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# BLACKTOP

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## Public version

Dear Sam and David,

### Trade Me / Homes – Trade Me’s response to the Statement of Unresolved Issues

1. I write on behalf of Trade Me in response to the Statement of Unresolved Issues issued by the Commission regarding Trade Me’s acquisition of Homes (**PropertyNZ Limited**).
2. This letter focusses on the Commission’s view that it cannot be satisfied that the acquisition would not be likely to substantially lessen competition in the listings market due to horizontal unilateral effects, with flow on effects into the audience market.<sup>1</sup> Trade Me submits that the Commission can be so satisfied, and otherwise agrees with the Commission that the acquisition is unlikely to substantially lessen competition in any other market or in any other way.<sup>2</sup>
3. This submission is structured as follows.
  - 3.1 Section A summarises Trade Me’s submissions.
  - 3.2 Section B provides some comments on the legal framework, including the requirement for a full, fair, and balanced, assessment of the information before the Commission, and the relevance of the Commission’s view that Trade Me has “significant” market power.
  - 3.3 Section C addresses the Commission’s potential competition theory of harm.
  - 3.4 Section D addresses the Commission’s tipping/foreclosure theory of harm.
  - 3.5 Section E offers some concluding comments.
4. **Attachment A** to this submission is an expert report by Dr Geoff Edwards of Charles River Associates providing his expert opinion on the Statement of Unresolved Issues.<sup>3</sup>

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<sup>1</sup> Statement of Unresolved Issues at [10].

<sup>2</sup> As described at [12] of the Statement of Unresolved Issues.

<sup>3</sup> Dr Geoff Edwards (Charles River Associates) “Trade Me / Property NZ: Expert Economic Opinion on the NZCC’s Statement of Unresolved Issues”, 18 July 2021 (**CRA Report**).

5. Information in this letter that is confidential to Trade Me is highlighted in blue (i.e., [Trade Me Confidential]), information that is confidential to Homes is highlighted in green (i.e., [Homes Confidential]), information that is confidential to Trade Me and Homes is highlighted in grey (i.e., [Trade Me and Homes Confidential]), and information that is confidential to third parties or is otherwise confidential to people who have executed a confidentiality undertaking is highlighted in yellow (i.e., [Confidential]).

#### A. Summary of Trade Me's submissions

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6. The Statement of Unresolved Issues describes two ways in which Trade Me's acquisition of Homes could substantially lessen competition.
- 6.1 The first is that in the absence of the acquisition Homes will grow to be a significant competitor to Trade Me for the sale of listings, such that Homes' removal via acquisition would substantially lessen competition in that market. **(The Homes growth theory of harm.)**
- 6.2 The second is that the combined Trade Me/Homes will fundamentally change the way in which consumers and real estate/agents use property portals, such that the market will 'tip', marginalising other competitors and leaving Trade Me/Home as the only material property portal. **(The tipping/foreclosure theory of harm.)**
7. While those theories might appear possible in theory, based on the information before the Commission and the characteristics of the markets, the prospect of either occurring can be described as no higher than a remote possibility. In summary:
- 7.1 The Homes growth theory of harm requires a belief that Homes – which does not provide any current constraint – will thrive in the listings market absent the acquisition, while the competitive constraint provided by other existing strong competitors – Realestate.co.nz and OneRoof – will wither. There is no commercially realistic prospect that this will occur.
- 7.2 The tipping/foreclosure theory of harm requires that the acquisition will cause audiences and real estate agents/vendors to no longer use multiple property portals to research, search for, and advertise property and that Realestate.co.nz and OneRoof will not be able to maintain their relevance as listing sites. Again, there is no commercially realistic prospect that this will occur.
8. Similarly, in his report, Dr Edwards describes the prospects of these theories of harm transpiring as "implausible".<sup>4</sup>
9. For these reasons, Trade Me submits that the Commission can be satisfied that the acquisition is not likely to substantially lessen competition and should grant clearance. Trade Me submits that the Commission would be in error not to do so.

#### The Homes growth theory of harm

10. Trade Me understands from the Statement of Unresolved Issues that the Commission accepts that Homes is not currently a competitive constraint on Trade Me in the listings

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<sup>4</sup> CRA Report at [102].

market. In contrast, the Commission accepts that Realestate.co.nz is a constraint in the listings market,<sup>5</sup> and that OneRoof imposes “some” constraint<sup>6</sup> and is likely to expand.<sup>7</sup>

11. While Trade Me accepts that the Commission’s analysis must be forward looking, the starting point is that these facts, as found by the Commission, make it difficult to see how competition could be said to be substantially lessened. The question then, is on what basis can this pattern of constraint and competition be expected to change?
12. Trade Me submits that for the Homes growth theory of harm to hold, the current pattern of constraint and competition in the market would have to undergo a fundamental and radical change. For this theory to hold, the Commission must believe:
  - 12.1 the constraint Homes provides will materially alter, despite:
    - 12.1.1 Homes already having [Confidential]% of Trade Me’s listings (and [Confidential]% of Realestate.co.nz’s and OneRoof’s listings<sup>8</sup>);
    - 12.1.2 Homes being an incidental user of listings that does not currently provide a constraint in the market; and
    - 12.1.3 Homes’ own evidence that it [Homes Confidential],  
(see [53] to [68] in Section C below); *and*
  - 12.2 the constraint Realestate.co.nz – the [Confidential] and a company owned by real estate agents – will dissipate or at the very least that Realestate.co.nz will not have the ability and incentive to compete strongly in the listings market (see paragraphs [69] to [79] in Section C below); *and*
  - 12.3 OneRoof’s expected future expansion would not be sufficient to constrain the merged entity in the listings market in the way it is theorised Homes could absent the merger, and OneRoof would not be able to match the combined listings and property information offering of Trade Me/Homes, even though:
    - 12.3.1 OneRoof currently imposes a material constraint;
    - 12.3.2 OneRoof [Confidential];
    - 12.3.3 OneRoof already includes valuations and other property information in its listings;
    - 12.3.4 OneRoof can leverage its media assets and sales force in a way that Homes cannot; and
    - 12.3.5 OneRoof’s 80% owner, NZME, has indicated that growing in listings is one of its three strategic priorities in transitioning from a print to a digital business,

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<sup>5</sup> Statement of Unresolved Issues at [114].

<sup>6</sup> Statement of Unresolved Issues at [119].

<sup>7</sup> Statement of Unresolved Issues at [120].

<sup>8</sup> Based on Trade Me’s analysis of Realestate.co.nz and OneRoof listings in Attachment C, and Homes listing data provided by Homes to the Commission.

(see paragraphs [80] to [97] in Section C below); *and*

- 12.4 no other participant in the markets or any adjacent market – such as Stuff/Neighbourly, Facebook, Google, Hougarden – would enter or expand in the market should the commercial opportunity the Commission identifies for Homes exist (see paragraphs [98] to [105] in Section C below).
13. While individually these premises might be possible, none of them can be said to be “likely” based on a full, fair, and balanced, reading of the information before the Commission.
14. In any event, even if one (or more) of these propositions is “likely” itself, there is no commercially realistic or meaningful real chance that *all* these propositions would hold at the same time as would be required for the Commission to find a substantial lessening of competition was likely.
15. Put another way, the Commission’s theory requires the Commission to treat Homes’ prospects in a fundamentally different way to Realestate.co.nz and OneRoof and other well-known providers in these or adjacent markets. It requires the Commission to have a significant degree of optimism about the future of Homes expanding from being an incidental participant in the listings market to become a constraint. At the same time, the Commission must also have a significant degree of pessimism about the ability of existing competitors – Realestate.co.nz and OneRoof – to maintain or grow their competitive presence, and the ability of other well-known providers in adjacent markets with large audiences – e.g., Facebook, Google, Stuff/Neighbourly – to do what the Commission theorises Homes could do.
16. Trade Me submits that this asymmetric treatment is wrong. Either Homes is well placed to expand and exert a constraint and so are Realestate.co.nz, OneRoof, Hougarden, Facebook, Google, Stuff/Neighbourly *et al*, or Homes is not. Either way, the acquisition does not substantially lessen competition. Put simply, the Commission cannot adopt mutually incompatible assumptions – a strong tailwind in the case of Homes’ prospects and a strong headwind for all other competitors – to develop a scenario that suggests a substantial lessening of competition.

