



COMMERCE COMMISSION

Decision No. 708

Determination pursuant to the Commerce Act 1986 in the matter of an application for a merger transaction between

PMP Print Limited

and

APN Print NZ Limited

The Commission: Mark Berry
Stephen Gale
Gowan Pickering

Summary of Application: The acquisition by PMP Print Limited of certain heat set printing assets (and related spare parts) owned by APN Print NZ Limited and located at 587 Great South Road, Manukau City.

Determination: Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition.

Date of Determination: 16 December 2010

**CONFIDENTIAL MATERIAL IN THIS REPORT IS CONTAINED IN
SQUARE BRACKETS**

TABLE OF CONTENTS

THE PROPOSAL	1
ANALYTICAL FRAMEWORK.....	1
PARTIES	2
The Acquirer – PMP	2
The Target – APN’s Manukau Heat Set Printing Assets.....	3
Webstar	3
MARKET DEFINITION	3
THE FACTUAL.....	4
PMP.....	4
APN.....	4
THE COUNTERFACTUAL.....	4
Introduction.....	4
Sale of the Business to a Third Party	5
Is the APN Manukau Heat Set Business a Failing Division?	6
<i>Performance of APN’s heat set business</i>	6
<i>Further attempts to restructure the heat set business</i>	7
<i>APN decision to exit</i>	8
<i>Will the assets exit the market?</i>	9
[].....	9
[].....	9
[].....	9
[].....	9
<i>Conclusion on failure</i>	10
Conclusion	10
Ancillary Contractual Matters.....	10
DETERMINATION ON NOTICE OF CLEARANCE.....	11

THE PROPOSAL

1. On 5 November 2010, the Commission received a notice pursuant to s 66(1) of the Commerce Act 1986 (the Act). The notice sought clearance for the acquisition by PMP Print Limited (PMP or the Applicant), of certain heat set printing assets (and related spare parts) owned by APN Print NZ Limited (APN) and located at 587 Great South Road Manukau City.
2. Broadly, PMP is acquiring the following assets (the assets):
 - a Goss M600, 32 page printing press;
 - a Muller Prima Tandem stitching line;
 - ancillary materials handling equipment; and
 - related spare parts.
3. These assets do not make up the entirety of the heat set printing assets located at the Manukau site. In addition to the M600 press outlined above, there are [] other heat set presses of various ages and paginations as well as a range of pre-press and finishing equipment at the Manukau site. This equipment is not being acquired by PMP.

ANALYTICAL FRAMEWORK

4. The Commission uses an analytical framework¹ for assessing a substantial lessening of competition in the context of an acquisition. The first step is to determine the relevant market or markets. To do this, the Commission identifies the areas of overlap between the acquirer and the target, and then considers what, if any, products and geographic regions, constitute relevant close substitutes from both a customer's and a supplier's point of view.
5. The Commission uses a forward-looking type of analysis to assess whether a lessening of competition is likely, so an important subsequent step is to establish the appropriate hypothetical future with and without scenarios, defined as the situations expected:
 - with the acquisition in question (the factual); and
 - in the absence of the acquisition (the counterfactual).
6. In framing a suitable counterfactual, the Commission bases its view on a pragmatic and commercial assessment of what is likely to occur in the absence of the proposed acquisition.²
7. The High Court³ recently noted that:

Because "likely" means something less than "more likely than not", there may be more than one "likely" counterfactual... We consider that where there is more than one real and substantial counterfactual it is not a case of choosing the one that we think has greater prospects of occurring... We are to discard those possibilities that have only remote prospects of occurring. We are to consider each of the possibilities that are real and

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

² Commerce Commission, *Decision No. 277: New Zealand Electricity Market*, 30 January 1996, p 16.

³ *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 at 116, 118 and 122.

substantial possibilities. Each of these real and substantial possibilities become counterfactuals against which the factual is to be assessed.

8. The Court further noted that:⁴

If in the factual, as compared with any of the relevant counterfactuals competition is substantially lessened then the acquisition has a “likely” effect of substantially lessening competition in a market.

