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Determination

AJ Park IP Limited, AJ Park Law Limited and Baldwins Intellectual Property, Baldwin Holdings Limited, Baldwins Intellectual Property Limited and Baldwins Law Limited [2020] NZCC 17

The Commission:	Anna Rawlings Dr John Small Dr Derek Johnston
Summary of application:	An application from AJ Park IP Limited and AJ Park Law Limited seeking clearance to acquire the assets of Baldwins Intellectual Property, Baldwin Holdings Limited, Baldwins Intellectual Property Limited and Baldwins Law Limited.
Determination:	Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to the proposed acquisition.
Date of determination:	2 September 2020

Confidential material in this report has been removed. Its location in the document is denoted by [ ].

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Executive summary

1. AJ Park and Baldwins are two of New Zealand's oldest providers of professional services related to intellectual property (IP) rights. Both have been active in this country for over 100 years. However, Baldwins has declined as a competitive force over time, while AJ Park remains one of the largest providers of specialised IP services in New Zealand.

2. Central to our decision to grant clearance is this decreased closeness of competition between AJ Park and Baldwins, together with the increased number, and size, of competitors in each of the relevant markets. These changes reflect and have been enabled by competitive dynamics that we expect to endure. In the patent services markets where AJ Park and Baldwins have historically competed most closely, growth has come from both local competitors (eg, James & Wells) and increasing competition from Australian based providers as clients' desire for localised services continues to decline.

3. While patent services is the main overlap between AJ Park and Baldwins, they also compete as providers of services related to trademarks, registered designs, plant variety rights and copyright, which require different skills to provide. We assessed the proposed acquisition in relation to these services as well.

4. We considered whether the proposed acquisition could raise unilateral, coordinated, or conglomerate competition concerns in any of the markets for IP professional services.

Unilateral effects

5. Based on the evidence before us, we are satisfied that the proposed acquisition is unlikely to give rise to a substantial lessening of competition due to unilateral effects in any of the relevant patent services markets.[1]

6. While we considered the competitive effects of the proposed acquisition in several narrow markets for patent services for different technological areas, conditions of competition were generally comparable in each of these markets.

7. For patent services supplied to New Zealand-based clients, the evidence suggests:

    7.1 AJ Park and Baldwins may have historically competed closely. However, Baldwins appears to have declined as a competitor recently, and it appears that the Parties are no longer each other's closest competitor;

    7.2 New Zealand-based providers such as James & Wells, and a growing number of smaller, more specialised, firms will likely continue to provide a significant competitive constraint;

[1] In these reasons, we refer broadly to 'patent services' collectively unless it is clear that the reasons relate to a particular technology-specific patent services market.

7.3 the constraint from large Australian-based providers (such as FB Rice) is increasing and will continue to grow. Market enquiries revealed that several large clients have either engaged these firms, or would be willing to; and

7.4 entry and expansion (including the threat of entry and expansion) from New Zealand and overseas firms will likely act as a constraint on the merged entity. This includes existing competitors in non-patent IP services markets offering patent services, and staff leaving existing firms to form or join new or expanding firms.

8. For similar reasons, we are satisfied that the proposed acquisition is unlikely to give rise to a substantial lessening of competition in relation to international clients. While there is some suggestion that the Baldwins brand remains relatively strong in relation to these clients, we consider that domestic and Australian firms are likely to constrain the merged entity's ability to raise prices or reduce quality.

9. While many of AJ Park and Baldwins' employees will be subject to non-compete arrangements for a period of time post-Acquisition, we consider these provisions are unlikely to materially inhibit entry or expansion by new or existing competitors.

10. We are satisfied that unilateral effects are unlikely to arise in any of the remaining markets. In each market, the merged entity will continue to be constrained by existing competitors, including both specialist and generalist providers. For certain IP services (eg, PVR) it appears that clients could also bring IP services in-house in response to a price increase.

Co-ordinated and conglomerate effects

11. We do not consider that the proposed acquisition is likely to substantially lessen competition in any relevant market due to co-ordinated or conglomerate effects.

11.1 In relation to coordinated effects, the proposed acquisition does not appear likely to significantly increase the likelihood of competitors reaching a coordinated agreement about prices, clients or output. In particular, Baldwins has not been a particularly aggressive or destabilising competitor in any of the relevant markets and there are significant differences in the structure of firms.

11.2 As to conglomerate effects, the absence of any "must have" services from any single firm and a willingness of clients to use different firms for different IP services limit the likelihood of an SLC arising in this way.

The proposed acquisition

12. On 22 June 2020 the Commerce Commission registered an application (the Application) from AJ Park IP Limited (a wholly-owned subsidiary of IPH Limited (IPH)), in conjunction with AJ Park Law Limited (together, AJ Park), to acquire the assets of Baldwins Intellectual Property, Baldwin Holdings Limited, Baldwins Intellectual Property Limited and Baldwins Law Limited (Baldwins) (Baldwins and AJ Park together, the Parties) (Proposed Acquisition).

Our decision

13. The Commission gives clearance to AJ Park to complete the Proposed Acquisition as the Commission 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.

Our framework

14. Our approach to analysing the competition effects of the merger is based on the principles set out in our Mergers and Acquisitions Guidelines (our guidelines).[2]

    14.1 We assess mergers using the substantial lessening of competition test. We determine whether a merger is likely to substantially lessen competition in a market by comparing the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).[3]

    14.2 Only a lessening of competition that is substantial is prohibited. A lessening of competition will be substantial if it is real, of substance, or more than nominal.[4] There is no bright line that separates a lessening of competition that is substantial from one which is not. What is substantial is a matter of judgement and depends on the facts of each case.[5]

    14.3 We must clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.[6] If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.

The Parties and the Proposed Acquisition

The applicant

15. AJ Park was established in 1891 and comprises the intellectual property practice of AJ Park IP Limited and the commercial law practice of AJ Park Law Limited. AJ Park IP Limited provides patent and trade mark prosecution (referring to the process of a filed application being examined and, if accepted, registered by the relevant IP

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2 Commerce Commission, *Mergers and Acquisitions Guidelines* (July 2019).

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

4 *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

5 *Mergers and Acquisitions Guidelines* above n2 at [2.23].

6 Section 66(3)(a) of the Commerce Act 1986.

authority) and maintenance, as well as other intellectual property services. AJ Park Law Limited specialises in IP commercial law, and IP enforcement and litigation.

16. AJ Park IP Limited was acquired by IPH Limited (IPH) in 2017. IPH is a publicly listed Australian holding company which owns several IP professional services businesses in the Asia-Pacific region. AJ Park is the only IPH firm with a physical presence in New Zealand although several of its Australian based firms provide IP services in New Zealand. Other IP services businesses owned by IPH include Spruson & Ferguson, Pizzeys, Griffith Hack and Shelston IP.[7]

The target

17. Baldwins was established in 1896 and provides patent, trademark, registered designs and PVR registration, prosecution and maintenance services and copyright advisory and litigation services. Baldwins also provides a range of IP related commercial law, enforcement, and litigation services.

The rationale for the Proposed Acquisition

18. AJ Park submitted that the proposed acquisition will add depth to its operations and increase the numbers and experience of its staff.[8] The proposed acquisition continues IPH's strategy of growth by acquisition.[9]

19. Baldwins considered the proposed acquisition will provide its clients with access to an increased range of IP professionals in Australasia and Asia, improve its systems and processes, and improve the career opportunities for its staff.[10]

Industry background

The relevant forms of IP

20. IP is the legally protected innovative output of intellectual activity. Without enforceable property rights, those outputs could be easily used by others without appropriate remuneration. Various statutes create different IP rights of varying duration to protect the incentives for creators to invest in innovation. These IP rights can then be licensed or sold to others. The IP services industry spans a wide range of professional services related to the protection of IP rights.

