

COMMERCE COMMISSION

DECISION NO. 315

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

WOLTERS KLUWER NV

and

REED ELSEVIER PLC

The Commission: Terry Stapleton
Kate Brown
Cathie Harrison

Summary of Proposal: The merger of the businesses of Wolters Kluwer NV and Reed Elsevier plc which in New Zealand will result in CCH New Zealand Limited and Butterworths of New Zealand Limited becoming interconnected bodies corporate in terms of the Commerce Act 1986.

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

Date of Determination: 29 January 1998

AUT/BA - W
M2360

MEMORANDUM

To: Terry Stapleton
Kate Brown
Cathie Harrison

From: John Preston
Jane Chilcott
Juliet Fletcher

Date: 29 January 1998

Subject: **Business Acquisition: Wolters Kluwer NV/Reed Elsevier plc**

Working Day 10: 30 January 1998

Confidential material in this report is contained in square brackets.

THE PROPOSAL

- 1 On 16 January 1998, the Commission registered a notice pursuant to s 66(1) of the Commerce Act 1986 (“the Act”) seeking clearance for the merger of the businesses of Wolters Kluwer NV and Reed Elsevier plc. The participants to the merger are Wolters Kluwer NV and Elsevier NV, both based in Amsterdam, and Reed International plc, based in London. The application was made by Wolters Kluwer NV (“the applicant”) on behalf of all parties to the proposal.
- 2 The merger will be effected by the dissolution of Wolters Kluwer NV and the passing of that company’s assets to Elsevier NV. Shareholders in Wolters Kluwer NV will be issued with shares in Elsevier NV, in exchange for their shares in Wolters Kluwer NV. Elsevier NV will be renamed Elsevier Wolters Kluwer NV (“EWK”). A new company will be formed by EWK, with the provisional name of “Dutch

Merge Co NV”, with its shares being held by Reed International plc (38.3%) and EWK (61.7%).

- 3 The proposal is subject to the Act by virtue of s 4(3), to the extent that the “acquisition affects a market in New Zealand”. CCH New Zealand Ltd (“CCH”), which is ultimately owned by Wolters Kluwer NV, and Butterworths of New Zealand Ltd (“Butterworths”), which is ultimately owned by Reed International plc and Elsevier NV, will become interconnected bodies corporate following the merger.

THE PROCEDURES

- 4 Section 66(3) of the Act requires the Commission either to clear, or to decline to clear, a notice given under s 66(1) within 10 working days, unless the Commission and the person who gave the notice agree to a longer period. As such, a determination is required by 30 January 1998.
- 5 This report concludes that staff are satisfied that implementation of the proposal would not result, and would not be likely to result, in the merged entity acquiring or strengthening a dominant position in any relevant market. It is recommended that, in terms of s 66(3)(a) of the Act, the Commission give clearance for the proposal.

THE INVESTIGATION

- 6 Staff discussed the proposal with the following parties:
- existing competitors of CCH and Butterworths, including Brooker’s Ltd, Status Publishing Ltd, GP Print Ltd, Law Library Management Ltd, LINX, editor of The Capital Letter, and Data Services Ltd;
 - law libraries including the Wellington District Law Society Library, Auckland District Law Society Library, Victoria University Law Library, and Auckland University Law Library;
 - the Institute of Chartered Accountants of New Zealand;
 - Price Waterhouse;
 - Coopers and Lybrand;
 - the Tax Education Office;
 - the Inland Revenue Department;
 - the Ministry of Commerce; and
 - an independent consultant on legal information issues;

- 7 Additional information was also sought from and provided by the applicant.

THE PARTICIPANTS

Wolters Kluwer NV

- 8 Wolters Kluwer is described as a multi-domestic publishing company operating in 25 countries worldwide. The company's corporate offices are in Amsterdam. Its principal business activities include academic, legal, accountancy and tax, and dictionary publishing.

- 9 CCH, based in Auckland, is a wholly owned subsidiary of CCH Australia Ltd. CCH Australia Ltd is wholly owned by CCH Inc, which is a subsidiary of Wolters Kluwer NV. CCH is involved in legal and accountancy and tax publishing in New Zealand.