9. Accordingly where, as here, there is more than one potential counterfactual, the Commission assesses the possibilities, discards those that have only remote prospects of occurring, and considers each of the real and substantial possibilities as counterfactuals against which the factual is to be assessed.
10. A comparison of the extent of competition in the relevant markets in the factual and counterfactual scenarios enables the Commission to assess the probable extent of the lessening of competition under the proposed acquisition, and whether that contemplated lessening is likely to be substantial.
11. Where there is more than one potential counterfactual in the failing firm setting, there is the potential that counterfactuals other than failure may be more likely to raise competition concerns. Accordingly, in the normal course of events, in such cases the Commission is likely to examine non-failure counterfactuals first in order to assess whether such counterfactuals may be determinative of the substantial lessening of competition test.

PARTIES

The Acquirer – PMP

12. PMP is a wholly-owned subsidiary of PMP Limited, an Australasian commercial printing group. In New Zealand, PMP produces a range of printed products including catalogues, magazines, books, directories and newspapers.
13. PMP operates heat set printing presses in both the North Island (Auckland and Warkworth) and South Island (Christchurch).
14. On 12 November 2010 PMP announced that it is consolidating its North Island printing, distribution and head office operations to a single South Auckland site. This consolidation, to be carried out by September 2011 involves the closure of PMP’s Warkworth and Wiri operations and the rationalisation of its North Island heat set printing presses [] on a new South Auckland site.⁵
15. [

]

⁴ Ibid at 122.

⁵ [].

The Target – APN’s Manukau Heat Set Printing Assets

16. APN is a wholly-owned subsidiary of APN News & Media Limited. It produces a range of printed products including magazines, catalogues and newspapers. In addition to providing printing services to external customers, APN also prints its own stable of magazine publications. APN operates both heat set and cold set printing operations in the North Island only (Auckland and Tauranga).
17. In recent years APN has progressively reduced its heat set printing operations. Prior to 2009 APN had three heat set facilities in Manukau, Ellerslie and Tauranga. In early 2009 it closed its Ellerslie facility and the printing presses were re-located or put up for sale.
18. In October 2010 APN announced that it was closing its heat set facility in Manukau and the business was closed on 29 November 2010. The business concerns that are the subject of the proposed acquisition are the heat set printing assets located at APN’s Manukau printing facility. APN will continue to operate its small-scale Tauranga heat and cold set facility which it uses to print a few APN regional publications (with small pagination and circulation numbers), but will no longer compete for third-party heat set printing contracts.

Webstar

19. Webstar is a division of the Bluestar Group, a large trans-Tasman print and communications group. In New Zealand, Webstar currently provides cold set and heat set printing services from its facility in Masterton. Webstar has recently secured the contract to print the magazine publications of ACP Media Limited and is in the process of establishing a heat set printing facility in Auckland.

MARKET DEFINITION

20. There are two principal forms of printing relevant to this transaction; heat set and cold set. The key difference between the two forms is that heat set printing utilises a higher quality coated paper and the ink is dried in an oven. Heat set printing is the predominant form used for the printing of magazines and higher specification retail catalogues. Cold set printing traditionally utilises newsprint and the ink is allowed to dry naturally on the paper. Cold set printing is mainly used for the printing of newspapers and lower quality catalogues.
21. These forms of printing can be further split into sheet fed and web fed printing. A web fed press is used for higher volume print runs as sheet fed printing is uneconomic in runs of greater than 20,000 – 25,000 copies.
22. The Applicant submitted that the relevant market is that for the provision of heat set printing services to publishers of magazines and catalogues throughout New Zealand.
23. There was broad industry agreement with the Applicant’s market definition. The Commission found some evidence of substitution between the different forms of printing. However, this substitution appears to be limited because the

lower quality of a cold set product means it is not suitable for the printing of most magazines and the higher quality retail catalogues.

24. The Applicant has submitted that the relevant market is national in scope. The Commission notes that of the larger heat set printers active in the market prior to the acquisition, only PMP has an operation in the South Island. Both APN and Webstar print catalogues, magazines and other publications from North Island sites for distribution nationally.
25. For these reasons, the Commission considers that the relevant market is the national market for the provision of heat set printing.

THE FACTUAL

PMP

26. In the factual PMP will acquire one heat set printing press and associated equipment located at APN's Manukau heat set printing facility and commence the printing of APN's magazine publications.