21. In New Zealand, patents, trademarks, and other forms of registerable IP such as registered designs and PVR, are granted by the New Zealand Intellectual Property Office (IPONZ). The IP most relevant to the Proposed Acquisition are listed below.

    21.1 **Patents** – a right to exclusive use of an invention (eg, a unique product, machine or process) in the country where it was granted. In New Zealand this exclusivity exists for up to 20 years.[11] A patent must be filed with, examined,

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7 AJ Park Law Limited is not an IPH subsidiary (it is owned by the Principals of AJ Park Law Limited), however, it operates as an "Exclusive Alliance Partner" of AJ Park IP Limited.

8 The Application at [16].

9 Ibid.

10 At [17.1]-[17.4].

11 IPONZ "About IP – Patents" <www.iponz.govt.nz>.

and granted by a relevant office in the jurisdiction where protection is sought.[12]

21.2 **Trade marks** – a sign or signs that distinguish the goods and services of one person from those of another (eg, a logo). Registration with IPONZ grants exclusive rights to use and legal protection against others trying to imitate the registered mark.[13] These rights last for 10 years and can be renewed indefinitely.[14]

21.3 **Registered designs** – a protection of the way things look rather than their functionality (eg, the shape of a container). Protection can exist for up to 15 years.[15]

21.4 **PVR** – the IP in plant varieties, including clones or hybrids, that are new, distinct and stable.[16] Most grants confer rights lasting between 20-23 years.[17]

21.5 **Copyright** – the IP that arises automatically without the need for registration upon creation for a broad range of original works (eg, a novel).[18] In New Zealand, copyright protects against the making of a substantial copy, or the public performance, of a work and does not involve or require registration in order to be enforced.[19] In most circumstances, this right lasts for more than 25 years following creation.[20]

International filing of patents

22. Holders of patents issued by other countries may file an application to have that patent registered in New Zealand through the Patent Cooperation Treaty 1970 (PCT). The PCT enables foreign based IP-owners to obtain patent certification in New Zealand without filing directly in New Zealand (and vice versa).[21] After an initial filing in one jurisdiction, which creates an application in other PCT countries, a PCT applicant may choose to pursue registration of a patent in other PCT countries by engaging a registered patent attorney in each jurisdiction.[22]

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12 As above, in New Zealand this is IPONZ, see Patents Act, ss 2 definition of "patent area" para (a), 13(1), 32 and IPONZ "About IP – Patents" <www.iponz.govt.nz>.

13 IPONZ "About IP – Trade Marks" <www.iponz.govt.nz>.

14 Ibid.

15 IPONZ "About IP – Designs" <www.iponz.govt.nz>.

16 Plant Variety Rights Act 1987, s 10(2)(d).

17 Section 14(2).

18 Copyrights Act 1994, s 14(1).

19 IPONZ "Enforcing copyright" <www.iponz.govt.nz>.

21 The Application at [28].

22 At [29].

23. A large proportion of patent applications in New Zealand originate as PCT applications.[23] In FY19,[24] [ ] of all New Zealand patents originated as PCT applications, with [ ] of these filed by non-residents.[25]

The regulation of IP professional services providers

Patents

24. Registration either as a lawyer or patent attorney is required to act as a patent attorney or agent.[26] Acting in this capacity includes applying for patents, preparing specification documents, and giving non-technical or non-scientific advice about the validity or infringement of patents on-behalf of, or to, third parties.[27] A patent attorney does not need to be a lawyer or hold a law degree. However, registered patent attorneys often qualify as lawyers in order to prepare court filings, give legal advice or conduct legal proceedings, all of which are relevant to IP protection.

25. Since 24 February 2017, New Zealand and Australia have shared a patent and trademarks attorney regulatory scheme meaning that registered patent attorneys can provide services in either jurisdiction.[28] Becoming registered as a trans-Tasman patent attorney generally requires at least two years of work under a registered patent attorney. Prior to registration prospective patent attorneys must generally have:[29]

    25.1 a qualification in a relevant area of practice, such as engineering or science;

    25.2 verifiable experience in performing supervised patent work;

    25.3 a reference from an experienced patent attorney; and

    25.4 passed nine intensive university papers at masters level.

26. Patent attorneys are required to have "appropriate competency for the work that they undertake.[30] In practice, attorneys tend to specialise in a limited area of patentable technology to meet this requirement and customer demand.[31] While we expand on the technical specialisation of patent attorneys in our assessment of the relevant markets below, we note that IPONZ patent examiners are organised on the

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23 At [30].

24 The filing year is 1 July – 30 June.

25 The Application at [30].

26 Patents Act, s 274(9) and (10); A lawyer must be separately registered as a patent attorney, instructed by a registered patent attorney or directed to do so by a court to prepare a specification, referring to the documents describing the invention and including other prescribed information, or of an amending document per the Patents Act, ss 277(1) and (2), and 279(b).

27 Section 274(9) and (10).

28 Australian or New Zealand patent attorneys who were registered prior to the creation of the shared scheme automatically became Trans-Tasman patent attorneys.

29 TTIPA "Registration requirements" <www.ttipattorney.gov.au>.

30 Code of Conduct for Trans-Tasman Patent and Trade Marks Attorneys 2018, cl 14(1).

31 See, for example, Interview with Pipers, 23 July 2020.

basis of their understanding of subject matter into one of five teams arranged by the broad technological areas into which patents may be categorised.[32] These are:

26.1 biotechnology (biotech);

26.2 chemical;

26.3 mechanical;

26.4 ICT; and

26.5 electrical.[33]

Other forms of IP

27. For non-patent IP services, the registration requirements to provide these professional services are either lower than for patents or are non-existent, for example:

27.1 trade marks professional services can be provided by lawyers and registered trade marks attorneys. Registration as a trade marks attorney requires meeting requirements that are significantly less intensive than for those patent attorneys set out above;

27.2 registered designs and PVR professional services can be provided without being a lawyer, patent attorney or trade mark attorney; and

27.3 copyright related professional services often require their provider to be a lawyer as they often involve the provision of services only able to be provided by a practising lawyer (such as appearing in court proceedings).[34]

Other relevant parties

28. There are several other competing IP professional services providers, which broadly fall into two categories.

28.1 Firms that offer a broad range of IP professional services (albeit with a focus on patents), including:

28.1.1 **James & Wells**, a privately held New Zealand based patent attorney firm with 21 patent attorneys across five New Zealand offices and one Australian office;

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32 Patent examiners are those responsible for assessing whether patents should be granted based on the documentation prepared about the subject of the application. It is very likely that this documentation was prepared by a patent attorney on a customer's behalf; We note that patent examiners are not required to be qualified patent attorneys, Interview with IPONZ, 16 July 2020.

33 Response to Commerce Commission information request – IPONZ (28 July 2020) at [2].

34 We note that for IP matters outside of patents and trade marks, lawyers may be more likely to be used given the increased relevance of statutory interpretation and case law knowledge for licensing etc in addition to court proceedings.

28.1.2 **FB Rice**, a privately held Australian based patent attorney firm with 56 attorneys, and staff across four technology groups; and

28.1.3 **Dentons and Dentons Kensington Swan**, a New Zealand based patent attorney firm operating with four patent attorneys across several technology types and an associated New Zealand based law firm providing services related to IP.

