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19 April 2021

[redacted]

By email only: [redacted]

Dear [redacted]

Official Information Act #20.181 - Wrightson NMA Limited / Dalgety Crown Limited (Decision 172)

1. We refer to your request received on 30 March 2021 for a copy of the Commerce Commission (**Commission**) decision 172: Wrightson NMA Limited and Dalgety Crown Limited, dated 27 August 1986.

2. We have treated this as a request for information under the Official Information Act 1982 (**OIA**).

Our response

3. We have decided to grant your request. A copy of the decision is **attached**.

4. Please note the Commission will be publishing this response to your request in the OIA register on our website.[1] Your personal details will be redacted from the published response.

5. Please do not hesitate to contact us at oia@comcom.govt.nz if you have any questions about this request.

Yours sincerely

Mary Sheppard
OIA Coordinator

[1] https://comcom.govt.nz/about-us/requesting-official-information/oia-register

BEFORE THE COMMERCE COMMISSION

DECISION NO 172

IN THE MATTER of the Commerce Act 1975 (The 1975 Act)

and

IN THE MATTER of a merger or takeover proposal involving WRIGHTSON NMA LIMITED and DALGETY CROWN LIMITED

DECISION OF THE COMMISSION

The Commission	W E B Tucker (Chairman) C E Dewe A L Jenkin
For Wrightson NMA Limited	W M Wilson M N Berry
For Dalgety Crown Limited	B M Hill
For Elders Pastoral Limited	D J White D F B Stevenson
For Examiner of Commercial Practices	J R A Stevenson A Lear
Counsel Assisting The Commission	P J Keane
Date of Decision	27 August 1986

THE PROPOSAL

1. The proposal is that Wrightson NMA Limited acquire all the share capital or the rural servicing business of Dalgety Crown Limited.

THE PARTICIPANTS

2. Wrightson NMA Limited [Wrightson] is a wholly owned subsidiary of Fletcher Challenge Limited and Dalgety Crown

Limited [Dalgety] is a wholly owned subsidiary of Crown Corporation Limited. Both companies are nationwide rural servicing companies engaged in the following activities: woolbroking, livestock services, the provision of finance, agricultural merchandising, grain and seed merchandising, insurance services, real estate, horticulture and commercial auction. Their respective parent companies also have numerous other business interests some of which operate in related markets.

REASONS FOR THE PROPOSAL

3. The farming industry in New Zealand is in an extremely difficult financial position, which has been increasing in severity for at least the last 12 months. There has been wide publicity as to the plight of the rural sector of the economy, and it has been acknowledged and commented upon by government, farmer organisations, social agencies, business and financial institutions, etc. The Commission has accepted as self-evident the background from which this proposal has been made.

4. The proposal states that farming in New Zealand is in a crisis of a severity not experienced since the 1930s. The current plight of farmers is inevitably having a great impact on the profitability of the rural service companies. Details of the present and projected financial position of the participants have been provided to the Commission, on a confidential basis. In general terms, however, both Wrightson and Dalgety estimate that the 1985/86 year will result in trading losses for them. The ramifications are particularly serious for Crown Corporation because the rural servicing activities of Dalgety comprise a significant part of Crown.

5. Prior to discussion of a merger, both parties had independently decided to reduce their existing operations. Subsequent to the submission of the proposal, while it was still being considered and before this decision, some of these reductions in operations have been made, particularly involving staff redundancies. This has given rise to the suggestion that the proposal has been implemented before the consent of the Commission has been obtained. Both parties have given assurances that this is not so and the staff reductions have been made because of the rapid deterioration in business. The staff reductions were made independently of the proposed merger, but emphasise the declining profitability of the participants. The two companies felt they could either proceed as separate businesses and each reduce their services and staff numbers or they could merge their rural servicing operations and by doing so lessen staff reductions and maintain services. Their clear preference

for the latter alternative was the reason for the proposal.

PROCEDURES

(a) Referral to Examiner

6. The proposal was referred to the Examiner of Commercial Practices [the Examiner] on 26 March 1986 under s.71(1)(b) of the Commerce Act 1975 [the 1975 Act]. It was registered on 7 April. The investigation of the proposal was completed on 18 June, being 50 working days after registration.

(b) The Examiner's Report

7. The Examiner carried out a very full and extensive investigation of the proposal. His detailed report covered 76 pages, plus a further 33 pages of appendices. After some preliminary matters, the Examiner provided a general comment on the stock and station industry. He then proceeded to an analysis of individual product/service markets, dealing with various aspects of each, including tables showing market shares. The markets dealt with were:

Financial
Agricultural Merchandising -
  Animal Health Products
  Agricultural Chemicals
  Fertilisers
  Fencing Wire
Real Estate Services
Insurance Services
Grain and Seed Merchandising
Horticulture
Stock Drafting
Livestock Trading
Deer and Goats
Wool Broking

8. The Examiner interviewed numerous firms, organisations and individuals and the Commission is appreciative of the information in the report. The Commission does not intend to attempt a summary of the report, although considerable reference will be made to it under the appropriate headings later in this decision. However, a full reading and understanding of the Examiner's Report is suggested as a necessary background to this decision.

9. After analysing the various markets the Examiner endeavoured to assess the effects of the proposed merger on a regional basis and the real ability of a competitor

or a new entrant to contest the relevant geographic markets. Livestock auctioning and wool auctioning had been identified by the Examiner as critical product/service markets, not only because of the substantial barriers to entry and lack of competition, but also because of their overall importance to the stock and station agency business. He therefore considered a minimum sustainable market share in relation to these markets only. In a 1983 merger application Wrightson itself had expressed the view that "as a broad yardstick a 33 per cent industry market share is necessary to maintain a full service to farmers and an adequate profit to the company".

10. He obtained the view of another stock and station agency firm and considered the present market shares of the regional stock firms. The results are set out in paragraph 259 - table 32 - of the report which for convenience is attached as Appendix A. From this analysis the Examiner concluded that, if the merger were to proceed, a limiting of competition, which would be contrary to the public interest, would occur in the following geographic markets:

King Country
Wanganui (including Taihape)
Wairarapa
Manawatu/Wellington
Canterbury
South Canterbury

11. The Examiner then proceeded, in terms of section 80(c) of the 1975 Act, to consider "the interests, in their capacity as employees, of any persons employed by any business or company which is directly affected" to see whether this was a matter which added to or mitigated against his opinion that the competition effects of the proposed merger would be contrary to the public interest. At the time of the original proposal the likely number of redundancies was still being assessed. Wrightson did, however, state that the number of redundancies which would result from the merger would be less than the total of the redundancies which both companies would be required to create independently if the merger did not proceed. The figures put forward changed during the course of the Examiner's investigation and the Commission understands that, in the two months subsequent to the report, changing economic circumstances make it likely that the final figures will differ again and probably increase. At the time of the report, however, the contention was that:

(a) If the companies remained as separate entities - close 101 outlets with 1,426 staff reductions, or

(b) If the merger was implemented - close 90 outlets with staff reductions of 1,060.

In other words, the merger would save 366 jobs.

12. The proposal also included other claims of beneficial economic and other effects of the merger, although the Examiner considered some of these represented a private commercial advantage rather than a public benefit. Overall he felt that public benefits had not been substantiated to a sufficient extent to overcome the significant competition concerns impacting on farmer consumers and users.

13. The Examiner then considered the possible application of the "failing company" doctrine in accordance with the principles enunciated in Wattie/Jim Bull (Decision No.85). Although both companies were in a difficult position, that of Dalgety was considered to be the more critical, and attention was concentrated on this company. As already noted, details of present and projected financial positions have been provided on a confidential basis. Included with these were several options for Dalgety including a restructuring which, although somewhat drastic, might put Dalgety into a more or less break-even situation. The indications were that Dalgety and its parent company were managed efficiently and competently, and the principal reasons for its present problems were external factors rather than any lack of internal controls. The company was large enough and had the managerial capacity and financial resources to alter its present course. The Examiner therefore concluded that Dalgety was not a failing company in terms of the principles previously laid down by the Commmission.

14. Following the completion of his investigation the Examiner formally notified the participants that he had formed the opinion that the proposal was or was likely to be contrary to the public interest on the grounds that it would have the effect, or likely effect, of reducing or limiting competition in the supply, purchase or sale of goods or services currently supplied by both participants. Although neither Wrightson nor Dalgety accepted the Examiner's opinion, they were both willing to discuss the possible modification of the proposal to remedy or remedy substantially the effects or likely effects which gave rise to the Examiner's opinion. Attention was focused on the degree of market concentration [in excess of 70%] in the regions already identified. Associated with this were the entry barriers to the auctioning of livestock and wool due to the difficulty of competitors or potential competitors obtaining membership of the national and regional Stock and Station Agents Associations [SSAA], and thereby generally preventing access to livestock and

wool auction facilities.

15. During these discussions Wrightson indicated its willingness to promote the removal of these barriers to entry. This allayed the Examiner's concerns relating to Canterbury and South Canterbury, particularly since a strong regional firm held close to a 30 percent share of the market. To a somewhat lesser extent his concerns relating to King Country were also allayed. In this region the Examiner also noted the presence of a potentional nationwide competitor in Elders Pastoral Limited (Elders), with an established base and a reasonable market share. He also took into account the proximity of King Country to Waikato and Auckland where a number of independent livestock and wool agents were currently operating and who should be assisted by the reduction in entry barriers. Agreement was therefore reached to remove Canterbury, South Canterbury and King Country from the geographic markets where it had previously been considered there would be a limiting of competition. At the same time agreement was reached on action to be taken to lower barriers to entry.

16. Agreement was finally reached on a modified proposal which incorporated the following agreed statement:

> "The participants (i.e. Wrightson and Dalgety) acknowledge that the current constitution and rules of the SSAA and NZ Woolbrokers Association including regional associations are not conducive to the promotion of effective competition in markets in which members will participate in the event of any Commerce Commission consent to the proposal and, in particular, the giving effect to such constitution and rules may not accord with the requirements of the Commerce Act 1986. Accordingly, the merger participants through their membership of and offices with the Association would forthwith upon any consent of the proposal promote the necessary revision of such constitution and rules with the objective of the completion of the revision no later than 1 March 1987.
>
> "The participants acknowledge specifically that rules, practices, and procedures governing the right of entry to auction facilities are not conducive to the entry and participation of competitors or potential competitors in the provision of commission services in respect of all livestock and wool. Accordingly, the

participants forthwith upon any consent to the proposal, will promote the necessary modification to such rules practices and procedures (including any memorandum or articles of association of any company with an interest in such facilities) to the effect that normally acceptable financial standing and integrity, together with reasonable sharing of facility costs, remain the sole criteria for entry and participation.

