

Statement of Preliminary Issues

Property Brokers/Farmlands

28 November 2019

Introduction

1. On 15 November 2019, the Commerce Commission (the Commission) registered an application (the Application) from Property Brokers Limited (Property Brokers) to acquire the West Coast real estate business and property management business of Farmlands Real Estate Limited and Farmlands Real Estate Property Management Limited (together Farmlands Real Estate) (Proposed Acquisition).¹
2. The Commission will give clearance if it is satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
3. This statement of preliminary issues sets out the issues we currently consider to be important in deciding whether or not to grant clearance.²
4. We invite interested parties to provide comments on the likely competitive effects of the Proposed Acquisition. We request that parties who wish to make a submission do so by **12 December 2019**.

The parties

5. Property Brokers offers real estate services from offices throughout New Zealand. It provides residential, lifestyle, rural and commercial real estate, and property management services. On the West Coast of the South Island, Property Brokers operates from offices in Westport, Greymouth and Hokitika.
6. Farmlands Real Estate is a fully owned subsidiary of Farmlands Co-operative Society Limited. Farmlands Real Estate also offers residential, lifestyle, rural and commercial real estate, and property management services from offices throughout New Zealand. On the West Coast of the South Island, Farmlands Real Estate operates from offices in Westport and Hokitika.

¹ A public version of the Application is available on our website at: <http://www.comcom.govt.nz/business-competition/mergers-and-acquisitions/clearances/clearances-register/>.

² The issues set out in this statement are based on the information available when it was published and may change as our investigation progresses. The issues in this statement are not binding on us.

Our framework

7. Our approach to analysing the competition effects of the Proposed Acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.³ As required by the Commerce Act 1986, we assess mergers and acquisitions using the substantial lessening of competition test.
8. We determine whether an acquisition is likely to substantially lessen competition in a market by comparing the likely state of competition if the acquisition proceeds (the scenario with the acquisition, often referred to as the factual), with the likely state of competition if the acquisition does not proceed (the scenario without the acquisition, often referred to as the counterfactual).⁴ This allows us to assess the degree by which the Proposed Acquisition might lessen competition.
9. If the lessening of competition as a result of the Proposed Acquisition is likely to be substantial, we will not give clearance. When making that assessment, we consider, among other matters:
 - 9.1 constraint from existing competitors – the extent to which current competitors compete and the degree to which they would expand their sales if prices increased;
 - 9.2 constraint from potential new entry – the extent to which new competitors would enter the market and compete if prices increased; and
 - 9.3 the countervailing market power of buyers – the potential constraint on a business from the purchaser’s ability to exert substantial influence on negotiations.

Market definition

10. We define markets in the way that we consider best isolates the key competition issues that arise from the Proposed Acquisition. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Commerce Act, as a matter of fact and commercial common sense.⁵
11. In its application, Property Brokers submitted that the relevant markets for assessing the Proposed Acquisition are the markets for the provision of:⁶
 - 11.1 real estate services in the West Coast region; and
 - 11.2 property management services in the West Coast region.

³ Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2019. Available on our website at www.comcom.govt.nz

⁴ *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

⁵ Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

⁶ The application at [55].

12. We will test whether these market definitions are appropriate. In particular, we will consider whether:
- 12.1 there should be one broad market for the provision of real estate services, or more narrowly defined markets based on property type (eg, residential); and
 - 12.2 the geographic scope of the relevant markets are broad West Coast region markets, or narrower markets by district within the West Coast (ie, Buller, Grey and Westland districts).

Without the acquisition

13. We will consider what the parties would do if the Proposed Acquisition did not go ahead. We will consider the evidence on whether the without-the-acquisition scenario is best characterised by the status quo, or whether the counterfactual may be something other than the status quo.

Preliminary issues

14. The parties overlap in the provision of real estate services and property management services in the West Coast region.
15. We will investigate whether the Proposed Acquisition would be likely to substantially lessen competition in the relevant markets by assessing whether horizontal unilateral and/or coordinated effects might result from the Proposed Acquisition.

Horizontal unilateral effects

16. Unilateral effects arise when a firm merges with a competitor that would otherwise provide a significant competitive constraint (particularly relative to remaining competitors) such that the merged firm can profitably increase price above the level that would prevail without the merger without the profitability of that increase being thwarted by rival firms' competitive responses. The question that we will be focusing on is would the loss of competition between the parties enable the merged entity to profitably raise prices or reduce quality or innovation by itself?⁷
17. In its application, Property Brokers submitted that the Proposed Acquisition would not be likely to substantially lessen competition due to unilateral effects because:⁸
- 17.1 there would be limited aggregation with the Proposed Acquisition;
 - 17.2 the merged entity would continue to face strong competition from existing competitors;

⁷ For ease of reference, we only refer to the ability of the merged entity to "raise prices" from this point on. This should be taken to include the possibility that the merged entity could reduce quality or innovation, or worsen an element of service or any other element of competition, i.e. it could increase quality-adjusted prices.

⁸ The application at [9-26].

- 17.3 there are no restrictions on the ability of existing market participants to expand their operations on the West Coast, and low barriers to new entry; and
 - 17.4 property owners have significant countervailing power and can sell or manage their property themselves.
18. We will consider:
- 18.1 the closeness of competition: the degree of constraint that Property Brokers and Farmlands Real Estate impose upon one another. To the extent that any constraint is material, we will assess whether the lost competition between the merging parties could be replaced by rival competitors;
 - 18.2 other competitive constraints: the degree of constraint that existing competitors would impose on the merged entity;
 - 18.3 entry and expansion: how easily rivals could enter and/or expand and whether that is likely in a timely manner; and
 - 18.4 countervailing power: whether customers have special characteristics that would enable them to resist a price increase by the merged entity.

Coordinated effects

- 19. A merger can substantially lessen competition if it increases the potential for the merged entity and all or some of its remaining rivals to coordinate their behaviour and collectively exercise market power such that output reduces and/or prices increase across the market. Unlike a substantial lessening of competition, which can arise from the merged entity acting on its own, coordinated effects require some or all of the firms in the market to be acting in a coordinated way.
- 20. We will assess whether the Proposed Acquisition would make coordination more likely, more complete or more sustainable. As part of our assessment we will consider whether any of the relevant markets are vulnerable to coordination, and whether the Proposed Acquisition would change the conditions in the relevant markets.

Next steps in our investigation

- 21. The Commission is currently scheduled to make a decision on whether or not to give clearance to the Proposed Acquisition by **12 February 2020**. However, this date may change as our investigation progresses.⁹ In particular, if we need to test and consider further the issues identified above, the decision date is likely to extend.

⁹ The Commission maintains a clearance register on our website at <http://www.comcom.govt.nz/clearances-register/> where we update any changes to our deadlines and provide relevant documents.

22. As part of our investigation, we will be identifying and contacting parties that we consider will be able to help us assess the preliminary issues identified above.

Making a submission

23. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference "Property Brokers/Farmlands" in the subject line of your email, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on **12 December 2019**.
24. Please clearly identify any confidential information contained in your submission and provide both a confidential and a public version. We will be publishing the public versions of all submissions on the Commission's website.
25. All information we receive is subject to the Official Information Act 1982 (OIA), under which there is a principle of availability. We recognise, however, that there may be good reason to withhold certain information contained in a submission under the OIA, for example in circumstances where disclosure would unreasonably prejudice the supplier or subject of the information.