

Determination

Inghams Enterprises (NZ) Pty Limited and Bromley Park Hatcheries Limited [2023] NZCC 16

The Commission:	Dr John Small Joseph Liava'a Nathan Strong
Summary of application:	An application from Inghams Enterprises (NZ) Pty Limited, or an interconnected body corporate of Inghams, to acquire the assets of the Cobb Commercial and Riverland businesses of Bromley Park Hatcheries Limited.
Determination:	Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to the proposed acquisition.
Date of determination:	5 July 2023

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The Proposed Acquisition

1. On 11 May 2023, the Commerce Commission registered a clearance application (the Application) for the proposed acquisition by Inghams Enterprises (NZ) Pty Limited (Inghams), or an interconnected body corporate of Inghams, of the assets of the Cobb Commercial and Riverland businesses (the Target Business) of Bromley Park Hatcheries Limited (BPH) (the Proposed Acquisition).¹ We refer to Inghams and BPH together as ‘the Parties’.

Our decision

2. The Commission gives clearance to the Proposed Acquisition as we are satisfied that it will not have, or would not be likely to have, the effect of substantially lessening competition in any market in New Zealand.
3. A key focus of our investigation was the determination of the appropriate counterfactual; that is, what would likely happen to the Target Business if its assets were not sold to Inghams.
4. After consideration of all the relevant factors, we are satisfied that the Proposed Acquisition is unlikely to substantially lessen competition in any New Zealand market. This is because we are satisfied that the Proposed Acquisition is unlikely to substantially lessen competition when compared to the situation if the Proposed Acquisition does not proceed.

Our framework

5. Our approach to analysing the competition effects of mergers is based on the principles set out in our Mergers and Acquisitions Guidelines (our guidelines).²
 - 5.1. We assess mergers using the substantial lessening of competition test. We determine whether a merger is likely to substantially lessen competition in a market by comparing the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).³
 - 5.2. Only a lessening of competition that is substantial is prohibited. A lessening of competition will be substantial if it is real, of substance, or more than nominal.⁴ There is no bright line that separates a lessening of competition that is substantial from one which is not. What is substantial is a matter of judgement and depends on the facts of each case.⁵

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

² Commerce Commission, *Mergers and Acquisitions Guidelines* (May 2022).

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

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

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

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

The key parties

BPH – the Target

6. BPH produces and sells day-old chicks (DOCs). It has three separate business units, being:
- 6.1. Cobb Commercial, which supplies Cobb DOCs⁷ to poultry growers and processors;
 - 6.2. Riverland, which sells Cobb parent stock to the Pacific Islands; and
 - 6.3. Shaver/SXB, which sells Shaver DOCs⁸ to egg production businesses.
7. The Proposed Acquisition relates only to the sale of the assets of the Cobb Commercial and Riverland businesses (the Target Business). Inghams is not seeking clearance to acquire BPH's Shaver/SXB business.
8. The Target Business has operations and assets in the North Island of New Zealand, including breeder farms and a hatchery.⁹
9. On the day the DOCs hatch at the Target Business' hatchery operations, they are placed on grower farms until they reach an appropriate weight for processing. They are then processed by broiler chicken producers¹⁰ into different primary and secondary processed chicken products.

Inghams – the Acquirer

10. Inghams is an Australian Proprietary Company registered in New South Wales and the acquirer is the New Zealand division of that Australian company, Inghams Group Limited.
11. In New Zealand, Inghams has rearing, production, hatchery, broiler, feedmill and primary plant facilities. Inghams produces DOCs for its own manufacturing needs but also buys in DOCs from BPH. Inghams does not currently sell DOCs to third parties.

Market definition

12. Market definition is a tool that helps identify and assess the competitive constraints a merged firm is likely to face. Determining the relevant market requires us to judge

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

⁷ Cobb is a breed of broiler (or meat) chicken.

⁸ Shaver is a breed of egg laying chicken.

⁹ Application at [3.4].

¹⁰ Such as Inghams, Tegal, Turk's, Brink's and Bostock Brothers.

whether, for example, two products are sufficiently close substitutes as a matter of fact and commercial common sense to fall within the same market.

13. We define markets in the way that we consider best isolates the key competition issues that arise from a merger. In many cases this may not require us to precisely define the boundaries of a market. What matters is that we consider all relevant competitive constraints, and the extent of those constraints. For that reason, we also consider products and services that fall outside a market, but which would still impose some degree of competitive constraint on a merged entity.
14. We consider that the relevant markets would likely include separate markets for each functional level of the supply chain for processed chicken, including a separate market for the supply of DOCs, consistent with our approach to market definition in Tegel/Brinks (2008) merger.¹¹
15. However, because our decision in this case rests on our assessment of the counterfactual we did not need to conclude on the relevant markets or identify their precise boundaries.