"The participants confirm that any contractual or other arrangements between them to give effect to the proposed merger shall ensure the continued severance of the respective business of Wrightson and Dalgety in all respects in the following regions:

Wellington
Manawatu
Wairarapa
Wanganui (Including Taihape)

"The participants note the Examiner's concerns that, in the event of Commission consent to the proposal, the merged company would enjoy a high level of market power, and possible market dominance, in some regions, in relation to the acquisition and retailing of a number of farm merchandising products. It was further noted that the Examiner has expressed the view that the distribution policies of the suppliers of products within that class and the buying practices of the merged company ought to be investigated in terms of the Commerce Act 1986 by the Commerce Commission, as reconstituted by the Act, within 6 months of any consent by the present Commission to the proposal."

17. The Examiner therefore finally considered that the proposal, as modified, was not or was not likely to be contrary to the public interest and he recommended that the Commission consent to the proposal as so modified. He reported that both participants had agreed to the amendment to the proposal and had concurred with his recommendation.

(c) Submissions

18. The proposed merger was a matter of great public and

commercial interest, involving as it did the restructuring of a major New Zealand industry. The Commission accordingly decided to seek the opinion of as broad a cross-section of the public as possible, and gave wide publicity to this intention. Copies of the Examiner's report, with confidential aspects deleted, were made available from 20 June, with a request that interested parties wishing to make submissions on the proposal should do so no later than 4 July.

19. Initially there was some confusion regarding the nature of these public submissions and particularly the manner in which the Commission would deal with them. In previous cases before the Commission which have gone to a full-scale public hearing (and only one of these has been a merger or takeover case) the proceedings have been conducted in a quasi-judicial manner. This has involved the formal application and admission of parties to the proceedings, the making of preliminary submissions, the calling of witnesses to give evidence, cross-examination and re-examination of witnesses by counsel for all parties, questioning by the Commission, argument on legal matters by counsel, concluding with final submissions by all parties. This can be a cumbersome and very time consuming process. Under Part III of the 1975 Act there are legal time constraints within which the Commission must make its decision - 50 working days after the date of receipt of the Examiner's Report.

20. Requests were made to the Commission, and were reported in the news media, on the one hand calling for a full scale public hearing and on the other calling for the Commission to curtail its deliberations in the light of the recommendation of the Examiner to accept a modified proposal which had been agreed by both participants. The latter course was urged by both Wrightson and Dalgety particularly because they felt the uncertainties as to the future of staff should be resolved as soon as practicable. The Commission believed that it would not be able to handle the matter within the time constraints of the Act if it endeavoured to hold a full public hearing. Practice has also shown that, where such large and complex matters were involved, concerning business judgments and broad policy decisions, the adversary procedures were less appropriate than administrative procedures. The Commission therefore decided to adopt a middle course and to deal with the proposal by administrative, rather than quasi-judicial, procedures. By still keeping the matter in the public arena, the principles of natural justice would be preserved.

21. The response to the call for public submissions was unprecedented. About 180 firms, organisations and individuals made submissions, ranging from brief telegrams

to quite lengthy and well-reasoned arguments. Virtually all of the submissions were opposed to the proposed merger. There were a number of submissions from the staff of Dalgety, individually and collectively, who were opposed to the merger in its modified form because they did not want their particular area excluded. Most of these came from Taihape. While it can perhaps be assumed that these people would have supported the merger if their area had not been excluded, the submissions did not address this issue. Their request was that their particular area be included in the merger, and if it had been then it is perhaps doubtful if they would have made any submissions at all. There were several submissions from parties (but not Dalgety staff) in other areas of the country, such as Nelson, suggesting that their areas should be added to those excluded by the modification to the original proposal. There were in fact only 3 submissions which could be regarded as independent which were in favour of the merger.

22. A number of submissions took the form of a brief covering statement objecting to the merger, supported by a number of signatures of individual farmers from the district, rather like a petition. A submission in this form was received from nearly every district in the country. The largest of them, from Southland had 369 signatures. It soon became obvious that these had been organised by Elders, and this was later confirmed. Many of the other individual letters and telegrams also carried a similarity of wording which suggested a common background, and indeed they often expressed direct support for the position of Elders. The Commission does not consider that the fact that many of the submissions were organised by a firm with a strong vested interest in the decision reduced the value of those submissions to any great extent. The spokesman for the Southland farmers stated that the 369 signatures had been collected in two days, only 3% of those approached had refused to sign and 55% of those who did sign were not Elders' clients. While petitions are sometimes discredited on the grounds that many people will sign almost anything, and often do not understand what they are signing, this was obviously a selected approach to farmers who had a real interest in the matter. The total response was quite impressive.

23. Some submissions, especially telegrams, were very brief. Thus a message "Object to Wrightson Dalgety merger monopoly created today" signed by a "Concerned Farmer" conveys a viewpoint but does not take an analysis of the proposal very far. It would be fair to say that many submissions expressed a general unease without going into much detail. There was a dislike for the monopoly that many saw would be created, with the belief that 70% of the market in the hands of one firm would remove competition.

The desirability of two strong national firms was a recurring theme. Some businesses which would be directly adversely affected presented submissions in opposition to the proposed merger but these tended to dwell on private rather than public interests. All of these submissions were made available for comment by interested parties. They were also available for inspection by the general public.

(d) Meetings on Submissions

24. From the volume of submissions received the Commission selected 27 for further discussion. One of these was from the Ministry of Agriculture and Fisheries but this submission was later withdrawn. From the Commission's viewpoint this was unfortunate, as it would have welcomed the opportunity to discuss the proposal with what was probably the only independent and unbiased party. The Commission believes that its selection for further consideration represented a good cross-section of the submissions received. They comprised six individual farmers (including a "Queen Street" farmer), five groups from Federated Farmers, representatives from four of the group "petitions", three of the regional stock and station agency companies, two staff representatives and six other firms closely associated with the farming industry - through wool, meat, grain, merchandising, private stock agency, etc. A full list of these parties is attached as Appendix B. The Commission was appreciative of the thought which had gone into the submissions, including the subsequent discussions with the Commission in Wellington. Those present at the meetings were one or more people presenting the submission, the Commission members and staff from the Examiner's office. Wrightson, Dalgety and Elders were not present, but a synopsis of the discussions was sent to them.

25. The present economic plight of the rural community was forcefully presented to the Commission. It was thought, however, that there was still a good future for farming, and that recovery would take place in the relatively near future - within the next one to three years. The merger proposal was therefore seen as a long-term solution to a short-term problem. When farming again became buoyant the reality of a single national stock firm holding a major share of the market would remain. The view that a minimum of 30% of the market was necessary for a firm to be viable gained more acceptance when there were three firms in competition, but was strongly disputed when there were only two firms and one of them held the remaining 70%. The view was that a firm holding 70% of the market could act in a perfectly normal manner and yet another firm holding only 30% could not compete. Not a great deal of confidence was expressed in

the ability of the Commerce Act 1986 to correct this. The number of stock firms had reduced considerably, usually by merger, from about 40 firms 40 years ago to the present eight. If this merger proceeded the eventual demise of all the remaining regional firms was foreseen. The loyalty of farmers to their stock and station firms was still considered to be strong, particularly among older farmers, although new-younger farmers were felt to be more influenced by financial and market considerations. Previous experience suggested that following a merger most clients remained with the new firm and only about 5% took the opportunity to transfer their business elsewhere. To a large extent the ability to move was limited where there were financial ties to a stock firm. The extent to which these ties were enforced varied, but there was usually at least an expectation that a farmer who had financial assistance from a firm would place his other business through that same firm. Opinions on whether a national firm had advantages over a regional firm, or vice versa, tended to vary with the nature of the farming operation. Those involved in store stock, which often had to be transported out of the district for fattening, were quite convinced that national firms offered a service which local firms could not. The difficulty in obtaining access to auction facilities [stock saleyards and wool exchanges] by independent firms was a matter of concern mentioned in many submissions. While the sentiments expressed in the "conditions" incorporated in the modified proposal were welcomed, previous conduct led to some doubt that these relaxations would actually occur. The above is necessarily a very brief overview of discussions which took place over three full days with 26 different parties. Further reference will, however, be made to some of these submissions in later sections of this decision.

(e) Meeting and Decision on Procedures

26. Although proceedings were well advanced at this stage, there was still not complete agreement between the major parties on a number of matters. The Commission accordingly held a meeting with counsel on 22 July, prior to which a Draft Memorandum of Procedures was circulated. The Commission subsequently issued Decision No 170 as a formal ruling on all the points raised and reference should accordingly be made to that Decision. Briefly the matters left to be determined by the Commission were:

(i) Whether the proposal should be considered under the 1975 or 1986 Act.

(ii) The relevance of trade practices and the Commission's ability to take action on

these in a determination of a merger or takeover.

(iii) Whether a merger is necessary to achieve efficiency.

(iv) Whether the Commission has power to impose conditions or accept undertakings.

27. The meeting on 22 July also discussed the format of a conference which the Commission intended to call to hear submissions from Wrightson, Dalgety and Elders. Although initially it had been envisaged that a separate conference would be held for each party, it was finally decided to hold one conference at which all three parties and the Examiner would be present. Procedures for this conference were established, including a provision that while questions to elicit facts or establish broad principles would be allowed (for a maximum of 45 minutes for each party) there would be no right of cross examination. Parties would be free to make their own decisions regarding witnesses. The Conference was held on July 29, 30 and 31. A list of all witnesses is attached as Appendix C. As mentioned earlier, the Commission is required to reach a conclusion on a very complex matter within a limited time frame. Within this legal time restraint, the Commission again repeats its observation that it is conscious of its statutory duty to at all times act in accordance with the rules of natural justice. The procedures were adopted with this in mind.

LEGISLATION TO BE APPLIED

28. The proposal was registered on 7 April 1986 at which date the Commerce Act 1975 was in force. It was referred to the Examiner under s.71(1)(b) of that Act, and his report was received on 18 June 1986. On 1 May 1986 the Commerce Act 1975 was repealed and the Commerce Act 1986 came into force. The question therefore arose as to which Act the Commission should proceed under. The Examiner was of the opinion that any registered proposal in respect of which a determination had not been made before 1 May 1986 was required to be dealt with under the Commerce Act 1975. The Examiner's investigation and report were accordingly undertaken in terms of that Act.

29. The Examiner relied on the fact that the 1986 Act provided no transitional arrangements for merger proposals that were before the Commission (or the Examiner) but were undecided as at 30 April. By contrast, the 1986 Act did provide for the transitional treatment for goods and services on price control and, to a limited extent, certain trade practices. He believed that, if Parliament had intended the 1986 Act to also apply to merger proposals on hand, a provision to this effect could easily have been inserted.