APN

27. In the factual APN will have ceased all printing activity at the Manukau site.

THE COUNTERFACTUAL

Introduction

28. In framing a suitable counterfactual, the Commission bases its view on a pragmatic and commercial assessment of what is likely to occur in the absence of the proposed acquisition.⁶
29. The Applicant submitted that APN intended to close its Manukau heat set printing operation and contract out its printing needs. In essence, the applicant submitted that APN's Manukau heat set business is a failing division.
30. The Applicant further submitted that there are two potential counterfactuals that may arise in the absence of the proposed acquisition:
 - that the assets would be relocated (either sold offshore or scrapped); or
 - that the assets would be purchased by a third party.
31. In its Supplementary Guidelines on Failing Firms⁷ the Commission outlines the approach it takes when assessing failing firm arguments. This approach lists two key factors that the Commission will take into account in assessing whether or not a business or division is failing:

⁶ *Commerce Commission, Decision No. 277: New Zealand Electricity Market*, 30 January 1996, p 16.

⁷ *Commerce Commission Mergers and Acquisitions: Supplementary Guidelines on Failing Firms* October 2009, para 3.03.

- Is the firm failing – taking into account (among other things) losses sustained and attempts to restructure, refinance or rescue the business or division; and
 - Is there an alternative third party purchaser of the business or division, either as a going concern prior to exit, or of the assets of the business or division upon exit.
32. When PMP’s application for clearance was received on 5 November, APN had announced that it was closing its heat set facility in Manukau on 29 November. During the course of the Commission’s consideration of the application, APN closed the business which then ceased to be a going concern. In assessing PMP’s application for clearance, the Commission has examined the specific facts and circumstances leading to closure, in order to be satisfied that the APN Manukau heat set printing business:
- had no possibility of being sold as a going concern to a third party in the counterfactual; and
 - was, prior to closure, indeed failing (i.e. was not a viable business that was being closed simply to obtain clearance).
33. As a final step in assessing the counterfactual, the Commission has considered the likelihood of the APN Manukau heat set assets exiting the market following closure of the business.

Sale of the Business to a Third Party

34. APN submitted that it had been trying ([]), to sell its Manukau heat set business as a going concern. It submitted that it was unsuccessful in its attempts to sell the business.

35. [

]

36. []

37. [

]

[

]

38. [

]

39. [] As noted above, APN's Manukau heat set facility ceased operating and was closed on 29 November 2010.
40. The Commission considers that APN made genuine attempts to sell the heat set business as a going concern prior to its eventual closure on 29 November 2010. The Commission therefore considers that the purchase of APN's Manukau heat set business as a going concern is unlikely.

Is the APN Manukau Heat Set Business a Failing Division?

41. Having determined that purchase of the business as a going concern by a third party is not a likely scenario for consideration, the Commission must now consider whether or not the Manukau heat set business is (or was) a failing firm or division.
42. The Commission's guidelines on failing firms indicate a range of factors which it will take into account in assessing whether or not failure of the business is actual, imminent or probable:
- Is there a trend of negative cash flows over a sustained period of time?
 - Is there any prospect of restructuring or refinancing the business?
 - Have there been ongoing and serious, but unsuccessful, attempts by the owner to rescue the business?
 - On closure, will the firm's assets exit the market (either by becoming scrap or being put to an alternative use)?

Performance of APN's heat set business

43. APN has submitted that its Auckland heat set printing business has been running at a loss for a number of years (since []). In Table 1, the Commission summarises the financial performance of the heat set business for the current year and two previous financial years. The Commission considers that the information in this table is an accurate representation of the financial performance of the APN Manukau heat set business.

Table 1: Financial Performance of APN Heat Set

	2008 Actual	2009 Actual	2010 Actual (YTD to March)
Revenue ⁸	[]	[]	[]
Direct Costs	[]	[]	[]
Gross Margin	[]	[]	[]
% of sales	[]	[]	[]
Overheads			
Indirect Labour	[]	[]	[]
Maintenance	[]	[]	[]
Administration	[]	[]	[]
Promotions	[]	[]	[]
	[]	[]	[]
EBITDA	[]	[]	[]
Depreciation	[]	[]	[]
EBIT	[]	[]	[]
% of sales	[]	[]	[]

Source: APN NZ Heat set P&L

44. [

]

45. APN has submitted that it made several efforts to restructure the heat set business and make it profitable, however the business continued to sustain losses. One of APN's attempts to lower costs and improve the business was the closure of its heat set printing plant at Ellerslie and consolidation of the business at Manukau (with some upgrading and investment). [

] In terms of the possibility of the heat set business becoming profitable in the future, APN submitted:

[

]

Further attempts to restructure the heat set business

46. APN's Annual Report for the year ended 31 December 2009 noted:

“32. DISCONTINUED OPERATIONS

Regarding the Auckland heat set printing business, the Group is in active discussions with a number of parties with a view to further restructuring. Based on such discussions, the Group does not expect to continue to consolidate this business and has, treated this as a ‘discontinued business’.”