### **The tipping/foreclosure theory of harm**

17. Nor does the information before the Commission support any concern that the acquisition is likely to result in the market “tipping” to a combined Trade Me/Homes.
18. While Trade Me accepts that real estate platforms involve some degree of indirect network effects, the presence of network effects is not a sufficient condition for competitive harm. Network effects only raise competition issues when they have a foreclosing effect on competition, or in the Commission’s theory result in a market “tipping”.
19. What is evident is that the property portal market has not tipped to a single platform in New Zealand (a “winner takes all scenario”<sup>9</sup>). Trade Me Property and Realestate.co.nz have both operated since 2005 and 1996<sup>10</sup> respectively, and OneRoof entered in 2018. No tipping has occurred even though Trade Me established a property information offering in 2016. Nor

<sup>9</sup> Statement of Unresolved Issues at [45], and Statement of Issues at [115].

<sup>10</sup> <https://www.realestate.co.nz/about-us>

is Trade Me aware of any property portal market in the world where tipping to a single platform has occurred.

20. One explanation for this is that the existence and prevalence of multi-homing on property sites and the continued incentives for buyers and sellers to do so in this market acts as a powerful antidote to the theoretical possibility of tipping in platform markets. As recognised by the Commission in respect of property portals, “multi-homing is relatively low cost” and “there is a high benefit to multi-homing”.<sup>11</sup> Put simply, multi-homing is simple, easy, and very low cost, compared to the significance of the investment home buyers are making.
21. Trade Me submits that there is no plausible reason to believe that the low costs or high benefits of multi-homing will change because of the acquisition such that consumer behaviour will change and lead to single homing on one or both sides of the market. Given the relative positions of Trade Me and Homes in respect of active home buyers, it is inevitable that the vast majority of the incremental audience that visit Homes but do not visit Trade Me are not active buyers. It is, therefore, improbable that gaining access to this audience will cause any tipping in the sense of convincing agents that they can simply list their properties on Trade Me, or convincing audiences not to visit multiple listings sites.
22. In addition, there is no reason to believe that Realestate.co.nz and OneRoof would lack the incentive and ability to respond competitively to any shift towards single homing with Trade Me.
23. As a result, multi-homing will continue. The continuation of multi-homing is fatal to the Commission’s tipping/foreclosure theory of harm.

## **B. Comment on the legal framework**

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### **The statutory test**

24. Trade Me accepts that it is required to satisfy the Commission that the acquisition is unlikely to substantially lessen competition in any market. That assessment must be informed by as much practical evidence as possible,<sup>12</sup> it should not be based on theory or speculation alone, and the Commission must make its assessment on the balance of probabilities.
25. Trade Me submits that the Commission should grant clearance if it is satisfied on the evidence before it that Trade Me’s position that there is no likelihood of a substantial lessening of competition is more probable than the competing hypothesis.<sup>13</sup>
26. Furthermore, as Trade Me has submitted before, the Commission should be cautious about seeking refuge in the term “doubt”. “Doubt” does not equate to a standard of beyond reasonable doubt as used in the criminal context. Rather, as the Court of Appeal has emphasised, in the clearance context, doubt simply means an applicant failing to discharge the burden of satisfying the Commission that no substantial lessening of competition is likely.<sup>14</sup>
27. In respect of the Homes growth theory of harm, Trade Me accepts that, at least conceptually, if a merger were to remove a firm that absent the merger would be likely to

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<sup>11</sup> Statement of Unresolved Issues at [39].

<sup>12</sup> *Commerce Commission v Woolworths* [2008] NZCA 276 (*The Warehouse*) at [191].

<sup>13</sup> *The Warehouse* at [99].

<sup>14</sup> *The Warehouse* at [98].

develop into a material competitive force, then that could amount to a substantial lessening of competition provided that no other firm would replace that competitive constraint.

28. In this sense it is possible that *any* merger involving firms that do not currently constrain each other could raise competition concerns. That is, a substantial lessening of competition is possible; however, the fact the theory of harm can be stated does not make that theory “likely” in the sense of being a real and substantial risk.<sup>15</sup>
29. The recent Australian case, *Vodafone v ACCC*<sup>16</sup> is an apt example. In *Vodafone*, Vodafone had sought a declaration from the Federal Court of Australia that Vodafone’s acquisition of TPG would not substantially lessen competition. Vodafone effectively faced the same legal test as applies to this clearance, i.e., Vodafone had to satisfy the Court that the acquisition was unlikely to substantially lessen competition.
30. The ACCC objected to the merger on the basis that, in its view, absent the merger TPG would roll out a fourth mobile network in Australia, and therefore the acquisition would reduce the number of competing mobile networks in Australia from four to three and thereby substantially lessen competition. The ACCC’s theory was a potential competition theory of harm akin to the Homes growth theory of harm.
31. The Federal Court dismissed the ACCC’s objection and found that Vodafone had discharged its burden of satisfying the Court that there was no likely substantial lessening of competition. The Court held that despite TPG having initially identified an opportunity to roll out a fourth mobile network, at the time of the merger, there was “no real chance that TPG will roll-out a retail mobile network or become an effective competitive fourth mobile network operator ... in Australia in the relevant future”.<sup>17</sup>
32. In reaching his decision, Middleton J cited with approval the following statement of the test for “likely” from the judgement of French J in *AGL*:

The meaning of “likely” reflecting a “real chance or possibility” does not encompass a mere possibility. The word can offer no quantitative guidance but requires a qualitative judgment about the effects of an acquisition or proposed acquisition. The judgment it requires must not set the bar so high as effectively to expose acquiring corporations to a finding of contravention simply on the basis of possibilities, however plausible they may seem, generated by economic theory alone. On the other hand it must not set the bar so low as effectively to allow all acquisitions to proceed save those with the most obvious, direct and dramatic effects upon competition. By the language it adopts and the function thereby cast upon the Court and the regulator in their consideration of acquisitions s 50 gives effect to a kind of competition risk management policy. The application of that policy, reflected in judgments about the application of the section, must operate in the real world. The assessment of the risk or real chance of a substantial lessening of competition cannot rest upon speculation or theory. To borrow the words of the Tribunal in the Howard Smith case, the Court is concerned with “commercial likelihoods relevant to the proposed merger”. The word “likely” has to be applied at a level which is commercially relevant or meaningful as must be the assessment of the substantial lessening of competition under consideration...<sup>18</sup>

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<sup>15</sup> Merger Guidelines at [2.27].

<sup>16</sup> *Vodafone v ACCC* [2020] FCA 117 (*Vodafone*).

<sup>17</sup> *Vodafone* at [10].

<sup>18</sup> *Vodafone* at [52].

