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Cross-submission: PBT Couriers acquisition by NZ Post

Response to NZ Post supplementary submission | 15 April 2024

Version 1.0

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Introduction

He tina ki runga, he tāmore ki raro.

In order to flourish above, one must be firmly rooted below.

This cross-submission is made in response to the matters raised by NZ Post in their submission in response, dated 5 April 2024.

The purpose of this cross-submission is to clarify our position on the markets in question, and whether there is a *prima facie* case that there will be a substantial lessening of competition within these markets as a result of the proposed merger. We reiterate our point that competition will be materially reduced in key markets, and provide evidence in support of our contention, noting that NZ Post's position is not consistent with the facts on the ground.

About us

Habilis New Zealand Ltd provides consultancy and advisory services to regional Aotearoa, including strategy development, economic and social impact modelling, business case and investment proposal development, stakeholder engagement and communications, and benefit and impact analysis. Our client base includes iwi, NGOs, local government and the private sector.

Habilis NZ Ltd is based in Tāmaki Makaurau.

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Overview

In its supplementary submission of 5 April 2024, NZ Post makes a number of assertions which we think may cause some confusion about the definition of the markets in question and the impacts of the proposed merger going ahead. For the purposes of clarity, therefore:

1. A market exists for **local pickup and delivery services**, between business and private customers and courier companies. It is our view that this market will see a significant lessening of competition if the proposed merger is approved, and that there is a material threat of adverse outcomes for consumers through the development of an oligopoly in the courier industry.

2. A market exists for **distribution and linehaul services**, between logistics and freight providers and courier companies. We note that PBT does not currently intend to exit the freight market as part of the merger proposal – albeit there are very high barriers to entry, and the proposed merger may well create an insurmountable hurdle for any new entrant. Further, we remain concerned about the very high degree of consolidation that already exists in this market.

3. A market exists for **contracted courier services**, between courier companies and individual courier drivers. It is our view that this market is already characterised by a very significant power imbalance between buyer and seller, there is *prima facie* evidence of abuse of market power, and a very significant risk of lessened competition if the proposed merger is approved, with adverse outcomes for courier drivers and the expropriation of market surplus by courier companies.

As the Commission is aware, we have fully discussed the first two markets in previous submissions, and the third market to a lesser degree. However, NZ Post's submission of 5 April does raise some issues in relation to the contracted courier services market, which we think bears some further assessment and evidence for the Commission to consider. This is the purpose of this cross-submission.

The courier services market

In the original clearance application, NZ Post described the national courier market as being essentially monolithic in nature:

> NZ Post submits that the relevant market is the national market for the provision of domestic courier services (the courier services market). The courier services market involves the pickup and delivery of ambient parcels under 25kg in weight.

In our previous submission we noted that this was a mischaracterisation, and that a number of markets exist, each of which has a different configuration as described above, and which will be differently affected by the proposed merger.

The market that we think is under-examined in the merger assessment is that for contracted courier services. This is clearly a functioning market between buyers and sellers, and one which will undoubtedly be impacted if the proposed merger is approved. We note that courier drivers have already provided submissions to the Commission regarding their concerns about the potential for adverse outcomes, which demonstrates there are genuine competition issues that require careful assessment.

As we noted in our submission of 25 March on the Statement of Issues:

> [I]t is worth noting that the individual contractors are already price-takers in this market, and there is a long and sordid history of the contractual abuse of drivers within the industry, with people routinely working exceptionally long hours for less than minimum wage. This indicates there is a very large power imbalance between courier companies and the contracted drivers.
>
> Accordingly, the Commission may wish to assess what the impacts of the proposed merger would be on the market for courier drivers, rather than just the market for courier parcels. After all, if the barriers to entry for individual contractors are low – which neither the Commission nor the submitters question – then the fact that courier drivers are subsisting on less than minimum wage would *prima facie* indicate an abuse of market power.
>
> These people are not employees; a market clearly exists for independent contractors who wish to drive courier vans; yet one party (the drivers) is suffering adverse outcomes as a result of the market power of a small number of large courier companies. Surely this is a flagrant breach of the Commerce Act, and therefore something which the Commission should investigate with some alacrity.