28.2 Firms that focus on supplying professional services for particular types of IP or technological areas such as:

28.2.1 **Blue Penguin IP**, a New Zealand based patent attorney firm with two registered patent attorneys which has recently focussed on services related to patents and other IP related to chemistry and biotechnology;

28.2.2 **Ellis Terry**, a New Zealand patent and trademark attorney firm with four registered patent attorneys and offices in Wellington and Auckland and a patent practice focussed on ICT;

28.2.3 **Catalyst IP**, a New Zealand based patent attorney firm with five registered patent attorneys which has a recent focus in biotechnology; and

28.2.4 **Hudson Gavin Martin**, a New Zealand based law firm with two registered patent attorneys and lawyers focussed on trade marks, copyright and the commercialisation of IP and wider strategy rather than, eg, the drafting of patents.

Market definition

29. Market definition is a tool that helps identify and assess the close competitive constraints the merged entity would face. Determining the relevant market(s) requires us to judge whether, for example, two products or services are sufficiently close substitutes as a matter of fact and commercial common sense to fall within the same market.

30. We define markets in the way that best isolates the key competition issues that arise from a merger.[35] In many cases this may not require us to precisely define the boundaries of a market. What matters is that we consider all relevant competitive constraints, and the extent of those constraints. For that reason, we also consider products and services which fall outside the market but which still impose some degree of competitive constraint on the merged entity.

[35] *Mergers and Acquisitions Guidelines* above n2 at [3.10]-[3.12].

Applicants' view of the markets

31. AJ Park considers that the relevant market for our assessment of the Proposed Acquisition is the market for the supply of specialised professional services in respect of the filing, prosecution and maintenance of patents in New Zealand.[36]

32. AJ Park did not consider any separate market or markets for other IP related services, such as those for non-patent IP, to be materially affected by the proposed acquisition.[37]

Our assessment of the relevant markets

33. The parties overlap in the supply of services related to the pursuit and maintenance of patents (Patent Services) and services related to the pursuit and maintenance of non-patent IP.

34. For the purposes of our assessment we consider that there are ten separate markets for Patent Services in New Zealand.

35. We consider that there are five relevant product markets for Patent Services in New Zealand that are at least as narrow as the five current specialisation/sector groups of IPONZ patent examiners:

    35.1 biotech;

    35.2 chemical;

    35.3 mechanical;

    35.4 ICT; and

    35.5 electrical. [38]

36. We also consider that in each of these five product markets, the competitive conditions to supply Patent Services to local and overseas clients differ and that separate markets based on the location of the customer are more likely to highlight the existing and potential overlap of the parties. We have therefore separately defined a local and overseas customer dimension for each of these five product markets.

37. Lastly, we consider that there is a separate product market for non-patent IP services. We have not concluded on the exact boundaries of this market as we do not need to do so to assess the Proposed Acquisition.

38. We discuss the reasons for our views on the relevant markets below.

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36 The Application at [36].

37 At [50]-[51].

38 Response to Commerce Commission information request – IPONZ (28 July 2020) at [2].

Specialty Patent Services markets

39. We consider there are separate markets for Patent Services in New Zealand which are at least as narrow as the current specialisation/sector groups that patent examiners are grouped under at IPONZ. These services include all aspects of patent services, which include searching relevant registers, drafting patent specifications, filing and prosecuting applications, maintaining and renewing registered patents and providing opposition and litigation services. [39]

The specialty Patent Services markets are distinct to other forms of IP

40. We consider that Patent Services are generally distinct from services related to other forms of IP:

    40.1 A customer seeking patent registration and protection is unlikely to consider services for other forms of IP in response to an increase in price (ie, a SSNIP). As indicated above, [40] other forms of IP, such as trade marks, registered designs, PVR and copyright provide different forms of protection, cover different subject matter and provide differing lengths of protection. For instance, a customer seeking patent protection for the exclusive use of an invention is unlikely to consider trademark or registered design protection as an effective substitute. In other words, there is a lack of demand-side substitutability between services related to different forms of IP.[41]

    40.2 It appears unlikely that firms specialising in services relating to other forms of IP could easily, profitably and quickly switch to providing patent services (ie, a lack of supply-side substitutability). This is primarily driven by the distinct registration requirement for those providing Patent Services related to patent drafting, filing and infringement and invalidity advice not present for other services related to other forms of IP.[42]

    40.3 We also note that there is a prevalence of firms in New Zealand and Australia who largely specialise in Patent Services. Individuals in these firms often have dual qualifications in law and a patentable subject matter such as physics or chemistry, typically at a master's level and above. There are few generalist law firms who offer or hold themselves out as being able to offer Patent Services.[43] We consider this supports our view that it is difficult to switch to providing Patent Services for individuals or firms who do not already have the requisite skills, experience and qualifications.

41. We consider that the Patent Services markets are likely to encompass the provision of all the services related to the pursuit and maintenance of patents that we set out

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39 Referring to hearings in front of IPONZ concerning the decision to accept a patent, and infringement and patent invalidity matters before the High Court (at least in the first instance) respectively.

40 In particular, under the Industry Background section from [20].

41 We note that one customer considered that clients may opt to protect processes as trade secrets rather than seeking patent protection ([ ]) but this view was not repeated by other clients.

42 Patents Act, s 274(1), (2), (9) and (10).

43 One firm noted that commercial lawyers in other firms tend to focus on trademark services and would not be able to service in the patent space, see Interview with Ellis Terry, 21 July 2020.

above. Although some clients seek out discrete services, qualified patent attorneys can, often do, and are uniquely qualified to, provide all of these services for clients. We also recognise that some aspects of Patent Services can be provided by specialist, non-patent attorney, providers (eg, searching, patentability analysis, renewal and some aspects of patent litigation), however we did not consider this to be material to our assessment of the Proposed Acquisition.[44]

Patent Services are separated by five speciality areas

42. We consider that Patent Services in New Zealand are separated by five speciality areas because:

    42.1 clients are unlikely to consider patent services in one particular specialisation/sector area as a substitute to patent services in another specialisation/sector area (ie, limited demand-side substitutability); and

    42.2 there are limitations on the ability of firms specialising in patent services in one speciality/sector area to easily, profitably and quickly switch to providing patent services in another specialty/sector area (ie, limited supply-side substitutability).

    We elaborate on these points below.

Clients seek out specialist technical expertise

43. A customer seeking to establish patent protection for an invention related to a certain field, such as biotech, is unlikely to consider services from a firm or patent attorney specialising in another field, such as engineering, to be a close substitute.

    43.1 Clients seeking Patent Services noted that they tend to align the technical background of the patent attorney at their chosen firm with the technology of their invention and have moved work to other firms to follow a patent attorney due in part to the expertise that attorney had. One Patent Services provider suggested that having the right kind of technical expertise is important for the vast majority of clients.[45]

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[44] We considered whether to separately analyse services related to patent litigation. Litigation in the Patent Services context tends to concern infringement actions related to a granted patent and/or claims of invalidity (see, for example, *Resmed Ltd v Fisher and Paykel Healthcare Ltd* [2017] NZHC 2954). Some market participants held a concern that the Proposed Acquisition could limit choice for clients of these services, particularly where conflicts between customer may be present. However, we consider the merged entity will be effectively constrained by Patent Services providers such as James & Wells and providers generally outside of Patent Services markets including Chapman Tripp, in addition to other large commercial law firms and specialist IP barristers. Consequently, we do not consider such a potential market in any detail.

[45] [ ]; One example is FB Rice now providing patent services to Fisher and Paykel Healthcare in the medical technology area. FB Rice considers this is based on expertise, as it has a good medical technology team, per Interview with FB Rice, 29 July 2020.

