



COMMERCE COMMISSION

Decision No. 535

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

iSOFT NZ LIMITED

and

HEWLETT-PACKARD NEW ZEALAND

- The Commission:** David Caygill
Donal Curtin
Peter Taylor
- Summary of Application:** iSOFT NZ Limited has sought clearance to acquire certain assets of Hewlett-Packard New Zealand comprising five customer contracts for the provision of software support services and associated goodwill and intellectual property rights in the HOMER and ORA*CARE software.
- Determination:** Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition.
- Date of Determination:** 29 September 2004

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EXECUTIVE SUMMARY

The Proposal

1. A notice pursuant to s 66(1) of the Commerce Act (the Act) was registered on 23 August 2004. The notice sought clearance for the acquisition by iSOFT NZ Limited to acquire certain assets of Hewlett-Packard New Zealand comprising five customer contracts for the provision of software support services and associated goodwill and intellectual property rights in the HOMER and ORA*CARE software, being the software supported under those contracts.

Market Definition

2. The Commission concludes that the relevant markets are:
 - The New Zealand market for the supply of patient administration software systems and related services to District Health Boards (patient administration software market).
 - The New Zealand market for the supply of clinical information systems and related services to District Health Boards (clinical information system market).

Counterfactual

3. The Commission considers that the appropriate counterfactual is the sale of the assets subject to this acquisition to another participant in the health information software industry.

Existing Competition

4. The Commission considers that in the factual scenario vis-à-vis the counterfactual scenario very little change to the competitive environment will occur. The number of existing competitors in the market will not change as Hewlett-Packard is not considered an active competitor in the market at present. Further, the Commission does not consider that being the incumbent provider of a legacy system provides any real advantage over a number of other factors such as price, functionality, or regional alignment such as to give iSOFT an advantage that would result in a substantial lessening of competition. The presence of IBA as an active existing competitor and TrakHealth as a near competitor gives DHBs options during the tendering process.
5. Accordingly the Commission concludes that the combined entity will continue to face a strong degree of constraint from IBA and TrakHealth in the market for patient administration software, and that there is limited change in the competitive situation between the factual and counterfactual scenarios.
6. No horizontal and no further vertical aggregation occurs in the market for clinical information systems as a result of the proposed acquisition. Further, in light of the analysis in respect of the patient administration software market above, there does not appear to be any degree of market power which could be exercised in the clinical information systems market which did not already exist.

Potential Competition

7. The Commission considers that despite the structural barriers to entry being low, strategic barriers to entry such as the encouragement of the Ministry of Health to look within New Zealand for a suitable information technology solution and the lack of certainty over the ability to obtain a critical mass of customers (due to switching costs and the increasing desire for system consolidation), potential entry into the New Zealand patient administration software market is unlikely.

Other Competition Factors

8. However, the Commission considers that DHBs possess some countervailing power in the process of selecting a patient administration software package due to the nature of the tendering process and the high value, long term contracts that are typical to this market. And when recent moves towards regional collaboration and alignment are considered the countervailing power in respect of DHBs in collective negotiations is considered to be strong and likely to significantly constrain the combined entity.

Overall Conclusion

9. The Commission is satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in the factual scenario vis-à-vis the counterfactual scenario, in:
 - the patient administration software market due to the presence of the existing competitor IBA and the near competitor TrakHealth and the countervailing power of the New Zealand District Health Boards; and
 - the clinical information system market due to the findings in respect of the patient administration software market and the minimal change in the factual and counterfactual scenarios.
10. Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition by iSOFT NZ Limited to acquire certain assets of Hewlett-Packard New Zealand comprising five customer contracts for the provision of software support services and associated goodwill and intellectual property rights in the HOMER and ORA*CARE software.

THE PROPOSAL

1. A notice pursuant to s 66(1) of the Commerce Act (the Act) was registered on 23 August 2004. The notice sought clearance for the acquisition by iSOFT NZ Limited to acquire certain assets of Hewlett-Packard New Zealand comprising five customer contracts for the provision of software support services and associated goodwill and intellectual property rights in the HOMER and ORA*CARE software, being the software supported under those contracts.

PROCEDURE

2. 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 notice agree to a longer period. An extension of time was agreed between the Commission and the Applicant. Accordingly, a decision on the Application was required by 29 September 2004.
3. The Applicant sought confidentiality for specific aspects of the Application. A confidentiality order was made in respect of the information for up to 20 working days from the Commission's determination notice. When that order expires, the provisions of the Official Information Act 1982 will apply.
4. The Commission's approach to analysing this proposed acquisition is based on principles set out in the Commission's Merger and Acquisition Guidelines.

STATUTORY FRAMEWORK

5. Under s 66 of the Act, the Commission is required to grant clearance to an Application, made in accordance with s66(1) of the Act, for an acquisition where it is satisfied that the proposed acquisition would not have, or would not be likely to have, the effect of substantially lessening competition in a market. The standard of proof that the Commission must apply in making its determination is the civil standard of the balance of probabilities.
6. The Commission considers that it is necessary to identify a real lessening of competition that is not minimal.² Competition must be lessened in a considerable and sustainable way. For the purposes of its analysis, the Commission is of the view that a lessening of competition and creation, enhancement or facilitation of the exercise of market power may be taken as being equivalent.³
7. When the impact of market power is expected to be predominantly upon price, for the lessening, or likely lessening, of competition to be regarded as substantial, the anticipated price increase relative to what would otherwise have occurred in the market has to be both material and able to be sustained for a period of at least two years.

¹ *Foodstuffs (Wellington) Cooperative Society Limited v Commerce Commission* (1992) 4 TCLR 713-722.

² See *Fisher & Paykel Limited v Commerce Commission* (1996) 2 NZLR 731, 758 and also *Port Nelson Limited v Commerce Commission* (1996) 3 NZLR 554.

³ See *Queensland Co-Op Milling Assn Ltd* (1976) 25 FLR 169, 515.

8. Similarly, when the impact of market power is felt in terms of the non-price dimensions of competition such as reduced service, quality or innovation, for there to be a substantial lessening, or likely substantial lessening, of competition, these also have to be both material and sustainable for at least two years.

ANALYTICAL FRAMEWORK

9. The Commission applies a consistent analytical framework to all its clearance decisions. The first step the Commission takes is to determine the relevant market or markets. As acquisitions considered under s 66 are prospective, the Commission uses a forward-looking analysis to assess whether a lessening of competition is likely in the defined market(s). Hence, an important subsequent step is to establish the appropriate hypothetical future with and without scenarios, defined as the situations expected:
- with the acquisition in question (the factual); and
 - in the absence of the acquisition (the counterfactual).
10. The impact of the acquisition on competition is then viewed as the prospective difference in the extent of competition in the market between those two scenarios. The Commission analyses the extent of competition in each relevant market for both the factual and counterfactual scenarios, in terms of:
- existing competition;
 - potential competition; and
 - other competition factors, such as the countervailing market power of buyers or suppliers.