We reiterate these points. We note, however, that NZ Post takes issue with them in a number of ways, notably:

> NZ Post is focussed on being a good partner to the delivery partners it contracts with. NZ Post wants to see – and benefit from – its delivery partners succeeding. As part of being a good partner, NZ Post regularly reviews and seeks to improve its contractual arrangements with its delivery partners (including runs, revenue, and contract models) as well as its communications with and to its delivery partners.

In addition:

> The commercial reality is that NZ Post – and other courier companies – are competing for contractors in the broader New Zealand labour market. That market is a highly competitive one, both amongst sellers of labour/small business operators, and the vast number of New Zealand businesses that are seeking labour. It is very difficult to see how the acquisition will make any difference to competitive conditions in that market and certainly not in a way that suggests a lessening of competition (let alone a substantial one).

We address each of these matters in turn.

Industry behaviour

While NZ Post's statements that it is focused on being "a good partner to the delivery partners it contracts with" are laudable, the industry has a less than stellar track record when it comes to the way it treats its contractors. The media is rife with well-documented stories of contractors who are working excessive hours under onerous contractual conditions for low incomes.

We reiterate some of the submissions made to the Commission by contracted drivers, which seem quite different from NZ Post's assertions that it is "being a good partner to the delivery partners it contracts with" and that it wishes to see "its delivery partners succeeding":

> "There's a lack of regulation at the moment around companies' responsibility for ***dependent contractors*** that obviously opens up for exploitation" [1]

The term "dependent contractor" is a technical term where a contract includes stipulations, such as uniforms and branded vehicles, that make it difficult for the contractor to work for other companies. The term itself alludes to an imbalance in market power between companies and contractors, and which forms the basis for a number of cases that have appeared before the Employment Court.

The test applied by the Courts evaluates the issues of control, integration, and economic reality to assess whether a worker is an employee or an independent contractor.[2]

> "Peter Gallagher, the chief executive of Pro Drive – a group representing Aramex drivers – says he's analysed the payslips and costs of 22 Auckland-based drivers and it shows on average they end up with less than $13 an hour in pay after costs are sorted."
>
> "There's people that are driving around that can't even afford to get their warrant and registrations sorted. There's about six people in Christchurch that can't even afford to pay their tax."[3]

We note that there is also evidence that the industry has begun to improve conditions for contracted drivers; however, this has primarily come as a result of public awareness of the adverse conditions under which some drivers have been working, rather than because of unilateral actions from the major companies.

The clear imbalance in power between companies and drivers is further illustrated by the transfer of liabilities from the companies to the contracted drivers. Noting the already poor working conditions and pay, some companies insist on contracted drivers bearing the costs of reimbursement for missing parcels, thus avoiding the liability for the courier companies:

> "The personal liability policy is another example of unfair treatment for couriers, as they don't make a lot of money and can't ride financial losses in the same way a large organisation like NZ Post can. Generally these couriers and other contractors can't afford to take this hit" [4]

These are not minor matters, and there appears to be a long-standing culture of low pay, strongly dependant contracts, and a steady shifting of risk and liability onto contracted courier drivers. And in response to these issues, there have been multiple cases of contractors seeking rulings from the Employment Court that they are indeed employees, with mixed success:

Leota v Parcel Express Ltd [2020] NZEmpC 61

> "The Court concluded that Mr Leota was an employee of the company and not a contractor, finding the documentation stating that he was a contractor to be less relevant than evidence about the actual work relationship."[5]
>
> Some of the factors pointing towards this finding included the fact that Mr Leota was not free to grow his supposed business, because his working hours were all spent doing work for Parcel Express, and the company retained all goodwill when he left. He did not earn more than his guaranteed daily rate, and it was unrealistic for him to increase his earnings with the way that the relationship operated. He was also required to provide personal service, and find substitute drivers when he took leave, and the company had to approve the substitute, which the court found was for purposes of protecting its own business.