43.2 The preference for patent attorneys with relevant expertise was also reflected by some clients' willingness to carry out some Patent Services in-house. One customer said that if they did not have the specific technical expertise, they would likely seek an external patent attorney with the same expertise at a very early stage.[46]

43.3 Opting for patent attorneys without relevant expertise may also be more expensive. For example, one customer thought that opting for firms or attorneys that were unfamiliar with the subject area of an invention would cost more, as the firm or attorney would spend more time getting familiar with the subject area.[47]

44. We consider the potential variation in the importance of specialisation for different types of customer in further detail in our analysis of customer dimensions below.

Limitations on the ability of attorneys to provide Patent Services across specialty areas

45. We consider it unlikely that firms with expertise in a certain subject area could easily, profitably and quickly switch to providing patent services in another subject area, such that a broader market is justified.

45.1 IPONZ divides its patent examiners into specialisation/sector groups with an expectation that within these groups all staff can examine any application.[48] We consider this specialisation on the examination side of patents is approximately matched on the Patent Services supplier side by the specialisation of a firm's attorneys and that having the requisite technological specialisation is a significant barrier to providing Patent Services across more than one area. We consider that this supports our view that firms specialising in one subject area cannot easily, profitably, and quickly switch to providing Patent Services in other subject areas.

45.2 Several firms noted that their attorneys or the firm as a whole, specialised in certain areas (eg, biotech or chemistry) and there was a limited ability for these specialists to serve other technology areas.[49] For example, one firm considered that the competency requirement in the Code of Conduct for patent attorneys,[50] meant that patent attorneys were required to only work in areas where they had sufficient technical background or expertise and would have to decline work in areas where they did not have relevant

46 [ ]; [ ] also noted that while it could look to bring patent prosecution work in-house, it comes to down to expertise. While they had individuals who had a chemistry background and could do work for patents in the biochemistry area, they would be unwilling to do the same for patents in the physics area, per Interview with [ ]

47 [ ].

48 Response to Commerce Commission information request – IPONZ (28 July 2020).

49 See, for example, Interview with Blue Penguin IP, 21 July 2020 and Interview with Catalyst IP, 28 July 2020.

50 Code of Conduct for Trans-Tasman Patent and Trade Marks Attorneys 2018, cl 14(1).

experience.[51] Another firm's attorneys suggested that while they might be able to provide Patent Services for some general engineering matters, it is unlikely that they could provide Patent Services related to ICT.[52]

Should markets be narrowed by customer location?

46. We consider that the five speciality Patent Services should be further narrowed on the basis of whether a customer is domestically based (local) or internationally based (international) for the purposes of our competition assessment. We considered whether international and local clients may have different requirements,[53] and different competitive alternatives, meaning that firms can price discriminate between clients based on their location. Although there was some mixed evidence, it appears that firms can and do discriminate between clients based on their location, such that it is appropriate to define separate domestic and overseas markets for each of the five speciality Patent Services markets.[54]

47. Market enquiries suggest that the differences between local and international clients are driven by:

    47.1 the nature of the Patent Services required for PCT applications versus New Zealand originating applications;

    47.2 PCT applications coming overwhelmingly from international clients and NZ originating applications coming overwhelmingly from local clients; and

    47.3 international and local clients' purchasing processes and preferences.

48. Market enquiries indicated that PCT applications generally require less extensive Patent Services compared to New Zealand originating work as the majority of drafting is often completed where it is originally filed.[55] For example, one market participant saw international filings as less substantive in terms of work required, provided quality instructions accompany the drafted specification.[56] Therefore, we

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51 Interview with Pipers, 23 July 2020; Similarly, another firm considered that attorneys needed to actively keep up with a technology area if they are to provide drafting services related to pursuing patent rights, see Interview with Potter IP, 27 July 2020.

52 [ ].

53 International clients are more likely to pursue PCT applications following an originating application in another jurisdiction while local clients are more likely to seek New Zealand originating applications.

54 For example, international clients generally pay a higher price but are more sensitive to deviations from this standard price as the work expected is generally consistent across different patents (see, for example, Interview with FB Rice, 29 July 2020, and Interview with Catalyst IP, 28 July 2020) while the substantiality of local customer work often means that prices vary between patents and, while secondary to an attorney's expertise, price is a key determinant in the customer's choice of firm and whether to proceed with seeking patent protection at all (see, for example, Interview with Catalyst IP, 28 July 2020, and Interview with James and Wells, 27 July 2020).

55 See, for example, Interview with Blue Penguin IP, 21 July 2020.

56 Interview with Blue Penguin IP, 21 July 2020; That said, we consider that technical specialisation remains sufficiently important to international clients, and relevant to Patent Services providers, such that markets should continue to be narrowed by technical area for international clients. Although the required Patent Services for international clients can be less substantive, an understanding of the underlying area is still seen to be important and referrals from foreign associates are unlikely to be made to firms without relevant expertise – see, for example, Interview with Blue Penguin IP, 21 July 2020.

consider that international clients may have relatively more Patent Services providers available as alternatives than domestic clients on the basis of required capacity and technical specialisation.

49. Industry participants said that international and local clients choose New Zealand Patent Services providers differently. While international clients focus more on the historic reputation of the firm, local clients focus more on the reputation of the individual attorneys at the firm. For example, one participant noted that while Baldwins' New Zealand presence was declining, it still enjoyed a good reputation with international clients and their associates.[57]

50. Although the evidence is mixed, local clients often prefer to use New Zealand based service providers. For example, some local clients expressed a preference for New Zealand based firms in part due to a desire for face-to-face meetings during the drafting and prosecution stages of the patent process which, as we set out above, tend to be more intensive than PCT applications (ie, the applications that are overwhelmingly filed by international clients).[58] However, one local customer noted that they had no qualms with working with Australian firms observing that increased use of video conferencing would likely help clients work better with Australian firms.[59] Similarly, another local firm that focusses on connecting clients to attorneys, rather than providing Patent Services itself, indicated that larger New Zealand companies are increasingly open to working with Australian firms.[60]

51. In contrast, international clients appear less likely to consider a New Zealand based provider of Patent Services to be necessary. A number of industry participants considered that international clients essentially treat Australia and New Zealand as one when selecting their Patent Services provider, and Australian firms sometimes offer free or discounted filing in New Zealand.[61]

52. While the evidence on the differences in preferences of local and overseas clients is mixed, we consider it is sufficiently likely that international and local clients may have different requirements and different competitive alternatives, meaning that firms can charge domestic clients more. We consider that separate markets based on the location of the customer are more likely to highlight the existing and potential overlap of the parties; if there are no significant competitive issues when considering these more narrowly defined markets, there are unlikely to be competitive issues if markets were more broadly defined (eg, markets that are not narrowed by customer location).

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57 [ ]

58 See, for example, [ ]

59 Noting that previously there might have been limited face-to-face availability of Australian attorneys which affected their willingness to engage them, see Interview with Auckland UniServices, 10 July 2020.

60 Interview with Potter IP, 27 July 2020.

61 See, for example, [ ] and Interview with Potter IP, 27 July 2020.

The market(s) for services related to other forms of IP

53. For the purposes of our competition assessment in this case we have defined separate markets for the provision of professional services for each type of non-patent IP.

