zealand”.¹ It would be useful for the Guidelines to address specifically whether the Commerce Act would provide for additional obligations on patent-holders to licence IP in these circumstances (acknowledging that each case will turn on its own facts).

4. Restrictive Licensing of IP

- 4.1 The Draft Guidelines state that a relevant consideration in determining the competitive effects of a restrictive IP licence is to consider whether, absent the restrictive conditions, the licensor would not grant the license at all.² The Guidelines should explicitly state that if the likely counterfactual is a refusal to license the IP altogether, the restrictive terms in the license will not breach the Commerce Act (as competition is worse-off in the counterfactual than the factual). This is implicit in the Draft Guidelines, but an explicit statement to this effect would be beneficial.
- 4.2 In addition, it would be beneficial to include more detail on how the Commission will make determinations on the counterfactual in these circumstances. For example, it would be useful to include specific references to avoidance of free-riding, protecting relationship-specific investments etc. as considerations that the Commission will take into account when assessing the likely counterfactual to restrictive licence terms.

Bell Gully

¹ Patents Act 2013, section 169(2).

² Commerce Commission “Guidelines on the Application of Competition Law to Intellectual Property Rights” (19 December 2022) at paragraph 43.