47. APN submitted that it endeavoured to improve the profitability of the heat set business and justify the necessary investment in new presses through the

⁸ [

]

formation of a joint venture. The Commission understands that APN held joint venture discussions with [

]

48. [

]

49. [

]

APN decision to exit

50. [

]

51. [

]

[

]

52. [

]

[

]

53. After full consideration of other options (including joint venture and selling the business as a going concern), APN decided to close its Manukau heat set printing plant and exit the market (other than to the extent of APN's small Tauranga heat set facility). This decision was made by the APN Board in October 2010. [

]

[

]

54. On 19 October 2010, APN publicly announced the closure of the business and that it had outsourced its heat set printing needs to PMP for a period of 10 years. The Manukau heat set plant closed and the PMP contract commenced at the end

of November 2010. [

]

Will the assets exit the market?

55. The Commission has investigated the likelihood of APN's presses exiting the market should the sale to PMP not proceed. Industry participants advised the Commission that currently there are a number of presses on the market that are likely to be more cost-efficient than the APN presses. The Commission has canvassed with a number of parties the likelihood of them acquiring the APN assets should PMP's acquisition not proceed.

[]

56. [] informed the Commission that it has no interest in purchasing any of the APN assets.

[]

57. [

]

58. [] informed the Commission that it [] would have no interest in acquiring any of the APN heat set assets.

[]

59. [

]

60. [

]

61. [] informed the Commission that it has no interest in acquiring any of the APN heat set assets should they become available.

[]

62. [

]

63. [] informed the Commission that it would not be in a position to acquire any of the APN heat set assets should they become available.

64. Accordingly, if clearance is not given to this application, it is likely that the assets that are the subject of this application will exit the market.

Conclusion on failure

65. The Commission has considered the submissions made by APN and reviewed the relevant documentary and financial evidence in order to assess whether or not APN's Manukau heat set business was a failing business, taking into account (among other things) the factors outlined in paragraph 42 above.
66. The Commission is of the view that faced with the loss of major external printing contracts, dwindling volumes and sustained losses, APN made reasonable attempts to bring the Manukau heat set business back onto a profitable footing. Despite these attempts, the Manukau heat set facility was closed on 29 November 2010. The Commission is therefore satisfied that the APN Manukau heat set printing business was a 'failing firm'.
67. The Commission is further satisfied that the Manukau heat set assets will exit the market under this counterfactual.

Conclusion

68. In order to give clearance, the Commission needs to be satisfied that there is no real prospect of a substantially less anti-competitive alternative to the proposed acquisition occurring in the counterfactual, and therefore no substantial lessening of competition.
69. The Commission considers that with the actual closure of APN's Manukau heat set facility and the lack of a potential third party purchaser of the heat set assets, in the absence of the proposed acquisition there is only one likely counterfactual; the exit of the Manukau heat set assets from the market. As a result, APN's Manukau heat set business would not exist either with or without the sale of the relevant assets to PMP.
70. Accordingly, there would be no material difference in competitive constraint on market participants between the factual and this counterfactual scenario in the relevant market. Accordingly, the Commission concludes that the proposed acquisition will not have, nor would be likely to have, the effect of substantially lessening competition in the New Zealand market for the provision of heat set printing services.

Ancillary Contractual Matters

71. The Commission's jurisdictional limits under a clearance application are confined to either giving or declining clearance for a given transaction. In cases where there are ancillary contractual arrangements between the merger parties, these arrangements remain open to scrutiny under Part 2 of the Commerce Act.

72. [

]

73. The parties should note that this clearance relates only to the acquisition by PMP of certain heat set printing assets owned by APN.

DETERMINATION ON NOTICE OF CLEARANCE

74. Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for PMP Limited to acquire certain heat set printing assets (and related spare parts), as outlined in Schedule 3A of the Asset Sale Agreement and owned by APN Print NZ Limited and located at 587 Great South Road, Manukau City.

Dated this 16th day of December 2010

Dr Mark Berry
Chair