33. In his judgment, Middleton J also commented:

It is not necessarily the number of competitors that are in the relevant market, but the quality of competition that must be assessed. Further, it is not for the ACCC or this Court to engineer a competitive outcome. The only question for this Court is whether the merger would have the effect, or be likely to have the effect, of substantially lessening competition in the supply of retail mobile services in Australia.<sup>19</sup>

34. Middleton J also commented on the care needed not to compound probabilities and to look at matters in the round.

An important matter to keep in mind when considering individual factors that may impact upon the future likelihood, possibility or real chance of a roll-out by TPG is the cumulative effect of these factors, and how this cumulative effect would impact on the likelihood of making a rational commercial decision to roll-out a retail mobile network. Just because one factor is not ‘critical’ to achieving a roll-out (but is otherwise undesirable or difficult to implement) does not mean that that factor in conjunction with other factors, may not swing rational decision makers to a particular view against rolling out a retail mobile network. If sufficient factors that may favour a roll-out are either not likely to occur, or to a rational decision maker are undesirable or difficult to implement, this may indicate that a roll-out would be a decision no rational company in the position of TPG would take in the relevant future period. This is not to say that in looking at each factor that may be in favour of, or an impediment to, a roll-out of a retail mobile network, each factor will not need to be assessed in isolation. It is just that it will be necessary to look at the whole picture.<sup>20</sup>

35. To put that statement in the context of this case, a hypothesis of a substantial lessening of competition made up of a series of “real chance” premises may not itself be likely. Trade Me says this is especially important in the context of the Homes growth theory of harm.
36. The Homes growth theory of harm is also different from the only other recent New Zealand potential competition cases Trade Me is aware of: *The Warehouse*, *NZ Bus*, and *Vero/Tower*.
37. In *The Warehouse*, the Commission initially declined clearance based on existing competition in local markets where The Warehouse Extra stores were operating.<sup>21</sup> The Court of Appeal differed from the Commission’s assessment of existing competitive constraint but was not convinced that evidence of constraint so soon after entry was a reliable indicator of future constraint, particularly given the clearance applications under consideration at that time.<sup>22</sup> As Trade Me has previously submitted, this case is quite different; the Commission can look at Homes’ six year history which indicates a lack of competitive constraint. Homes is not a recent entrant. Moreover, this case is not a 3 to 2 merger, and furthermore, in *The Warehouse* neither the Court nor the Commission needed to downgrade the existing competition provided by the other supermarket chain to reach a finding of a substantial lessening of competition.
38. The *NZ Bus* case was unique in that Miller J found that the merging parties had a tacit understanding under which neither firm would compete for contracts in the other’s defined area. His Honour found that such an understanding was not likely to survive transfer of control of Mana to a new entrant in the counterfactual.<sup>23</sup> That case was effectively a 2 to 1

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<sup>19</sup> *Vodafone* at [11].

<sup>20</sup> *Vodafone* at [14].

<sup>21</sup> See Decisions 606 & 607 *Woolworths Limited / The Warehouse Group Limited*, 8 June 2007, at [E49].

<sup>22</sup> *The Warehouse* at [192].

<sup>23</sup> *Commerce Commission v New Zealand Bus Limited* (2006) 8 NZBLC 101,744, at [201].

merger and the tacit understanding contained in it means it is a very different situation to this one.

39. Another recent case in which the Commission considered potential competition was *Tower/Vero*.<sup>24</sup> However, unlike this case (and *The Warehouse* and *NZ Bus*), the Commission declined clearance on the basis that Tower was at the time of clearance a competitor of significance, albeit it expected that competitive significance to be enhanced in the future.<sup>25</sup> The Commission also effectively considered the merger as a 3 to 2.<sup>26</sup> Put another way, the Commission's decline decision was based on existing competition and reinforced by concerns that the existing constraint would expand. In contrast, the Commission's concern here is solely with future competition in a market where there are already three existing competitors.<sup>27</sup>
40. In any event, in this case Trade Me submits that based on the weight of the evidence before it, the Commission can be satisfied that a substantial lessening of competition is unlikely. That is, based on the weight of evidence, the Commission can exclude the real chance of a substantial lessening of competition on the balance of probabilities.

#### **Commission's assessment must be informed by a full, fair, and balanced, reading of the evidence**

41. Trade Me apprehends that it shares with the Commission the view that the assessment of whether a substantial lessening of competition is likely should be based on a full, fair, and balanced reading of the information available. In this context, Trade Me wishes to respectfully bring three issues to the Commission's attention.
42. First, as Dr Edwards explains in his report while the Commission's review of this merger is occurring at a time when theories of harm based on loss of potential competition and tipping – in particular in digital markets characterised by network effects – are of particular concern to competition authorities,<sup>28</sup> Trade Me submits that this does not obviate the need to focus on the particular facts of the merger involved. The facts of this merger show that this is not a case where any theoretical concerns are likely to come to pass.
43. The second is that **[Trade Me Confidential]**.
44. The third is that the Statement of Unresolved Issues references two Trade Me documents to justify a conclusion that **[Trade Me Confidential]**.<sup>29</sup> Trade Me does not agree with this conclusion, and in any event it is not a conclusion that can be drawn from the documents relied on as is evident on the face of the documents themselves.
45. The relevant pages from these documents are included as **Attachments B1 and B2**. What the pages cited by the Commission in the document attached as Attachment B1 show is that **[Trade Me Confidential]**. This classification is inconsistent with the conclusion the

<sup>24</sup> *Vero Insurance New Zealand Limited and Tower Limited* [2017] NZCC 18 (**Tower**).

<sup>25</sup> *Tower* at [111].

<sup>26</sup> *Tower* at [X3].

<sup>27</sup> For completeness, Trade Me submits that the present case can also be distinguished from *Vodafone/Sky* [2017] NZCC 1 and 2. The Commission declined clearance for that proposed merger based on a concern about the merged entity leveraging exclusive premium live sports content to substantially lessen competition in telecommunications markets. This case does not have the same exclusive "must have" content (which was a long-standing feature of the market at the time of the merger due to consumer preferences), nor the features of technological change and convergence and a one-off increase in the potential for customer switching due to the roll out of UFB that existed in that case.

<sup>28</sup> CRA Report at [13]-[15].

<sup>29</sup> Statement of Unresolved Issues at [116].



Commission draws from the document in circumstances [Trade Me Confidential] is not just within the same document, it is on the same page.

46. Moreover, the comment at [116.5] that [Trade Me Confidential] does not provide the context for that statement. What is recorded (and shown in Attachment B2) is the [Trade Me Confidential].
47. Finally, the comment referred to by the Commission at [116.6] that [Trade Me Confidential] does not justify a finding that [Trade Me Confidential]. All this comment says is that [Trade Me Confidential], although as the Statement of Unresolved Issues records, at least one real estate agency has told the Commission that Realestate.co.nz generates the best quality leads.<sup>30</sup> As an aside, it is also notable that Trade Me does not list Homes as a platform for listings in this market research.
48. The only other time the page from which the comments in [116.1] to [116.4] are drawn is referred to in the Statement of Unresolved Issues is as an indicator that print is not a strong constraint.<sup>31</sup> However, what is equally evident from this page, but which is not reflected anywhere in the Statement of Unresolved Issues is that:
- 48.1 [Trade Me Confidential]; and
- 48.2 [Trade Me Confidential].
49. These latter two themes together with [Trade Me Confidential] consistently permeate Trade Me's documents. Put simply, either the Commission believes this page is a reliable indicator of Trade Me's views on the risks it faces (which would strongly point towards granting clearance) or it does not. Trade Me submits that it would be inappropriate to only rely on those parts of these documents (and Trade Me's and Homes' documents more generally) that support the theories of harm described in the Statement of Unresolved Issues but fail to reflect and adopt other nearby comments that do not.

