

## Statement of Preliminary Issues

### AJ Park / Baldwins

10 July 2020

### Introduction

1. 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) (Proposed Acquisition).<sup>1</sup>
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 to grant clearance.<sup>2</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 **24 July 2020**.

### The parties

5. IPH is publicly listed on the ASX and owns several intellectual property (IP) professional services businesses in the Asia-Pacific region. These include the New Zealand based AJ Park IP Limited, as well as patent and trademark firms that trade under the brands of Spruson & Ferguson, Pizeys, Griffith Hack, Shelston IP and Watermark. IPH is based in Australia.
6. AJ Park IP Limited (which trades under the name “AJ Park”) focusses on the provision of patent and trade mark prosecution<sup>3</sup> and maintenance services, while AJ Park Law Limited specialises in, IP commercial law, and IP enforcement and litigation. AJ Park IP Limited is the only IPH owned business

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<sup>1</sup> A public version of the Application is available on our website at: <http://www.comcom.govt.nz/business-competition/mergers-and-acquisitions/clearances/clearances-register/>.

<sup>2</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>3</sup> In this context “prosecution” refers to the consideration of a patent application (in New Zealand, by the Intellectual Property Office (IPONZ)).

with a physical presence in New Zealand, maintaining offices in Auckland and Wellington.

7. Baldwins is the trading name for the group of entities consisting of the partnership of Baldwin Son & Carey (trading as Baldwins Intellectual Property), Baldwin Holdings Limited and Baldwins Law Limited.
  - 7.1 Baldwins Intellectual Property partnership focusses on providing patent attorney and trademark attorney services;
  - 7.2 Baldwins Law Limited operates a law firm business specialising in IP commercial law, IP enforcement and litigation; and
  - 7.3 Baldwin Holdings Limited provides administrative, management, and other ancillary services to Baldwins Intellectual Property partnership and Baldwins Law Limited.

## Our framework

8. 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>4</sup> As required by the Commerce Act 1986, we assess mergers and acquisitions using the substantial lessening of competition test.
9. 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>5</sup> This allows us to assess the degree by which the Proposed Acquisition might lessen competition.
10. 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:
  - 10.1 constraint from existing competitors – the extent to which current competitors compete and the degree to which they would expand their sales if prices increased;
  - 10.2 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>4</sup> Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2019. Available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz)

<sup>5</sup> *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

- 10.3 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

11. 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>6</sup>
12. In the Application, AJ Park submitted that the market relevant to our assessment of the Proposed Acquisition is the New Zealand market for the supply of specialised professional services in respect of the filing, prosecution, and maintenance of patents (Patent Services Market).<sup>7</sup>
13. AJ Park notes in its application that IPH firms and Baldwins also provide services going beyond the prosecution and maintenance of patents, including for other IP rights (such as trade marks, registered designs, and copyright), brand protection services, and commercial and legal dispute resolution services. AJ Park submitted that these services may form part of one or more separate relevant markets. However, it argues that competition in relation to these other services will not be materially affected by the Proposed Acquisition.<sup>8</sup>
14. In testing these views, we will consider whether the proposed market definition is appropriate and whether any other markets are relevant to our assessment of the Proposed Acquisition. In particular, we will consider whether:
- 14.1 there may be one or more broader markets for specialised IP-related professional services, including those related to the protection and commercialisation of patents and other forms of IP such as trade marks, designs and copyright, that may be relevant to our assessment of the Proposed Acquisition;
- 14.2 the relevant markets may be more narrowly defined by the type of expertise sought by the firm or agent based on the nature of the creation (eg patents versus trademarks), the relevant sector (eg chemistry versus engineering), and the complexity of the services required (eg renewal versus novel applications for protection); and
- 14.3 the relevant markets may be more narrowly defined by the size, sector or location of customers (eg small domestic start-ups versus

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<sup>6</sup> Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

<sup>7</sup> The Application, at 36.

<sup>8</sup> At 50.

large multi-nationals) because their different requirements may mean their competitive alternatives vary.

### **Without the acquisition**

15. We will consider what the parties would do if the Proposed Acquisition did not go ahead, including whether Baldwins would seek an alternative buyer or if the appropriate scenario is the status quo.

### **Preliminary issues**

16. The parties overlap in the supply of IP-related professional services in New Zealand (to customers both inside and outside New Zealand). We will investigate whether the Proposed Acquisition would be likely to substantially lessen competition in the relevant market (or markets) by assessing whether horizontal unilateral, coordinated and/or conglomerate effects might result from the Proposed acquisition.