THE PARTIES

Key Parties

iSOFT NZ Limited (iSOFT)

11. iSOFT Group plc is the parent company of a number of subsidiaries operating in New Zealand. Its first involvement in the New Zealand market came through iSOFT's Australian subsidiary. iSOFT Australia implemented its patient administration system in what is now known as the Counties Manukau DHB in 1997. The neighbouring Waitemata DHB followed Counties and implemented the same application in 2002. A private hospital, Mercy Ascot, also uses this software.
12. iSOFT NZ Limited was only recently incorporated in November 2003. Its first step was to purchase two sister companies, the Galen Group Limited and i-Health Limited, in January 2004. The Galen Group supplied patient administration software and i-Health Limited supplied clinical information software. Following this incorporation, iSOFT NZ Limited is the entity that conducts business operations for the iSOFT Group in New Zealand.
13. iSOFT Group has also been active in acquisitions in its home market, the United Kingdom. iSOFT Group recently merged with Torex, another British company in April 2004. The only penetration that Torex had in New Zealand was with its HAS

Solutions patient administration system which is supplied to two private hospital operators, the Southern Cross Group and the Cornwall Park Hospital.

Hewlett-Packard New Zealand (Hewlett-Packard)

14. Hewlett-Packard New Zealand is an unlimited liability company owned by Hewlett-Packard Australia & New Zealand Pty Limited, a wholly owned subsidiary of Hewlett-Packard Australia. The ultimate parent company is Hewlett-Packard Company, a United States-listed corporation.
15. Hewlett-Packard is an international technology solutions provider to individual consumers, businesses and institutions. The company provides information technology infrastructure, personal computing and access devices, global services and imaging products.
16. Hewlett-Packard acquired the assets subject to this application in 2001, when it purchased CSC New Zealand Limited. It has no other involvement in the health information technology sector.

Other Relevant Parties

IBA Health Limited (IBA)

17. IBA is an Australian company, founded in 1982, that supplies healthcare information services in Australia, New Zealand, Singapore and the United Kingdom.
18. IBA offers a patient administration system which can be integrated with its range of clinical solutions. Its main involvement in the New Zealand market is with its administration systems.

Orion Systems International Limited (Orion)

19. Orion Systems International is a New Zealand company formed in 1993. It has offices in the United States, Canada, United Kingdom and Australia.
20. Orion is a provider of clinical workflow and integration technology for the healthcare sector. Orion does not supply a patient administration system. It has in the past partnered itself with a PAS provider when this has been required in tender situations.

TrakHealth Pty. Limited (TrakHealth)

21. TrakHealth is an Australian company, founded in 1991, that supplies a fully integrated patient administration and clinical software package. TrakHealth's software is currently used and supported in 23 countries around the world.
22. Last year, TrakHealth was in discussions with Southland District Health Board to implement its patient administration system until negotiations were discontinued.
23. TrakHealth has recently invested in development and has a product that has been tailored to meet the requirements of the New Zealand market.

District Health Boards (DHBs)

24. District Health Boards are responsible for funding the provision of health and disability services in their district. DHBs are bodies corporate owned by the Crown and are required to operate in a transparent manner.

25. DHBs took over the responsibilities previously administered by the Health and Hospital Service providers in January 2001. There are currently 21 DHBs in New Zealand.
26. The objectives of the DHBs include improving the health of communities, promoting the integration of health services and promoting effective care of those in need of personal health services or disability support.

New Zealand Health Information Services (NZHIS)

27. The New Zealand Health Information Service is a business unit of the Ministry of Health (MOH) and is responsible for the collection and dissemination of health-related data. Its goal is to make information readily available to support improvements in health services.
28. One of the responsibilities of NZHIS is the provision of appropriate databases, systems and information products, which include patient administration software. In this regard the NZHIS provides a supervising role in the procurement and operation of PAS systems.

INDUSTRY BACKGROUND

29. When a person enters the hospital system their details are recorded for administrative purposes. The computer system that performs this function is known as a Patient Administration Software (PAS) system, or alternatively an Admission, Discharge and Transfer system. PAS is designed to capture the key administrative details for patients on, and during, admission to hospital.
30. A PAS system's primary purpose is to place the patients in their allocated hospital beds. These systems are often described as supplying the hospital with all the elements required to run a hotel service. The hospital has numerous beds and as such it has to be able to efficiently allocate these beds to its patients.
31. Not only must the bed be correctly allocated, the resulting information must be accessed by a number of different people. Every patient might see a dozen or so different doctors, clinicians and physiotherapists in various departments every day. This is over and above the duties of the ward nurses. All need to be able to locate their patient at various times throughout the day and night.
32. Accordingly, allocation and tracking are the core features of a PAS system. Essentially it enables the hospital to manage and track patient movements throughout the length of their stay at the hospital. A more sophisticated PAS system is able to handle further operational data that deal with 'outpatient' details. Outpatients are people who are not formally admitted into a hospital but do receive services. They might only be receiving minor treatment and as such do not need to be assigned to a bed.
33. This is often the case in the emergency department where a patient might arrive by ambulance, be treated immediately and then released. Alternatively the hospital may not have the resources to care for the injured patient and so that patient is referred to a more suitable hospital. A PAS system needs to be able to administer these types of

scenarios. It may also be required to administer such things as patient waiting lists, the scheduling of appointments, and the management of the surgical theatres.