30. Consequently the Examiner contended that s.20(g) of the Acts Interpretation Act 1924 applied to its fullest extent. This reads as follows:

> "**20. General provisions as to repeals–** The provisions following shall have general application in respect to the repeals of Acts, except where the context manifests that a different construction is intended, that is to say:
>
> .....
>
> (g) Any enactment, notwithstanding the repeal thereof, shall continue and be in force for the purpose of continuing and perfecting under such repealed enactment any act, matter, or thing, or any proceedings commenced or in progress thereunder, if there be no substituted enactments adapted to the completion thereof:"

It was the Examiner's submission that there were "no substituted enactments adapted to the completion thereof".

31. Elders had a contrary view. While agreeing that the 1986 Act contained no express provision requiring the Commission to apply the 1986 Act in these circumstances, Elders also pointed out that the 1986 Act contained no express provision requiring the application of the 1975 Act to such a proposal. In fact, Elders submitted, there were no transitional provisions in the 1986 Act relating to such proposals. Elders provided the Commission with a lengthy analysis of features of the 1986 Act (including those relating to "conditions and undertakings" which are in themselves a separate issue) to establish the intention of Parliament and the scheme of the Act. From this analysis it concluded that "from 1 May 1986 all merger or takeover proposals to which the Act applied, including proposals not determined under the 1975 Act, must be considered under the 1986 Act. Parliament intended no other result from the 1986 Act."

32. In relation to s.20(g) of the Acts Interpretation Act 1924, Elders submitted that the opening wording of the section "where the context manifests that a different construction is intended ..." were crucial and made it clear that paragraph (g) of the section had no application. Reference back to the arguments already

provided to establish the intention of Parliament and the scheme of the Act indicated that the context of the 1986 Act "manifested" that Parliament intended the provisions of the 1986 Act to apply to merger or takeover proposals as from 1 May 1986. Furthermore, since the Commission no longer existed in its 1975 Act form, it was unable to exercise the authority and powers vested in it under that Act, and accordingly was unable to "perfect" the merger proposal under the 1975 Act. On the contrary, there was a substituted enactment [the 1986 Act] which was "adapted" to completion of any undetermined merger, Elders submitted.

33. Wrightson and Dalgety both supported the Examiner on the question of which Act should be used, and they therefore disagreed with Elders' submission. Wrightson was of the opinion that to proceed under the 1975 Act was consistent with s.110(4) of the 1986 Act which provides that consents to mergers under the 1975 Act were not to be repealed whereas all other approvals, consents and the like were. This indicated that the scheme of the 1975 Act was to have an ongoing application to mergers commenced prior to 1 May 1986. Special provision was required in the case of consents granted prior to 1 May because, unlike applications which remained undetermined at that date, the Acts Interpretation Act provisions could not apply as there were no "proceedings" in place. Elders responded by submitting that the question of whether or not there were "proceedings" in place was irrelevant. Section 20(e) of the Acts Interpretation Act preserves the validity of anything already done under any Act which is repealed. Thus any merger consents granted before 1 May 1986 were already protected. The principal purpose of s.110(4) was to terminate all such other orders, approvals and the like.

34. Reference was made to the Commission's recent decision in News Ltd/Independent Newspapers Ltd (Decision No 164). In that Decision the Commission said:

> "In these circumstances, we consider that we are entitled to and should as a matter of expedience and common sense deal with the matter under the 1986 Act where the parties agree and where there would be no prejudice involved in so doing".

In the case now under consideration the participants filed their proposal under the 1975 Act and the Examiner conducted his investigation and reported pursuant to that Act. The participants were of the view that the Commission too was required to determine the proposal under the 1975 Act by virtue of the Acts Interpretation

Act 1924, as the proceedings were "commenced on or in progress". In the Commission's view there is thus a major difference between this case and the News/Independent Newspapers Limited case. Interestingly enough, both Wrightson and Elders disputed that the Commission was even correct in allowing the parties in that case the choice of which Act was to apply but drew different conclusions from this. Elders submitted that the Commission was required to apply the 1986 Act as in fact it did, and endorsed the "common sense" approach as one which was also in accord with the correct approach in law. Wrightson saw no value in News Ltd/Independent Newspapers Ltd as a precedent since it believed giving the parties a choice was not correct as a matter of law.

35. In another recent case, Rheem NZ Ltd/Zip Holdings Ltd [Decision No 168], which also involved a merger or takeover proposal registered prior to 1 May 1986 but decided after that date, the Commission proceeded under the 1975 Act.

36. Elders contended, in effect, that the 1986 Act had retrospective effect, and that the rule stated in s.20(g) of the Acts Interpretation Act therefore did not apply. The principles for testing this contention are stated in Spiers v Piako County [1969] NZLR 69, Speight J, and in Re Universal Limited (1983) NZLR 463 C.A.

37. The Commission has carefully considered all the submissions on this point and is satisfied that s.20(g) of the Acts Interpretation Act preserves the applicants' ability to proceed under the 1975 Act. There is nothing compelling in the 1986 Act that would lead the Commission to the view that s.20(g) ought not to be applied. In particular, there is nothing in the 1986 Act that is "adapted to the completion" of an application under the 1975 Act. On Elders' own reasoning, a new application would be required under the 1986 Act to require the applicants to face the tests under that Act, which Elders describes as more demanding tests.

THE MARKET

38. The market affected by this proposal is the provision of services traditionally associated with the stock and station agency business. Within that overall market are a number of distinct product/service markets. Of these the essential features are the supply of farm requirements and the provision of livestock selling services at auction, the preparation and sale of the wool clip, seed dressing and other produce department services as well as the provision of seasonal finance.

39. The first matter the Commission was required to address was the identification of the relevant market under consideration. Elders submitted that the appropriate market for consideration was the national market, whereas Wrightson and Dalgety considered that regional markets should be the focus of consideration.

40. The identification of the relevant market is critical to ascertaining the effects on competition and is a matter of fact in every case. In Visionhire Holdings Limited/Sanyo Rentals Limited [Decision No 79] the Commission stated that:

> "Whether a merger proposal is likely to curtail effective competition must be examined in relation to a given market. A "market" is usually delineated by the function performed, the commodity affected and the area in which it operates."

41. In his decision in Air New Zealand v Commerce Commission the Chief Justice referred with approval to the decision of the Commission in the Edmonds/Tucker case [Decision No 84] where the Commission said:

> "Ultimately the judgment as to the appropriate market - and its delineation by function, product and area - is a question of fact which must be made on the basis of commercial commonsense in the circumstances of each case ..."

42. All parties agreed that identification of the relevant market is a matter of commercial commonsense. Applying the guidance available to it from the Visionhire/Sanyo case, and having regard to its own observations, the Commission has reached the view that an analysis of the competitive effects of the proposed merger requires a consideration of regional markets in the manner adopted by the Examiner. The Commission does not, however, discount the importance of a national presence in the market, particularly in so far as it relates to the achievement of economies of scale, innovation, effective participation in the introduction of new technology and stock movement throughout the country. The industry appears to be poised for further change in many of its facets, such as livestock trading and wool auctioning and, in these, a national presence would carry with it many advantages.

COMPETITION

Introduction

43. Section 80 of the 1975 Act defines the criteria against which the public interest is to be evaluated and it is

clear from that section that a consideration of the effects of any merger or takeover on competition is crucial to a determination of the question before the Commission. On this matter the Commission had regard to the approach in Queensland Co-operative Milling Association and Defiance Holdings [1976] which was also adopted by the Commission in the Visionhire/Sanyo case and by the Chief Justice in Air New Zealand v Commerce Commission. This requires the Commission to consider the effect of the proposed merger on actual and likely future competition. "Likely" future competition means "some degree of assurance that the contemplated result will eventuate". A possibility that it will, or mere potential, is insufficient.

44. On the basis of the Examiner's report and the Commission's own inquiries, the Commission was satisfied that the proposed merger/takeover did not give rise to any anti-competitive effects as it related to real estate and insurance activities, horticulture and livestock drafting. The Commission, therefore, concentrated its attention on the provision of finance, agricultural merchandising, grain and seed merchandising, livestock trading and wool broking.

45. The Commission noted that in some areas of livestock drafting in particular, competition could be affected post-merger by the incidence of vertical integration through Fletcher Challenge Limited ownership of freezing works. While the Commission would be concerned if this should lead to limitations on effective competition it did not consider that the degree of vertical integration was sufficient to have a significant bearing on its decision in the case now before it. Should problems affecting livestock drafting arise they could be dealt with in terms of the 1986 Act.

46. At present there are eight companies in New Zealand supplying stock and station agency services to farmers. They are:

Firms with nation-wide coverage

- Dalgety Crown Limited
- Wrightson NMA Limited

Firms with regional coverage

- Elders Pastoral Ltd [Elders]
- Farmers Co-op Organisation Society of NZ, Taranaki [FCOS]
- Pyne Gould Guinness Ltd, Canterbury, Marlborough [PGG]
- Reid Farmers Ltd, Otago [Reid]
- Williams & Kettle Ltd, Hawkes Bay [W&K]
- Southland Farmers Co-op, Southland [SFC]

47. Elders has comprehensive coverage in northern North Island and Southland and also has a more limited presence in some other parts of the country. It is understood to be seeking nation-wide comprehensive coverage.

48. Each of the product or service markets which require closer study in relation to this proposal will now be discussed.

(i) Seasonal Finance

49. Finance of this nature is short term borrowing and generally takes the form of extended credit with repayment coming from the proceeds of wool, stock and other produce. Of the total lending by stock and station agents, approximately 80% is for seasonal purposes but increasingly such finance is provided by the trading banks. The Commission was told that the further one moves south there is an increasing dependence on stock and station agents for the provision of seasonal finance. Nevertheless, even in Otago/Southland, the Wrightson/Dalgety market share is less than 50%, whilst in the northern North Island it does not appear to attain 10%. Clearly farmers are turning to trading banks for a greater proportion of their seasonal finance and relying to a substantially lesser extent than hitherto on stock and station agents. The Commission noted, however, that where stock and station agents do provide seasonal finance a concern was apparent among some farmers that they would be under an obligation to use the lending agencies' other services, such as merchandise, which may be more cheaply obtainable elsewhere. This concern might well be increased by a merger of Wrightson and Dalgety which would result in one firm providing 25% of seasonal finance on a nation-wide basis.

(ii) Merchandising

50. A feature of the stock and station agency business has been the retailing of a wide range of merchandise to meet farmers' needs. This range has included such diverse products as groceries, electrical appliances and whiteware in addition to direct farm inputs such as fertiliser, animal health products, fencing material and agricultural chemicals. The Commission was told that in recent times competition has forced many stock firms to reduce substantially their product range so that they now concentrate on retailing the direct farm inputs. It is clear too, that the stock and station agents are facing increasing competition for those products from veterinary clubs, co-operative dairy companies and farmer owned co-operative trading societies.