Subsequent to the Leota v Parcel Express finding, a case seeking a ruling on the employment status of 500 courier drivers against NZ Post was taken by the E Tu union:

> "Asneil Kumar and his union E Tū lodged a group action in the Employment Court in 2021 to seek a decision on whether courier drivers are employees and for the right to have collective bargaining."[6]

The case was settled out of court and dropped. However, the fact that the case didn't progress to a hearing by no means invalidates concerns about the nature of the courier services contracts and the resulting power imbalances between the parties.

If the market between courier companies and contractors was actually characterised by good partnerships and a joint view of success – as NZ Post claims – then it's hard to believe that these news stories and court actions would have eventuated. Further, if the market for contracted courier services was fair and functioning well, it is hard to see why contractors would seek the protection of an employment relationship through the courts.

The state of the market

In our view, there is a very significant power imbalance between courier companies and contractors, and the market for contracted courier services is heavily biased towards the companies. This is further evidenced by:

- **The apparent lack of contractual negotiability between companies and contractors.** According to media reports, the contracts between the two parties are standardised, with negligible ability for individual contractors to negotiate or amend contracts to suit their specific circumstances, or to negotiate pricing. Markets with these sorts of "take it or leave it" contracting arrangements are inevitably ones where there is a large power imbalance between the parties, as demonstrated by the unliateral power to amend the contract or pricing to suit the preferences of the dominant party. This power appears to be pervasive in the courier services market.
- **The ability of the courier companies to immediately capture any market surplus for their own benefit.** As was extensively noted during the COVID-19 pandemic, courier companies immediately captured the wage subsidy payments that contracted couriers should have benefited from – which is a graphic demonstration of the power imbalance between the parties. As this episode demonstrates, the courier companies seem to treat their drivers as employees when it benefits them, but otherwise regard them as independent contractors where then are cost or efficiency gains to be realised. There is little reason to think this imbalance has materially altered since.[7]

Whether or not this represents an abuse of market power – as we maintain and which NZ Post takes issue with – is a matter for the Commission and the Courts. However, there is no getting around the fact that in every respect, contractors have extremely limited market power – and that any consolidation in the industry will have a further adverse impact on this group.

Competition effects

The risks of undue consolidation and an entrenching of what could be seen as untoward market power in the courier services market cannot be overlooked by the Commission in its assessment of the merger proposal. The contracted drivers themselves already have strong concerns, as noted by the anonymous submissions to the Commission:

> "We don't have a safety net beneath us, no separation pays or redundancy package. Most of us are still paying of the vehicle we invested on. We don't have any assurance of where we will end up even though we have invested ***redacted*** to the company."[8]

> "The current acquisition of customers and not the owner drivers means we will have to struggle to find other options of income which is quite stringent as per the market situation. Scares us how we are going to feed our family and pay our livings"[9]

Based on the statements by NZ Post in its application, the outcome from approval of the merger is likely to be the absorption of the PBT business into the existing NZ Post logistics network. In practice, this may well mean:

- The rationalisation of the PBT courier routes and parcel volumes into the existing NZ post routes
- The consequential termination of the contracts between PBT and its courier drivers, resulting in drivers needing to seek other work
- An increase in workload for existing NZ Post contracted drivers, with the potential for some new drivers to be contracted if parcel volumes exceed carrying capacity on specific routes
- Closure of the PBT branch network (potentially 15+ locations), as they will no longer be required.

From a market perspective, the resulting rationalisation will increase the supply of drivers, whilst matching this with only minor increase in demand for courier contracts. So the concerns expressed by the anonymous submissions to the Commission are both genuine and – in our view – highly likely to result in adverse outcomes for the contracted drivers.

Competition for contractors

In the event the merger is approved, it is almost certain that competition for drivers will decrease – there will be fewer companies with less demand, due to the efficiency gains postulated by NZ Post in consolidating the PBT business.