34. The Ministry of Health drives a large component of the requirements that are determined for data capture in public hospitals by the PAS and, as such, most systems ultimately provide the same outcome or output.
35. Clinical information systems are another important aspect of information technology in a hospital. The PAS handles the tracking of patients and it theoretically remains behind the scenes. Clinical software plays a more direct role in patient care. These are the software applications used in specific areas and departments of the hospital such as the radiology, the neurology and the pharmacy departments.
36. It is necessary for these clinical systems to interface and communicate with the PAS system in order for the hospital to be run efficiently. Clinical systems are designed to sit on 'top' of the central PAS. They are both able to function with different hardware.
37. Historically in New Zealand the suppliers of PAS have not supplied clinical systems, resulting in many hospitals having multiple suppliers of software. More recently the market has seen a move towards offering a complete package and firms, such as iSOFT and IBA, now provide clinical information system solutions. Primarily these systems have been obtained through acquisition.
38. The New Zealand health sector has undergone numerous structural changes in recent history namely the move from Hospital Boards, to Area Health Boards, to Crown Health Enterprises, to Health and Hospital Service providers, and finally to the current DHB structure. This has had a significant impact on the procurement of PAS systems. The Ministry of Health, through the NZHIS, would like to achieve greater standardisation, increased interoperability, greater collaboration and more effective use of capital with DHBs in the procurement of software used in public hospitals.
39. The decision to purchase a PAS rests with the DHB itself. However the Ministry of Health provides support to the DHBs in this area and, through the NZHIS, has introduced guidelines for procuring information technology. These guidelines aim to ensure the DHBs follow a common process. Although the decision rights remain with each particular DHB, the NZHIS recommends that the processes outlined in the guidelines are adhered to, particularly with respect to purchases of a value greater than \$500,000 (as noted in the DHB delegations around the use of capital and the procurement of information technology). The guidelines focus the DHB activity around developing a business case to meet their requirements and ensure a comprehensive evaluation of options is undertaken. The guidelines require the DHBs to work in a collaborative fashion across their geographic regions which ensures the DHBs are made aware of known potential risks and current solutions that may be associated with large procurements.
40. An example of the influence of these guidelines occurred with the Southland DHB in the first quarter of 2003. Southland DHB selected TrakHealth as their preferred supplier of PAS, replacing the incumbent IBA system. TrakHealth is an Australian company and is not currently a supplier in New Zealand. [

]. This involved consultation with its neighbouring DHBs, namely Otago and the West Coast. It also involved an assessment of the potential risks of using a system that was not currently operating in New Zealand. This process saw Southland DHB reverse its previous recommendation and in due course select iSOFT as its preferred PAS supplier. []

41. In recent times there has been a move towards regional alignment of systems. As clinicians often work between different DHBs there is a desire for common systems to create some efficiency in not having to train people twice. There is also a strong argument for regional alignment based on the sharing of costs particularly in respect of upgrades and improvements to the software systems which can be shared across a number of DHBs. Regional alignment issues will be considered further in the competition analysis.
42. The legacy systems that exist in the market currently are the Galen, HOMER, ORA*CARE, HAS, SMS and HOSPRO systems and also the Auckland DHB and South Canterbury DHB in-house systems. HOMER and ORA*CARE are the Hewlett-Packard systems. The two systems that are not considered legacy systems are the iSOFT and the IBA PAS systems.

MARKET DEFINITION

43. The Act defines a market as:

“... 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.”⁴

44. For competition purposes, a market is defined to include all those suppliers, and all those buyers, between whom there is close competition, and to exclude all other suppliers and buyers. The focus is upon those goods or services that are close substitutes in the eyes of buyers, and upon those suppliers who produce, or could easily switch to produce, those goods or services. Within that broad approach, the Commission defines relevant markets in a way that best assists the analysis of the competitive impact of the acquisition under consideration, bearing in mind the need for a commonsense, pragmatic approach to market definition.⁵
45. For the purpose of competition analysis, the internationally accepted approach is to assume the relevant market is the smallest space within which a hypothetical, profit-maximising, sole supplier of a good or service, not constrained by the threat of entry, would be able to impose at least a small yet significant and non-transitory increase in price, assuming all other terms of sale remain constant (the SSNIP test). The smallest space in which such market power may be exercised is defined in terms of the four dimensions (product, functional, geographic and customer) of the market discussed below. The temporal dimension is not relevant to the analysis in this case. The

⁴ s 3(1A) New Zealand Commerce Act 1986.

⁵ Australian Trade Practices Tribunal, *Re Queensland Co-operative Milling Association*, above note 10; *Telecom Corporation of NZ Ltd v Commerce Commission & Ors* (1991) 3 NZBLC 102,340 (reversed on other grounds).

Commission generally considers a SSNIP to involve a five to ten percent increase in price that is sustained for a period of one year.

Product Market

46. Initially, markets are defined for each product supplied by two or more of the parties to an acquisition. For each initial market so defined, the Commission considers whether the imposition of a SSNIP would be likely to be profitable for the hypothetical monopolist. If it were, then all of the relevant substitutes must be incorporated in the market.
47. The greater the extent to which one good or service is substitutable for another, on either the demand-side or supply-side, the greater the likelihood that they are bought and supplied in the same market. The degree of demand-side substitutability is influenced by the extent of product differentiation.
48. Close substitute products on the demand-side are those between which at least a significant proportion of buyers would switch when given an incentive to do so by a small change in their relative prices.
49. Close substitute products on the supply-side are those between which suppliers can easily shift production, using largely unchanged production facilities and little or no additional investment in sunk costs, when they are given a profit incentive to do so by a small change in their relative prices.

Patient Administration Software

50. The Applicant has submitted that the relevant market is the market for supplying hospitals in New Zealand with patient administration software and related implementation, consulting and support services.
51. From a demand side perspective there is no real substitute for patient administration systems. All New Zealand public hospitals run a system that has been specifically designed for the New Zealand requirements of managing patients whether by way of a commercially available product or a system that has been developed and maintained in-house. The Commission has been informed that the systems currently in use in New Zealand public hospitals are very similar in functionality and operability with many functions being legislatively required. Most variations are in the look, layout and required hardware rather than their functionality. This uniqueness is such that a five to ten percent increase in the price of patient administration software by a hypothetical monopolist would be very unlikely to induce customer switching to any other product such as to make the price increase unprofitable.
52. From a supply side perspective the Applicant has submitted that very similar equipment, skills and know-how are required in order to produce a wide range of similar health information technology products.
53. The Commission has found conflicting evidence in this regard. The Commission has been informed that the development of a new software solution would require a significant re-deployment of resources and investment, a large component of which would be sunk. The Commission has also been informed that the development of a patient administration system would take considerably longer than 12 months

regardless of an existing presence in the health information technology sector. In counter to this however, the Commission notes the fact that companies, such as TrakHealth, have developed such systems in recent years and specifically in the case of TrakHealth have developed a system that is both a PAS and a CIS. On balance, the Commission concludes that while there is a degree of supply-side substitutability in consideration of the relevant market it is insufficient to offset the lack of demand side substitutability.

54. Further, the Commission considers that it is not appropriate to attempt to identify all of the services that may be bundled with the sale of the software system such as installation and maintenance services. Such services are the subject of negotiation in each case and will be specified within the contractual agreement for the purchase and use of the software. As such the Commission is of the view that it is appropriate in this case for the product market definition to be for patient administration systems and related services, acknowledging that the scope of such services will vary in each case.

