

## Statement of Preliminary Issues

### Inghams/Bromley Park Hatcheries

25 May 2023

#### Introduction

1. On 11 May 2023, the Commerce Commission registered an application (the Application) from Inghams Enterprises (NZ) Pty Limited (Inghams) seeking clearance to acquire the assets of the Cobb Commercial and Riverland businesses of Bromley Park Hatcheries (BPH) (the Proposed Acquisition).
2. The Commission will give clearance if it is satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
3. This statement of preliminary issues sets out the issues we currently consider to be important in deciding whether or not to grant clearance.<sup>1</sup>
4. We invite interested parties to provide comments on the likely competitive effects of the Proposed Acquisition. We request that parties who wish to make a submission do so by **9 June 2023**.

#### The parties

##### The applicant – Inghams

5. Inghams is part of Inghams Group Limited, an Australian-based poultry company that has breeding operations, hatcheries, contract growing and processing operations.<sup>2</sup> Inghams produces day-old chicks for its own manufacturing needs but does not sell them to third parties.<sup>3</sup> Day-old chicks are grown into broiler chickens which Inghams then processes into different primary and secondary processed chicken products.
6. Inghams' primary processing plant is located in Waitoa and it has other processing facilities in Cambridge and Auckland.<sup>4</sup>

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<sup>1</sup> The issues set out in this statement are based on the information available when it was published and may change as our investigation progresses. The issues in this statement are not binding on us.

<sup>2</sup> The Application at [1.2].

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

### The target – BPH

7. BPH is a producer and supplier of day-old chicks. Its operations include breeder farms and a hatchery.<sup>5</sup>
8. BPH has three divisions, being:<sup>6</sup>
  - 8.1 Cobb Commercial, which supplies day-old chicks to poultry growers and processors;
  - 8.2 Riverland, which sells Cobb parent stock to the Pacific Islands; and
  - 8.3 Shaver/SXB, which produces day-old chicks for egg production only.
9. The Proposed Acquisition relates only to the sale of the assets of the Cobb Commercial and Riverland businesses.<sup>7</sup> Inghams is not seeking clearance to acquire the Shaver/SXB business.

### Our framework

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

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<sup>5</sup> The Application at [3.4].

<sup>6</sup> Ibid.

<sup>7</sup> The Application at [3.5].

<sup>8</sup> Commerce Commission, *Mergers and Acquisitions Guidelines*, May 2022. Available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz).

<sup>9</sup> *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

- 12.3 the countervailing market power of buyers – the potential constraint on a business from the purchaser’s ability to exert substantial influence on negotiations.

### **Market definition**

13. We define markets in the way that we consider best isolates the key competition issues that arise from the Proposed Acquisition. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Commerce Act, as a matter of fact and commercial common sense.<sup>10</sup>
14. In the Application, Inghams submitted that the relevant markets are the downstream markets for the wholesale supply of primary and secondary processed chicken products on a national basis to:<sup>11</sup>
- 14.1 supermarkets;
- 14.2 food service providers; and
- 14.3 Quick Service Restaurants.
15. We will consider whether the most appropriate markets for assessing the Proposed Acquisition are those suggested by the Applicant, or whether the impact of the transaction is better assessed with reference to other markets.
16. For example, we will consider whether the Proposed Acquisition is best assessed with reference to the upstream market for the supply of day-old chicks. We may also consider whether it would be appropriate to define separate geographic markets.

### **Without the acquisition**

17. We will consider what the Parties would do if the Proposed Acquisition does not go ahead, as well as the competitive position of each. We will consider the evidence on whether the without-the-acquisition scenario is best characterised by the status quo or whether the parties would seek alternative options, for example, finding a different buyer for BPH.

### **Preliminary issue: would the merged entity be able to foreclose rivals?**

18. We will investigate whether the Proposed Acquisition would be likely to substantially lessen competition in the relevant market(s) by assessing whether vertical effects might result from the Proposed Acquisition.
19. A merger between suppliers (or buyers) who are not competitors but who operate in related markets can result in a substantial lessening of competition due to vertical or conglomerate effects. This can occur where a merger gives the merged entity a

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

<sup>11</sup> The Application at [16.1].

greater ability or incentive to engage in conduct that prevents or hinders rivals from competing effectively (which we refer to as “foreclosing rivals”).

20. The Proposed Acquisition would combine BPH’s day-old chick production facilities with Inghams’ downstream processing operations. Inghams already produces day-old chicks for its own requirements, so the Proposed Acquisition would increase the amount of day-old chicks Inghams produces. However, Inghams has submitted that there is no prospect of the Proposed Acquisition having the effect, or likely effect, of substantially lessening competition.
21. Inghams submits that the merged entity would not have the ability to foreclose its rivals in the downstream market for the supply of processed chicken because it will in particular continue to face strong competition from Tegel, a well-resourced vertically integrated player who currently supplies day-old chicks to virtually all other chicken processors.<sup>12</sup>
22. Inghams further submits that the merged entity would not have the incentive to foreclose its rivals in the downstream market for the supply of processed chicken because:<sup>13</sup>
  - 22.1 day-old chicks do not represent a significant cost for competitors;
  - 22.2 it will be financially incentivised to supply day-old chicks to third parties; and
  - 22.3 Tegel’s hatchery facilities have excess capacity, enabling Tegel to service third parties.
23. As part of our assessment of these issues, we will consider:
  - 23.1 whether the merged entity would have the ability to foreclose, through having control of an important input (ie, day-old chicks);
  - 23.2 whether the merged entity would have the incentive to foreclose, ie, whether it could earn additional profits from this strategy; and
  - 23.3 whether competition lost due to any foreclosure of competitors would amount to a substantial lessening of competition.
24. We invite submissions on these issues.
25. At this stage we do not consider the Proposed Acquisition is likely to give rise to horizontal or coordinated effects, but we also invite submissions on these issues.<sup>14</sup>

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<sup>12</sup> The Application at [18.5].

<sup>13</sup> The Application at [18.6].

<sup>14</sup> Please see our *Mergers and Acquisitions Guidelines* for more information on how we assess horizontal and coordinated effects.

## Next steps in our investigation

26. The Commission is currently scheduled to make a decision on whether or not to give clearance to the Proposed Acquisition by **7 July 2022**. However, this date may change as our investigation progresses.<sup>15</sup> In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.
27. As part of our investigation, we will be identifying and contacting parties that we consider will be able to help us assess the preliminary issues identified above.

## Making a submission

28. If you wish to make a submission, please send it to us at [registrar@comcom.govt.nz](mailto:registrar@comcom.govt.nz) with the reference "Inghams/BPH" in the subject line of your email, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on **9 June 2023**.
29. Please clearly identify any confidential information contained in your submission and provide both a confidential and a public version. We will be publishing the public versions of all submissions on the Commission's website.
30. All information we receive is subject to the Official Information Act 1982 (OIA), under which there is a principle of availability. We recognise, however, that there may be good reason to withhold certain information contained in a submission under the OIA, for example in circumstances where disclosure would unreasonably prejudice the supplier or subject of the information.

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<sup>15</sup> The Commission maintains a clearance register on our website at <http://www.comcom.govt.nz/clearances-register/> where we update any changes to our deadlines and provide relevant documents.