51. Nevertheless, the Examiner's inquiries suggest that for some key products Wrightson/Dalgety, post-merger, would have high market shares in some areas, vis:

	Chemicals	Fertiliser
King Country	65%	65%
Wanganui	70%	60%

For most products and in most geographical areas, however, the Commission has not received information that would suggest a high degree of market concentration exists or would result as a consequence of this merger. Adequate competition is evident in all areas and for all products.

52. Fencing wire caused the Commission some concern and the Examiner also referred to this product in some detail in his report. A high degree of vertical integration of the wire industry is apparent particularly in relation to Wrightson's parent company's ownership or part ownership in the New Zealand steel making companies. The potential exists for the imposition of supply constraints on new entrants to the retailing market. The Commission's concerns have been lessened considerably by the more liberal import licensing policy adopted for fencing wire from July 1986 and by the recent abandonment of certain exclusive distribution arrangements. In any event, if undesirable practices were to develop they could well be caught by the 1986 Act.

(iii) Grain and Seed Merchandising

53. The Examiner expressed the view in his report that, for grain and seed merchandising, adequate competition existed. He presented data to the Commission on a wide range of grains and seeds which showed that, post merger, the Wrightson/Dalgety market share on a national basis ranged from a low of 38% for barley to a high of 55% for wheat. Market shares for other grains and seeds fell between these two extremes. Competition, in his view, would be assisted by the de-regulation of the flour industry from 1 February 1987. The Examiner did, however, point out that Wrightson and Dalgety would have a dominant position in the Canterbury regional market for:

Wheat	Wrightson	28%
	Dalgety	26%
	Total	54%

Peas	Wrightson	35%
	Dalgety	21%
		56%

For all grain and seed products, apart, perhaps, from this regional market for wheat and peas, this proposal would not be likely to result in any lessening of effective competition.

(iv) Livestock Trading

54. Livestock trading is an important element of any comprehensive stock and station agency business. The stock traded by farmers is principally "store stock" [for fattening by other farmers] and prime stock [for slaughter for the local market]. For the purposes of the Commission's inquiry prime stock does not here include stock drafted for export meat works to which different considerations apply and for which, post merger, adequate competition will exist, particularly from the works own drafters.

55. It has traditionally been the role of the stock and station agent to act as intermediary in arranging the sale and purchase of sheep and cattle for farmers. More recently this function has also been performed by independent livestock operators. Livestock is sold by auction or by private treaty. According to the Examiner's report approximately 95% of stock sold by auction is store stock and 5% is prime stock. Sales of store stock by stock and station agents, either by auction or by private treaty, account for more than 90% of the livestock trading market.

56. The Examiner provided the following information on market shares for sheep and cattle sold at auction:

	Auctioned Sheep		Auctioned Cattle	
	Wrightson /Dalgety	Other SSA	Wrightson /Dalgety	Other SSA
	% Share	% Share	% Share	% Share
North Auckland	69	31	72	28
Auckland	79	21	79	21
Waikato	81	19	65	35
King Country	80	20	82	18
Hawkes Bay	63	37	60	40
Taranaki	50	50	50	50
Wanganui	95	5	88	12
Wairarapa	100	-	100	-
Manawatu/Wellington	99	1	96	4
Marlborough/Nelson	66	34	71	29
Canterbury	70	30	75	25

South Canterbury	67.5	32.5	71	29
Otago	66	34	63	37
Southland	64	36	73	27
Nationwide	75	25	75	25

57. It is clear from the above table that a merger between Wrightson and Dalgety would lead to the merged company securing a very large part of the market, whether viewed regionally or nationally. For Wairarapa, Wanganui and Manawatu/Wellington that market share amounts to almost total dominance. In Southland some competition is provided by Elders and SFC, but in all other regions the maximum number of traders would be two - the newly merged company and one other.

58. Of crucial importance to any new entrant desiring to trade in livestock is access to saleyards. At present, in order to gain access to those saleyards, the prospective new trader is required to gain admission to the Stock and Station Agents Association [SSAA] which, in turn, requires prospective members to undertake the whole range of stock and station agency services. This, of itself, is a barrier to entry and will be referred to later in this decision. It is noteworthy that no independent trader, nor indeed Elders, has gained access to established saleyards except by acquiring an existing firm with an existing right of access.

(v) Wool Broking

59. The Commission understands that farmers may sell their wool by auction or by private treaty. A number of considerations are taken into account in judging which method to use, but it seems clear that private treaty sales generally account for about 20% of total sales. This suggests that farmers are heavily dependent upon the auction system for the marketing of their wool. Wool is auctioned at Napier, Wellington, Christchurch and Dunedin. The stock and station agents virtually control the wool auction system. An agent must first become a member of the SSAA [and carry out the full range of SSA services] before it can become a member of the Woolbrokers Association.

60. Information presented to the Commission demonstrated quite clearly that a merger between Wrightson and Dalgety would lead to the merged company enjoying a very high market share both regionally and nationally. Information provided by the Examiner is set out below:

AUCTIONED WOOL BY REGIONS WITH COLLECTING CENTRES

	Wrightson/Dalgety Market Share [%]		
	1982/83	1983/84	1984/85
Auckland	72	72	72
Napier	73	72	72
Wellington	100	100	77
Wanganui	81	80	81
Christchurch	72	72	71
Timaru	74	74	73
Dunedin	68	68	69
Invercargill	61	61	60

The national market shares were reported to be as follows:

	1983/84	1984/85
Wrightson/Dalgety	72.0	71.7
Pyne Gould Guinness	5.8	6.4
Williams & Kettle	6.2	6.3
Reid Farmers	4.9	5.0
Elders	5.2	4.6
Southland Farmers	1.9	2.0
Other	3.9	3.8

61. The minimal variations in market shares from year to year were attributed by the Examiner to the traditional ties between farmers and stock firms, together with the lack of any price competition in the services offered. The only exception to this has been the performance of Central Wool Services in Wellington in 1984/85, the success of which was due in part to a cheaper service. Central Wool Services has managed to become a member of the Wellington Woolbrokers Association without first becoming a member of the SSAA and in its first year of operating in the auction system has managed to acquire a 23% market share in the Wellington region.

(vi) Summary

62. The Commission is satisfied that there is no need for further inquiry, on the basis of information before it, on the provision of seasonal finance, general merchandising and grain and seed merchandising. For some products in some areas the market shares that would accrue to Wrightson and Dalgety are disconcertingly high and there is some residual concern about vertical integration in the wire industry. Overall, however, there appears to be a sufficient level of competition from a variety of sources in these product/service markets and, given other changes that are to take place [e.g. deregulation of the flour industry] effective competition should be maintained post-merger.

63. The same cannot be said of livestock trading and wool auctioning. The merger of Wrightson and Dalgety will lead, in both these product/service markets, to a high degree of market concentration, both regionally and nationally.

64. Submissions were made to the Commission by the participants that market-concentration should be given little, if any, weight in the Commission's deliberations. Primary emphasis should, in the view of the proponents of this theory, be given to contestability of the market and, in particular, to the presence or otherwise of exit and entry barriers.

65. The Commission does not totally accept this view. Whatever the trend of so called modern economic theory, the Commission is bound by the statute under which it operates. In any event, the Commission believes that the degree of concentration in any particular market will provide an important signal for the extent of any further inquiry that may be necessary to establish the presence or otherwise of effective competition and probable future competition.

66. In looking particularly at market shares the Commission has noted the view expressed in several of the submissions before it that a merger often results in some degree of erosion of the market share of the combined enterprise post-merger. Historically this has occurred in New Zealand but not to an extent that would lessen the Commission's concern at the resultant market aggregation in this particular case.

(vii) Potential Competition

67. The main sources of competition for the merged enterprise in the core areas of activity, given the present barriers to entry, would come from regional stock and station agency firms. Inconclusive evidence was placed before the Commission on minimum or optimum market shares required to sustain a viable business. With the high degree of concentration of the marketing for wool and livestock it is clear that regional firms would individually be left in the position of being minor players against a dominant competitor. Several of the regional firms expressed concern at their ability to compete with the dominant enterprise in this situation, not because they expected Wrightson/Dalgety to use its dominant position in any unlawful way, but because of the natural advantages that would accrue to the merged enterprise by way of economies of scale and introduction of new technology etc. To some extent these views are speculative but they do raise some doubts about the continued effectiveness of competition in a situation where barriers to entry are high.

68. The position of Elders is far from clear. On the one hand the company has made a substantial investment in rural servicing in New Zealand and has sought and obtained from the Commission clearance to acquire Dalgety; but, on the other hand, in its final submission to the Commission Elders stated: "In assessing the likelihood of future competition in the New Zealand stock and station agency business in the event that the merger proposal is approved the Commission should therefore not consider Elders as a future national competitor". In a relatively short space of time Elders has made inroads into the New Zealand market principally by acquisition of existing companies rather than by organic growth. This progress would probably have been more dramatic had barriers to entry in some key areas been lower.

(viii) Product Differentiation

69. The Commission has received a variety of submissions on this question and, particularly, on the so-called "bundling" phenomenon. The rules of the SSAA require members to perform a range of services to qualify for admission. Part of those services is the provision of seasonal finance. As stated earlier in this decision there is a concern among some farmers that acceptance by them of stock and station agency seasonal finance would place them under an obligation to use the lending agency's other services which may not be as cheap as those obtainable elsewhere. The agents clearly offer a bundle of services and, as one submission put it, the seasonal finance is the glue that holds the "bundle" together.

70. The Commission accepts that for some services this phenomenon has been eroded over the years by single product firms in the stock and station agency industry, but the Commission believes, on the basis of its own analysis of the submissions before it, that the provision of a package of services, especially the core services associated with wool and livestock trading, remain essential ingredients to successful entry to the market. This package is cemented in place by the ownership arrangements of wool and livestock auctioning facilities which are then reinforced by the protective rules governing entry into SSAA and the Woolbrokers Association.

BARRIERS TO ENTRY

(a) Introduction

71. Of the product markets adversely affected by this proposal, no real barriers to entry exist for either merchandising or for grain and seeds. Each, of

course, does require normal capital resources for a new entrant to establish a market niche, but those resources are not so great as to prohibit entry. To a much greater extent, however, are the capital establishment requirements for the provision of seasonal and other finance for rural lending. There are at present a number and variety of financial institutions (notably the trading banks) who provide such services to farmers and, no doubt, following the government's already stated intention to relax the controls governing banking generally, some, if not all, of the new financial institutions entering the banking system will be prepared to also enter the rural lending market. The two product and function markets which require very close examination, and which are central to the issue of ensuring effective competition remains in this industry post merger, are auctioning of wool and store stock. The Commission (as did the Examiner) sees the availability of the auctioning facilities as the decisive factor affecting this proposal.