Clinical Information Systems (CIS)

55. Although no aggregation in respect of clinical information systems will result from the acquisition the Commission considers that it is appropriate to consider the market for Clinical Information Systems to assess whether there is the potential for power to be exercised in the market as a result of the acquisition. Any such ability would stem from the fact that iSOFT (and IBA) is vertically integrated, providing both PAS and CIS.
56. Clinical Information Systems are highly technical and complex pieces of software. They provide functionality and information to a hospital clinician without which it would be difficult for a hospital to function. There is no demand side substitute for these software packages and the demand for them is inelastic. The systems are specifically designed to perform the functions required by the different areas and specialists within a hospital. As such the systems consist of varying modules which are differentiated to suit the particular hospital department. Clinical information systems, in recent times, are generally procured as a suite of products rather than a choice of individual components.
57. As with patient administration systems, there is likely to be a degree of supply-side substitutability in regards to clinical information systems, as evidenced by [] However, again the development of a clinical information system would be a very costly and lengthy exercise even if a company with an existing presence in the health information technology sector possesses the relevant equipment and expertise.
58. It is also appropriate with respect to these systems to include the range of services that are sold contemporaneously with the system. Again the scope and detail of the related services is a matter that will be contractually defined in each case.
59. Accordingly the Commission concludes that it is appropriate to define the following product markets in this case:
- The market for patient administration software systems and related services.

- The market for clinical information systems and related services.

Functional Markets

60. The production, distribution and sale of a product typically occurs through a series of functional levels, conventionally arranged vertically in descending order. Generally, the Commission identifies separate relevant markets at each functional level affected by an acquisition, and assesses the impact of the acquisition on each.
61. It is at the supply level (which aggregates both sales and distribution) that any competition effect will occur as a result of the acquisition in respect of both the market for patient administration software and related services and the market for clinical information systems and related services. The software systems are developed by iSOFT in its research and development centres situated in the United Kingdom and India and development is unaffected by this acquisition. As such the Commission is of the view that it is appropriate to define the relevant functional level as the supply level for both of the markets under analysis.

Geographic Markets

62. The Commission defines the geographic dimension of a market to include all of the relevant, spatially dispersed sources of supply to which buyers would turn should the prices of local sources of supply be raised.
63. Suppliers of patient management systems and clinical information systems operate on a nationwide basis from a regional office with, in most instances, a head office located overseas. The high value of the product, the length of the contract cycle and infrequency of system purchases result in the value of each contract won being high, which ultimately results in any locality related costs being relatively insignificant.
64. Accordingly the Commission concludes that the appropriate geographic market is the New Zealand market.

Customer Market

65. Where a significant group of buyers within a relevant market is likely to be the subject of price discrimination, the Commission considers whether it would be appropriate to define additional markets based on particular uses for a good or service, particular groups of buyers, or buyers in particular geographic areas that are captive to those products, and in the face of a price increase unable to switch. For example, some customers may be captive to a particular supplier by virtue of the costs associated with switching to an alternative source of supply.
66. The Applicant has submitted that the relevant customer market is the sale of systems to hospitals, which covers both public and private facilities. However, the Commission has found that the systems sold to private hospitals are differentiated in terms of the billing functionality that is required in order for them to properly manage their costs. Boulcott Hospital informed the Commission that private hospital systems also need a greater focus on contract management and scheduling than public hospitals do.
67. In terms of any private healthcare market for systems this acquisition will likely have minimal effect. Hewlett-Packard does not supply patient administration software

systems to private hospitals nor is its product marketed for such an application. iSOFT currently only has a minimal presence in the private health industry with its PAS software.

68. The Commission is also of the view that the relevant customers for these software systems are the DHBs, rather than individual hospitals. A DHB ultimately has the purchasing power to acquire a system and may have multiple hospitals under its control. As such the hospitals within a particular DHB are not free to make separate purchasing decisions.
69. Accordingly the Commission concludes that the appropriate customer market in this case is the supply of systems to DHBs.

Conclusion on Market Definition

70. The Commission concludes that the relevant markets are:

- The New Zealand market for the supply of patient administration software systems and related services to District Health Boards (patient administration software market).
- The New Zealand market for the supply of clinical information systems and related services to District Health Boards (clinical information system market).

FACTUAL AND COUNTERFACTUAL

71. In reaching a conclusion about whether an acquisition is likely to lead to a substantial lessening of competition, the Commission makes a “with” and “without” comparison rather than a “before” and “after” comparison. The comparison is between two hypothetical future situations, one with the acquisition (the factual) and one without (the counterfactual). The difference in competition between these two scenarios is then able to be attributed to the impact of the acquisition.

The Factual

72. The proposed acquisition relates to the transfer of five customer contracts for the provision of software support services to the Wanganui, Mid-Central, Nelson-Marlborough, Canterbury and Otago District Health Boards. The proposed acquisition also involves the transfer of associated goodwill and intellectual property rights in the HOMER and ORA*CARE software.

73. iSOFT has submitted that there are three main reasons for the acquisition namely:

- i. [];
 - ii. [];
 - iii. [];
-]; and
-]

74. iSOFT has submitted that it will continue to provide software support services to the customers involved in the acquisition, in the short term, and seek to persuade these customers to upgrade to iSOFT's new generation software system in due course.

The Counterfactual

75. Hewlett-Packard informed the Commission that the provision and maintenance of patient administration software systems is not part of its core business, having acquired these systems through its acquisition of CSC New Zealand Limited in 2001.
76. Both the HOMER and ORA*CARE products are considered to be legacy systems and Hewlett-Packard does not actively compete in the tender market and []
77. Hewlett-Packard informed the Commission that it has []

78. []

79. The Commission was informed by Hewlett-Packard that there were [] bidders for its software. []
80. Additionally, the Commission notes that there is a general trend in this market to replace legacy systems which would, in time, see the Hewlett-Packard systems being replaced by newer generation software products.
81. The Commission concludes that the most likely counterfactual is the sale of the assets, subject to this acquisition, to another participant in the health information software industry.

COMPETITION ANALYSIS

Existing Competition

82. Existing competition occurs between those businesses in the market that already supply the product, and those that could readily do so by adjusting their product-mix (near competitors). Supply-side substitution by near competitors arises either from redeployment of existing capacity, or from expansion involving minimal investment, in both cases involving a delay of no more than one year.
83. An examination of concentration in a market can provide a useful indication of the competitive constraints that market participants may place upon each other, providing there is not significant product differentiation. Moreover, the increase in seller concentration caused by a reduction in the number of competitors in a market by an acquisition is an indicator of the extent to which competition in the market might be lessened.