54. We consider that clients generally do not consider services for one form of IP protection as an alternative to another. As above, trade marks, registered designs, PVR and copyright, provide generally different forms of protection, cover different subject matter and provide different lengths of protection.[62]

55. We consider that there is a greater degree of supply side substitutability between the provision of professional services related to trade marks, registered designs, PVR and copyright. As above, with the exception of trade marks, there is no separate registration requirement for the provision of these services.[63] Generally, the IP teams of commercial law firms provide a range, if not all, of these services for clients.[64]

56. Such supply side substitutability between the provision of professional services related to trade marks, registered designs, PVR and copyright would suggest a broader market for other forms of IP, despite these services being distinct from the perspective of a consumer.

57. While we have not concluded on the exact boundaries of the markets for services related to non-patent IP rights, for the purpose of our competition analysis, we have considered how the Proposed Acquisition impacts competition for services related to each type of non-patent IP separately.

Conclusion on the relevant markets

58. We consider that the appropriate markets for the purposes of our competition assessment are:

    58.1 the supply of Patent Services to local clients for each of the following technical areas:

        58.1.1 biotech;

        58.1.2 chemical;

        58.1.3 mechanical;

        58.1.4 ICT; and

        58.1.5 electrical; and

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62 For example, one services provider considered that copyright could be an alternative for registered designs (but not vice-versa), Interview with Pipers, 23 July 2020.

63 The registration requirement for trade marks services can be met by lawyers, patent attorneys and registered trade marks attorneys, see Trade Marks Act 1995 (Cth), s 156(1) and (2).

64 See, for example, Interview with Dentons and Dentons Kensington Swan, 22 July 2020.

58.2 the supply of Patent Services to international clients for each of the following technical areas:

58.2.1 biotech;

58.2.2 chemical;

58.2.3 mechanical;

58.2.4 ICT; and

58.2.5 electrical; and

58.3 the supply of professional services for each of:

58.3.1 trade marks;

58.3.2 registered designs;

58.3.3 PVR; and

58.3.4 copyright.

The without the merger scenario

59. To assess whether a merger is likely to substantially lessen competition in a market, we compare the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).[65]

60. For the purposes of considering the competitive effects of the Proposed Acquisition we have adopted a without-the-acquisition scenario of the status quo, with Baldwins continuing to provide intellectual property professional services in all of the relevant markets independently of AJ Park. We did not consider that a sale of Baldwins to an alternative purchaser was likely.

61. If the Proposed Acquisition does not proceed, AJ Park submitted that it would [ ][66]

62. Absent its sale to AJ Park, Baldwins submitted that [ ][67]

65 *Mergers and Acquisitions Guidelines* above n2 at [2.29].

66 The Application at [19].

67 [ ].

How the Proposed Acquisition could substantially lessen competition

63. We have considered whether the Proposed Acquisition could have the effect of substantially lessening competition in any of three ways.

64. First, we have considered whether the Proposed Acquisition could give rise to unilateral effects. Unilateral effects may occur when a firm acquires a current or potential competitor that would otherwise provide a competitive constraint and remaining constraints are insufficient to prevent the merged firm from being able to profitably increase prices or reduce service quality. The Proposed Acquisition would mean that any existing or potential competition between AJ Park and Baldwins is lost. We have tested whether this means that the merged entity would be able to raise prices (and/or reduce quality) in the relevant markets. We have assessed:

    64.1 whether the merging firms impose a competitive constraint on one another now (or would do in the future) and the extent of any constraint;

    64.2 whether there are other competitors in the market that could replace the lost competition;

    64.3 whether the merged firm would be constrained by the threat of entry and/or expansion by rivals; and

    64.4 the extent to which clients have special characteristics that would enable them to resist a price increase by the merged entity.

65. Secondly, we have considered whether the Proposed Acquisition could increase the potential for coordinated effects. Coordinated effects can occur when a merger or acquisition makes it significantly more likely that the remaining firms can collectively exercise market power to increase prices (or reduce quality). Coordinated effects are more likely when a market is characterised by certain features, which make it easier to reach, and then to sustain, an agreement or understanding.[68] Our approach was to test whether the relevant markets were vulnerable to coordination (by looking at whether the characteristics above apply) and then consider how the Proposed Acquisition might change the likelihood, completeness or sustainability of coordination.[69]

66. Finally, we have considered whether the Proposed Acquisition could give rise to conglomerate effects. Conglomerate effects can arise where the merged entity is able to bundle (ie, provide together at a discount) or tie (ie, only provide a service on the condition that another is acquired) complementary services, such as Patent Services and services related to other forms of IP, so that competitors are unable to provide a competitive constraint on the merged entity (eg, the tying or bundling limits competitors' access to clients and the scale necessary to be an effective constraint).[70]

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68 See *Mergers and Acquisitions Guidelines* above n2 at [3.89].

69 At [3.86].

70 At [5.15].

Unilateral effects: Markets for the supply of Patent Services to local clients

SLC not likely in any Patent Services market for local clients

67. For the reasons described below, we consider that the Proposed Acquisition is unlikely to substantially lessen competition due to unilateral effects in the markets for the supply of Patent Services in the areas of, separately, biotech, chemical, mechanical, ICT or electrical patents, to local or international clients.

68. We have first assessed the likelihood of unilateral effects in the markets for local clients, considering:

    68.1 the competition between each of the Parties, noting that the Parties are not each other's closest competitor but that competition is significant;

    68.2 the competitive constraint of existing competitors, which appears to be extensive across all of the technology areas between James & Wells and smaller New Zealand based firms, and from the increasing presence of Australian providers;

    68.3 potential competition from new entry or expanding competitors, which we consider to be a material constraint on the basis of continued growth from local generalist Patent Services firms, increasing local presence of Australian firms and entry by additional specialist firms; and

    68.4 any countervailing power of clients, such as via self-supply of Patent Services from in-house attorneys.

69. We have largely considered the five markets defined by technological specification together because we have not identified significant variation in those relevant features set out above, such as the level of competition between the Parties and the likely effects of the proposed acquisition on these markets.[71]

70. However, we have considered the market for the provision of ICT Patent Services to local clients in further detail. This is in response to concerns raised by some industry participants that the Proposed Acquisition will have a greater impact on local clients in some technical markets.

Difficulty in obtaining reliable market share data

71. Once we have defined markets, we typically seek to obtain information about market shares to provide an indicator of the current market structure and how the merger is likely to change that structure. However, we consider that the information available to calculate market shares is of limited use in our assessment of competition in this matter. This is because we are only able to calculate shares based on the total patent filings made by the competing providers of patents services. This information is of limited assistance to our assessment of the impact of the merger in the narrower markets we have defined because:

[71] We also adopt this approach in our consideration of international customer markets below from [105].

71.1 the share of filings by each firm/agent in each of the narrower markets may not be the same as their share of total patent filings;

71.2 the merged entity is conservatively treated as having the combined share of the Parties, however, not all current clients are likely to be retained by the merged entity due to conflicts between current clients of the Parties;[72] and

71.3 these historical shares may understate the future competitive constraint provided by Australian providers of Patents Services.

72. For completeness, we have included Table 1 below to give an indication of the relative size of competitors in the markets for the provision of Patent Services to local clients. Table 1 is based on the information prepared by AJ Park and included in the Application. However, we have placed limited weight on these figures for the purposes of our competition assessment.

Table 1: Patent filings in New Zealand for local clients by firm/agent

Firm/Agent	FY17 (%)	FY18 (%)	FY19 (%)
Total IPH (including AJ Park)	[ ]	[ ]	[ ]
Baldwins	[ ]	[ ]	[ ]
Merged Entity (IPH and Baldwins)	[ ]	[ ]	[ ]
James & Wells	[ ]	[ ]	[ ]
Pipers	[ ]	[ ]	[ ]
Ellis Terry	[ ]	[ ]	[ ]
Catalyst IP	[ ]	[ ]	[ ]
Origin IP	[ ]	[ ]	[ ]
Others	[ ]	[ ]	[ ]

Competition between AJ Park and Baldwins

73. We consider Baldwins is not likely to be AJ Park's closest competitor in the five Patent Services markets identified above, although it does provide some competitive constraint on AJ Park.