In its supplementary submission, NZ Post states:

> The commercial reality is that NZ Post – and other courier companies – are competing for contractors in the broader New Zealand labour market. That market is a highly competitive one, both amongst sellers of labour/small business operators, and the vast number of New Zealand businesses that are seeking labour. It is very difficult to see how the acquisition will make any difference to competitive conditions in that market and certainly not in a way that suggests a lessening of competition (let alone a substantial one).

In some ways this is an accurate statement; however, it completely inverts the market dynamic and reinforces our concern about adverse competition outcomes in the courier services market.

NZ Post's supplementary submission seems to imply that there is insufficient supply (contractors) in the face of greater demand (courier companies), and that current and prospective contractors can pick and choose between a plethora of competing options from different courier companies. We can find negligible evidence for this idea, and quite strong evidence – including from drivers making submissions to the Commission – that supply significantly exceeds demand across the industry and will continue to do so for the foreseeable future.

As has been noted in media reports and in NZ Post's application, the courier companies are in sole control of the number of contractors, the routes and territories they serve, and the potential revenue they can generate from their work. Further, we can find no reported circumstance where courier companies have been unable to find contractors to fill their routes, with the exception of examples where the rates of pay have been so low that contractors have been unable to be economically viable.

In other words, supply exceeds demand; there are more people who are prepared to drive a courier van for a living than there are routes available. And as NZ Post notes, the barriers to entry for individual contractors are relatively low.

This situation is likely to continue as the recession bites; thanks to Reserve Bank and Central Government policies, the economy will continue to slow and unemployment will likely increase, for at least the next 12 months, as forecast in The Treasury's Economic and Tax Outlook - BPS 2024[10]:

> "The falls in economic activity in 2023, together with expected modest quarterly growth over 2024 has led to sharply lower year-on-year growth in this scenario than previously forecast.
>
> We expect pressure on household budgets from the erosion in real wages over the past few years, and the decline in household wealth from past falls in house prices, to contribute to declines in real consumption spending until the second half of 2024."
>
> "Economic growth is expected to remain subdued this year. These conditions are reflected in modest employment growth in the BPS scenario, and in rising unemployment and increasing spare capacity in the economy."

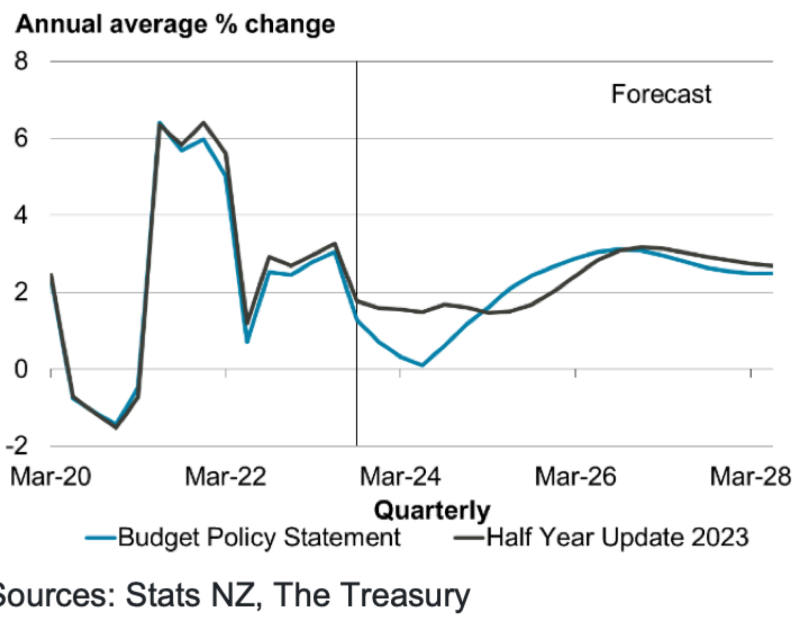

Figure 1: Real GDP Growth

In this environment, it is reasonable to expect that an increased number of people will look to the possibility of becoming a courier contractor as permanent employment decreases and other options decline, over and above the people who would explicitly seek the work in a more vibrant economy.