(b) Entry to Wool Auctioning

72. As mentioned earlier, the stock and station agents control the wool auction system by virtue of ownership of the auction facilities. Auctions are held each year at four centres only - Napier, Wellington, Christchurch and Dunedin - with the possibility that in the foreseeable future wool auctions will be held in Wellington and Christchurch only. Further, the rules of the Woolbrokers Association state that entry to its Association is restricted to those who are members of the SSAA. In other words unless a wool trader can gain membership of the SSAA that trader is unable to gain entry to the Woolbrokers Association and is thus precluded from offering wool from farmer clients at auctions held anywhere in New Zealand. Almost 80% of all wool produced annually is traded through the auction system.

73. The Examiner stated in his Report that a Wairarapa company, Central Wool Services, had in 1984/85 gained membership of the Wellington Woolbrokers Association without first becoming a member of the SSAA. The Examiner suggested that such entry to a regional association may have come about through intervention of the New Zealand Wool Board (Wool Board). The Wool Board clarified this for the Commission, for as the Wool Board actually owned the auction facility, it was thus able to allow Central Wool Services to use this facility in Wellingon, irrespective of it having membership of either the SSAA or the Woolbrokers Association.

74. Evidence was also given to the Commission by the NZ Wool Marketing Co-operative Association that the only way it

was able to offer wool at auction was through the regional stock and station agents, where its offering was regarded as part of Reids, Elders, PGG or W&K's own offering. Wrightson & Dalgety, as the only two national operating stock and station agents, have a part ownership in all the wool auction facilities in New Zealand (with the exception of Wellington), with the various regional stock and station agents holding a one-third (approximately) share of the auction facility in their own region.

75. The recent changes to the operations of the handling of wool offered at auction, whereby the wool is offered by sample only and certified as to its various qualities (such as greasiness, crimp, texture, etc) necessitates stock and station agents having warehouses where wool can be stored, sorted, sampled and classified ready for sale. The capital cost of ownership of such warehouses is substantial.

76. In Wellington the arrangements are somewhat different from most other centres. The warehouse facilities are owned jointly by Wrightson and Dalgety, whilst the auction facilities are owned by the Wool Board which leases that facility to the Wellington Woolbrokers Association. The Wool Board informed the Commission it believed that all auction facilities could be made available to non SSAA members on a similar basis. It also advised that it was in the process of discussing with the owners of the wool auction facilities a proposal to enable freer access and was hopeful that some agreement could be reached between the owners prior to the Commission determining this proposal. When questioned by the Commission at the Conference on the Wool Board's suggestion both Wrightson and Dalgety stated they were receptive to the Wool Board's idea. Wrightson, however, initially "reserved its position" in relation to Elders. Wrightson stated that Elders was a "substantial company" and could well afford to purchase a share of the equity of the auction facilities, but considered that "smaller" traders may be allowed access on a cost sharing basis.

77. There is no doubt at all that up to now the barriers to entry into the wool broking market have been extremely high. Moves are appearing to be made to lower those barriers and these moves will be discussed later in this decision.

(c) Entry into Livestock Auctioneering

78. To be able to compete in the market for the auctioning of store stock (sheep, cattle, deer and goats) a trader must have access to sale yards. Ownership of such yards varies but generally in the North Island the sale yards appear to be owned or controlled by the members of the

SSAA. In the South Island the yards are owned either by the stock and station agents or by farmer co-operatives. In the case of farmer owned yards, users pay a "yardage" or rental fee calculated on the number of stock put through the yards by that user. The availability of such yards to other than members of the SSAA also appears to vary, with access in the South Island seemingly to be more readily available than is the case in the North Island. To obtain the use of saleyards owned or controlled by the stock and station agents, a livestock trader must be a member of the SSAA and, up to the present, entry to that association has been very strictly controlled and limited to only those businesses which offer a full range of stock and station agency services. Even Elders has only gained membership of the SSAA through the purchase of stock and station agency businesses which had existing membership. Even that, however, has not enabled Elders to gain access to all sale yards throughout New Zealand and the Commission was provided with considerable evidence by Elders of the difficulties it has encountered in its endeavours over the past two years to gain access to sale yards, particularly in the North Island.

79. The Examiner, in his report, stated that no independent livestock trader (i.e. a trader who is not an SSAA member) has been able to gain access to established stock yards. He cited the case of one livestock specialist trader, Mr J Jones, who does offer auction selling but only because, having been refused access to existing sale yards, he built his own stock yards.

80. The Commission received evidence from Mr C M Egan, an independent livestock trader operating in the Gisborne area, detailing the history of his persistent requests to obtain membership of the Gisborne SSAA and the consistent refusals by the Association to allow him to do so. Mr Egan's purpose was, through membership of the Association, to thus gain entry to the Matawhero saleyards.

81. Elders' evidence of its attempts to gain entry to four stock and station agent owned saleyards in Hawkes Bay was that, after some delay, it was offered, on 30 May 1986, a one-quarter share in the yards for $1.7million, a figure which Elders considered excessive. That view was based on the fact that the Government Valuation figure for the four saleyards in question amounted to $1.3 million, of which a quarter share would be $327,000. Elders was unable to obtain details of how that valuation had been arrived at, other than that it contained a goodwill calculation of 20% on all commissions assessed over a twelve month period ended 30 November 1985. Elders other applications to obtain access to saleyards in Gisborne, Taihape, Masterton, Manawatu and Wairarapa have also encountered difficulties and have been held in abeyance

until the Hawkes Bay access is settled.

82. In September 1983 Crown Consolidated Limited (now named Crown Corporation) was granted consent by the Examiner for it to acquire all of the share capital of Dalgety New Zealand Limited (which brought about the formation of Dalgety Crown Corporation). That consent was subject to various conditions, most notably three specifically directed at freeing up access to saleyards. Those conditions were:

(i) that it shall be the policy of DCCL to continue to provide access to other companies or operators to sell livestock at saleyards on an equitable commercial basis.

(ii) That in future it shall be the policy of DCCL to provide similar access to other companies or operators to sell livestock at any saleyards owned or controlled by DCCL.

(iii) That it shall be the policy of DCCL, where saleyards are partly owned or controlled by DCCL, to exercise its influence to support the non-preferential access of other companies or operators to sell livestock at those saleyards on an equitable commercial basis.

83. At the Conference the Commission sought to ascertain how Dalgety had complied with those conditions. Dalgety advised the Commission that the schedule of conditions was "tabled" at a meeting of the SSAA where some discussion on the conditions ensued. Dalgety took no further action to comply with those conditions with either the SSAA or at a provincial association level.

(d) Events at the Conference

84. It became obvious as the Conference progressed that Wrightson was more than eager to move from its initial position in relation to access to auction facilities for Elders and the other private traders in both wool and livestock. Wrightson admitted that the rules of the SSAA had been used to keep out any trader who did not offer all stock and station agency services.

85. An even more disturbing feature of how powerful the influence of the stock and station agents is, related to an application for saleyard access from John Pinel Limited of Pahiatua. Pahiatua saleyards are owned by a public

company and the majority of its shareholders are farmers. Wrightson, which owns no shares in that saleyard company, was agreeable to allowing Pinel to use the saleyards but not on the days when members of the SSAA were auctioning stock. [Pinel also sought membership of the local stock and station agents association. On 18 July 1986 he was sent a letter from the Wairarapa Stock and Station Agents Association, a copy of which he sent to the Commission. This quoted part of the undertaking given to the Examiner relating to promoting the revision of the SSAA constitution and rules following consent being given to this merger proposal and the letter ended with the sentence "You will be contacted when the Commerce Commission decision is known."). Wrightson, at the Conference, informed the Commission that it will "not oppose Pinel but they have in the past" and, in spite of the letter of 18 July, Wrightson "have now made that decision to allow Pinel entry". Wrightson's position relating to access to auction facilities was summarised by its counsel as being that, if the proposal is approved then, because of the agreement reached with the Examiner, there will be a significant advance in the ability for other traders to obtain access to the auction facilities. If, however, the proposal is not consented to then Wrightson will continue to look at applications on an individual basis before coming to a view on access. The influence which Wrightson has over sale yards in which it does not have proprietary rights is a matter of concern to the Commission.

86. During the course of the Conference the Examiner clarified the purpose of the agreed statement. He stated that his concern was to ensure access to both wool and stock auction facilities by the independent traders who may not be able to afford to purchase a share of the capital in such facilities. He recognised that it would be difficult to draw up in detail the rules which would determine who would or would not qualify for entry on a "fee paying" basis as distinct from those who would be required to purchase a share of the equity. Neither had the Examiner addressed the basis of calculating that equity to enable a fair and reasonable price to be set. If a firm chose to buy a share of the equity, that should still be possible, but he had in mind a fee of some kind.

87. The Commission expressed the view that it was highly desirable that the rules allowing access to all auction facilities, whether for livestock or wool, should be very clearly laid down, be applicable across the board and that those rules were clearly and fully known to all intending applicants. It did not want to find itself in the position of writing rules for some and not for others. Neither did it relish the task of defining who was a "small operator" or who was a "substantial operator".

[It was very clear and it was admitted by Wrightson that there was only one possible "substantial operator" and that was Elders]. The Commission was also of the opinion that the agreements with the Examiner did nothing to resolve the real problems if a dispute arose regarding the level of costs to be charged or fees to be levied for use by other than the owners. The Commission stated it did not wish to be placed in a position of constantly adjudicating on such matters.

88. As the discussion with Wrightson developed it became very evident that Wrightson was only too willing to alter its position to meet the Commission's concerns on these points. Wrightson finally stated that it would be prepared to agree to a simple formula with each party appointing its own valuer to value the property involved, and with a method for arbitration should there be a failure to agree on the figure involved. There the matter rested, as in almost every instance where Dalgety and Wrightson own either wool auction facilities or saleyards there is one other owner whose agreement to such arrangements would need to be sought.

(e) Events Following the Conference

89. On 6 August 1986 the Commission received a letter from Wrightson which, inter alia, set out Wrightson's position on access to the wool exchanges and to saleyards. Because of the importance of both facilities in relation to this proposal, those sections of the letter warrant reproduction in full. They read as follows:

"(2) ACCESS TO SALEYARDS

"Following approval to the Merger of Wrightson and Dalgety Crown, Wrightson NMA Limited is prepared to support access to saleyards on a fair basis by any party who is prepared to offer a permanent service for the sale of livestock.

"Where Wrightson NMA Ltd is a shareholder in saleyards they will agree for new participants:

(i) That separate yard fees be established to cover a return on capital invested and the operating costs, calculated annually on a headage sold basis.