Elsevier NV

- 10 Elsevier NV, based in Amsterdam, is listed on the Amsterdam, London and New York stock exchanges. Its principal activity is the holding of 50 percent of the share capital in Reed Elsevier plc and 54 percent of the share capital in Elsevier Reed Finance BV.

- 11 Elsevier Reed Finance BV, based in Switzerland, acts as financier to the Reed Elsevier group.

Reed International plc

- 12 Reed International plc, based in London, is also listed on the Amsterdam, London and New York stock exchanges. Its principal activity is the holding of 50 percent of the share capital in Reed Elsevier plc and 46 percent of the share capital in Elsevier Reed Finance BV.

Reed Elsevier plc

- 13 Reed Elsevier plc, formed in 1993 and registered in the United Kingdom, controls all the assets and liabilities of the Reed Elsevier group. The shares in Reed Elsevier plc are currently held by Reed International plc (50%) and Elsevier NV (50%).

Through its various subsidiaries worldwide, Reed Elsevier plc is involved in publishing and the provision of information. Its principal business activities include academic, legal, accountancy and tax, business, and consumer publishing, the organisation of exhibitions and seminars, the provision of information for the study of the English language, and travel industry services.

- 14 Butterworths, based in Wellington, is a wholly owned subsidiary of Reed Elsevier Overseas BV, which is a wholly owned subsidiary of Reed Elsevier plc. Butterworths is involved in legal and accountancy and tax publishing in New Zealand.

OTHER RELEVANT PARTIES

Brooker's Ltd ("Brooker's")

- 15 Brooker's is owned by Brooker & Friend Limited, a New Zealand and Netherlands registered company, which in turn is owned by Lawbook Holdings BV. Lawbook Holdings BV is owned by the Thomson Corporation, a Canadian-based company with publishing operations worldwide. Brooker's is involved in legal and accountancy and tax publishing in New Zealand.

GP Legislation Services

- 16 GP Legislation Services is a division of Wellington-based GP Print Ltd, which is a subsidiary of Blue Star Group Ltd. GP Legislation Services is contracted to Parliament to print and distribute the "official version" of Parliament's statutes and statutory regulations.

Status Publishing Ltd

- 17 Status Publishing, established in 1992 and based in Christchurch, is involved in the publishing of legal and tax information in electronic form. For example, Anderson's Tax Companion is electronically published by the company. Status Publishing is not involved in paper-based publishing.

Law Library Management Ltd

- 18 Law Library Management Ltd, based in Auckland, is involved in the production of

Briefcase, an on-line case law database in index form. The database is available via CD-ROM, computer disk, and can be accessed via the Internet.

Data Services Ltd

- 19 Data Services Ltd, based in Auckland, is involved in publishing materials relating to resource management and local government law. It produces a database of case law and statutes relating to this specific area of law in paper-based and electronic form.

New Zealand Financial Press Ltd

- 20 New Zealand Financial Press Ltd, based in Auckland, is involved in business directory and legal publishing. For example, the company publishes The Capital Letter, a “weekly review of administration, legislation & law” and the New Zealand Business Who’s Who.

LINX

- 21 LINX is a semi-commercial database produced by the Auckland, Wellington and Christchurch Law Societies which indexes all Court of Appeal, High Court, District Court and Family Court judgments, all major New Zealand legal journals, textbooks, and some overseas journals.

THE RELEVANT MARKETS

Introduction

- 22 Section 3(1A) of the Act provides that:

... the term ‘market’ is a reference to a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.

- 23 The purpose of defining markets is to provide a framework within which the competition implications of a business acquisition can be analysed. The relevant markets are those in which competition may be affected by the acquisition under consideration. Identification of the relevant markets enables the Commission to examine whether the acquisition would result, or would be likely to result, in the

acquisition or strengthening of a dominant position in terms of s 47(1) of the Act in any of those markets.