The likely effect of this can be taken directly from any Economics 101 textbook: where supply continues to exceed demand, prices will fall. In this case, it means the excess supply of actual and potential contractors will allow courier companies to lower the prices they pay to contractors – either through direct pricing mechanisms, or via cost or risk transfer mechanisms, enforced by contractual conditions – and to increase the market surplus they receive.

None of this will be helped by industry consolidation, if the proposed merger is approved. We can expect rising supply to intersect with decreasing demand – as NZ Post integrates and rationalises the PBT Courier routes into its own operations – to produce a substantial reduction in competition for courier contractors. In turn, this will drive prices and incomes for courier contractors down, with no evidence that this will result in material savings for courier company customers.

It is also worth noting that NZ Post clearly regards the contractor model as being lower cost than having employees. The company recently announced that it was rationalising postal services, laying off 750 roles over the next five years from its permanent staff in favour of contractors – to the consternation of unions[11]:

The Postal Workers Union president has stated that:

> "The Company has since confirmed that means there will be no posties employed by NZ Post after that deadline. The service wants all delivery workers - parcels and mail - to be contractors, which leaves staff in a very vulnerable position."

While NZ Post is a State Owned Enterprise rather than a traditional business, it's reasonable to assume it is a rational economic actor. Its choice to use contractors in place of employees is therefore likely to be for economically rational reasons: cost and flexibility. So if contractors were more expensive than employees, then it seems likely the company would continue with their existing employment structures.

From this we can conclude that contractors are – when costs are fully allocated – more cost effective and more flexible for NZ Post. This situation would not exist if the assertion that demand exceeds supply for courier contractors was correct.

Coordination effects

The Commission may also wish to turn its attention to the likelihood of coordination in the contracted courier services market. With fewer courier companies, a ratcheting of adverse terms and conditions for contractors and further erosion of any pricing power seems possible.

As is the case in markets dominated by oligopolies – banking, for instance – there is a steady worsening of contractual conditions over time, as the dominant parties enforce ever more onerous conditions on other market participants. As we have noted in other submissions, this has been the case with residential mortgages over the last 20 years, with requirements such as full recourse, insurance requirements and inequitable fee allocations becoming more and more pervasive.

The same has been the case in the grocery duopoly, where both costs and risks have been progressively shifted to suppliers using onerous contractual mechanisms.

So the Commission needs to assess whether the contracted courier services market also exhibits coordination effects in the consistency of onerous contractual conditions between companies and drivers. From the consistency of the media reports over the last few years, there is every reason to think the contracted courier services market is susceptible to coordination behaviours. In our view, the temptation for coordination will only increase if there is further consolidation in the courier market and fewer companies for drivers to contract to.

Distribution and linehaul

In its additional submission of 5 April, NZ Post states:

> NZ Post agrees with Habilis that the logistics and linehaul "market" is competitive. However, NZ Post disagrees that the acquisition could harm competition in this market. The principal reason is that PBT will remain a participant in this market post-acquisition. It is therefore difficult to see how the acquisition could harm competition in that "market".

We accept that the future of PBT's freight business is not the subject of the merger application, and that PBT intends continuing its operations in this market. However, there may well be some wider industry effects from the sale of PBT's courier customers to NZ Post.

As the application makes clear, NZ Post is not acquiring PBT's operational assets; merely the contracts for the supply of courier services with PBT's customers. NZ Post has also made it clear that it intends rationalising PBT's courier logistics into its own network, which means NZ Post has no interest in PBT's existing facilities.

From the PBT perspective, the courier volumes that justified an investment in sections of its distribution network – such as the 15+ branch locations – are likely to substantially decrease; the existing PBT courier volumes will evaporate, leaving only whatever contracts currently exist for parcel logistics from any third parties.