74. Most industry participants we interviewed did not view Baldwins as AJ Park's closest competitor (and vice versa) in the relevant markets. AJ Park and Baldwins have been close and vigorous competitors in the past. However, the extent to which Baldwins provides a material constraint on AJ Park appears to have diminished in recent years,[73] with Baldwins being described as "flat" [ ].[74] Most industry participants consider

[72] Although AJ Park does not consider this to be substantial, per Interview with AJ Park, 19 August 2020.
[73] [ ]
[74] [ ]

that James & Wells has superseded Baldwins as the second largest domestic provider in the relevant markets.

Constraint from existing competitors is strong

75. The Proposed Acquisition would mean the loss of existing competition between AJ Park and Baldwins. However, we consider that existing competitors, particularly James & Wells, will continue to provide material constraint on the merged entity for the provision of patent services, in all five relevant local markets.[75] In ICT, where Baldwins and AJ Park are considered by some to have competed more closely, we consider that larger IP firms, such as James & Wells and smaller, more specialised firms will continue to provide a significant competitive constraint on the merged entity.

76. AJ Park submitted that James & Wells would provide strong competitive constraint on the merged entity.[76] James & Wells has 20 patent attorneys, considers that it is able to offer patent expertise across all technical areas, [ ].[77] James & Wells has historically viewed AJ Park as its major competitor and considered it has moved above Baldwins as AJ Park's closest competitor over the last ten years.[78]

77. Clients and industry participants we spoke to all considered that James & Wells is now AJ Park's main domestic competitor in the relevant Patent Services markets and would continue to provide strong competitive constraint on the merged entity.[79] For example,[ ].[80]

78. We also consider that, in addition to James & Wells, there are many other alternative local firms which are likely to continue to provide a material constraint on the merged entity in the relevant markets. These firms are likely to provide a constraint by:

    78.1 targeting a broader customer base and seeking to cover a broad range of, if not all, technical areas (eg, Pipers); or

    78.2 focussing on specific technical areas (eg, Ellis Terry, Blue Penguin IP and Catalyst IP).

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75 We also note the limited constraint provided by firms, which may be local or international, which provide a narrower part of Patent Services such as specialist search or maintenance. Broadly, these where not considered to be a material constraint on Patent Services providers but providers that may be sought out in addition to a primary Patent Services provider.

76 The Application, at [55].

77 Interview with James and Wells, 27 July 2020.

78 Ibid.

79 See for example, [ ]

80 [ ]

ICT Patent Services

79. ICT captures a broad range of communication and networking technology, including but not limited to software. AJ Park and Baldwins have nine and eight registered patent attorneys that list ICT as an area of expertise respectively.[81]

80. Although ICT was raised as an area of concern by one firm,[82] this concern was not supported by the balance of evidence that we received. We consider that James & Wells and software specialists such as Ellis Terry, in addition to large Australian firms, would continue to provide significant constraint in this area. Further, most clients that seek ICT Patent Services did not reflect concerns about the Proposed Acquisition and we note that:

80.1 XERO [ ];[83]

80.2 Ellis Terry [ ];[84] and

80.3 Potter IP [ ].[85]

Constraint from Australian firms

81. We consider that Australian firms would provide a material constraint on the merged entity. Despite local clients' historic preference for New Zealand firms, Australian firms have had a growing presence in New Zealand.

82. Australian headquartered firms such as Davis Collison Cave (DCC) and FB Rice have established a presence in New Zealand, either physical (in the case of DCC) or by gaining significant clients (eg, [ ]). These firms tend to have a large number of qualified patent attorneys and sufficient technical expertise to provide Patent Services in New Zealand in every Patent Services market.

83. The Australian firms we spoke with did not consider any preference of local clients for local providers of Patent Services to significantly impair their ability to compete in New Zealand and have found it easier to win business over time. These firms do not hesitate to participate in RFPs or tenders run by New Zealand clients, and are actively aware of the major potential clients in New Zealand. One also submitted that they had previously lowered their prices to win New Zealand clients.[86]

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81 Per AJ Park and Baldwins, <www.ajpark.com> and <www.baldwins.com> respectively (viewed on 26 August 2020).

82 [ ]

83 Interview with XERO, 18 August 2020.

84 Interview with Ellis Terry, 21 July 2020.

85 Interview with Potter IP, 27 July 2020.

86 [ ]

84. Consistent with this evidence, several clients indicated that despite a historic preference for New Zealand based providers, they would increasingly consider Australian firms to access the scale and expertise that Australian firms can supply and/or avoid conflict issues.[87]

Potential competition: Conditions of entry and expansion

85. We have assessed whether the threat of new entry or expansion by existing competitors would constrain the unilateral exercise of market power by the merged entity. We consider that conditions of entry into the patent services markets are not so onerous as to prevent sufficient and timely entry or expansion and that the threat of new entry and/or expansion, by new specialised firms and growing general firms respectively, will act as some constraint on the merged entity.

Likelihood of entry and expansion

86. We do not consider that the Proposed Acquisition will materially affect conditions of entry or expansion in any of the relevant markets.

87. It is likely that existing providers of patent services will continue to seek to grow, in particular providers such as
[
],[88] in addition to Australian firms engaging with local clients that are more willing to consider them as alternatives.

88. Patent Services markets have been characterised in recent years by fragmentation with many smaller firms emerging, usually formed by former staff of AJ Park and/or Baldwins.[89] We consider that the threat of new entry is also likely to constrain the merged entity either through the formation of new firms, the entry of more Australian firms in the local market,[90] or through entry by competitors in adjacent markets. For example, Chapman Tripp is looking to enter the patent services market in the near future and actively seeking to meet the patent services needs of their existing commercial law clients.[91]

Conditions of entry and expansion

89. We consider that there are two key considerations relating to the conditions of entry and expansion into the Patent Services markets. These are:

89.1 the ability to attract and recruit patent attorneys; and

89.2 the ability to attract clients away from firms/attorneys.

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87 See, for example,
[ ]

88 [ ]

89 For example, Catalyst IP and Blue Penguin IP.

90 Consistent with our assessment of a trend of increasing presence of Australian firms in local markets over time.

91 Interview with Chapman Tripp, 11 August 2020.

90. In particular, we have assessed whether the restraints of trade, to which existing employees and/or seller-principals of Baldwins will be subject to are likely to reduce the likelihood of new entry (by preventing senior staff from setting up on their own account) or expansion of existing or near competitors into Patent Services markets. We consider that the restraints that current Baldwins staff will be subject to are unlikely to materially change the conditions of entry and expansion so as to give rise to concerns about the constraint from the threat of entry and expansion.

91. There are some switching costs which make it difficult to win clients from existing suppliers. However, these costs have generally become less significant over time, are not likely to deter entry and expansion and the Proposed Acquisition will not materially affect these costs. For example, while many local clients have been loyal to their attorneys by following them when they move to another Patent Services provider even after a delay, such as those created by restraints of trade,[92] the extent of this loyalty appears to be declining due to, among other things, increasing customer sophistication.