- 24 Markets are defined in relation to product type, geographical extent, and functional level. With the first two dimensions, market boundaries are determined by testing for substitutability in terms of the response to a change in relative prices of the good or service in question, and possible substitute goods or services. A properly defined market will include products which are regarded by buyers as being not too different ('product' dimension), and not too far away ('geographical' dimension), and are thus products to which they could switch if a small yet significant and *non-transitory* increase in price ("*ssnip*") of the product in question was to occur. It will also include those suppliers currently in production who are likely, in the event of such a *ssnip*, to shift promptly to offer a suitable alternative product.
- 25 In addition, markets are also defined in relation to functional level. Typically, the production, distribution, and sale of products proceeds through a series of functional levels, so the functional levels affected by the acquisition have to be determined as part of the market definition. For example, the functional level between manufacturers and wholesalers might be called the "manufacturing market", while that between wholesalers and retailers is usually known as the "wholesaling market".
- 26 As previously stated, CCH and Butterworths are both involved in legal and accountancy and tax publishing in New Zealand, both paper-based and electronic. Prior to the introduction of electronic publishing, publishing companies were involved in the provision of paper-based products only; for example, books, journals, loose-leaf binders, and so on. Loose-leaf services, which are able to be regularly updated with loose-leaf inserts, were introduced in the 1970s. Electronic publishing commenced in the early 1990s, with on-line database services appearing in the mid 1990s.
- 27 The applicant submits that the publishing and information industry as a whole is undergoing a period of rapid change in light of a number of developments in information technology and telecommunications. As such, traditional paper-based publishing companies have had to respond to these developments to meet the rapidly changing demand for electronic products, while continuing to service their existing but diminishing market for printed materials.

- 28 The applicant submits that the advent of electronic publishing has led to changes in the availability of, access to, and use of, the information. Specifically:
- advances in computer technology are enabling information to be available in many formats including print, computer disk, CD-ROM, and on-line database. The content in the electronic formats can be automatically indexed, sorted and summarised, and “hypertext links” can be created linking material.
 - telecommunications developments have resulted in increasing accessibility to, and availability of, information.
- 29 Electronic publishing has also seen the costs of preparing and reproducing the material being dramatically reduced.
- 30 The applicant argues that cost reduction has encouraged competition from smaller publishers who are able to enter a market in a “niche” area, and has also seen legal and accounting firms produce their own publications. The applicant also argues that publishers face strong actual and potential competition from computer and telecommunications companies in relation to the provision of information. These companies have the technological capacity and experience, as well as the commercial resources, to innovate methods of delivering information. The applicant argues, for example, that the convergence of computer technology and telecommunications has seen the development of the Internet, enabling access to complex and comprehensive information at low cost. The constraints from existing and potential competition in the relevant markets will be considered later in this report.

Market Definitions

- 31 The applicant submits that the specific markets in New Zealand which will be affected by the proposal are:
- the legal publishing market in New Zealand; and
 - the accountancy and tax publishing market in New Zealand.
- 32 The applicant notes that CCH is principally involved in tax and accountancy publishing and Butterworths is principally involved in legal publishing.¹
- 33 The legal publishing market encompasses all legal information materials, excluding accountancy and tax information materials. These materials are designed for and

supplied to professional customers such as lawyers, corporate counsel, others working in the law, academic institutions, and the judiciary, to inform them of all aspects and developments of the law.

- 34 Within this market, the applicant has identified two main segments - the primary materials segment and the secondary materials segment. Primary materials are the laws and statutory regulations from Parliament and case law from the Courts and Tribunals. Secondary materials comprise any “value added services” such as case annotations, articles, general introductory works, and so on. The information in both of these segments is required to be continuously updated as the law is amended and case law develops.
- 35 Primary and secondary materials are often combined in a single publication, with many publications including legislation, related case law, case notes and/or relevant articles. For example, text books may contain relevant legislation, commentary on that legislation, and relevant case law. Technology has also allowed primary and secondary materials to be linked together electronically using “hypertext links”, and has seen the development of complex searching tools and navigation techniques. As such, it is appropriate to include both primary and secondary materials in the same market.
- 36 The materials in the legal publishing market are provided through a wide range of paper-based and electronic formats. These sources include books, articles, journals, loose-leaf binders, CD-ROM, and on-line services, which provide varying degrees of depth and frequency of updates. These sources may cover fields of law in a general way, or cover specific subject areas within a field. The applicant submits that the market comprises legal information in any format or medium. The same or similar content is supplied by the various media, with the different formats used by the same customers depending on factors such as the user’s personal preference, technological availability and awareness. As such, Commission staff accept that the availability of similar content in the various media makes distinguishing between different media inappropriate for the purposes of this report.
- 37 The applicant also submits that the customers in the legal publishing market can not be segmented according to subject matter as:
- the majority of lawyers in private practice are generalists;
 - specialist lawyers are usually members of large law firms which cover a broad range of legal services; and
 - corporate lawyers also deal with a broad range of subject matter.