#### **(Ir)Relevance of Trade Me's alleged "significant" market power**

50. The Statement of Unresolved Issues refers to the Commission's view that Trade Me has "significant" market power. It is not clear to Trade Me what the Commission means by "significant" market power, but in any event, Trade Me does not accept it has any such "significant" market power. Nor is it clear to Trade Me how the Commission's view is relevant to the comparative test the Commission is required to undertake to assess whether to grant clearance. The question before the Commission is whether the acquisition is likely to substantially lessen competition. It is not about what, if any, the level of market power is.<sup>32</sup>

#### **C. The Homes growth theory of harm**

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51. Trade Me submits that there is no real chance of the Homes growth theory of harm occurring. As described above, for this theory to occur the following four premises must hold:

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<sup>30</sup> Statement of Unresolved Issues at footnote 57.

<sup>31</sup> Statement of Unresolved Issues at [60].

<sup>32</sup> *Air New Zealand v Commerce Commission (No 6)* (2004) 11 TCLR 347 (HC) at [42], and Merger Guidelines at 2.20.

- 51.1 the constraint Homes provides will materially alter; *and*
- 51.2 the constraint Realestate.co.nz will dissipate or at the very least that Realestate.co.nz will not have the incentive to compete strongly in the listings market in a way that would be sufficient to constrain the merged firm in the way Homes would absent the merger; *and*
- 51.3 OneRoof’s expected future expansion would not be sufficient to constrain the merged firm in the way Homes would absent the merger; *and*
- 51.4 no other participant in the markets or an adjacent market – such as Stuff/Neighbourly, Facebook, Google, Hougarden – would enter or expand in the market should the commercial opportunity the Commission identifies for Homes exist.
52. Trade Me submits that none of these premises is likely, and that certainly there is no real chance that they all hold together.

### Homes’ constraint in the counterfactual

53. The Commission’s view that Homes will become a significant constraint to Trade Me is based on its conclusion that “Homes has been growing in the listings and audience markets”<sup>33</sup> and that it is likely to expand in the future by adding more listings and developing new property information features to attract audiences to its site.<sup>34</sup> The Commission’s view is that by increasing its audience, Homes will attract more buyers to its site and therefore become a more attractive place for listings, which may lead to an increase in listings and impact on Trade Me’s value to agents and audiences.<sup>35 36</sup> As a result Homes will become “a significant competitor to Trade Me”.<sup>37</sup>
54. Trade Me understands that Homes has responded separately to the Commission’s view from its perspective.
55. From Trade Me’s perspective, it is important to distinguish between (a) having listings on a website, and (b) actively participating in the market for the sale of those listings to real estate agencies in a way that will constrain providers in that market. As the Court of Appeal has recognised, being present in a market is not the same thing as being a material competitive influence in that market for competition law purposes.<sup>38</sup>
56. Trade Me does not accept the proposition that Homes has been expanding in the listings market. It certainly appears true that Homes carries more listings on its sites than it did previously. That has been driven by a decision not to charge for listings to obtain more listings for use as a way of building an audience for its advertising products.

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<sup>33</sup> Statement of Unresolved Issues at [74].

<sup>34</sup> Statement of Unresolved Issues at [77]-[79].

<sup>35</sup> Statement of Unresolved Issues at [99].

<sup>36</sup> Statement of Unresolved Issues at [82].

<sup>37</sup> Statement of Unresolved Issues at [94].

<sup>38</sup> *The Warehouse* at [201].

57. However, adding listings is not the same as growing in the listings market. As Trade Me has submitted previously, listings are not what Homes is known for or what its audience visits the site for. And for the reasons Homes explain in their submission, that matters.<sup>39</sup>
58. As recognised in the Statement of Unresolved Issues, what matters to real estate agents and vendors is the number of enquiries from a listing. [Homes Confidential]. The reason is that audiences – including buyers – do not use Homes to look for listings. They use Trade Me, Realestate.co.nz, and OneRoof to look for listings. By way of comparison, the table below provides average views, phone reveals, and email enquiries per live listing on Homes and Trade Me for May 2021.<sup>40</sup>

Table 1

	Homes	Trade Me
Average views per live listing	[Homes Confidential]	[Trade Me Confidential]
Average phone reveals / call buttons activated per live listing	[Homes Confidential]	[Trade Me Confidential]
Average email enquiries per live listing	[Homes Confidential]	[Trade Me Confidential]

59. To put the information in Table 1 in more concrete terms, a listing on Trade Me in May 2021 generated just over [Trade Me Confidential] email enquiries. As recorded in Homes' submission, Realestate.co.nz has reported that for the same month (May 2021) on average, a listing on Realestate.co.nz generated four email enquiries.<sup>41</sup> In contrast, Homes generated only [Homes Confidential].
60. Plotting this data over time provides no evidence that Homes is expanding to become a competitive constraint in the listings market. While the property market boom in the last 12 months has materially increased audiences generally (see paragraph 61 below) and Trade Me's enquiries from its audience, [Homes Confidential].

<sup>39</sup> Homes submission on the Statement of Unresolved Issues, 14 July 2021 (Homes submission), at [18]-[34].

<sup>40</sup> Table 1 and Figures 1, 2, and 3 are based on data supplied by Trade Me and Homes to the Commission.

<sup>41</sup> Homes submission at [19].

Figure 1: Average views per live listing

[Confidential]

Figure 2: Average phone reveals per listing

[Confidential]

Figure 3: Average email enquiries per listing

[Confidential]

61. Similarly, Trade Me's analysis of the Nielsen unique audience data available to Trade Me shows that [Trade Me Confidential].

Table 2

	3-month average audience (000)		
	May 2020	May 2021	Change
Trade Me		[Trade Me Confidential]	
Realestate.co.nz		[Trade Me Confidential]	
OneRoof		[Trade Me Confidential]	
Homes		[Trade Me Confidential]	

Table 3

	12-month average audience (000)		
	May 2020	May 2021	Change
Trade Me		[Trade Me Confidential]	
Realestate.co.nz		[Trade Me Confidential]	
OneRoof		[Trade Me Confidential]	
Homes		[Trade Me Confidential]	

Figure 4

[Trade Me Confidential]

62. Put another way, Trade Me submits that [Trade Me Confidential].
63. In terms of Homes' increased audience, [Confidential].

64. In contrast, as Homes address in its submission, [Homes Confidential].<sup>42</sup> [Homes Confidential].

65. The Homes view is consistent with Trade Me's own research from December 2020 that indicates that Homes is not used for searching for property (as opposed to researching a specific property).<sup>43</sup> That research shows that [Trade Me Confidential].

[Trade Me Confidential]

66. For all these reasons, Trade Me says it is wrong to conclude that Homes has expanded in the sale of listings. [Trade Me Confidential], [Homes Confidential]. If the Commission were correct that having a larger audience and more listings was sufficient to generate greater demand for its listings services and greater constraint, then at [Confidential]% of Trade Me's listings (and [Confidential]% of Realestate.co.nz's and OneRoof's listings and [Trade Me Confidential]% and [Trade Me Confidential]% of their audience respectively) it could have been expected that [Homes Confidential].

67. This has not happened. What this indicates is that Homes is not a material constraint today, as the Commission appears to accept. For the reasons explained in Homes' submission, without a change in focus that is unlikely to change.<sup>44</sup>

68. However, the Statement of Unresolved Issues simply asserts that Homes will become a significant competitor to Trade Me and therefore its removal will amount to a substantial lessening of competition. The practical evidence does not suggest that Homes will be a material constraint.

68.1 [Homes Confidential].<sup>45 46</sup>

68.2 [Trade Me Confidential].<sup>47</sup>

68.3 [Trade Me Confidential].