Access to patent attorneys: the mobility of the merged entity's staff

Restraints on Baldwins staff

92. At the completion of the Proposed Acquisition, AJ Park anticipates taking on [ ] Baldwins patent attorneys and it views the acquisition and retention of staff as a key rationale for the transaction.[93] This represents a small number of patent attorneys, specifically [ ]% of the New Zealand based patent attorneys in firms, and [ ]% of those employed in firms across Australasia.[94]

93. To preserve the value of the transaction, Baldwins staff transferring to AJ Park are subject to restraints [ ][95].[96] Of the [ ] transferring patent attorneys AJ Park intends to take on as a result of the Proposed Acquisition:

    93.1 the [ ] seller-principals are subject to [ ] non-compete and non-solicitation clauses of [ ] post completion in addition to any subsequent

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92 For example, one customer moved its patent work back to its historic patent attorney even after several years practising overseas, see Interview with Catalyst IP, 28 July 2020.

93 The Application, at [16].

94 There are 149 New Zealand based patent attorneys in firms and 768 registered patent attorneys in Australia and New Zealand, per information provided to the Commission by Patentology dated 16 July 2020.

95 [ ]

96 [ ]

individual agreement with AJ Park.[97] AJ Park submitted that these restraints are necessary to protect the goodwill in the Baldwins business and are an important factor in enabling AJ Park to receive a return on its investment;[98]

93.2 the [ ] transferring staff members that will become AJ Park principals will be subject to non-solicitation terms of [ ]. These staff are also subject to a [ ] non-compete clause.

93.3 the remaining [ ] patent attorneys,[99] are broadly subject to the terms of their Baldwins agreements with [ ] non-solicitation and non-compete terms.

94. For the reasons we set out below, we do not consider the imposition of these restraints will materially impact rival firms' ability to recruit patent attorneys so as to expand or enter in response to an increase in price (or decrease in quality) by the merged entity.

Restraints seem unlikely to significantly impair patent attorney mobility

95. Industry commentary indicates that firms and attorneys do not appear to be apprehensive about seeking out and taking on experienced staff that are subject to similar restraints.[100] We also note that a number of parties interviewed indicated that they were either actively approaching Baldwins staff, or viewed the Proposed Acquisition as an opportunity to recruit potentially disaffected staff post-merger.[101]

96. We consider that the restraints on transferring staff appear unlikely to have a significant effect on the general mobility of qualified patent attorneys, particularly those below principal level. This enables the constraint provided by expansion and potential new entry on the merged entity. In concluding this, we have noted that:

96.1 recruitment-driven expansion, as opposed to expansion by acquisition, frequently involves staff below principal or partner level who are greatest in number and who are subject to less significant restraints;

96.2 as we set out above, the number of qualified patent attorneys moving to AJ Park in the transaction is small in proportion to the total number of registered patent attorneys and even if the restraints were to bind this will not materially constrain rivals' ability to enter and expand;

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97 Broadly, non-solicitation refers to restrictions on drawing away of employees and/or clients of a former firm while non-compete refers to restrictions on acting as or working for a competing provider of the relevant professional services.

98 Email from AJ Park, 20 August 2020; Interview with AJ Park 19 August 2020.

99 In addition to [ ] staff yet to qualify as patent attorneys.

100 Mark Summerfield "New Practices Arise, as Over 20% of Australian and New Zealand Patent Attorneys Change Jobs in Just Two Years" (17 February 2020) Patentology <blog.patentology.com.au>.

101 [ ]

96.3 although a prior attorney-customer relationship has historically been important,[102] staff of all levels tend to have relationships with clients. This means that Baldwins staff below principal (who are subject to less onerous restraints than their more senior colleagues), are likely to be viewed as attractive employees and an effective means of facilitating expansion or new entry;

96.4 clients can and do switch their work to the new firm of a former attorney even several years following the patent attorney's departure from previous employer;[103] and

96.5 no one firm is perceived to be more attractive to patent attorneys than others in terms of compensation, the potential for promotion and attractiveness of clients.

The ability for clients to switch

97. AJ Park submitted that customer purchasing behaviour, which we consider in more detail below, means that switching patent services provider is easy for clients of any size.[104] AJ Park also noted that patent attorneys are under a positive obligation to take reasonable steps to inform the customer of actions necessary to maintain their IP rights, and to cooperate with any new patent attorney so the IP rights are maintained during the process of switching.[105]

98. The upfront costs associated with switching appear to be minimal and IPONZ makes a significant effort to reduce risk such as prioritising matters that may need to be dealt with quickly (ie, where action by a patent attorney or customer is imminently necessary).[106]

99. Despite these low upfront costs (eg, there are no switching fees), clients are far less likely to switch the Patent Services provider for a particular invention once a patent has been drafted or prosecution has begun.[107] Market participants suggested that switching providers creates risk and potential future costs where attorneys are not already familiar with the relevant invention or do not have a relationship with the customer, resulting in a perceived incumbency advantage.[108] Historically, larger clients that hold multiple existing patents, or those with ongoing patent applications (ie, those that have not yet been granted) are significantly less likely to move to another provider of Patent Services.[109] For example, one large customer explained

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102 For example, [ ].
103 For example, Interview with Catalyst IP, 28 July 2020.
104 The Application at [99].
105 At [99] and [100]; Code of Conduct for Trans-Tasman Patent and Trade Marks Attorneys 2018, cl 22.
106 Interview with IPONZ, 17 July 2020.
107 Churn is approximately 1.4%, Interview with Patentology, 30 July 2020.
108 See, for example, interview with Potter IP, 16 July 2020.
109 For example, one large customer still uses a patent attorney firm for portfolio management even where the substantive patent work is done in-house, see [ ]

that the process of bringing on a firm and attorneys that have not worked with that customer before may take over six months.[110]

100. While a potential incumbency advantage is still present, it appears to be tempered by several factors, including:

100.1 future patent applications not necessarily being iterative or benefiting as extensively from using an incumbent provider;

100.2 increased sophistication of larger clients who have a decreasing reliance on external providers for portfolio management and greater ability, and potentially willingness,[111] to search for providers outside of incumbent firms;

100.3 increased use of panels of Patent Services providers to whom additional work can be directed with less risk and additional cost;[112] and

100.4 in relation to the merged entity, clients' processes/particularities being widely understood given the large number of attorneys who have been previously employed by the Parties.[113]

We expand on some of these factors in more detail below when we consider countervailing power.

101. There are also several examples of clients taking on new providers or changing the mix of providers they use (ie, increasing the Patent Services acquired from one provider at the cost of the volume they acquire from another). For example, [ ] increased the amount of Patent Services it acquired from smaller firms at the cost of larger incumbent providers,[114] while [ ] switched its primary provider from to an Australian firm following an RFP process in 2019.[115]

Conclusion on entry and expansion

102. We consider that entry and expansion (and the threat of entry and expansion) is likely to provide a material constraint on the merged entity. The conditions of entry and expansion, in particular the restraints over transferring and non-transferring employees/principals of Baldwins, are not so significant as to prevent the entry by new providers of patent services, or expansion by current providers.

110 [ ]
111 [ ]
112 Used by Wellington UniVentures, Fisher and Paykel Healthcare and Auckland UniServices.
113 Due to the trend of fragmentation and attorney movement, and because of the increased use of panels.
114 [ ].
115 [ ]

Countervailing power is limited

103. We consider that some larger and more sophisticated clients have a limited degree of countervailing power, which would better enable them to resist a price increase or quality decrease by the merged entity.

103.1 Larger clients can spread their work across multiple patent attorneys and may punish an increase in price or decrease in the quality of Patent Services for one type of technology by diverting their demand for Patent Services to a competitor. This is made increasingly possible with the use of panel arrangements where there are a number of firms which clients are able to engage for Patent Services.[116] However, we have not found evidence of countervailing power being exercised in this way.