With and without scenarios

16. To assess whether competition is likely to be substantially lessened in any market, we compare the likely state of competition with the acquisition (often referred to as the factual) to the likely state of competition without the acquisition (often referred to as the counterfactual).¹²
17. With the Proposed Acquisition, Inghams would acquire the assets of the Target Business.
18. Without the acquisition, Inghams submits that it would [],¹³ and that the [].¹⁴
19. Without the Proposed Acquisition, we consider that the only likely scenario []. This is because the evidence supports that in the absence of the Proposed Acquisition:
 - 19.1. the Target Business would likely []; and
 - 19.2. [].

¹¹ Tegel Foods Limited and Brinks Group of Companies (Commerce Commission Decision 658 22 October 2008).

¹² *Mergers and Acquisitions Guidelines* above n2 at [2.29]; Commerce Commission v Woolworths Limited (2008) 12 TCLR 194 (CA) at [63].

¹³ Application at [10.1].

¹⁴ Application at [11.1].

20. We discuss each point below.

The Target Business is likely to []

The Parties' submissions

21. The Parties submit that:

21.1. []¹⁵ and [];

21.2. BPH took [],¹⁶

21.3. due to the [];¹⁷

21.4. the effect of the []¹⁸
[],¹⁹ and

21.5. the Target Business has []²⁰
[].²¹

22. Therefore, if the Proposed Acquisition does not complete, the Parties submit that [].

Evidence and analysis

23. Evidence gathered during our interviews with [] customers of the Target Business confirmed the impact the []. For example:

¹⁵ Application at [11.2].
¹⁶ Application at Figure 3.
¹⁷ Application at [11.12].
¹⁸ Application at [11.19].
¹⁹ Application at [11.22].
²⁰ Application at [11.24] and [11.29].
²¹ Application at [11.31].

23.1. [],²² and

23.2. [] commented that the [].²³

24. [] also played a role in customers [].
[],²⁴ and
[] told us that it had received a few batches of birds from the Target Business
[].²⁵

25. We understand that BPH made [].²⁶ [] customers
told us that they
[].²⁷

26. BPH advised that the [] to fulfil these requirements
would include [].²⁸ and
[].²⁹ The Target Business does not
[].³⁰

27. []. BPH has also [].
[],³¹ and
[].³²

²² Commerce Commission interview with [].

²³ Commerce Commission interview with [].

²⁴ Commerce Commission interview with [].

²⁵ Commerce Commission interview with [].

²⁶ Commerce Commission interview with BPH (7 June 2023).

²⁷ Commerce Commission interviews with [].

²⁸ [].

²⁹ Commerce Commission interview with BPH (7 June 2023).

³⁰ Ibid.

³¹ Email from [].

³² Commerce Commission interview with BPH (7 June 2023).

28. BPH stated that it []³³ If after this point the Proposed Acquisition does not proceed:

28.1. BPH stated that it would []³⁴

28.2. []³⁵

29. We are therefore satisfied that, absent the Proposed Acquisition, the Target Business would [].

[]

The Parties' submissions

30. Once it was determined that []

[]³⁶

31. Inghams submitted that the most likely alternative purchaser would be a party already in the poultry industry given that the operation of a hatchery for the supply of DOCs is highly complex and requires specialist expertise.³⁷ Inghams further submitted that there are no other New Zealand based companies with the required expertise to adequately manage the assets and address the biosecurity issues that would present a more competitive purchaser than Inghams.³⁸

32. Therefore, the Parties also consider that there are no plausible alternative purchasers aside from Inghams []³⁹

Evidence and analysis

33. During our investigation, we spoke with []

³³ Commerce Commission interview with BPH (7 June 2023).

³⁴ Ibid.

³⁵ Email from [].

³⁶ Application at 12.5]-[12.7].

³⁷ The Application at [12.9]-[12.11]. Commerce Commission interviews with BPH (7 June 2023); [].

³⁸ Application at [12.11].

³⁹ Application at [12.9].

].

34. All the industry participants we spoke with agreed with the proposition that the most likely alternative purchaser would be a party already in the poultry industry.⁴⁰ A purchaser would also need to have the [].

35. The Target Business is unlikely to appeal to anyone outside the poultry industry given it is [], and requires specific industry knowledge to run. We have not identified any party other than Inghams, that would be likely to acquire the assets of the Target Business absent the Proposed Transaction. Accordingly, we consider it unlikely that an alternative purchaser would acquire the Target Business [].

36. We are therefore satisfied that, in the counterfactual, [] the Target Business would [] given that:

36.1. it is unlikely that []; and

36.2. it is unlikely that, after the [].

Overall conclusion

37. We consider that in the counterfactual, the Target Business would [].

38. This means that in both the with and without the merger scenarios, supply of DOCs to poultry processors would be [].

39. Accordingly, we are satisfied that the Proposed Acquisition would not have, or would not be likely to have, the effect of substantially lessening competition in any market.

⁴⁰ For example, see Commerce Commission interviews with []; []; and [].

Determination on notice of clearance

40. Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to Inghams Enterprises (NZ) Pty Limited, or an interconnected body of Inghams, to acquire the assets of the Cobb Commercial and Riverland businesses of Bromley Park Hatcheries Limited.

Dated this 5th day of July 2023

Dr John Small
Chair