68.4 Neither Homes' shareholders, nor other potential investors, appear to apprehend the opportunity the Commission perceives, i.e., Homes growing to a point where it is a constraint on Trade Me. This is consistent with [Confidential].<sup>48</sup> Moreover, Spark's submission on the Statement of Issues records: [Confidential].<sup>49</sup> As Homes explains:

[Homes Confidential]<sup>50</sup>

68.5 Based on the information Trade Me has seen to date, the evidence from real estate agencies does not suggest that they apprehend Homes growing to become a significant constraint in listings. Agencies have indicated that Homes was unlikely to

<sup>42</sup> Homes submission at [27]-[29].

<sup>43</sup> This research was provided as Confidential Attachment A to Trade Me's submission on the Statement of Issues.

<sup>44</sup> Homes submission at [18]-[34].

<sup>45</sup> Homes submission at [1].

<sup>46</sup> See also, CRA Report at [2.1.3].

<sup>47</sup> [Trade Me Confidential].

<sup>48</sup> Spark submission on Statement of Issues at [8].

<sup>49</sup> Spark submission on Statement of Issues at [15].

<sup>50</sup> Homes submission at [34].

be a constraint on Trade Me in the future,<sup>51</sup> and/or was more likely to try to differentiate itself rather than compete directly with Trade Me.<sup>52 53</sup>

### The position of Realestate.co.nz

69. Trade Me agrees with the Commission that Realestate.co.nz is a constraint on Trade Me in the listings market today.<sup>54</sup> Trade Me would describe the constraint provided by Realestate.co.nz as strong. As the Commission recognises:
- 69.1 After Trade Me, Realestate.co.nz is **[Confidential]**;<sup>55</sup>
- 69.2 Real estate agencies have variously said:
- 69.2.1 Realestate.co.nz provides higher quality enquires than Trade Me;
- 69.2.2 Realestate.co.nz has good awareness;
- 69.2.3 the number of enquiries from the listing is critical and Realestate.co.nz gives the best quality leads;
- 69.2.4 Realestate.co.nz has an advantage with its domain name; and
- 69.2.5 Realestate.co.nz has strong international traffic.<sup>56</sup>
70. Despite these strong statements of support from the agencies and a long-standing record of sustainability in the market, the Commission expresses pessimism about Realestate.co.nz's ability to maintain or increase its level of constraint.
71. Trade Me disagrees and notes that the Commission's pessimism is in stark contrast to the optimism the Commission has for Homes. From Trade Me's perspective there is no reason to believe that Realestate.co.nz will not continue to be a strong constraint in the market in the future, especially if faced with a commercial opportunity or impetus to expand its offering.
72. One apparent basis for the Commission's pessimism about Realestate.co.nz is its view that **[Confidential]**.<sup>57</sup> This conclusion appears based on **[Confidential]**. Trade Me makes the following points in response.
- 72.1 **[Confidential]**.
- 72.2 **[Confidential]**. Trade Me's figures show **[Trade Me Confidential]**.<sup>58</sup>
73. Regardless, Trade Me submits that it would be wrong to infer that Realestate.co.nz is doomed to be marginalised as a competitor. To the extent that Realestate.co.nz is facing challenges, Trade Me submits that the reason why that has occurred is increased

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<sup>51</sup> Statement of Issues at [74.1].

<sup>52</sup> Statement of Issues at [74.3].

<sup>53</sup> See also footnote 96 in the Statement of Unresolved Issues.

<sup>54</sup> Statement of Unresolved Issues at [114].

<sup>55</sup> Statement of Unresolved Issues at [114.3].

<sup>56</sup> Statement of Unresolved Issues at footnotes 57 and 81.

<sup>57</sup> Statement of Unresolved Issues at [115.1].

<sup>58</sup> See Attachment C.

competition from OneRoof, which is seeking to usurp Realestate.co.nz as the clear number two in the market.

74. Trade Me does not expect Realestate.co.nz – or its real estate agent shareholders – to simply give up, as the Statement of Issues seems to envisage. Nor is this consistent with Realestate.co.nz’s conduct. As Trade Me has previously submitted, Realestate.co.nz and OneRoof are both in a stronger position to expand and constrain Trade Me than Homes is. They both currently have more listings than Homes while offering property information and valuation services to audiences as part of their websites. They have the same access to data and the same ability to add features that Homes has, but have more resources, and a greater buyer audience for listings than Homes.
75. Realestate.co.nz’s conduct confirms it will not simply give up. Realestate.co.nz has:
- 75.1 invested in a new website;
  - 75.2 spent an estimated [Trade Me Confidential] on advertising in the last 12 months;<sup>59</sup>
  - 75.3 been hiring additional staff;<sup>60</sup> and
  - 75.4 since the Clearance Application was filed:
    - 75.4.1 announced a partnership with REINZ to improve its valuation product based on proprietary data that no other provider will have;<sup>61</sup> and
    - 75.4.2 introduced a new Homepage spotlight product.<sup>62</sup>
76. This conduct is not the conduct of a firm intending to go quietly into the night. Rather, it indicates that Realestate.co.nz is focussed on and will remain a strong and motivated competitor in the listings market.
77. In contrast, the Commission’s reasons for thinking that Realestate.co.nz’s competitive constraint will diminish appear to be based on its ownership structure and a view that Realestate.co.nz will not expand its property information set. However:
- 77.1 Trade Me considers that Realestate.co.nz’s ownership structure provides it with a very strong incentive and basis from which to take action to constrain Trade Me. Realestate.co.nz’s website says that Realestate.co.nz’s establishment predated Google and is New Zealand’s longest standing property website.<sup>63</sup> This does not suggest that its ownership structure has inhibited its operation.
  - 77.2 There is nothing that would stop Realestate.co.nz adding a feature to its website or enhancing an existing feature if it considered it would enhance its listings offering.

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<sup>59</sup> See Attachment D.

<sup>60</sup> See blog post from 22 April 2021: “The realestate.co.nz sales team has expanded exponentially over the past 12 months, and we now cover most of New Zealand with our regionalised team of Territory Managers.” Available at <https://www.realestate.co.nz/blog/news/meet-our-sales-team>.

<sup>61</sup> Referred to in passing in footnote 42 of the Statement of Unresolved Issues. See <https://www.blog.reinz.co.nz/blog/reinz-launches-avm>, which includes the comment “The majority of AVMs on the market don’t have access to the most up-to-date sales data in order to make their calculations. However, REINZ’s unconditional sales data provides a key advantage and therefore increases confidence levels in making accurate and informed valuation predictions”.

<sup>62</sup> <https://www.realestate.co.nz/blog/tips-and-guides/all-new-exclusive-homepage-spotlight>.

<sup>63</sup> <https://www.realestate.co.nz/about-us>.

Indeed, Realestate.co.nz has done this since the Clearance Application was filed by updating its AVM. As Trade Me and Homes have consistently stated, none of the property information they display is proprietary, and Realestate.co.nz's move to upgrade its AVM is strong evidence that Realestate.co.nz is willing to invest to improve its property information offering if it decides that is needed to meet or better the competition.

78. Finally on Realestate.co.nz, I have already described why the Commission's conclusion that Trade Me **[Trade Me Confidential]** is incorrect. **[Trade Me and Homes Confidential]**.<sup>64</sup>  
**[Trade Me and Homes Confidential]**
79. For all these reasons, Trade Me submits that the Commission can be satisfied that Realestate.co.nz will remain a strong and motivated competitor in the market and sufficient to constrain the merged entity in the way the Commission envisages Homes could constraint Trade Me absent the merger.