- 38 Commission staff accept that while individual publications may not be direct substitutes for one another, it is appropriate to combine these individual publications into a single legal publishing market. Commission staff also note that it is likely that an existing publisher, in the event of a *snip* in one subject area or segment of the legal publishing market, would move to offer a suitable alternative product.
- 39 The applicant has identified a separate accountancy and tax publishing market in New Zealand. It is argued that accountancy and tax is a highly specialised and complex area, requiring very specialised publications aimed at a specialist audience. The content of accountancy and tax publications is continually changing, with a need for the information to be continuously updated, accurate and of a very high standard.
- 40 The customers in the accountancy and tax publishing market are professional advisers who focus on accountancy and tax issues. These customers can be distinguished from those with a more peripheral interest in the subject who require less technical and comprehensive information.
- 41 As with the legal publishing market, the accountancy and tax publishing market includes both primary materials and secondary materials segments. Primary materials are the accountancy and tax laws and regulations from Parliament and case law from the Courts and the Taxation Review Authority. Secondary materials comprise “value added services” such as annotations and discussion papers.
- 42 The accountancy and tax publishing market includes publications in different formats: books, loose-leaf services, CD-ROMs, on-line databases, and so on. Again, the availability of similar content in multiple media and the fact that the different formats are often used by the same customer makes distinguishing between the different media inappropriate.
- 43 Although it is recognised that individual publications within the accountancy and tax publishing market may not be directly substitutable for one another, it is considered inappropriate to define a large number of narrow product markets within the area of accountancy and tax publishing for the purposes of analysing the competition effects of the proposal.

- 44 Brooker's agrees that it is realistic to define a separate accountancy and tax publishing market, noting that the subject area is very specialised, aimed at a specialist audience, and that there is very little demand substitution between purchasers of tax publications and purchasers of other legal publications.
- 45 Brooker's identified a number of different sectors within the accountancy and tax publishing market including:
- first point of reference materials; for example, the Master Tax Guide (CCH) and Staples Guide to New Zealand Tax Practice (Brooker's);
 - commentaries;
 - source materials including the legislation, tax cases, tax tables, and IRD tax rulings; and
 - current awareness materials including newsletters and bulletins.
- 46 However, Brooker's also considered it unnecessary, for the purposes of considering the competition effects of the proposal, to further define the market into these different sectors, or into separate subject areas. [
-].
- 47 Based on the information provided by the applicant, Brooker's, and other industry participants, Commission staff consider it appropriate, in the present context, to define a separate product market for accountancy and tax publishing.
- 48 Brooker's identified a third market that would be affected by implementation of the proposal, namely the "regulatory publishing" market. Regulatory publishing refers to publications which are generally law-based, but which are intended for non-lawyers who need to refer to legislation; for example, general summaries of relevant legislation. Customers would include human resources management, company secretaries, company directors, and so on. The publications would not be suitable for tax or legal advisors.
- 49 However, the applicant states that there will be no aggregation in relation to what it describes as "legal to business" publications which are too general to be of any significant value to legal or accounting professionals. It is argued that while CCH has some publications which are designed for non professionals who work in the "legal to business" field, Butterworths does not produce any "legal to business" publications. As such, there will be no aggregation of "legal to business" publications.

50 Further, it is noted that there will be no aggregation in relation to the medical publishing market in which Wolters Kluwer is involved in New Zealand, through its subsidiary Adis Publishing Ltd. Reed Elsevier does not participate in that market in New Zealand.

Conclusion on Market Definitions

51 It is concluded that the relevant product, functional and geographic markets for the purpose of assessing the competition implications of the proposal are as follows:

- the legal publishing market in New Zealand; and
- the accountancy and tax publishing market in New Zealand.

ASSESSMENT OF DOMINANCE

52 Section 66(3) of the Act, when read in conjunction with s 47(1) of the Act, requires the Commission to give clearance for a proposed acquisition if it is satisfied that the proposed acquisition would not result, and would not be likely to result, in a person acquiring or strengthening a dominant position in a market. If the Commission is not so satisfied, clearance must be declined.