(ii) That the return on capital invested be calculated on the basis of a triennial valuation of land at market value and improvements at replacement cost less depreciation multiplied by the rate of interest charged at the beginning of the

period by the AMP Society on first mortgage commercial loans.

(iii) That annual operating costs cover all other expenses such as rates, insurance, maintenance, labour, advertising, telephones, power, etc.

(iv) That there be no qualification for a new entrant other than normal financial standing and integrity provided:

(a) They are a licensed auctioneer.

(b) They sell under the standard conditions of sale established for the yards. To do otherwise would cause unnecessary confusion to buyers.

(c) They accept majority decisions of all participants in the operation of the yards.

(v) Wrightson NMA Ltd will use their best endeavours to persuade other stock and station firms to also accept these proposals. If agreement on a reasonable basis is not forthcoming Wrightson NMA Limited will withdraw from membership of the New Zealand Stock and Station Agents Association and its constituent Associations.

"(3) ACCESS TO WOOL EXCHANGES

"Agreement in principle has been reached with the NZ Wool Board and as stated at the meeting on 31 July 1986 we believe that with the Wool Board's involvement, experienced and reputable applicants will have no problem gaining access to wool selling facilities."

A copy of Wrightson's agreement with the Wool Board is attached to this decision as Appendix D.

90. It seems therefore that the above undertakings given by Wrightson cover most of the deficiencies which were apparent to the Commission from the agreed statement in the Examiner's report. What is still lacking is of course a means of settlement should disputes arise. The Commission's view is that in the event of disputes the procedures of the Arbitration Act should be followed. The intention to ensure freer access to auction facilities has been publicly expressed.

(f) Commission's Conclusions on Barriers to Entry

91. It is indisputable that the barriers to entry to the wool and livestock auction markets are, at present, formidable indeed. The arrangements to date have been so structured that new entrance has been nigh impossible. Thus market control has been vested in a very small group of stock and station agents by virtue of ownership of key property and even to the point where there was enough market power to influence the use of other key property over which those agents had no ownership rights. Independent traders have been unable to offer any effective competition against this coterie. There have been no new entrants into the market for a considerable number of years and even Elders have only been able to gain access through the purchase of companies which already possessed ownership rights to auction facilities. In addition, conditions which were attached to a merger or takeover consent which, in the Commission's view, should have been regarded as legally binding, were disregarded by at least one stock and station agent and that disregard was well known to other members of the SSAA. The Commission does not wish to appear unduly cynical, but the remarkable "change of heart" which became evident at the Conference and which Wrightson stated it "would like to think" was based on "logic" seems to have coincided with this merger application and after conciliation with the Examiner. Wrightson stated that the proposal "focussed" on the issue of access and it had committed itself to changing the rules. The Commission however notes that that commitment only applies so long as approval to this proposal is given.

OTHER SECTION 80 EFFECTS

(a) Employment

92. In the application for consent to the proposal the participants acknowledged that staff numbers would need to be reduced and that would be so even if the proposal did not proceed. It was suggested to the Examiner that, in fact, the merging of the two companies would protect some jobs that would otherwise be lost should Wrightson and Dalgety continue to compete with each other as in the past. Much of what was earlier stated to the Commission in the original application is now widely known as both Wrightson and Dalgety have made public announcements as to the number of staff redundancies. Wrightson have shed 337 staff and Dalgety has given notice to 500 staff with

the prospect of additional redundancies. The Examiner in his report estimated that if the merger were not to proceed a total of 1,426 staff would lose their jobs and this number would reduce to 1,060 if the proposal were given consent. Thus the benefit from the proposal being able to proceed was the saving of approximately 360 employment positions.

93. Elders had submitted to the Commission that if it were to acquire Dalgety (for which clearance has been given by the Commission) the number of employees who would be made redundant would be substantially reduced and Elders suggested that this could be in the order of 180 staff retained. That may well be so. Nevertheless the Commission must look at the employment as affected by this proposal and make its decision accordingly. Whether any proposal proceeds or not is eventually a matter for commercial decision.

94. The Commission was surprised that it received no submissions whatsoever from the Unions or the Federation of Labour (FOL). In mid-April it received a telegram from the Secretary of the FOL expressing "grave concern" at the merger proposal in respect to "large scale redundancy". No further contact was made with the Commission. It therefore appears that the unions involved, through the FOL, straightway entered into negotiations with the participants to obtain a redundancy agreement. A copy of that redundancy agreement, to which the Examiner alluded in his Report as being a requirement prior to consent to the proposal, was forwarded to the Commission.

95. The staff at some Dalgety branches did make extensive submissions to the Commission. These mainly came from staff in branches which the Examiner recommended be excluded from forming part of the proposal, notably from staff at Taihape, Wanganui, Te Kuiti, Gore, Masterton and Levin. All those submissions sought that the original proposal be allowed to proceed and that there be no branches excluded. Understandably the staff in these branches believed that they would have more job security in those circumstances.

96. The Commission was not unsympathetic to those submissions and at the Conference sought Dalgety's views as to the viability of the excluded branches. The staff certainly believed that their branches were sound profitable ones. Dalgety, however, was of the opinion that they could be viable but would require some rationalisation with staff numbers reduced before the company could continue to keep them in operation. The Commission is well aware that Elders were at one stage negotiating to purchase those branches if they were available for sale. It is possible

that should the Commission determine to accept the Examiner's recommendation and exclude those branches then the staff may find that they still have job security, albeit with a new employer.

97. It does therefore appear that the proposal may benefit the employees of the participants in that the level of redundancies will be less than would have been the case if no merger or takeover proposal was in contemplation.

(b) Other Benefits

98. The Examiner, in his report, stated that he had fully considered all claims of the participants as to the public benefits of the proposal, but in his view those claimed benefits had not been substantiated. In its application for consent Wrightson had stated that the benefits of the proposal would:

(i) assist consumers by the re-organisation of Wrightson and Dalgety into a viable and efficient nationwide rural servicing company, especially in the current economic climate, with a better utilisation of resources, increased productivity and a reduction of costs.

(ii) prevent the reduction of services to farmers and maintain the continuance of farming development by being able to offer a full range of services to farmers.

(iii) promote exports by combining the resources of the two companies.

(iv) avoid the unilateral withdrawal of Dalgety from the rural servicing market.

(v) enable the combined company to attract the capital investment needed to meet clients' funding requirements, and protect such investment by being able to offer the investors the security they require.

(vi) benefit the investing public many of whom are shareholders in Fletcher Challenge and Crown Corporation.

99. Elders submitted that these benefits had not been substantiated by the participants and went so far as to state that in Elders' view, the benefits claimed were

self-interest ones and that Wrightson and Dalgety were endeavouring to take advantage of the depression in the rural sector to advance that self-interest.

100. Indeed at the Conference when questioned by the Commission on the benefits under s.80 of the 1975 Act, Wrightson agreed it was pursuing self-interest in this proposal. Wrightson and Dalgety were faced with the reality that to maintain their existing structures and operations was no longer an option. It was a case of restricting operations and activities, which would lose the companies business, or close more branches down and concentrate only on products and geographical areas where profits could be made.

101. The Commission agrees with the Examiner in his analysis of the other benefits under s.80 of the 1975 Act. Wrightson and Dalgety offered no evidence to the Commission to verify the claimed public benefits of the proposal. There is no doubt either that the downturn in the farming economy has severely affected the business of both Wrightson and Dalgety. Both companies have publicly announced they have suffered substantial financial losses as a result of that downturn. The two certainly see the proposal as a means to retain one viable business in this economic scene instead of two financially troubled ones. However, that result can not in itself be classed as a public benefit in terms of the Act.

(c) Whether a Merger is Necessary to Achieve Efficiency

102. In this connection, the Commission in its decision No 170 on Procedural matters sought the parties' views on whether the claimed benefits were only able to be achieved by a merger; whether they were public rather than private interests and whether those claimed benefits would result in price benefits to consumers. No party specifically addressed these points. Therefore it does not appear that, other than in relation to employment effects, the merger can be regarded as essential to achieve efficiencies, although no doubt some cost savings would result. What has not been established is whether any such cost savings will prove to be public benefits which would be likely to be passed on to the consumer in the form of lower prices.

ENFORCEABILITY OF CONDITIONS OR UNDERTAKINGS

103. The relevant provisions of the 1975 Act relating to conditions and undertakings, and the distinction between them, were summarised by the Examiner as follows:

(a) S.78(4)(a)(iii) empowers the Commission, where it considers a merger proposal to be contrary to the public interest, to make an order allowing the proposal to proceed subject to terms or conditions for the:

> "purpose of remedying or preventing or modifying the effects of the ... proposal ... which are or are likely to be contrary to the public interest".

(b) S.81 JD enables the Commission in giving a consent or clearance to accept or require the giving of a written undertaking concerning the conduct to be engaged in by that person which may affect competition in a market. Every undertaking so given is deemed to be a condition of consent or clearance.

(c) Undertakings can only be given in the case where the Commission consents to the proposal: namely in terms of s.78(1)(a). To summarise therefore, if the Commission finds the proposal not contrary or likely to be contrary to the public interest, it may nevertheless require an undertaking as part of the consent to correct any anti-competitive conduct. On the other hand should the Commission find the proposal contrary to the public interest, it can only impose terms or conditions (and not an undertaking) on an order to proceed with the proposal.

104. The Commission's power under the 1975 Act to approve a merger proposal subject to conditions has not been repeated in the 1986 Act. Furthermore, the provisions relating to the enforcement of conditions imposed by the Commission under the 1975 Act have been repealed by the 1986 Act. Elders therefore submitted that the Commission had no power under the 1986 Act to impose the conditions suggested by the Examiner in his report. If the Commission did impose conditions in a decision given under the 1975 Act (obviously after 1 May 1986), then such conditions would not be enforceable.

105. The question of the imposition of conditions to a merger under the 1975 Act and, by necessary implication, the enforceability of such conditions under the 1986 Act, was considered in two recent cases before the High Court. In Fletcher Metals Ltd/Pacific Steel Ltd, [M600/85] on appeal from a decision of this Commission the High Court stated:

> "In our opinion it is the duty of the Commission whenever reasonably possible to consent to a proposal and endeavour to remedy or modify identified detrimental effects by means of undertakings or conditions".

106. This judgment was given on 28 April 1986, three days before the repeal of the 1975 Act and the coming into effect of the 1986 Act. It is significant therefore the High Court in NZ Steel Ltd/Pacific Steel Ltd [M725/85], which was heard on 5 and 6 May 1986 and on which judgment was given on 10 June 1986, chose to impose a condition to an application determined pursuant to the 1975 Act after the repeal of that Act and the introduction of the 1986 Act, presumably on the principle set out in paragraph 105.