84. The Commission estimates market shares for all significant participants in the relevant market. Market shares can be measured in terms of revenues, volumes of goods sold, production capacities or inputs (such as labour or capital) used.
85. An aggregation that would result in a very small change in the level of market concentration is unlikely to be associated with a substantial lessening of competition in a market. On this basis, indicative safe harbours may be specified.
86. A business acquisition is considered unlikely to substantially lessen competition in a market where, after the proposed acquisition, either of the following situations exist:
- where the three-firm concentration ratio (with individual firms' market shares including any interconnected or associated persons) in the relevant market is below 70%, the combined entity (including any interconnected or associated persons) has less than in the order of a 40% share; or
 - where the three-firm concentration ratio (with individual firms' market shares including any interconnected or associated persons) in the relevant market is above 70%, the market share of the combined entity is less than in the order of 20%.
87. The Commission recognises that concentration is only one of a number of factors to be considered in the assessment of competition in a market. In order to understand the impact of the acquisition on competition, and having identified the level of concentration in a market, the Commission considers the behaviour of the businesses in the market. Specifically, the Commission seeks to understand the dynamics of the competition that would exist between the remaining firms in the market, compared to what would exist in the absence of the merger.

Patient Administration Software Market

Market shares

88. The Applicant submitted that there are three possible ways of analysing market shares of the various competitors in the market for PAS systems. Market shares for PAS systems could be assessed either by the number of hospitals where they are installed, by the number of customers that have purchased a particular PAS system, or finally by the number of hospital beds the PAS administers.
89. The Applicant considered the most appropriate measure is the breakdown of market share by customer. Based on this assessment and on the data supplied, iSOFT Group's market share by customer is 23.2% (being the combined shares of Galen, HAS Solutions and iSOFT Australia). After the proposed acquisition of the Hewlett-Packard assets the data suggested that iSOFT's market share by customer would increase to 34.8%. Combined with the two next biggest suppliers (being IBA and Hospro) the data indicated a three-firm concentration ratio of 51.1%. The Commission notes that the market share information supplied was inclusive of both the public and private health care sectors.
90. In speaking to industry participants the Commission found that the most common indicator of market shares used was the PAS used in the 21 DHBs because, as discussed in the industry background, the DHB is the entity with the purchasing

power. Market shares by hospital or by hospital bed numbers skew the market share data as hospitals do not make individual purchasing decisions within the same DHB. Bed numbers also do not accurately reflect market shares. Although the scale of the system and hardware requirements might differ with the size of the hospital, software systems are sold as a package that is not dependant on bed numbers.

91. Accordingly the Commission considers that a measure by DHB is the most accurate and appropriate indicator of market share in this case. Table 1 represents the market in terms of the systems currently being operated by the 21 New Zealand DHBs.

Table 1
Patient Administration Software, Market Shares by DHB

Vendor	No. of DHBs	PAS Application	Market Share
iSOFT	6	iSOFT, Galen	28.6%
Hewlett-Packard	5	ORA*CARE, HOMER	23.8%
<i>Combined Entity</i>	11		52.4%
IBA	6	ibaPAS	28.6%
In-house Systems	2		9.5%
Hospro	1	Hospro	4.8%
SMS	1	SMS	4.8%
	21		100%

92. Based on the information in table 1, iSOFT will have a 52.4% share of the market post-acquisition with the next largest competitor being IBA with 28.6%.
93. The majority of PAS systems in New Zealand are classified as legacy products. This indicates that the product is based on out-dated technology. Although these products are still used and may provide a revenue stream for the vendor, the expectation is that in the medium to long term these legacy products will be withdrawn. These include all the Hewlett-Packard products, the Galen products (currently supported by iSOFT) and the SMS and Hospro products. The only systems that are currently being used in New Zealand that are not categorised as legacy are the iSOFT PAS and the IBA PAS.
94. Many DHBs are in the process of selecting a new PAS to replace their existing legacy system. Accordingly the information in table one does not fully represent the procurement activities, regional collaboration and negotiations that are currently taking place in the market. Some examples of recent activity are the decisions of Southland DHB and Capital & Coast DHB to enter into preferred supplier arrangements with iSOFT and IBA respectively.
95. There are ten sites with legacy systems that are likely to be replaced in the next few years. Post-Acquisition iSOFT would be the incumbent provider at nine of those sites. Waikato's Hospro system is the tenth. Of the 5 DHBs that iSOFT gains access to through the acquisition three are expected to remain with iSOFT for regional alignment reasons. The other two will depend on decisions made by other DHBs.

There are also two in-house systems which are currently meeting the needs of the respective DHB but will be replaced in time.

96. Of the remaining nine sites iSOFT is the incumbent provider to three of these sites whilst IBA is the provider to six. These numbers are likely to move however in the near future due to regional alliances. This will result in some DHBs switching systems such as the West Coast DHB which has followed Southland and selected iSOFT as its preferred supplier over its current supplier IBA.
97. While market shares can be defined for the market immediately post-acquisition, the Commission considers that it is difficult to draw conclusions on what will happen in the PAS market in the future from the market share information above. This is due to the current procurement activities of a large number of DHBs, with the outcome in many cases likely to result from a combination of factors including price, functionality, regional alignment, previous dealings with the vendor and incumbency.

Existing competitors

98. IBA is the main competitor to iSOFT in the market for the supply of patient management software systems. IBA currently has systems in six DHBs and has recently become the preferred supplier to Capital & Coast. The Commission has been informed that the IBA PAS system is functionally equivalent to iSOFT's PAS system.
99. It appears that IBA (post-acquisition) is likely to have five DHB sites in the medium term with the potential to win sites such as Waikato (which is currently in a closed Request for Proposal with iSOFT and IBA) and other sites such as Mid-Central, Whanganui and Wairarapa when their systems come up for replacement. However, due to regional alignment considerations IBA may lose some of its existing sites including its presence in the West Coast as the West coast DHB is likely to align itself with Southland and Otago and implement an iSOFT system.
100. SMS and HOSPRO no longer support their systems currently in use in New Zealand. These systems are considered to be legacy systems and both Capital & Coast and Waikato DHBs (the current users of these systems) are in the middle of procurement activities to change providers. Accordingly SMS and HOSPRO are not considered to be active competitors in the market for patient administration software systems.
101. South Canterbury and Auckland are currently meeting their PAS needs with software that has been developed and maintained in-house. Auckland DHB informed the Commission that they will look to replace their system in time but that the investment required is substantial and it is not financially viable for them at this point in time. Both in-house systems are not commercially available and will be replaced in due course. These in-house software systems are not considered to be active competitors in the market for patient administration software systems.
102. Hewlett-Packard currently supports five sites in New Zealand using its HOMER and ORA*CARE products which are the subject of this acquisition. Hewlett-Packard has not upgraded the HOMER and ORA*CARE products since they were purchased through acquisition from CSC New Zealand Limited in December 2001. [

] Accordingly, Hewlett-Packard is not considered to be an active competitor in the patient administration software market.