### The position of Onerooft

80. The Statement of Unresolved Issues records that:
- If OneRoof is likely to expand to a similar or greater level of competitive constraint on Trade Me as Homes in the counterfactual, then the Proposed Acquisition may not result in a substantial lessening of competition.<sup>65</sup>
81. Trade Me submits that the Commission can be satisfied that OneRoof is likely to expand to at least a similar or more probably greater level of competitive constraint on Trade Me as Homes in the counterfactual.
82. The Commission accepts that OneRoof: provides "some competitive constraint" on Trade Me now<sup>66</sup> while Homes does not, has grown listings and audience **[Confidential]**,<sup>67</sup> is recognised by agencies as a close competitor in the listings market when Homes is not,<sup>68</sup> and "is likely to expand further".<sup>69</sup>
83. The Commission's findings that OneRoof has grown its listings and audience **[Confidential]**, is recognised by agencies as a competitor when Homes is not, and that it is likely to expand further are consistent with Trade Me's experience. However, Trade Me submits those facts **[Trade Me Confidential]**. Indeed, the Commission cites an email from **[Trade Me Confidential]**.<sup>70</sup>
84. Notwithstanding these positive findings and evidence, the Commission again expresses scepticism about whether OneRoof's continued expansion would be sufficient to replace the constraint the Commission theorises Homes would provide.<sup>71</sup> The Commission harbours this scepticism despite the fact that NZME has said that "Creating New Zealand's leading real estate platform" is one of its three strategic priorities for transitioning to a digital business.<sup>72</sup>

<sup>64</sup> Homes submission at [21].

<sup>65</sup> Statement of Unresolved Issues at [121].

<sup>66</sup> Statement of Unresolved Issues at [119].

<sup>67</sup> Statement of Unresolved Issues at [122].

<sup>68</sup> Statement of Unresolved Issues at [122].

<sup>69</sup> Statement of Unresolved Issues at [120].

<sup>70</sup> Statement of Issues at footnote 73.

<sup>71</sup> Statement of Unresolved Issues at [124]-[126].

<sup>72</sup> NZME *New Zealand Media and Entertainment Investor Day* 16 November 2020, page 10.



Again, the Commission's position is hard to reconcile with its optimism about Homes in circumstances where **[Homes Confidential]**.<sup>73</sup>

85. As an initial point, the competitive constraint the Commission assumes Homes will provide would appear to arise organically over time as Homes increases its audience and listings. The Commission is not envisaging a sudden change (at least in the Statement of Unresolved Issues). This is important when considering whether OneRoof's expansion will be sufficiently timely. Put simply, if Homes' constraint will arise gradually, then the parallel expansion by OneRoof in the factual need only happen in that gradual way.
86. The reasons for the Commission's scepticism about OneRoof's prospects (in contradistinction to Homes' prospects) are set out in paragraph [124] of the Statement of Unresolved Issues. Trade Me submits that none of the factors listed by the Commission in paragraph [124] will undermine the likelihood or ability of OneRoof to expand to constrain Trade Me in the counterfactual.

### ***OneRoof's strength in Auckland***

87. At [124.1] the Commission implies that OneRoof's strength in Auckland is a barrier to it expanding throughout the country. **[Trade Me Confidential]** there is nothing that would prevent it from expanding nationally and it has expressed an intention to do so by "utilising NZME's leading platforms across print, digital and radio".<sup>74 75</sup> Indeed, it is interesting that rather than seeing this as a barrier, OneRoof itself regards this as an opportunity.<sup>76</sup>
88. Trade Me submits that [124.1] of the Statement of Unresolved Issues overstates the importance of the NZ Herald paper and overlooks the fact that the nzherald.co.nz website (from which many of the OneRoof audience is likely to derive) is, by definition, national in scope.<sup>77</sup> The Commission recognised this in its decision in *NZME/Stuff* where it defined a national market for online news.<sup>78</sup> In this respect, it is relevant that NZME reports that nzherald.co.nz has a unique audience of between 1.6 million and 2 million people per month.<sup>79</sup>
89. Therefore, Trade Me submits that OneRoof has a strong basis for increasing its presence outside Auckland.

### ***OneRoof only being in the market for a short time***

90. At paragraph [124.2] the Commission refers to OneRoof as only being in the market for a short time and comments that it remains to be seen whether it will generate an acceptable return.

<sup>73</sup> Homes submission at [1].

<sup>74</sup> NZME *New Zealand Media and Entertainment Investor Day* 16 November 2020, page 115.

<sup>75</sup> See also NZME 2020 Full Year Results Presentation, 24 February 2021, page 20 which states that one of NZME's 2021 Initiatives is "Leverage NZME sales capability to drive national growth strategy" and "Utilise the strength of NZME audience and expand OneRoof Local magazines as a geotargeted complement to digital vendor listings".

<sup>76</sup> See for example, *New Zealand Media and Entertainment Investor Day* 16 November 2020, page 109 and <https://www.nzherald.co.nz/nz/nzme-appoints-new-christchurch-general-manager-south-island-agency-team-lead/YF4MIVIE7W5OSCJTM6605JSGE/>

<sup>77</sup> NZME also has its national radio assets, and regional print publications (e.g., The Northern Advocate, Rotorua Daily Post, Bay of Plenty Times, Hawkes Bay Today, and Whanganui Chronicle, and others see <https://www.nzme.co.nz/nzme-brands/publishing/>).

<sup>78</sup> *NZME Limited and Fairfax New Zealand Limited* [2017] NZCC 8, at [628].

<sup>79</sup> NZME 2020 Full Year Results Presentation, 24 February 2021, page 14.

91. However, from what Trade Me understands based on public information, OneRoof is profitable and had an EBITDA margin of 8% in FY2020 (its third year) while OneRoof was also profitable in FY2019 (its second year).<sup>80</sup> OneRoof has also signalled digital platform “year on year revenue growth of over 95% for the first quarter of 2021”.<sup>81</sup> In contrast, [Homes Confidential] and Spark [Confidential].<sup>82</sup>
92. Simply put, there is no reason to believe that OneRoof is likely to exit the market, and certainly no reason to think it is more likely to exit than Homes. That is, if Homes can establish a sustainable position, then there seems to be no reason why OneRoof could not.
93. As the Court of Appeal indicated in *The Warehouse*, care should be taken when second-guessing the commercial decisions made by experienced senior management and directors.<sup>83</sup> In this respect, NZME decided to roll out OneRoof and make it a strategic priority despite existing competition from Trade Me and Realestate.co.nz and as recently as April 2021 appears committed to this strategy.<sup>84</sup>

***The Commission’s description of OneRoof’s “comparative advantage”***

94. At paragraph [124.3], the Commission expresses concern that the merger will remove what the Commission sees as OneRoof’s comparative advantage against Trade Me. Putting aside for the moment the question of whether if that were correct, that would give rise to a competition problem as opposed to simply being a consequence of competition and a pro-competitive development, Trade Me does not believe the Commission’s assessment is consistent with how OneRoof would describe its own comparative advantage, based on OneRoof’s public pronouncements.
95. Trade Me apprehends that OneRoof would see its key comparative advantage as its ability to leverage all its media assets (print, online, and radio). [Trade Me Confidential]. This acquisition does not change that.