We obviously don't have access to PBT"s proprietary and confidential information about its internal operations, so we have no way of knowing what the logistical and financial viability of the PBT branch network actually is. However, it's reasonable to assume that the network primarily exists to collect and distribute parcels for its own courier business, with any contracted parcel volumes providing additional economies of scale. In other words, the primary purpose of PBT's branch network is to sustain the logistics of its own courier business.

Unless PBT is providing very substantial linehaul and distribution services to the wider industry, it is therefore likely that a majority of PBT's branch network will be closed, post-acquisition. This is obviously a straightforward business decision for PBT's management and Board.

However, this may result in adverse outcomes for other courier companies seeking contracted linehaul and logistics, particularly new entrants. If PBT does rationalise its branch network, there is little scope for a new entrant to leverage existing networks and decrease its startup risks – it must establish at least the equivalent number of branches to be able to credibly provide a national service, raising the cost and complexity and commercial risk of entry.

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So while we broadly agree with NZ Post's assertion that the linehaul market itself will not be impacted if the merger is approved, there are highly likely to be consequential impacts on the viability of new entrants from PBT reverting to being solely a freight company; the barriers to entry will be further raised. After all, a new entrant seeking to establish a national presence might well prove to be a viable and profitable customer for a smaller linehaul and logistics company such as PBT, but is unlikely to be welcomed and assisted by any of the major incumbents.

These second-order effects are difficult to predict or model, particularly given the unpredictability of whether or how or when a new national entrant might arise, but they should not be overlooked by the Commission. As we have noted in previous submissions, if there is ever likely to be a maverick challenger to NZ Post and the other major providers, their pathway to a competitive market position probably lies via partnering or acquisition of a mid-market company such as PBT. If this merger is approved, that door will be firmly shut.

Summary

We reiterate the conclusion we reached in our previous submission – it's hard to see any benefit to Aotearoa New Zealand from the proposed acquisition proceeding:

1. There will be minimal logistical impacts but a significant risk of price increases in the local parcel collection and delivery market
2. There will be a further concentration of market power within a small number of large courier companies in the market for the supply of contracted courier services
3. There will be a likely narrowing of choices in the logistics and line haul markets, with a serious risk of the erosion of price competitiveness for medium to smaller courier companies wishing to provide national services
4. There will be a steeper barrier to entry for any new national competitor, as the lack of available medium-sized acquisition targets or the ability to leverage existing distribution networks will significantly raise the risk profile for a new entrant.

The test applied by the Commission is, of course, whether the acquisition will result in a substantial lessening of competition. One could make the argument that in each of these individual markets, the acquisition could proceed without triggering the "substantial lessening" threshold; however, as anyone who has sent a courier parcel from one end of Aotearoa to the other knows, all these sub-markets must operate efficiently for the item to be delivered on time, in one piece, and for a reasonable cost.

Taken in whole, therefore, the issues in each of the sub-markets very much breaches the threshold for a substantial lessening of competition in the key market of national business courier delivery. The proposed acquisition should therefore be declined.

We also note that this is an important matter for the nation. As the COVID-19 pandemic showed, there are times when efficient and cost-effective small parcel delivery becomes strategically important for everyone in the country, from individuals in rural locations all the way through to the largest corporates in the main centres. We therefore cannot afford to engender the preconditions for an oligopoly, where a small number of large companies can exert pricing power and stifle innovation – as has already happened in the grocery, electricity and banking markets.

From our perspective, this acquisition is a step too far in the direction of oligopoly. It entrenches a major incumbent further, will decrease product choice and likely price, perpetuate the market distortions in contracted courier services, and raise the barriers to entry further. These are all steps in the wrong direction to an efficient and well-functioning market in national courier services.

On the other side of the argument, the reasons given for the acquisition – that it will improve NZ Post's economies of scale following a $200 million capital investment – are not strategically important to the country in any way, even when the public is a shareholder via the SOE structure. Producing a return on that investment is a problem for NZ Post's management, not an excuse for market consolidation.

We continue to recommend the Commission declines the acquisition.

Endnotes

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