107. It should be noted that those appearing before the Commission used a variety of terms to describe the participants' stated intentions. The Examiner did not consider the agreed statement to be either attached as conditions or accepted as undertakings. He referred to them as "assurances", and in his view were agreed statements which had been incorporated into a modified proposal. Wrightson and Dalgety, on the other hand, called them "conditions" and/or "undertakings".

108. Wrightson adopted the form of submission to the High Court by NZ Steel in the NZ Steel/Pacific Steel case. Wrightson considered that any undertakings which the company gave would be enforceable against it where such undertaking was given in relation to conditions imposed pursuant to the 1975 Act. As authority for the proposition that the Commission could rely on undertakings in circumstances such as these, it cited the decision of the English High Court in Augier v Secretary of State of the Environment [1978] 38 P & CR 219 at 225-228, which decision was followed in New Zealand by the Planning Tribunal in Application by New Zealand Synthetic Fuels Corporation [1981] 8 NZTPA 138 at 164-165. Dalgety agreed that the Augier principle applied, as did the Examiner. Dalgety also submitted that, since the agreed statement formed part of the terms of consent recommended by the Examiner, if the Commission consented in such terms, a breach of the agreed statement would constitute a breach of the terms of the consent under the 1975 Act, and would be enforceable as such.

109. The Augier principle does not depend on enforcement provisions in the statute. It was formulated in the context of a statute which did not provide for the giving of the particular undertaking, or for the imposition of that undertaking as a condition, or for enforcement. The

Planning Tribunal took the view that the undertaking was "intrinsic" to the consent and that, if it was not adhered to, "the whole grant must fall". The High Court did not comment on the effect of the decisions quoted above but made a decision in NZ Steel/Pacific Steel consistent with their application.

110. Elders submitted that the conditions embodied in the modified proposal were of little practical effect in coping with the barriers to entry. Both the first condition [that the rules of the Stock and Station Agents Association and the New Zealand Wool Brokers Association be revised by 1 March 1987 to lower barriers to entry] and the second condition [that Wrightson/Dalgety undertake to promote modification of rules and procedures relating to rights of entry to certain facilities, since they are not presently conducive to the entry of new participants] are indicative of trade practices which would appear to fall within s.27 of the 1986 Act. As such any agreement to comply with such conditions is necessary in any case and is only a promise to observe the existing laws. The fourth condition [which noted the Examiner's concern that the merged organisation would enjoy possible market dominance], merely stated that the Commission ought to investigate future conduct in accordance with its powers under s.36 of the 1986 Act. Elders felt that any actions which might be taken under either ss.27 and/or 36 were clearly already within the existing laws, and imposing them as conditions gave them no added weight. As such the conditions to the merger, as distinct from ss.27 and 36 of the 1986 Act, were unenforceable and worthless.

111. The contrary argument was that the statement agreed by Wrightson and Dalgety was not just a simple promise to obey the law. It was an acceptance that, unless the agreed statement was adhered to, there was an admission that the law had not been obeyed. Dalgety, for example, stated that the statement marked a significant advance on the Company's legal duties. It represented a moral obligation to take all necessary steps to ensure the effective carrying out of the particular undertakings. From the Commission's point of view, acceptance of the statement agreed with the Examiner would constitute admissible evidence establishing a substantial purpose, in relation to ss.27, 29 and 36 of the 1986 Act, all of which provisions involve the prohibition of purposive conduct. For its part Dalgety was in no doubt that the agreed statement substantially increased the risks of successful contravention proceedings under the 1986 Act, if there were a failure to give effect to any of the particular undertakings.

112. The Commission's view on the question of the imposition of conditions/undertakings is as follows:

(a) Since it is proceeding under the 1975 Act, the Commission has the power under that Act to accept undertakings when giving a consent to a proposal, or to permit a proposal to proceed by order subject to conditions when it would otherwise consider the proposal to be contrary to the public interest. This is in accordance with the High Court's imposition of conditions in the New Zealand Steel/Pacific Steel decision, issued after the 1975 Act had been repealed.

(b) Following the High Court ruling in that case and in the Fletcher Metals/Pacific Steel case, the Commission should "endeavour to remedy or modify identified detrimental effects by means of undertakings or conditions".

(c) As a minimum, these could be based on the agreed undertakings included in the terms of the modified proposal. The Commission believes, however, that this minimum could be extended to include any further offers clearly made by Wrightson/Dalgety during the Conference or in final submissions.

(d) Such conditions/undertakings would appear to be directly enforceable as integral to the basis of consent.

(e) Alternatively, the application of ss.27 and/or 36 of the 1986 Act provide a perhaps more suitable means of enforcement. While this would mean the Court being satisfied on the application of the Commission, in this eventuality the Commission could proceed on the basis that the undertakings/conditions rested on what are in effect "admissions" under each section that the proponent is party to answerable trade practices unless it adheres to the undertakings/conditions.

(f) Finally, however, it is for the Commission to decide whether the imposition of conditions would in fact remedy or modify identified detrimental effects.

PROPRIETARY RIGHTS

113. Access to sale yards and wool auction facilities is an important issue in this case and was widely discussed at the Conference. The Commission concurs with the Examiner in his view that in many instances it is not feasible to duplicate these facilities by persons or firms who are denied access to existing facilities. In many instances, however, these facilities are owned, either totally or to a large extent, by Wrightson and Dalgety. Given this ownership, the question therefore arose as to whether the Commission could include in its determination a condition which purported to derogate from these proprietary rights.

114. Both participants observed that there is no general duty at law upon a person to divest himself of the whole or part of a capital facility to any other party. The point at issue, however, was the reasonable use of these facilities by other persons, and not the requirement that either company dispose of any proprietary interest in such facilities. While persons requiring access to such facilities would be welcome to acquire a proprietary interest in such facilities they should not be required to participate.

115. Wrightson's view was that if it had given an undertaking in terms of the Examiner's report [to promote easier entry to and participation in auction facilities for livestock and wool] then it would be bound by such undertaking. It believed that all steps would then have been taken to ensure that competitors could gain access to auction facilities. Wrightson recognised that if it were in a dominant position in any market then, in terms of s.36 of the 1986 Act, it could not use that position for the purpose of restricting the entry of any competitor into that or any other market. Further, if it acted in concert with other proprietors in denying access to facilities, s.29 of the 1986 Act would have application.

116. The Commission accepts that, as a general proposition, it can not order the owner of a property to share that property with his competitors. In this particular case, however, given the undertakings offered by the participants and their acknowledgement that present practices contravene the 1986 Act, the Commission does not consider that the proprietary rights of Wrightson and Dalgety in livestock saleyards and wool auction premises would be a hindrance to the implementation of any proposed condition.

117. RELEVANCE OF TRADE PRACTICES

This matter was one raised by the Commission in the procedural note to counsel. In essence the Commission sought the parties' views as to whether, if it found that a trade practice existed, or did exist until recently, that ought to be taken into account in its determination of a merger or takeover. No submissions were received on this point. In the past the Examiner had, on occasions where he considered it warranted, attached conditions to his consent requiring participants to abandon certain practices. In this particular case there is prima facie evidence that trade practices do in fact exist. These relate to the SSAA and Woolbrokers Association limitation on entry pursuant to their rules. The flow-on effects of those rules have already been sufficiently elaborated on in this decision. As a general principle it is the Commission's opinion that a merger or takeover proposal should not be the vehicle for seeking the abandonment of a trade practice, which rightfully is required to be investigated and determined under the appropriate section of the Act. That applied to the 1975 Act and applies equally to the 1986 Act. In this case the fundamental problem is that the practices operated by members of the SSAA, who are also members of the Woolbrokers Association, have considerable effects on the ability of any new competitor to enter the market, to capture and to sustain a reasonable market share. Hence, in the agreed statement with the Examiner, the participants promised to promote changes to the rules and practices, post consent to this merger proposal. The Commission makes no other comment on the rules of the two Associations as they exist at the moment. Those rules are subject to the provisions of the 1986 Act and doubtless the members of those Associations are well aware of that. It is now a matter for the members to decide whether or not to seek authorisation under the 1986 Act for those rules or to make the appropriate amendments thereto.

THE FAILING COMPANY DOCTRINE

118. As noted earlier in paragraph 13, the Examiner considered the application of the "failing company" doctrine in this case, but came to the conclusion that it was not applicable. Subsequently the Commission received further confidential financial information. Since, however, the evidence was not tested at the Conference and the participants themselves made no further comments, confidential or otherwise, the Commission is unable to take the matter beyond the conclusion reached by the Examiner that the doctrine was not applicable. It therefore formed no part of the Commission's deliberations.

CONCLUSIONS

119. The public interest in this merger proposal has been unprecedented as was evidenced by the large number of submissions presented to the Commission and the widespread publicity it has engendered. There is no doubt that the proposal has widespread implications for the farming industry and that farmers are concerned at these implications. Perhaps the overriding concern expressed to the Commission was the desirability of maintaining, throughout the country, an infrastructure in which competition among stock and station agencies would flourish in the market for the supply of goods and services to the farming community.

120. Recognising this wide public interest, the Commission decided to adopt procedures somewhat at variance with its traditional procedures to leave no room for doubt that, within the time constraints imposed upon it by the legislation governing its deliberations, all who wanted to be heard would be heard and that the principles of natural justice would be preserved. The Commission has been greatly assisted by the submissions made and by the views presented to it both at meetings convened to hear elaboration of some submissions and at the more formal Conference with the parties.

121. With the assistance of a comprehensive report from the Examiner of Commercial Practices and of the information gained in its inquiries, the Commission has been able to reach broad conclusions on the matter before it as follows:

(a) The changing face of the stock and station agency industry suggests an increasing level of competition from non-traditional sources in a number of product/service markets, including the provision of seasonal finance and merchandising.

(b) The provision of seasonal finance to farmers by stock and station agents remains quite significant, albeit at a declining level. To the extent that farmers are tied, by the provision of seasonal finance, to stock and station agents for their other supplies the full impact of the competitive process is retarded.

(c) A merger of Wrightson and Dalgety would not, however, cause the Commission undue concern in most product/service markets examined since a reasonable level of

effective competition by regional stock firms and by single product suppliers would remain.

(d) This could not be asserted with any degree of confidence for wool and livestock trading. Wool and livestock trading are at the heart of any stock and station agency business. The proposed merger would bring with it a high degree of market aggregation for both these major activities in most regions. This, in itself, is a matter of considerable concern.

(e) Market aggregation is, however, but one aspect of the Commission's concern. It became clear during the Commission's inquiries that livestock and wool auctioning are beset by very high entry barriers which would, if they were to endure, severely limit competition.