53 Section 3(9) of the Act states that a person is in a “dominant position” if:

... a person as a supplier or an acquirer of goods or services either alone or together with an interconnected or associated person is in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in that market ...

54 That section also states that a determination of dominance shall have regard to:

- market share, technical knowledge and access to materials or capital;
- the constraint exercised by competitors or potential competitors; and
- the constraint exercised by suppliers or acquirers.

55 In reaching a conclusion on whether a person is in a position to exercise a dominant influence in a market, the Commission considers the foregoing non-exhaustive factors and any other relevant matters that may be found in a particular case. One important factor to consider in this case is the constraint from existing and potential competitors.

56 In *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554, the Court of Appeal approved the following dominance standard, adopted by McGechan J in the High Court:

...dominance involves more than “high” market power; more than mere ability to behave “largely” independently of competitors; and more than power to effect “appreciable” changes in terms of trading. It involves a high degree of market *control*.

57 A dominance assessment for each of the relevant markets follows.

The Legal Publishing Market in New Zealand

58 The two major players in the legal publishing market in New Zealand are Butterworths and Brooker’s. Other participants include CCH, Law Library Management, The Capital Letter, LINX, GP Print, Status Publishing and Data Services.

59 As noted in paragraph 6, in the course of their investigation of the proposal, Commission staff contacted existing competitors and a number of users of legal publications such as university law libraries, district law societies, and an independent consultant on legal information issues.

Market Shares

60 In the Commission’s view, a dominant position in a market is generally unlikely to be created or strengthened where, after the proposed acquisition, either of the following situations exist² :

- the merged entity (including any interconnected or associated persons) has less than in the order of a 40% share of the relevant market;
- the merged entity (including any interconnected or associated persons) has less than in the order of a 60% share of the relevant market and faces competition from at least one other market participant having no less than in the order of a 15% market share.

61 Except in unusual circumstances, the Commission will not seek to intervene in business acquisitions which, given appropriate delineation of the relevant market(s) and measurement of market shares, fall within these “safe harbours”.

62 Market share information has been obtained from the applicant and Brooker's, and staff's assessment of market shares is as follows:

Publisher	Turnover (\$ million)	Market Share
Butterworths ³	[]	[]
CCH ⁴	[]	[]
Combined Entity	[]	[]
Brooker's ⁵	[]	[]
Others ⁶	[]	[]
Total	[]	100%

63 Brooker's estimates total turnover for the legal publishing market to be [], in comparison to the applicant's estimate of []. The figure shown above for total market turnover incorporates Brooker's estimate for its own turnover and the applicant's more conservative estimate for total turnover.

64 While implementation of the proposal would lead to some aggregation in this market, the merged entity's market share would appear to fall within one of the Commission's safe harbours. That is, the merged entity would have less than in the order of a 60% share of the market, facing competition from one other competitor having a market share of no less than in the order of 15%. As such, it is considered that the merged entity would continue to face strong competition from Brooker's, and to a lesser extent, other smaller market participants.

65 [] states that it considers it unlikely that the merged entity will acquire or strengthen dominance in the legal publishing market. Most buyers of legal publications contacted by Commission staff were in agreement that Brooker's was a strong competitor in this market, and has the ability to compete with the merged entity.

66 Commission staff contacted several competitors involved in more specialised 'niche markets'. Those contacted included Data Services, Law Library Management, LINX, and the editor of The Capital Letter. These market participants did not believe that the proposal would affect the more specific areas of the legal publishing market, as the larger players tended to provide a wider and more general range of products.

Conclusion on the Legal Publishing Market in New Zealand

67 Due to the market share of [] for Brooker’s, and [] for other existing competition, staff conclude that the proposal would not result, and would not be likely to result, in the merged entity acquiring or strengthening a dominant position in the legal publishing market in New Zealand.

The Accountancy and Tax Publishing Market in New Zealand

68 The two major players in the accountancy and tax publishing market in New Zealand are CCH and Brooker’s, providing an extensive range of electronic and paper-based products (refer to list in Appendix A). Other participants include Butterworths, GP Print and Status Publishing.