103. In assessing the ability of a DHB to switch between the two existing competitors post-acquisition, the Commission was informed that there are two strong influences on the choice of a patient management system in a particular hospital, being the desire for regional alignment of systems between neighbouring DHBs and the preference for an incumbent supplier. This latter preference was suggested due to the ability for an incumbent supplier to provide an upgrade path to a DHB looking to upgrade their system, which may allow for a smoother transition with fewer disruptions to the hospital (assuming that functionality and price are equal) and potentially avoid the need for an RFP process.
104. However, Mike Rillstone, Group Manager of NZHIS, informed the Commission that it would be unwise for a DHB to avoid the guideline recommendations through adopting a piece-meal replacement of their PAS system as this would circumvent any chances for savings and efficiencies from regional alignment, potentially increase issues around interoperability, duplication and add cost and risk due to compliance issues with New Zealand health information standards. Another reason would be that there is an increased system risk and increased transition costs if a replacement is done in a piece-meal fashion. These are all elements that DHBs would usually seek to avoid. [

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105. The Commission is of the view that any advantage that stems from a company being the incumbent provider of a legacy system is not clear cut. The replacement of a legacy system would require a greater investment in training, hardware, software and related services than simply an upgrade to a newer version of an existing software system. Accordingly, while the Commission considers that there may be the ability for iSOFT to establish a good relationship with the five customers being acquired, it considers that there is no substantial advantage gained by the acquisition through incumbency, given that the systems being acquired are legacy systems and not new systems that currently compete in the market. The development of a relationship and reputation as a good vendor, with good support procedures through being the incumbent provider of a system is only one factor considered during a procurement process, with regional alignment being one of the other key factors for consideration.
106. One example of this is Mid-Central DHB who informed the Commission that they were unsure of who the future supplier of their PAS system would be. While there may be advantages with selecting the incumbent provider (which post-acquisition would be iSOFT), on the other hand, there exists an equally strong argument for alignment with Capital and Coast (who currently have a preferred supplier arrangement with IBA).
107. The Commission has been informed that the choice of iSOFT as the preferred supplier in Southland will result in Otago and West Coast (through their Southern Alliance) being very likely to implement iSOFT systems in the near future. It has

been further suggested that there would exist a strong incentive for the remaining three South Island DHBs to also implement iSOFT systems for regional alignment. This scenario would be consistent with the Ministry of Health's procurement guidelines described in the Industry Background.

108. In comparing the factual and the counterfactual scenarios it is important to consider that Hewlett-Packard is not an active competitor in the market for patient administration software systems in New Zealand. The Commission is of the view that the change in the factual vis-à-vis the counterfactual scenario is not significant because the active number of competitors in the market is not reduced as a result and also because being the incumbent provider of a system does not appear to guarantee victory at a subsequent procurement, particularly in regards to replacing legacy systems. A key driver in this market also appears to be related to regional alignment and the desire to replace legacy systems with reputable New Zealand based suppliers, as encouraged by the Ministry of Health.

Near competitors

109. Australian based TrakHealth is considered to be a near competitor to this market. It informed the Commission that it was recently in discussions with Southland District Health Board for the provision of a patient management system until a very late stage when negotiations were discontinued. It said that it had made the necessary adjustments to its patient administration software to enable it to function correctly in a New Zealand environment and could easily, with little additional investment required, supply its product into the New Zealand market in the future.

110. [

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111. The Commission considers that even though TrakHealth is not currently focusing on the New Zealand market, it could quickly move to expand into the market especially if sponsored by a DHB or group of DHBs. Therefore, the presence of TrakHealth and the threat that it could potentially supply the New Zealand market easily is considered to act as an additional constraint on the actions of the combined-entity.

Clinical Information Systems Market

112. iSOFT has a clinical information system in New Zealand that was acquired through its acquisition of i-Health in 2004. No horizontal and no further vertical aggregation results in the market for clinical information systems as a result of the proposed acquisition, as Hewlett-Packard does not have a clinical information system. However, the concern expressed by a number of industry participants was that an increase in market power in terms of the patient administration software market could ultimately lead to a lessening of competition within the market for clinical information systems.
113. Whilst it is arguable that having a portfolio of systems may give a particular vendor an advantage when attempting to bid for a contract that requires numerous systems

this acquisition does not create any advantage, in respect of iSOFT, that it did not already have.

114. Further, in light of the analysis in respect of the patient administration software market above there does not appear to be any degree of market power which could be exercised in the clinical information systems market which did not already exist. The Commission concludes, therefore, that no lessening of competition will occur between the factual and the counterfactual scenarios as a result of the acquisition and, accordingly, this market will not be considered further.

Conclusion on Existing Competition

115. The Commission considers that in the factual scenario vis-à-vis the counterfactual scenario very little change to the competitive environment will occur. The number of existing competitors in the market will not change as Hewlett-Packard is not considered an active competitor in the market at present. Further, the Commission does not consider that being the incumbent provider of a legacy system provides any real advantage over a number of other factors such as price, functionality, or regional alignment such to give iSOFT an advantage that would result in a substantial lessening of competition. The presence of IBA as an active existing competitor and TrakHealth as a near competitor gives DHBs options during the tendering process.
116. Accordingly the Commission concludes that the combined entity will continue to face a strong degree of constraint from IBA and TrakHealth in the market for patient administration software, and that there is limited change in the competitive situation between the factual and counterfactual scenarios.

Potential Competition

117. An acquisition is unlikely to result in a substantial lessening of competition in a market if the businesses in that market continue to be subject to real constraints from the threat of market entry.
118. The Commission's focus is on whether businesses would be able or would be likely to be able to enter the market and thereafter expand should they be given an inducement to do so, and the extent of any barriers they might encounter should they try. Where barriers to entry and expansion in a market are clearly low, it may be unnecessary for the Commission to identify specific businesses that might enter. In other markets, where barriers are higher, the Commission may seek to identify possible new entrants as a way of testing the assessed entry and expansion barriers.

Barriers to Entry and Expansion

119. The likely effectiveness of the threat of new entry and expansion in preventing a substantial lessening of competition in a market following an acquisition is determined by the nature and effect of the aggregate barriers to entry into that market. The Commission is of the view that a barrier to entry is best defined as anything that amounts to a cost or disadvantage that a business has to face to enter a market that an established incumbent does not face.