(f) The Commission was not persuaded that there were sufficient public benefits arising from the proposed merger to offset what it perceived as the detrimental effects of the proposal in the market for wool and livestock trading.

122. Having regard to the foregoing the Commission has determined that both the original proposal and the modified proposal were contrary to the public interest or were likely to be contrary to the public interest.

123. In finally deciding whether the merger should proceed, however, the Commission had a number of matters to address in greater detail. The first was the question of market aggregation. In the Commission's view, market aggregation does not, of itself, disqualify the proposal from further consideration. It does, however, cause the Commission to look more carefully at the degree to which the market is contestable and, in particular, whether there is opportunity for effective competition, post-merger.

124. If the Commission were to accept that existing regional stock firms and other independent traders were able to provide an effective discipline on the merged enterprise that would resolve the question. However, in some geographical areas effective regional competition does not exist at all and nationwide there are high barriers to entry for new or potential competitors.

125. Thus, the removal of barriers to entry becomes crucial. In reaching a final view on the proposal the Commission was influenced by the fact that Wrightson stated, both at the Conference and later in writing, that it was prepared, on the merger being allowed to proceed, to work for the removal of barriers to entry forthwith. The Commission has noted, particularly, the assurances given by the company and set out in paragraphs 16 and 89 of this Decision. It has noted, also, that the merged company, because of its relative size, will carry a heavy onus of responsibility for the conditions that govern all stock and station agents' trading, at least in the short to medium term. Having regard to Wrightson's statements to the Commission and to the legal considerations outlined in paragraphs 103-112 of this Decision, the Commission considers that it is bound to be guided by the decision of the High Court in New Zealand Steel Limited and therefore must attempt to remedy the detrimental effects of the proposed merger by attaching conditions to any approval. It, therefore, proposes to permit the modified proposal to proceed subject to the conditions specified in the Determination.

126. In this matter of conditions the Commission has already commented, in paragraph 104 of this decision, on the 1986 Act, and the Commission's power to agree to a merger or takeover proposal subject to conditions. Indeed, the Commission has commented on this in two recent decisions, but notably in No 164 News/Independent Newspapers. It is primarily because the High Court in its judgment in the Fletcher Metals case delivered on 28 April 1986 [3 days before the 1986 Act came into force], stated that "... it is the duty of the Commission whenever reasonably possible to consent to a proposal and endeavour to remedy or modify identified detrimental effects by means of undertakings or conditions" that the Commission sees this course of action as open to it. The Commission also notes that in the NZ Steel case the High Court attached conditions to a consent in its judgment delivered on 10 June 1986. It is also comforted by the Augier principle supra [see paragraphs 108 and 109]. Further, it becomes "reasonably possible" to attach conditions in this case because of the Wrightson and Dalgety ownership of and/or influence over the saleyards and wool auction facilities. It is for all of these reasons that the Commission proposes to allow the modified proposal to proceed subject to conditions. In the absence of such reasons the Commission would not have seen any way of attaching conditions to remedy the detrimental effects on competition so evident from this proposal.

127. The Commission attaches the utmost importance to the observance of these conditions, which derive in a large measure [but not solely] from undertakings by the

participants. This is in spite of the less than satisfactory observance of similar conditions in the past. The Commission wishes to make it clear that, without the ability to attach these conditions, the proposal would not have found acceptance.

128. The Commission shares the view of the Examiner that Dalgety Crown rural servicing businesses in Wanganui, Taihape, Manawatu, Wellington and Wairarapa should not form part of the merger. In those areas the proposed merger would lead to an unreasonably high degree of market aggregation in an environment which lacks effective competition.

DETERMINATION

129. Accordingly the Commission hereby issues an order permitting the modified proposal to proceed allowing Wrightson NMA Limited to acquire all the share capital or the rural servicing business of Dalgety Crown Limited excluding all of the rural servicing business being carried on by Dalgety Crown Limited as at 31 March 1986 in Wellington, Manawatu, Wairarapa and Wanganui [including Taihape], subject to the following conditions:

(a) That the merger participants forthwith promote the necessary changes to constitutions of the NZ Stock and Station Agents' Association [including regional associations] and the NZ Wool Brokers Association [including regional associations] so that they facilitate effective competition in markets in which they participate; and

(b) That the merger participants forthwith promote the necessary changes to rules, practices and procedures [including the Memorandum and Articles of Association of any company with an interest in such facilities] governing the right of entry to auction facilities by competitors or potential competitors in the provision of commission services for all livestock and wool; and

(c) That the only criteria for entry to and participation in these livestock and wool auction facilities shall be normally acceptable financial standing and integrity, together with [at the option of the user] a preparedness to:

(i) either purchase at an agreed valuation a share of the equity in the facilities; or

(ii) pay reasonable fees for the use of the facilities; and

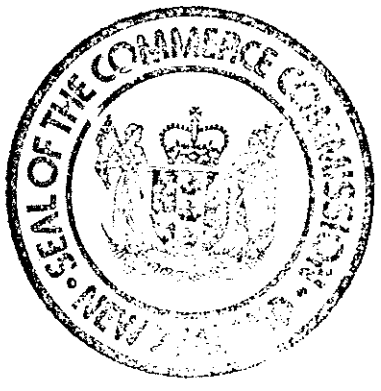
(d) That in the event of failure to agree on a valuation for determining the purchase price of a share of the equity in the facilities, or failure to agree on a reasonable level of fees for the use of the facilities, the parties shall refer the matter to arbitration under the Arbitration Act 1908; and

(e) That all necessary rule changes and changes to practices arising from this decision shall be completed and implemented as early as possible but no later than 1 March 1987.

In terms of section 78(6) and as provided in section 81(2) of the Act, this approval shall not come into force until twenty-eight days after the date of publication in the Gazette of this decision.

Dated at Wellington this 27th day of August 1986.

The Seal of the Commerce Commission was affixed hereto in the presence of:



W E B Tucker
Chairman

APPENDIX A

EXTRACT FROM THE REPORT OF THE EXAMINER OF COMMERCIAL PRACTICES - PARAGRAPH 259, TABLE 32

259. If 30 percent is accepted as a market share ensuring effective competition to a merged entity, Table 32 points up those geographic markets where effective competition would be substantially affected in a post-merger situation with regard to the product markets of auctioning wool and auctioning sheep and cattle.

Table 32

Percentage Market Shares

	Auctioning Wool		Auctioning Sheep		Auctioning Cattle	
	Wrightson/ Dalgety	Other	Wrightson/ Dalgety	Other	Wrightson/ Dalgety	Other
North Auckland			69	31	73	27
Auckland	72	28	79	21	79	21
Waikato			81	19	65	35
King Country			80	20	82	18
Taranaki			50	50	50	50
Hawkes Bay	72	28	63	37	60	40
Wanganui	81	19	95	5	88	12
Manawatu/ Wellington	78	22	99	1	96	4
Wairarapa			100	-	100	-
Marlborough/ Nelson			66	34	71	29
Canterbury	71	29	70	30	75	25
South Canterbury	73	27	67.5	32.5	71	29
Otago	68.5	31.5	66	34	63	37
Southland	60.5	39.5	64	36	73	27
National	71	29	75	25	72	28

APPENDIX B

PARTIES WHO APPEARED PERSONALLY TO PRESENT THEIR SUBMISSIONS TO THE COMMERCE COMMISSION

Farmers	Archie C Bayley, Te Karaka, Gisborne Alex Clark, Masterton B N Davidson, Papakura, Auckland John Falconer, Kaiwera, Gore P R Gaddum, Havelock North Robert M Sharp, Ngataki, Kaitaia
Federated Farmers	Head Office Nelson North Canterbury Southern Hawkes Bay Wairarapa
Farmers Groups (Petitions)	Ashburton (A Copeland) Canterbury (J.Sidey) Hunterville (C R Grace) Southland (S J Jones)
Dalgety Staff	L N Hocquard, Wanganui B F Quinn, Taihape
Stock & Station Agents	Reid Farmers Ltd, Dunedin Southland Farmers Co-op Association Ltd Williams & Kettle Ltd, Napier

S J Callesen, Valhalla Partnership, Seed Cleaners, Longburn

C M Egan, Stock Agent, Gisborne

New Zealand Wool Board

N.Z. Co-op Wool Marketing Association Ltd

Producers Ltd, Dunedin

Waitaki International Ltd

APPENDIX C

WITNESSES WHO APPEARED AT THE CONFERENCE HELD ON 29-31 JULY 1986

Party Represented	Names of Witnesses
WRIGHTSON-NMA LIMITED	Mr A B Downey [Chairman of Directors]
	Mr A J McLachlan [Managing Director]
	Mr D A Crengle [Planning Executive]
DALGETY CROWN LIMITED	Mr John Hunn [Managing Director, Crown Corporation Limited]
	Mr T R Harper [Managing Director, Dalgety Crown Limited]
	Mr G Snell [Deputy Managing Director, Dalgety Crown Limited]
ELDERS PASTORAL LIMITED	Mr M G Hamilton [Managing Director, Elders Pastoral, Adelaide]
	Mr S C H Matthews [General Manager, Elders Pastoral Limited, Wellington]
	Mr J J Matthews [Elders IXL, Melbourne]
	Mr R D Chomley [Elders Pastoral, Adelaide]
	Mr B Easton [Economist]
	Mr R G Lattimore [Director, Agricultural Economics Research Unit, Lincoln College]

Mr R L Sheppard
[Assistant Director, Agricultural Economics Research Unit, Lincoln College

Mr J A Scotland
[Scotland Services Limited, Hastings]

Mr D A Urlich
[Arthur Young, Chartered Accountants, Wellington]

APPENDIX D

Wrightson NMA Limited

P.O Box 1895. Fletcher Challenge House, 87-91 The Terrace, Wellington.
Phone 738-238.

August 5 1986

WOOL EXCHANGE SHAREHOLDING

It is agreed by Wrightson NMA Ltd that new entrants to Wool Exchanges in Napier, Christchurch, and Dunedin, will be admitted on a fee basis. The Wool Board proposes that any fee shall recognise an appropriate return on the valued equity of the Exchange plus the operating costs of such facilities.

On this basis the Wool Board has agreed to purchase a shareholding in the above premises and to make available to other brokers a share of its Exchange facilities in Wellington.

The above is subject to the approval of the other shareholder in each facility, namely Williams & Kettle in Napier, Pyne Gould Guinness in Christchurch, and Reid Farmers in Dunedin.

These arrangements will be finalised and implemented following the approval of the Commerce Commission of the merger between Wrightson NMA and Dalgety Crown Ltd.

WRIGHTSON NMA LTD

A.J. McLachlan
MANAGING DIRECTOR

NEW ZEALAND WOOL BOARD

B.K. Knowles
MANAGING DIRECTOR