69 In addition to existing competitors, Commission staff contacted users of tax and accountancy publications including representatives from large accounting firms and the Inland Revenue Department.

Market Shares

70 Market share information has been obtained from the applicant and Brooker’s, and staff’s assessment of market shares is as follows:

Publisher	Turnover (\$ million)	Market Share
CCH ⁷	[]	[]
Butterworths ⁸	[]	[]
Combined Entity	[]	[]
Brooker’s ⁹	[]	[]
Others ¹⁰	[]	[]
Total	[]	100%

71 Brooker’s estimates the turnover of those market participants described above as ‘others’ as [], in comparison with the applicant’s estimate of [] as shown. Staff have used the applicant’s more conservative estimate in calculating total market turnover and market shares.

72 Implementation of the proposal will lead to the merged entity having a market share of approximately [], which falls outside the Commission’s “safe harbours”. However, market shares are insufficient in themselves to establish whether a

dominant position would exist in a market. As Tipping J stated in *New Zealand Magic Millions Ltd & Anor v Wrightson Bloodstock Ltd* (1990) 3 NZBLC 99-175:

... market share is not the sole determinant of the presence or absence of dominance or market power. The most that can be said is that dominance is frequently attended by a substantial market share but all other relevant factors must be brought into account. For example, a substantial market share without barriers to entry will seldom, if ever, be indicative of dominance.

- 73 Accordingly, the Commission considers a range of additional factors before reaching a conclusion on the acquisition or strengthening of a dominant position in any market, such as the constraint from existing and potential competition and barriers to entry. These additional factors are discussed below.

Constraint from Existing Competitors in the Accountancy and Tax Publishing Market

- 74 The applicant submits that Brooker's provides the major source of competition in the market and that this competition will be sufficient to ensure that the merged entity does not acquire or strengthen a dominant position in the market. However, []].
- 75 Most of the competitors and users of accountancy and tax publications contacted by staff stated that Brooker's is a strong competitor in the market, providing comparable substitute products to CCH. Brooker's has expanded its share of the tax and accountancy market recently by providing the SMART Tax service, an electronic tax publication, and was considered by a number of users to be leading the market in electronic publishing.
- 76 Status Publishing, which provides electronic legal and tax information products including Anderson's Tax Companion, []].
- 77 GP Legislation Services, the official printer and distributor of legislation including tax legislation, is not concerned with the impact of the proposed merger on the markets in which it is involved. []].

J. GP Legislation added that competition is increasing in the electronic field as technology develops.

Conclusion on Constraint from Existing Competitors

78 Staff conclude that existing competition in the accountancy and tax publishing market, particularly from Brooker's, would provide sufficient constraint on the merged entity to alleviate any concerns of dominance in this market.

Constraint from Market Entry in the Accountancy and Tax Publishing Market

79 The applicant states that the electronic 'revolution' has not only brought about new opportunities for existing publishers, it has enabled and encouraged competition from different sources. New competition has emerged from small publishers and legal and accounting firms producing their own publications.

80 The applicant further submits that publishers throughout the world face actual and potential competition at an international level from large computer and telecommunication companies such as Microsoft, IBM, World Com, AT&T and BT. As previously noted, the applicant submits that these companies in the wider information industry have the technological capacity, experience and resources to innovate methods of delivering information.

81 Staff have considered whether a new entrant may face initial problems in sourcing legislation, regulations and judgments due to copyright restrictions. Crown copyright currently exists in any Bill, regulation, Act, bylaw or court judgment.¹¹

82 Commission staff have been advised by the Competition and Enterprise Division of the Ministry of Commerce that anyone wishing to publish any of the works listed under s 27 must apply to the Parliamentary Counsel Office for a licence to do so. Licences are granted as a matter of course and no fee is charged. Both Brooker's and Butterworths hold such licences.

83 Publishers have ready access to legislation and judgments. CCH, Butterworths and Brooker's have an arrangement with the courts to send them copies of judgments (for which a fee is charged), and arrangements with GP Print for the supply of statutes and regulations.