Structural barriers to entry

120. The Applicant has submitted that imports have the ability to provide considerable constraints on domestic suppliers. The Applicant submitted that there are no tariffs, quotas or licensing requirements on importing the software. However the Commission has identified two possible barriers to entry in the market for PAS, the requirements for system modification and a New Zealand presence. These are assessed below.

System Modification

121. The Commission has been informed that software from overseas vendors would require modification to comply with New Zealand regulatory requirements, such as the necessary interface with the National Health Index, and to be suitable for implementation and use with the New Zealand public health system.
122. iSOFT submitted to the Commission that the modification of software to meet the requirements of the New Zealand market were minimal and relatively easily executed. However, [] were of the opposite view stating that significant time and expense would be required in order to develop an adequate New Zealand software solution.
123. TrakHealth is one example of a company which has recently attempted to enter the New Zealand market through discussions with Southland District Health Board. The Commission has been informed by TrakHealth that making the modifications necessary to their software was not a hugely complicated exercise due to the fact that it had already made similar alterations to their software in other countries around the world. TrakHealth estimated that the modifications required would have been able to be performed in a matter of months at a minimal cost.
124. It is also worth noting that iSOFT and IBA are based in the United Kingdom and Australia respectively and have both managed to modify their software and establish a strong presence in the New Zealand market.
125. The system modification barriers to entry for a United States company are considered to be higher than for a United Kingdom or Australian company. This is due to the fact that the health system in the United States is fundamentally different from that in New Zealand with more of an insurance and private health care driven approach. TrakHealth informed the Commission that United States is one country that they do not sell their software to as it would be more difficult for them to modify the software in order to provide an adequate solution.
126. The Commission considers that modification of existing systems from overseas software developers would be required for entry but notes that this has been performed by companies in the recent past. Most of the software systems currently serving the New Zealand market are systems that have had their origins overseas which have been modified and adapted to fit the New Zealand market at some point. At least for an Australian or United Kingdom based software developer the Commission is of the view that system modification only presents a low barrier for a potential entrant.

New Zealand presence

127. The Commission also considers that a company looking to enter the New Zealand market would be required to establish a New Zealand presence in order to be able to offer support and maintenance effectively and to bring them more into line with the emerging Ministry of Health procurement guidelines.
128. The Commission considers that the cost of such an exercise is not prohibitive requiring only registration with the New Zealand Companies Office and a few support staff to be based in New Zealand. In comparison to the value of a contract, particularly with a larger District Health Board, it is considered a low barrier to entry.

Strategic barriers to entry

129. The Applicant did not consider that there were any strategic barriers to entry into the market for the supply of patient administration software systems. However, the Commission has identified the following factors which are likely to be considered by a prospective competitor in contemplating entry into the market.

Ministry of Health procurement guidelines

130. The Ministry of Health, within the past 12 months and following sector consultation, has introduced a new approach to the procurement of information systems in the public health sector. A set of processes were established that need to be followed by the DHBs. These processes are represented in the document 'Business Case Guidelines for Investment in Information Technology' produced by the MOH. The DHBs should not avoid implementing these guidelines; however their approach to procurement and purchase decision responsibility still remains with the individual Board. The guidelines encourage regional collaboration in decision making and also encourage a DHB to present a business case to the regional, National Capital groups, and to the Ministry for procurements in excess of \$500,000. Mike Rillstone from NZHIS informed the Commission that the guidelines are required to focus the sector on identifying clearly the business requirement, identify opportunities for collaboration between DHBs with potential vendors, achieve greater standardisation, increase interoperability between solutions and ensure a more effective use of the capital available. He stated that this approach does encourage looking initially at vendors with a New Zealand presence that have demonstrated the ability to deal with such business needs successfully in the past. He continued to say that in terms of overseas vendors the test is therefore more difficult if they are only duplicating a current vendor's capability. However, if the business need is one that has not been addressed by any software vendor in the past then the playing field is levelled.
131. One example of the influence of the Ministry of Health was the recent activity of Southland DHB in the procurement of their PAS system. Southland DHB selected TrakHealth as its preferred supplier for its new PAS system and were asked to [] and place more emphasis on regional collaboration and the ability for a supplier with an existing New Zealand presence to be able to fulfil its business need. Southland has subsequently chosen iSOFT as its preferred supplier.
132. The Ministry of Health and DHBs have expressed a desire for a degree of system consolidation. Many industry players anticipate that the market, going forward, will

be split between two strong suppliers. Mike Rillstone said that it would not be undesirable for a lesser number of vendors than at present to actively compete for new contracts. He said however, that too few or too many suppliers is a risk, in that a particular system may be an orphan (which has occurred with the SMS and HOSPRO systems) or not meet the changing needs of the New Zealand market, as the market is not considered big enough to support numerous vendors.

133. The Commission considers that the recent experience of TrakHealth with respect to Southland DHB and the approach of the Ministry of Health towards procurement and consolidation is likely to be of particular concern to a potential entrant and amount to a significant barrier to entry into the New Zealand market.

The ability to secure a critical customer base

134. [] as the opportunities to obtain a critical mass of customers in order to justify the initial investment that would be required does not exist. [] said that with the increasing importance of regional alignment in the selection of systems and the current stronghold of IBA and iSOFT on most of the market there is limited scope for a viable customer base. This consideration would be of even more concern to []
135. Most industry participants spoken to were also of the view that the New Zealand market as a whole is relatively small and that there would be little incentive for an international software developer to attempt to enter the New Zealand market as there are more lucrative business opportunities in North and South America. This consideration is further emphasised by the fact that PAS systems are usually in place for a long time due to the costs, time and disruptions involved in implementing new systems.
136. The Commission is of the view that there are significant switching costs in changing PAS suppliers, when the incumbent PAS is a relatively new product. There are significant costs including the cost of the software, hardware, installation and data transfer. As such, the likelihood of a potential entrant being able to expand into New Zealand on the back of one DHB contract is unlikely due to the fact that a great majority of the New Zealand DHBs either have new systems already in place or are in the process of procuring a new system and have choice between the two existing suppliers. The switching costs with respect to incumbent systems, however, are less of a concern as they will need to be incurred regardless of the new system chosen.
137. The Commission concludes that the unlikelihood of being able to obtain a critical customer base to make entry into the market viable amounts to a significant strategic barrier to entry into the New Zealand patient administration system market.