103.2 Some large clients can bring Patent Services in-house. For example, Auckland UniServices has in-house patent attorneys,[117] and [ ].[118]

104. However, smaller clients would not be protected by any larger clients' countervailing power and tend to have less countervailing power themselves, given they spend less on patent services and therefore cannot justify the cost of as much in-house expertise.

Unilateral effects: Markets for the supply of Patent Services to international clients

105. We consider that the Proposed Acquisition is unlikely to give rise to unilateral effects in the markets for the supply of Patent Services to international clients. We have analysed the separate technical areas together as the factors relevant to our assessment do not appear to vary materially between these markets.

106. These markets share a number of characteristics with those for the supply of services to local clients, such as existing competition from New Zealand based firms that make a substantial lessening of competition in those markets unlikely. However, there are some differences in competitive conditions for international clients that reinforce these views driven by the less substantial Patent Services they require relative to local clients. We consider that in the markets for international clients:

106.1 there has been increasing competition from Australian firms in recent years.[119] For example, one Australian provider noted their value proposition was to provide Patent Services for parallel filings in Australia and New

116 For example, Wellington UniVentures, the commercialisation vehicle for Victoria University, recently put its patent services requirements out to tender with the intention of forming a panel of providers to choose from, Interview with Wellington UniVentures, 29 July 2020.

117 These attorneys can be, for example, contacted by researchers informing them of a soon to published academic paper disclosing an invention, Interview with Auckland UniServices, 10 July 2020.

118 [ ]

119 Potter IP considered the markets for international clients to be "ridiculously competitive" with Australian firms often winning work instead of New Zealand firms, Interview with Potter IP, 27 July 2020.

Zealand "for the price of 1.8",[120] and another submitted that international clients are likely to have greater awareness of Australian firms and have naturally used Australian firms for filings in both Australia and New Zealand.[121]

106.2 switching between Patent Services providers appears to be easier for international clients than for local clients as incumbency advantages are less significant. For example, international clients can and have moved work elsewhere without the incumbent being made aware,[122] and regularly use multiple firms;[123] and

106.3 the majority of the time intensive, and technically specialised, areas of those Patent Services (eg, drafting) takes place overseas meaning that there are lower specialisation requirements (ie, lower conditions of entry) and smaller firms are able to take on more international work, increasing the number of potential competitors in the relevant markets.

107. We do not consider that Baldwins' potentially stronger international reputation, relative to what it enjoys locally,[124] and any potential increase in aggregation in these international customer markets, creates any additional concern due to the constraints provided by the existing competition and potential competition in the relevant markets as set out above from [75] and [85] respectively.

Unilateral effects: Supply of other IP professional services

108. We consider that the Proposed Acquisition is unlikely to substantially lessen competition in any market(s) for the supply of other IP professional services because the merged entity would be constrained by:

108.1 competing providers, including other patent attorney firms, commercial law firms, and specialist providers; and

108.2 the ability of clients to self-supply.

109. Both AJ Park and Baldwins provide the full range of IP professional services related to trade marks, registered designs, PVR and copyright. However, because of the lower requirements to provide these services compared to Patent Services, there are an extensive number of alternative providers who will continue to provide competitive constraint on the merged entity. In addition to all the major firms that provide Patent Services, the merged entity will face competition from an additional array of competitors for each type of IP.

109.1 For trade mark and copyright services, the majority of intellectual property and commercial law firms offer these services and are seen as viable options

120 [ ]
121 [ ]
122 [ ]
123 [ ]
124 [ ]

by clients. [ ] [125]Furthermore, there tends to be greater capacity for these services to be self-supplied.[126]

109.2 For PVR services, specialist horticulture providers such as nurseries and seed companies provide these services, and many clients have the ability to, and do, bring these services in-house. For example, Plant and Food Research (the largest domestic filer of PVR applications) files all of its domestic PVR applications itself.[127]

109.3 For registered designs services, in addition to other intellectual property firms with registered design expertise (such as Ellis Terry and Pipers), the merged entity will continue to be constrained by the presence of commercial law firms with registered designs capability (such as Dentons Kensington Swan), and the potential for clients to substitute copyright protection for registered designs in New Zealand.[128]

Coordinated effects

110. We do not consider that an SLC through coordinated effects is likely in any of the relevant markets as the proposed acquisition will not make co-ordination materially more likely, complete or sustainable.

Patent Services markets

111. We have assessed whether the Proposed Acquisition would have, or would be likely to have, the effect of substantially lessening competition due to coordinated effects. We have not identified significant variation in the relevant features of, and the likely effect of the Proposed Acquisition on the relevant markets.[129] Therefore, we have considered the potential for coordinated effects in these markets together.

112. Although there is volume, customer and, to a degree, price transparency alongside established inter-attorney relationships, our enquiries suggest that coordinated effects are not likely to arise as a result of the merger. Primarily, Baldwins has not been an aggressive or destabilising presence in any of the relevant markets and there is no evidence to indicate that this is likely to change.[130] Market participants have described its current level of competitive activity as "flat",[131] [ ].[132]

113. Beyond the reduction in the number of larger patent attorney firms and subsequent higher concentration in the relevant markets, our market enquiries do not suggest that the Proposed Acquisition would make coordination more likely, complete or

[125] [ ]
[126] See, for example, interview with Fonterra, 21 August 2020 and interview with Xero, 18 August 2020.
[127] Interview with Plant and Food Research, 14 August 2020.
[128] Interview with Pipers, 23 July 2020.
[129] We have made specific reference to international customer markets where the extent of these factors differ significantly.
[130] [ ]
[131] [ ]
[132] [ ]

sustainable compared to the situation that would be likely to occur without the Proposed Acquisition.

Markets for other IP services

114. Although these markets share some characteristics with those for Patent Services,[133] there is far more variation between existing competitors and any increase in concentration is lower.

Conglomerate effects

115. We consider that the Proposed Acquisition is not likely to result in a substantial lessening of competition due to conglomerate effects. This is primarily because the majority of New Zealand and Australian providers offer a range of intellectual property related services and no one provider has any "must have" services or expertise in any area of IP law. We also note that clients can and do seek out specialist firms,[134] and are also able to bring some if not all of the non-patent related IP professional services in-house.[135]

116. Therefore, we do not consider it likely that other firms will be foreclosed, for example, due to a denial of the necessary scale, such that they are unable to provide a constraint in the relevant markets.[136]

Overall conclusion

117. We consider that the Proposed Acquisition is unlikely to substantially lessen competition in any relevant market.

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133 Specifically, the customer, volume and subject matter transparency via equivalent public registers for trademarks, registered designs and PVR alongside an understanding of approximate prices.

134 For example, Fisher and Paykel Healthcare who uses Zone Law for all of its trade marks work, see Interview with Fisher and Paykel Healthcare, 22 July 2020.

135 Interview with Fonterra, 21 August 2020; Interview with Plant and Food Research, 14 August 2020.

136 *Mergers and Acquisitions Guidelines* above n2 at [5.15].

Determination on notice of clearance

118. We are 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.

119. Pursuant to section 66(3)(a) of the Act, the Commerce Commission determines to give clearance to AJ Park IP Limited and AJ Park Law Limited to acquire the assets of Baldwins Intellectual Property, Baldwin Holdings Limited, Baldwins Intellectual Property Limited and Baldwins Law Limited.

Dated this 2nd day of September 2020

Anna Rawlings
Chair