***Trade Me’s increased audience***

96. At [124.4] the Commission expresses the view that “the Proposed Acquisition would also provide the merged entity with enhanced scale ... making it more difficult for OneRoof to compete and attract paid listings”.
97. For the reasons explained in Section D below, in Trade Me’s submission, this does not amount to a competition problem. In summary:
- 97.1 As Trade Me has explained, it will only sustainably increase its audience if consumers see the combination of the two sites as being of benefit to them. Such outcomes are generally seen as pro-competitive and likely to enhance consumer welfare. Consumers are faced with a better product, and competitors like OneRoof and Realestate.co.nz will be forced to respond via lower pricing or through innovation. That is not anti-competitive – quite the reverse: it is the very essence of

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<sup>80</sup> NZME 2020 Full Year Results Presentation, 24 February 2021, page 19.

<sup>81</sup> NZME Presentation to Annual Shareholders Meeting, 16 April 2021 at page 21.

<sup>82</sup> Spark Submission on Statement of Issues at [14].

<sup>83</sup> *The Warehouse* at [142].

<sup>84</sup> NZME Presentation to Annual Shareholders Meeting, 16 April 2021 at pages 8 and 21.

competition.<sup>85</sup> Trade Me’s competitors should not be insulated from that competition.

97.2 In any event, the characteristics of the incremental audience Homes provides that do not currently visit Trade Me means that there is no real chance that incremental audience will alter the incentives for agents to list properties on multiple platforms, or for audiences to visit multiple listings sites. As explained further in Section D, it is almost inevitable that the vast majority of the incremental **[Trade Me Confidential]** audience that visit Homes but do not visit Trade Me are not active buyers. It is, therefore, improbable that any additional audience will convince agents that they can simply list their properties on Trade Me. Nor is there any reason to believe that those who currently visit Trade Me and other sites will simply decide to only visit Trade Me.

### The position of other platforms

98. The Statement of Issues identifies four firms that could potentially enter/expand: PropertyValue, MyValocity, Stuff/Neighbourly, and Facebook. Trade Me submits that Google should be added to this list as should Hougarden, which is in fact an actual competitor in the relevant markets but is mentioned only in passing in the Statement of Unresolved Issues.<sup>86</sup>
99. Trade Me disagrees with the Commission’s implicit assessment that Homes is uniquely placed to overcome any barriers to entry or expansion to become a constraint in the listings market but the likes of PropertyValue, MyValocity, Stuff/Neighbourly, Facebook, and Google could not.
100. The Statement of Unresolved Issues refers to the fact that an entrant would have to compete with the combined Trade Me / Homes listings and property offering. However, PropertyValue and MyValocity already have property information (as do Trade Me, Realestate.co.nz and OneRoof) and there would be nothing to prevent Stuff/Neighbourly, Facebook, and Google from accessing the data necessary to provide property information to do so if they felt they needed to. Furthermore, providers could differentiate their offer in other ways.
101. The Commission also indicates that a new entrant would need to have an existing audience to leverage. Putting aside whether that is correct, what is clear is that Stuff/Neighbourly<sup>87</sup>, Facebook<sup>88</sup>, and Google<sup>89</sup> have existing audiences that are significantly larger than Homes, while PropertyValue and MyValocity are also likely to have significant audiences compared to Homes.<sup>90</sup>

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<sup>85</sup> See CRA Report at [81].

<sup>86</sup> There are also others: Listed, Open2View, relab.

<sup>87</sup> Stuff’s website states that “Over 2 million New Zealanders visit Stuff each month to catch up on news”. See <https://advertise.stuff.co.nz/brand/digital/stuff-2/>. In addition, Neighbourly has over 750,000 members in 2019, a number which is likely to have increased since then (<https://www.scoop.co.nz/stories/BU1907/S00649/neighbourly-skyrockets-to-750000-members.htm>), and **[Trade Me Confidential]**.

<sup>88</sup> There were 3.998 million Facebook users in New Zealand in June 2021. See [https://napoleoncat.com/stats/facebook-users-in-new\\_zealand/2021/06](https://napoleoncat.com/stats/facebook-users-in-new_zealand/2021/06).

<sup>89</sup> Reported to have a 98% share of search engine use in New Zealand. See <https://gs.statcounter.com/search-engine-market-share/mobile/new-zealand>.

<sup>90</sup> See, for example, **[Trade Me Confidential]**.

102. In terms of specific entrants, as the Commission recognises, Facebook already has listings on its website and while it has a limited search function currently, it does have a more advanced search function for properties for rent.<sup>91</sup> It would not be a difficult task for Facebook to improve its search functionality. Facebook is already well known and used by agents to promote their services and their listings, while its audience would dwarf that of Homes. Moreover, its rich data on its users would provide a further mechanism for targeting a listings product to active buyers in a way that would be difficult for other providers.
103. Also, as the Commission recognises, Stuff/Neighbourly already have listings.<sup>92</sup> The prospects of Stuff/Neighbourly expanding into the listings market further are best exemplified by the entry of OneRoof. OneRoof made a considered business decision to enter this market, seeking to leverage its media assets. Stuff/Neighbourly could well face the same economic driver and have the same incentive to seek to leverage their existing media assets by adding a listings service for property. Put simply, if there is an opportunity for Homes, it is hard to see how there is not an opportunity for Stuff/Neighbourly in the listings market. Indeed, [Trade Me Confidential].<sup>93</sup>
104. Finally, there is simply no reason why Google, which already provides ‘listings’ for travel services<sup>94</sup> and has started to trial its own motor listings,<sup>95</sup> could not likewise add a real estate listings service. Trade Me remains of the view that the same goes for PropertyValue and MyValocity.
105. Importantly in terms of the Commission’s theory of harm, all it would take is one of these providers to enter for the Homes growth theory of harm to fail. Trade Me accepts that, except for [Trade Me Confidential]. However, [Trade Me Confidential].

#### **D. The tipping/foreclosure theory of harm**

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106. The Statement of Unresolved Issues refers to the indirect network effects inherent in a two-sided platform and to the theoretical possibility of a market “tipping” in favour of a single platform in some circumstances.<sup>96</sup>
107. However, network effects do not, in and of themselves, indicate a competition problem is likely to arise. Network effects only raise competition issues when they have a foreclosing effect on competition, or in the Commission’s theory result in a market tipping.<sup>97</sup>

#### **Multi-homing means tipping is unlikely**

108. As the Commission correctly notes in the Statement of Unresolved Issues, “tipping” is less likely to occur when users multi-home and multi-homing is an indicator that tipping has not occurred. Trade Me agrees that the presence of multi-homing makes tipping unlikely and that “multi-homing is a feature of property platforms” both in New Zealand and internationally.<sup>98</sup> Indeed, multi-homing happens on the audience and listings sides of the

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<sup>91</sup> Statement of Unresolved Issues at [28.1].

<sup>92</sup> Statement of Unresolved Issues at [127.3].

<sup>93</sup> See Attachment B1.

<sup>94</sup> For example, if you Google “Auckland hotels” the search will return a Google generated listing of hotels with prices and a map view with various search filters.

<sup>95</sup> See <https://aimgroup.com/2021/04/30/googles-own-car-listings-pilot-could-be-extended-to-u-k/>

<sup>96</sup> Statement of Unresolved Issues at [46].

<sup>97</sup> See, for example, the European Commission’s decision in *Case M.7217 – Facebook/ WhatsApp*, 3 October 2014, at [130].

<sup>98</sup> Statement of Unresolved Issues at [39].

market in New Zealand today and, as far as Trade Me is aware, there is no evidence of real estate platforms internationally “tipping”.