Conclusion on Barriers to Entry

138. The Commission concludes that the barriers to entry into the New Zealand market for patient administration systems are high due to strategic considerations such as the encouragement of the NZHIS to look within New Zealand for a suitable information technology solution and the lack of certainty over the ability to obtain a critical mass

of customers (due to switching costs and the increasing desire for system consolidation).

The “LET” Test

139. In order for market entry to be a sufficient constraint, entry of new participants in response to a price increase or other manifestation of market power must be Likely, sufficient in Extent and Timely (the LET test).
140. The mere possibility of entry is, in the Commission’s view, an insufficient constraint on the exercise of market power, and would not alleviate concerns about a substantial lessening of competition. In order to be a constraint on market participants, entry must be likely in commercial terms. An economically rational business would be unlikely to enter a market unless it had a reasonable prospect of achieving a satisfactory return on its investment, including allowance for any risks involved.
141. If it is to constrain market participants, the threat of entry must be at a level and spread of sales that is likely to cause market participants to react in a significant manner.
142. If it is to alleviate concerns about a substantial lessening of competition, entry must be feasible within a reasonably short timeframe, considered to be two years, from the point at which market power is first exercised.

Likelihood

143. The desire for system collaboration, the recent selection and subsequent re-evaluation of Southland DHB and the desire for software suppliers to have a presence in New Zealand present a strong disincentive for potential competitors contemplating entry.
144. There also seem to be considerable advantages for a District Health Board in choosing a vendor with a New Zealand presence, working knowledge of the New Zealand market and working proven systems in place around the country both in terms of cost and efficiency.
145. Whilst the Commission is of the view that a suitable product could be developed with time, in conjunction with a New Zealand DHB, it appears unlikely that an overseas software company would be prepared to make such an investment when there is the risk that it may not be possible to secure more than one New Zealand customer, which would be needed to make such an operation viable. The risk of an international software developer is also greater when the current attitude of the NZHIS is taken into account.
146. While TrakHealth, defined as a near competitor, already has a system developed, and therefore could respond to a request by a number of DHBs to enter quickly, a de novo entrant is likely to see the cost of developing a New Zealand compliant system as prohibitive in the face of the strategic barriers that exist.
147. The Commission is of the view that potential entry is unlikely due to the desire for system consolidation, the risk for DHBs in considering vendors with no presence or track record in New Zealand, the encouragement of NZHIS to look within New Zealand already for a suitable solution and the lack of certainty over the ability to

obtain a critical mass of customers required to ensure that entry into the New Zealand market would be a viable and sustainable business proposition.

148. Due to the Commission's finding that entry into the market for patient administration software systems in New Zealand is unlikely it is not necessary for the Commission to consider the extent and timeliness elements of the LET test.

Conclusion on Potential Competition

149. The Commission considers that despite the structural barriers to entry being low, strategic barriers to entry such as the encouragement of the Ministry of Health to look within New Zealand for a suitable information technology solution and the lack of certainty over the ability to obtain a critical mass of customers (due to switching costs and the increasing desire for system consolidation), potential entry into the New Zealand patient administration software market is unlikely.

Other Competition Factors

150. The potential for a firm to wield market power may be constrained by countervailing power in the hands of its customers, or alternatively, when considering buyer (oligopsony or monopsony) market power, its suppliers. In some circumstances, it is possible that this constraint may be sufficient to eliminate concerns that a business acquisition may lead to a substantial lessening of competition.
151. Where a combined entity would face a purchaser or supplier with a substantial degree of market power in a market affected by the acquisition, the Commission will consider whether that situation is such as to constrain market participants to such an extent that competition is not substantially lessened.
152. The market for patient administration systems is characterised by infrequent, high value sales that are generally made through a tendering process. As such the District Health Boards are well positioned when making the decision between tendered options as long as there is a sufficient degree of competition from other competitors in the market.
153. Regional Alliances, such as the Southern Alliance of Otago, Southland and the West Coast have started to emerge in recent times with a view to increasing DHB collaboration in the procurement process and also to strengthen their collective positioning when selecting a software vendor. These alliances will ultimately increase the countervailing power held by the DHBs when negotiating together, particularly in light of the value and length of the contracts to be won.
154. It was suggested to the Commission that even though collective bargaining power may be increased at the initial stages of procurement through regional collaboration, once a particular DHB in a certain area has chosen a particular system, a 'follow the leader' effect will occur, ultimately reducing the level of countervailing power held by the other DHBs in that particular region. There is a possibility that DHBs will not regionally align, if for example, they have had a particularly bad experience with the chosen regional supplier, or if they are particularly cost constrained. However as regional alignment is considered to be the strongest factor in procurement choice the countervailing power of the DHBs may indeed be lessened, although not altogether removed.

155. Even given this potential for slightly reduced countervailing power on the part of individual DHBs, the Commission considers that DHBs possess some countervailing power in the process of selecting a patient administration software package due to the nature of the tendering process and the high value, long term contracts that are typical to this market. And when recent moves towards regional collaboration and alignment are considered the countervailing power in respect of DHBs in collective negotiations is considered to be strong and likely to significantly constrain the combined entity.

OVERALL CONCLUSION

156. The Commission is required to give clearance to a clearance Application under section 66(3) of the Act if it is satisfied that the acquisition will not lead to a substantial lessening of competition in a market or decline clearance where the Commission is not satisfied that the acquisition will not lead to a substantial lessening of competition in a market.
157. The Commission has considered the probable nature and extent of competition that would exist in the counterfactual in the following markets:
- The New Zealand market for the supply of patient administration software systems and related services to District Health Boards (patient administration software market).
 - The New Zealand market for the supply of clinical information systems and related services to District Health Boards (clinical information system market).
158. The Commission considers that the appropriate counterfactual is the sale of the assets subject to this acquisition to another participant in the health information software industry.
159. The Commission is satisfied that the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in the factual scenario vis-à-vis the counterfactual scenario, in:
- the patient administration software market due to the presence of the existing competitor IBA and the near competitor TrakHealth and the countervailing power of the New Zealand District Health Boards; and
 - the clinical information system market due to the findings in respect of the patient administration software market and the minimal change in the factual and counterfactual scenarios.
160. Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition by iSOFT NZ Limited to acquire certain assets of Hewlett-Packard New Zealand comprising five customer contracts for the provision of software support services and associated goodwill and intellectual property rights in the HOMER and ORA*CARE software.

DETERMINATION ON NOTICE OF CLEARANCE

161. Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition by iSOFT NZ Limited to acquire certain assets of Hewlett-Packard New Zealand comprising five customer contracts for the provision of software support services and associated goodwill and intellectual property rights in the HOMER and ORA*CARE software.

Dated this 29th day of September 2004

David Caygill
Deputy Chair
Commerce Commission