



COMMERCE COMMISSION

Decision No. 550

Determination pursuant to the Commerce Act 1986 in the matter of an application for clearance of a business acquisition involving:

PPCS LIMITED

and

VENISON ROTORUA LIMITED

- The Commission:** P Rebstock
D Caygill
D Bates
- Summary of Application:** The acquisition by PPCS Limited of the 19.9% shareholding of Killin Limited and the 60.2% shareholding of New Zealand Deer Farms Limited in Venison Rotorua Limited.
- Determination:** Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance to the proposed acquisition.
- Date of Determination:** 12 May 2005

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THE PROPOSAL

1. A notice pursuant to s 66(1) of the Commerce Act 1986 (the Act) was registered on 21 April 2005. The notice sought clearance for the acquisition by PPCS Limited (PPCS) of the 19.9% shareholding of Killin Limited and the 60.2% shareholding of New Zealand Deer Farms Limited in Venison Rotorua Limited (VRL).

PROCEDURE

2. Section 66(3) of the Act requires the Commission either to clear or to decline to clear a notice under s 66(1) within 10 working days, unless the Commission and the person who gave notice agree to a longer period. An extension of time was agreed between the Commission and the Applicant. Accordingly, a decision on the Application was required by 20 May 2005.
3. The Commission's approach to analysing this proposed acquisition is based on principles set out in the Commission's Merger and Acquisition Guidelines.¹

THE PARTIES

PPCS Limited (PPCS, the Applicant)

4. PPCS is a farmer owned co-operative based in Dunedin, and is New Zealand's largest meat marketing company, exporting sheepmeat, beef, venison and associated products to around 60 countries.
5. PPCS procures and processes venison in both the North and South Islands. PPCS has one venison processing plant in the North Island, located at Te Kauwhata. PPCS procures and slaughters around [] deer per year in the North Island.
6. PPCS holds 19.9% of the shares in Venison Rotorua Limited, as well as []].

Venison Rotorua Limited (VRL)

7. VRL was incorporated in June 2001 when PPCS acquired Mair Venison Limited's Rotorua Venison plant (the Mair plant). The Mair plant was then sold to VRL, which []].
8. The shares in VRL are held 19.9% by Killin Limited (Killin), 19.9% by PPCS and 60.2% by NZ Deer Farms Limited (NZDFL). These shares entitle PPCS and Killin to have one representative each on the Board of VRL with the remaining two seats held by NZDFL.
9. VRL slaughters and processes venison only and has a []].
10. VRL manages day to day operations including the procurement of deer, which is done by stock agents employed by VRL. The financial and administrative operations of VRL are run by Horizon Meats New Zealand Limited.

¹ Commerce Commission, *Mergers and Acquisition Guidelines*, January 2004.

Other Relevant Parties

NZ Deer Farms Limited (NZDFL)

11. NZDFL is a deer farming operation in the South Island with approximately [] deer. It currently holds 60.2% of the shares in VRL.
12. Ashwick Limited is wholly owned subsidiary of NZDFL and formerly held the 19.9% share in VRL before this was transferred to its parent company.

Killin Limited

13. Killin Limited was incorporated in 1989 and is owned by the Mathias Family Trust. It currently holds 19.9% of the shares in VRL.

Horizon Meats New Zealand Limited (Horizon)

14. Horizon was established in 1987 and was formerly owned by the Mathias Family Trust (owners of Killin Limited). In 2003 Horizon Meats became a wholly-owned subsidiary of Blue Sky Meats, a company unrelated to the Mathias Family Trust.
15. Horizon was replaced as a shareholder by Killin Limited in 2003. The Horizon name was transferred along with Horizon's staff to Blue Sky Meats Limited.
16. The historic arrangement of Horizon staff being involved in the operation of VRL, continued with a management fee being paid to Horizon to manage the financial and administrative operations. John Upton, Marketing Manager of Horizon, represents Killin's interest on the VRL Board.

Progressive Meats (Progressive)

17. Progressive slaughters and processes at its plant in Hastings. Currently it has a contractual arrangement with PPCS to slaughter and process deer for PPCS []. In the 2004 calendar year Progressive slaughtered [] deer of which [] were slaughtered and processed for PPCS.

PREVIOUS DECISIONS

18. In 2002, the Commission investigated the New Zealand deer industry when PPCS acquired Mair Venison Limited and a significant share of Richmond Limited. In the resultant investigation report (the Mair Report) the Commission concluded that the acquisitions were unlikely to have given rise to a substantial lessening of competition in the North Island market for the procurement and processing of deer or in any of the other markets analysed. The Mair Report also found PPCS and VRL to be associated entities under section 47 of the Act.

SUBSTANTIAL DEGREE OF INFLUENCE

19. Sections 47(1) and 47(2) of the Act stipulate:

- 47(1) A person must not acquire assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market.
- (2) For the purposes of this section, a reference to a person includes 2 or more persons that are interconnected or associated.