109. This is most likely because, as the Commission explains, “multi-homing is more likely to occur when the costs of consuming multiple services are low, and where there are benefits to doing so”.<sup>99</sup> The Statement of Issues records, and Trade Me agrees that:

109.1 multi-homing is low cost because “buying a house can be a lengthy process, and buyers therefore have time to consider their options” and because “multi-homing across a range of different online platforms is very simple and incurs no monetary cost”<sup>100</sup>; and

109.2 “there is a high benefit to multi-homing” because “the purchase of a house is a significant investment, which the average buyer enters into infrequently, meaning that they are motivated to ensure they find the best possible option” and “it is possible a house is listed on one platform and not on another (or it may be listed more prominently with better photos)”.<sup>101</sup>

#### **No reason to believe that the acquisition will change consumer or vendor/agent multi-homing**

110. Trade Me submits that there is no reason to believe that the costs or benefits of multi-homing, as described above, will change because of the acquisition such that audience or agent/vendor behaviour will change and lead to single homing on one or both sides of the market.
111. The Statement of Unresolved Issues refers to the additional [Trade Me Confidential] of audience who currently visit Homes but do not visit Trade Me as the stimulus that could lead to audiences and agents ceasing to multi-home. As an initial point, Trade Me submits that it will only maintain this [Trade Me Confidential] on Homes’ website if Trade Me continues to provide consumers with a high-quality service seen as of benefit to them. The audience is in no way proprietary to Trade Me.
112. Moreover, the characteristics of that incremental audience mean that even if they stay on Homes’ website, there is no real chance that incremental audience will alter the incentives for agents to list properties on multiple platforms, or for audiences to visit multiple listings sites.
113. As has been indicated by real estate agencies, what matters in terms of the value of a listing is the enquiries that a listing generates. So, for the acquisition to have the impact the Commission envisages, active buyers would need to switch from using Realestate.co.nz and OneRoof (whether alone or together with Trade Me) to only use Trade Me to view listings.
114. However, given Trade Me’s and Homes’ existing positions in the listings market, it is inevitable that the vast majority of the incremental [Trade Me Confidential] audience are not active buyers. They are likely to be using Homes for research rather than to search for listings. It is, therefore, improbable that the additional [Trade Me Confidential] of audience will convince agents that they can simply list their properties on Trade Me.

<sup>99</sup> Statement of Unresolved Issues at [38].

<sup>100</sup> Statement of Unresolved Issues at [39.1].

<sup>101</sup> Statement of Unresolved Issues at [39.2].

115. Moreover, there is no reason to believe that the additional audience will result in the other active buyers who currently visit Trade Me and other sites, or who do not visit Trade Me at all, would cease to view multiple sites. As illustrated in Trade Me’s response to the Statement of Issues, Trade Me’s own research from December 2020 shows that [Trade Me Confidential]% of audiences used Trade Me and other listing sites and/or print to search for properties, while [Trade Me Confidential]% did not use Trade Me at all.
116. There is no evidence to suggest that the acquisition would lead to the [Trade Me Confidential]% of property audiences that do not use Trade Me switching to only use Trade Me, or why the [Trade Me Confidential]% of audiences that multi-home would no longer visit multiple listings sites. Such a conclusion would require one to believe that there would be a fundamental change in consumer behaviour. Such a change in consumer behaviour is not plausible.

#### **Realestate.co.nz and OneRoof would respond strongly to any shift away from multi-homing**

117. In any event, the Statement of Unresolved Issues recognises Realestate.co.nz and OneRoof as competitors and refers to the benefit of attracting vendors and audiences.<sup>102</sup>
118. Even if the acquisition produces such a good product that it could be said to prompt a shift toward single-homing, Realestate.co.nz and OneRoof will not sit aside, powerless to mount any competitive response. They will be strongly incentivised to respond to that competition in the same way the Commission envisages they would be forced to respond to competition from Homes in the Commission’s (albeit implausible) counterfactual.<sup>103</sup> There would be no barrier to them doing so in terms of foreclosed access to audience or listings (or other property information). They would just have to raise their game to compete with the stronger product Trade Me would be providing.
119. Such an outcome would be pro-competitive and would enhance consumer welfare. Consumers and vendors/agents would have a better product, and competitors would be forced to respond via lower pricing or through innovation. That is competition at work.

#### **Trade Me providing a better product is not a barrier to expansion**

120. In places, the Statement of Unresolved Issues characterises the prospect of Trade Me providing a better product and thereby gaining audience as raising barriers to expansion.<sup>104</sup> This is a misconception of the impact of the acquisition.
121. Importantly, what matters for the Commission’s theory is that Trade Me increases its audience for listings sustainably in a way that the audience or listings are denied to others. Trade Me’s motivations for the acquisition are described in the Clearance Application.<sup>105</sup> One of those motivations is “the opportunity to show Trade Me’s property listings to Homes’ unique (from Trade Me Property) audience of [Trade Me Confidential]”. Put another way, Trade Me is not buying “audience” in the way a person might buy stock or buy contracts. Trade Me is buying an opportunity to market its listings to those people who use Homes who do not currently visit Trade Me.

<sup>102</sup> Statement of Unresolved Issues at [49] and [99].

<sup>103</sup> Statement of Unresolved Issues at [101].

<sup>104</sup> For example, Statement of Unresolved Issues at [125].

<sup>105</sup> Clearance Application at [38]-[39].

122. As already described above, the number of active buyers who visit Homes but do not currently visit Trade Me will be very small. In any event, what is important is that all Trade Me is buying is an opportunity; it must convert that opportunity by providing that audience something they value and in doing so it must be offering something better to these consumers than they are receiving now.
123. Trade Me rejects the suggestion that providing a product that is more valuable to audiences (and/or vendors/agents) to win their custom amounts to a barrier to expansion for other competitors and that therefore Trade Me's competitors should be insulated from that competition. It is simply competition at work and is the type of outcome the Commission should encourage not prevent.<sup>106</sup>
124. Trade Me submits that a lessening of competition would not arise unless and until there is a foreclosing effect.<sup>107</sup> In this case, that would occur if OneRoof or Realestate.co.nz were denied access to listings or audiences. Neither of those things would occur. Access to listings is controlled by agents, not Trade Me, while audiences are not proprietary and, as the Commission recognises, multi-home. OneRoof and Realestate.co.nz would have the same ability to access both, albeit that they might have to innovate and compete harder. But that is a good outcome for consumers and vendors/agents.
125. For these reasons, Trade Me submits that there is no plausible reason to believe that this acquisition is one of those rare situations where a consumer welfare enhancing merger is likely to harm competition by foreclosing competitors (in this case via foreclosing access to listings or audiences).

#### **E. Concluding comments**

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126. For the reasons explained in this letter, Trade Me submits that the Commission can be satisfied that the acquisition is not likely to substantially lessen competition and should grant clearance. Trade Me submits that the Commission would be in error not to do so.
127. Trade Me also recognises that the Commission has requested additional information from Trade Me and other parties that is not reflected in the Statement of Unresolved Issues. To the extent that the Commission intends to rely on that information or any analysis of that information, or any other analysis not contained in the Statement of Unresolved Issues, in a way that is adverse to Trade Me's position, Trade Me says that fairness would dictate that the Commission must provide Trade Me with an opportunity to comment on that information or analysis before the Commission makes its final decision.

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<sup>106</sup> See CRA Report at [81].

<sup>107</sup> As described in the CRA Report at [78].

128. Finally, if you need any further information from Trade Me, please do not hesitate to contact me.

Yours sincerely

A handwritten signature in blue ink that reads "David Blacktop". The signature is written in a cursive, flowing style.

**David Blacktop**

Director

T (09) 377 0592 / M 021 366 284



**Attachment A: CRA Report**

**Attachments B1 and B2**

**[Trade Me Confidential]**

Attachment C

**[Trade Me Confidential]**

**Attachment D**

**[Trade Me Confidential]**