- 84 [] submits that a new entrant in the tax publishing market faces an entrenched competitor in CCH, and the established reputation of CCH makes it difficult to convince customers to change publications. [] states further that writers seek to be published in publications with established reputations.
- 85 Most users of tax and accountancy publications contacted by staff (such as accounting firms and universities) did not consider brand recognition to be of great significance. Several users believed that product quality and service were equally if not more important. Status Publishing pointed out that it had successfully entered the market in competition with CCH and Brooker's without existing recognition or an established reputation.
- 86 A representative of Price Waterhouse commented that each product has a different editorial panel and editorial style, and as a result services different segments of the market. As there was a continuous need for alternative commentaries by technical publishers, any gap in the market would be quickly filled by either a new or existing competitor.
- 87 Some users of tax and accountancy publications (representatives from Inland Revenue and Price Waterhouse) had concerns about the cost of switching from one product to another, including associated training requirements. A representative from Coopers and Lybrand stated however that Coopers and Lybrand requires a premium product and service, and cost is not considered to be a determining factor in the decision to purchase or switch products.
- 88 According to the applicant, the majority of its revenue is generated from ongoing servicing of a publication (the subscription) rather than the initial purchase of the publication. The applicant also states that, in relation to electronic products, there is no difference between subscription prices for first and subsequent years.
- 89 [] states that although important in the publishing market, brand reputation does not in itself prohibit or impair other players from entering the market. Brooker's SMART Tax is now a well established brand, evolving from a company called Smart Information Ltd which started in 1992/93 and was subsequently purchased by Brooker's.

- 90 Staff do not consider that brand recognition and reputation of existing publishers in the market are a significant disadvantage to a new or potential entrant. The main competitor of the merged entity, Brooker's, has an established reputation itself as a major publisher, and a recent entrant into the market, Status Publishing, has been able to enter the market successfully without such recognition and compete directly with CCH and Brooker's.
- 91 [] states that strategic behaviour by an entrenched competitor may also raise barriers to entry. An example of strategic behaviour which could have this effect is given as a recent CCH media release, advising that CCH has launched an electronic product which is to be included in the subscription for CCH's print product. This provides CCH with an advantage over its competitors who have solely electronic products.
- 92 It was noted by a representative of Coopers and Lybrand that CCH has changed its marketing approach recently due to developments in, and increasing use of, electronic products. For example, if a customer purchases CCH's print product, the electronic product is offered at a greatly reduced price. By linking its electronic product with its premium paper-based product in this way, CCH is securing custom for further electronic developments in the future.
- 93 A representative from Price Waterhouse stated that in a technical and frequently changing area such as tax, different publications have different styles, strengths and weaknesses. Consequently, users refer to all available commentary relating to a particular matter, and consider it important to have various editorial viewpoints. Coopers and Lybrand use both the CCH tax library and Brooker's SMART Tax library.

Conclusion on Constraint from Market Entry

- 94 Staff believe that there are no significant barriers to entry to the accountancy and tax publishing market. Because of increasing demand for electronic products either to complement or substitute for printed material, opportunities are arising for new entry to the market. Potential new entry would therefore appear to provide a constraint on the behaviour of the merged entity.

Constraint from Buyers in the Accountancy and Tax Publishing Market

- 95 As major buyers of tax and accountancy publications, Coopers and Lybrand considered that they would have some degree of countervailing power against the merged entity. Coopers and Lybrand believed that as a key customer, it had some ‘clout’ with CCH, and would be likely to resist any significant price increases.
- 96 Staff consider that while such buyers may provide some degree of constraint on the merged entity, it is unlikely to be sufficient in itself to alleviate any concerns of dominance in this market.

OVERALL CONCLUSION

- 97 The applicant submits that the constraints provided by existing competitors in the relevant markets will be sufficient to ensure that CCH and Butterworths will not, and will not be likely to, acquire or strengthen a dominant position in any market.
- 98 In relation to the legal publishing market, staff conclude that the merged entity’s market share will fall within one of the Commission’s “safe harbours”, and that competition from existing competitors is such that the proposal would not result, and would not be likely to result, in the merged entity acquiring or strengthening a dominant position in that market.
- 99 In the accountancy and tax publishing market, implementation of the proposal would lead to the merged entity having a market share of approximately [], which falls outside the Commission’s “safe harbours”. However, there appears to be sufficient constraint from existing competition to eliminate concerns that the merged entity would acquire or strengthen a dominant position in that market. Brooker’s has a market share of approximately [], with a number of comparable publications of a high standard, and an established reputation. There is also competition from smaller market participants, including Status Publishing and GP Legislation Services, which have a total market share of approximately []. In addition, some degree of constraint is provided by buyers, and staff note the applicant’s submissions about constraint from market entry.
- 100 Staff conclude that the proposal would not result, and would not be likely to result, in the merged entity acquiring or strengthening a dominant position in the accountancy and tax publishing market.