20. Association is defined, for the purposes of section 47, in subsections 47(3) and 47(4), which provide:

- 47(3) For the purposes of this section, a person is associated with another person if that person is able, whether directly or indirectly, to exert a substantial degree of influence over the activities of the other
- (4) A person is not able to exert a substantial degree of influence over the activities of another person for the purposes of subsection (3) by reason only of the fact that—
- a) those persons are in competition in the same market; or
 - b) 1 of them supplies goods or services to the other.
21. The Commission is of the view that, in this context, a substantial degree of influence means being able to bring real pressure to bear on the decision making process of the other.²
22. In considering association, the Commission must consider each case on its particular facts. Among the factors the Commission usually takes into account in determining association are:
- the nature and extent of ownership links between the companies;
 - the presence of overlapping directorships;
 - the rights of one company to appoint directors of another; and
 - the nature of other shareholder agreements and links between the companies concerned.
23. The Commission also considers the interaction between these various factors. For example, the Commission assesses the nature and extent of the communications between persons, and the apparent influence of one person on the key strategic decisions of the other.³ The question the Commission has to answer is whether two enterprises can, for the purposes of commerce and competition, be regarded as one.⁴
24. The Applicant submitted that PPCS and VRL should be considered to be associated. In its Application, PPCS highlighted the factors that led to the Commission's conclusion on association in the Mair Report and submitted that nothing material has changed in the relationship since that report was written.
25. In the Mair Report the Commission determined that PPCS was in a position to exert a substantial degree of influence over VRL. The Commission based its finding on association on a number of factors including that:
- PPCS []
 -];
 - PPCS holds [] ordinary shares in VRL which constitutes [] of VRL's total issued share capital;
 - PPCS has one representative on the Board which consists of four members; and

² Commission Decision No. 278: Air New Zealand Ltd/Ansett Holdings Ltd/Bodas Pty Ltd, 3 April 1996.

³ Commission Decision No. 388: New Zealand Seafood Investments Ltd / Basuto Investments Ltd, Para's 16 – 24.

⁴ Commission Decision No. 278: Air New Zealand Ltd/Ansett Holdings Ltd/Bodas Pty Ltd, especially Para's 180 – 182.

- [

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26. Further, the Commission also considered the Heads of Agreement between PPCS, Horizon, Ashwick and Mair (the Heads of Agreement) which established the following:

- [

].

27. The [

] The Commission considers the [

] suggests that PPCS is in a position to exert

influence over the operations of VRL.

28. In the Mair Report the Commission highlighted the following considerations in response to the claim of PPCS that PPCS and VRL were not associated:

- there are only two other shareholders in VRL;
- each of those shareholders []]; and
- there are only three other directors on VRL's board.

29. The presence of a director appointed by PPCS on the board of VRL and the [

].

30. In respect of the [

].

31. Mr Upton informed the Commission that [

]

32. Furthermore, the general perception of the industry is that PPCS and VRL are already acting as one head in the market and as such expressed little concern regarding the proposed acquisition.

33. The Commission agrees with the Applicant and is of the view that the cumulative effect of [] amounts to sufficient evidence of PPCS having the ability to exert a substantial degree of influence over VRL either directly or indirectly.
34. As associated entities can, for the purposes of commerce and competition, be regarded as one, if one associated entity acquires another, then the acquisition can be likened to an internal transfer.

COUNTERFACTUAL AND FACTUAL

35. The Commission must be satisfied that the proposed acquisition would not have, or be likely to have, the effect of substantially lessening competition in any market. In reaching a conclusion the Commission compares two future situations, one with the acquisition (the factual) and one without (the counterfactual). The difference between these two hypothetical situations can be attributed to the impact of the acquisition and establishes whether there is likely to be a substantial lessening of competition.
36. The Commission considers the relevant counterfactual to be the status quo where PPCS and VRL operate as separate legal entities, but with a high degree of co-operation and co-ordination in circumstances where the Applicant has submitted, and the Commission finds, that PPCS is in a position to exert a substantial degree of influence over VRL.
37. If the proposed acquisition does proceed (the factual), the Commission considers that the acquisition will have the effect of formalising the influence PPCS currently has over VRL, through the acquisition of the remaining shareholding not already held by PPCS. On the balance of probabilities, the Commission considers that this will not result in any material difference when compared with the status quo.
38. Accordingly, the Commission considers that the proposed acquisition will not create a significant change in the current state of competition.

CONCLUSION

39. Therefore, the Commission is of the view that the proposed acquisition by PPCS Limited of the 19.9% shareholding of Killin Limited and the 60.2% shareholding of New Zealand Deer Farms Limited in Venison Rotorua Limited, would not have, or be likely to have, the effect of substantially lessening competition in any market.

DETERMINATION ON NOTICE SEEKING CLEARANCE

40. Pursuant to section 66(3) (a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition by PPCS of the 19.9% shareholding of Killin Limited and 60.2% shareholding of New Zealand Deer Farms Limited in VRL.

Dated this 12th day of May 2005

Paula Rebstock
Chair
Commerce Commission