### **Unilateral effects: would the merged entity be able to profitably raise prices by itself?**

17. Unilateral effects arise when a firm merges with a competitor that would otherwise provide a significant competitive constraint (particularly relative to remaining competitors) such that the merged firm can profitably increase prices above the levels that would prevail without the merger. We will focus on whether the loss of competition between the parties would enable the merged entity to profitably raise its prices or reduce quality.
18. In the Application, AJ Park submitted that the Proposed Acquisition would not give rise to unilateral effects in the submitted patent services market.<sup>9</sup> AJ Park submits that several vigorous competitors across Australasia, including QANTM Intellectual Property (the other large ASX-listed professional IP services group), will continue to impose a substantial competitive constraint on the merged entity.<sup>10</sup>
19. AJ Park considers that barriers to entry and expansion are low in relation to the supply patent-related services, including due to:
  - 19.1 the absence of significant expenditure or overheads, including there being no need to have a physical presence in New Zealand;<sup>11</sup>
  - 19.2 the mobility of patent attorneys and their ability to establish new firms, especially over the medium term;<sup>12</sup>
  - 19.3 low switching costs, with the ability to switch enshrined in the statutory regime;<sup>13</sup>

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<sup>9</sup> The Application, at 106.

<sup>10</sup> At 55, 73 and 75-77.

<sup>11</sup> At 78-79.

<sup>12</sup> At 79.

- 19.4 limited scope for differentiation between firms when competing for incoming international applications, enabling smaller firms to viably compete;<sup>14</sup> and
  - 19.5 changes to customer preferences, such as smaller IP portfolios, more one-off applicants, less loyalty to established brands and lower search costs, allowing small firms to compete more successfully.<sup>15</sup>
20. Furthermore, AJ Park submits that countervailing customer power exists as customers can:
- 20.1 impose price constraints through their procurement processes, such as full RFPs, panel arrangements and reverse auctions;<sup>16</sup> and
  - 20.2 can bring patent services in-house.<sup>17</sup>
21. We will consider:
- 21.1 the degree of competitive constraint that AJ Park and Baldwins impose upon one another and, to the extent that any constraint is material, we will assess whether the lost competition between the merging parties would likely be replaced by rivals;
  - 21.2 the degree of competitive constraint that existing competitors would likely impose on the merged entity;
  - 21.3 how easily rivals could enter and/or expand, to what extent, and whether that is likely to occur in a timely manner; and
  - 21.4 the extent to which any customers have special characteristics that would enable them to resist a price increase or reduction in quality or innovation by the merged entity, such as bringing IP services in-house and/or self-filing.

**Coordinated effects: would the Proposed Acquisition make coordination more likely?**

22. An acquisition can substantially lessen competition if it increases the potential for the merged entity and all or some of its remaining competitors to coordinate their behaviour and collectively exercise market power or divide up the market such that output reduces and/or prices increase. Unlike a substantial lessening of competition that arises from a merged entity acting on its own, coordinated effects require some or all of the firms in the market act in a coordinated way.<sup>18</sup>

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<sup>13</sup> The Application, at 99 and 100.

<sup>14</sup> At 78 and 83.

<sup>15</sup> At 84.

<sup>16</sup> At 89, 90 and 93-98.

<sup>17</sup> At 98, 101, 104 and 105.

<sup>18</sup> *Mergers and Acquisitions Guidelines*, above n4, at [3.84].

23. In the Application, AJ Park submitted that the Proposed Acquisition would not be likely to substantially lessen competition in the submitted patent services market due to coordinated effects.<sup>19</sup> Several of AJ Park's submissions on market characteristics are relevant to this assessment, specifically the:
- 23.1 transparency of each firm/agent's clients and their IP-related activities, as indicated by the extensive information available from the New Zealand Intellectual Property Office (IPONZ); and
  - 23.2 suggestion that the patent professional services required are broadly consistent for most patents.<sup>20</sup>
24. We will assess whether the Proposed Acquisition would change the conditions in the relevant market/s so that coordination is more likely, more complete or more sustainable, and in particular whether:
- 24.1 there are factors that make the relevant markets vulnerable to coordination; and
  - 24.2 the merger is likely to change conditions so that coordination is more likely, including whether one or both of the parties are currently acting as a destabilising competitor.

**Conglomerate effects: would the merged entity be able to foreclose rivals?**

25. A merger between suppliers (or buyers) 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 greater ability or incentive to engage in conduct that prevents or hinders rivals from competing effectively.
26. AJ Park did not submit on conglomerate effects. However, we will assess whether the merged entity is likely to bundle (ie provide together at a discount) or tie (ie only provide one service with another) complementary services, such as other forms of legal advice or IP strategy, so that competitors are unable to provide a competitive constraint on the merged entity.

**Next steps in our investigation**

27. The Commission is currently scheduled to make a decision on whether or not to give clearance to the Proposed Acquisition by 17 August 2020. However, this date may change as our investigation progresses.<sup>21</sup> In particular, if we

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<sup>19</sup> The Application, at 106.

<sup>20</sup> At 42, 43 and 67.2.

<sup>21</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.

need to test and consider the issues identified above further, the decision date is likely to extend.

28. 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**

29. 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 "AJ Park / Baldwins" 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 24 July 2020.
30. 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.
31. 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.