101 Having regard to the factors set out in s 3(9) of the Act and all other relevant factors, staff conclude that the proposal would not result, and would not be likely to result, in the merged entity acquiring or strengthening a dominant position in the following markets:

- the legal publishing market in New Zealand; and
- the accountancy and tax publishing market in New Zealand.

RECOMMENDATION

102 It is recommended that, in terms of s 66(3)(a) of the Act, the Commission give clearance for the proposal.

John Preston
Chief Investigator

Jane Chilcott
Investigator

Juliet Fletcher
Investigator

Jo Bransgrove
Manager

DETERMINATION ON NOTICE OF CLEARANCE

We agree/disagree with the recommendation.

We are satisfied/not satisfied that implementation of the proposal would not result, and would not be likely to result, in any person acquiring or strengthening a dominant position in a market.

Accordingly, pursuant to s 66(3)(a) of the Commerce Act 1986, we hereby give/decline to give clearance for the merger of the businesses of Wolters Kluwer NV and Reed Elsevier plc, which in New Zealand will result in CCH New Zealand Limited and Butterworths of New Zealand Limited becoming interconnected bodies corporate in terms of the Act.

Dated this day of January 1998

Terry Stapleton
Member

Kate Brown
Member

Cathie Harrison¹²
Member

APPENDIX A

Existing Competitors' Main Publications in the Accountancy and Tax Publishing Market in New Zealand

CCH

Electronic products

- Electronic Tax Library
- Electronic Master Tax Guide

Loose-leaf services

- NZ Income Tax Law & Practice
- NZ Income Tax Guide
- NZ Tax Cases
- NZ Income Tax Legislation
- NZ Goods & Services Tax Guide
- NZ IRD Tax Rulings
- NZ Asset Planning and Duties Guide
- NZ Financial Reporting Manual
- NZ Tax Planning Report
- NZ Master Tax Guide Updates
- NZ Lawyers' Tax Companion

Books/Other

- Master Tax Guide
- NZ Income Tax Tables
- Income Tax Legislation, 1997 edition
- NZ Goods & Services Tax Legislation
- GST - A Practical Guide
- A Practical Guide to New Zealand Financial Reporting Standards

BROOKER'S

Electronic products

- SMART tax
- Tax Edge

Loose-leaf services

- New Zealand Guide to Tax Audits
- New Zealand Tax Rates and Tables

Books/Other

- Staples Guide to New Zealand Tax Practice
- Guide to Estate Planning and Tax
- SMART Tax Bulletin
- New Zealand Journal of Taxation Law and Policy

BUTTERWORTHS

Electronic products:

- Taxbase I, II, III

Loose-leaf services:

- Butterworths Taxation Service

Books/Other:

- Tax Practitioner
- Income Tax Law: Concepts and Cases
- Essential Tax Legislation
- Current Taxation
- Understanding Accounting Principles, 2nd edition
- Financial Management and Decision Marketing, 4th edition

¹ Refer clearance application, p6, para 7.5 and para 7.6.

² Refer Commerce Commission's Business Acquisitions Guidelines, 1996, p17

³ Applicant's estimate.

⁴ Applicant's estimate.

⁵ Brooker's estimate.

⁶ Applicant's estimate.

⁷ Applicant's estimate.

⁸ Applicant's estimate.

⁹ Brooker's estimate.

¹⁰ Applicant's estimate.

¹¹ Section 27 of the Copyright Act 1994 has not yet come into force.

¹² Associate Commissioner Harrison is a contributor to a loose-leaf service published by Butterworths. She has also contributed to a Brooker's publication in the past. These matters are not considered either by her or the Commission to be interests in terms of s 14 of the Act which disqualify or would disqualify her from taking part in the consideration and determination of the notice seeking clearance.