AJ PARK RESPONSE TO COMMERCE COMMISSION'S STATEMENT OF PRELIMINARY ISSUES

PUBLIC

1. Introduction and executive summary

1.1. This submission sets out AJ Park IP Limited's (**AJ Park**'s) response to the Commission's Statement of Preliminary Issues dated 10 July 2020 (**SOPI**) regarding the proposed acquisition of Baldwins Intellectual Property, Baldwin Holdings Limited, Baldwins Intellectual Property Limited and Baldwins Law Limited (**Baldwins**) (**Proposed Acquisition**).

1.2. AJ Park's position on many of the potential areas of interest raised in the SOPI is set out in the clearance application. We do not repeat those positions here, but remain very happy to provide further information on those points to the Commission as may be requested.

1.3. This submission focuses on three points mentioned in the SOPI:

a. a potentially narrower market definition, as referred to in paragraph 14.2 of the SOPI;
b. the degree of competitive constraint imposed by existing competitors, as referred to in paragraphs 18 and 21.1-21.2 of the SOPI – which was addressed in AJ Park's original application but AJ Park expands upon here; and
c. potential conglomerate effects, as referred to in paragraphs 25 and 26 of the SOPI.

1.4. This application contains information that is confidential to AJ Park. The confidential information is commercially sensitive, and the disclosure of it would be likely to unreasonably prejudice AJ Park's commercial position. Confidential information is identified by bolded square brackets.

1.5. AJ Park would be pleased to provide further information to the Commission in relation to this submission on request. Further detail can be found in the Application, and this submission should be read alongside the Application.

2. Market definition

2.1. At paragraph 14.2 of the SOPI, the Commission notes that it plans to consider whether the proposed market definition for patent services in New Zealand may be more narrowly defined based on:

a. the nature of the creation (e.g. patents vs trademarks);
b. the relevant sector (e.g. chemistry vs engineering); and
c. the complexity of the services required (e.g. renewal vs novel applications for protection).

2.2. AJ Park's view of the appropriate market definition remains unchanged from that proposed in the Application. In respect of the specific parameters raised by the Commission:

a. The nature of the creation will typically dictate the type of intellectual property right that is appropriate. For example, an invention will require a patent; a logo or brand will require a trade mark; an artistic work will involve copyright. These rights are non-

substitutable. On this basis, AJ Park continues to consider that the relevant market should be defined with reference to patent services.

b. The relevant sector does not materially affect the nature of services supplied or by whom they are supplied. It is common for patent attorney practices to advise clients across a wide range of industries and to provide the common services for all such clients. While a patent attorney may have a specific detailed technical background in one particular sector, this does not generally limit that patent attorney's ability to prepare, prosecute and maintain patents in other sectors (subject to the attorney's general competence to advise). Competing firms will also typically have a broad range of backgrounds within their team, allowing them to advise across all relevant sectors as required.

c. [ ]

d. The complexity of the service does not materially affect the market. A patent attorney, once registered, is qualified to provide the full spectrum of assistance, from renewals to the drafting of applications. In AJ Park's experience attorneys and competing attorney firms provide services across all requirements in the patent lifecycle. Further, in large firms, teams are set up so that senior patent attorneys supervise the work of junior attorneys and support staff (and can provide more hands-on support for complex works, if required).

e. Similarly, smaller firms are typically owned and operated by experienced attorneys who have built up expertise in a larger firm and are therefore capable of providing the full range of assistance themselves. By law, to operate as an individual patent attorney an individual must demonstrate to the Trans-Tasman IP Attorneys Board that, among other things, they have been employed in a position that provided them experience in the following skills:
   - searching patent records;
   - preparing, filing and prosecuting patent applications in Australia;
   - preparing, filing and prosecuting patent applications in other countries and organisations, particularly countries and organisations that are regarded as major trading partners with Australia;
   - drafting patent specifications; and
   - providing advice on the interpretation, validity and infringement of patents,

   and must have been in that position(s) for at least 2 continuous years or a total of 2 years within 5 continuous years.[1] These regulatory obligations are designed to ensure that patent attorneys are independently certified as capable of supplying patent services at all stages of the patent lifecycle, notwithstanding their relative complexity, and weighs against narrowing the relevant market definition to split out different aspects of patent services.

3. **Strong competitive constraint from existing competitors**

[1] Australian Patent Regulations 1991, paragraph 20.10.

3.1. In addition to the patent filing data which is publicly available through the IPONZ website and offers the most robust indication of market share, another third party source of objective data is available describing the qualitative performance and reputation of key competitors in the market.

3.2. The New Zealand Law Awards, which is run annually and is not affiliated with any supplier of legal services, has a separate category for "Intellectual Property Specialist Law Firm of the Year". Each year up to six of the nominated firms are listed as finalists. This is a small subset of the actual number of firms in the market and indicates the high standard of finalist firms.

3.3. The finalists and winners are publicly available on the New Zealand Law Awards website (https://www.lawawards.co.nz/index.php). For ease of reference AJ Park has collated the results in the table below:

New Zealand Law Awards: Intellectual Property Specialist Law Firm of the Year					
2014	**2015**	**2016**	**2017**	**2018**	**2019**
AJ Park	**AJ Park**	**AJ Park**	**AJ Park**	AJ Park	**AJ Park**
Baldwins	Baldwins Intellectual Property	Baldwins Intellectual Property	Baldwins Intellectual Property	Baldwins Intellectual Property	Baldwins Intellectual Property
Create IP	Create IP	Create IP	Create IP	Create IP	Create IP
Hudson Gavin Martin	Henry Hughes	James & Wells	Ellis Terry	Ellis Terry	Ellis Terry
James & Wells	James & Wells	Zone Law	Hudson Gavin Martin	Hudson Gavin Martin	James & Wells
	Zone Law		James & Wells	**James & Wells**	Zone Law
			Zone Law	Zone Law	

Note: *Winners in bold. Finalists are listed in alphabetical order.*

3.4. As the table illustrates, while AJ Park and Baldwins are both regular finalists (and AJ Park is proud to be recognised as a frequent winner of the category), the table includes a mix of other consistently-nominated firms (e.g. Create IP, James & Wells and Zone Law) as well as a dynamic selection of other firms that are nominated based on their competitive performance over time.

3.5. The New Zealand Law Awards process uses a broad "intellectual property law" category description. AJ Park notes that:

a. **Broad market definition:** This description of the relevant category, while not developed on a competition law basis, reflects common thinking in the industry and is considerably broader than the patent services market proposed for the Proposed Acquisition. This weighs against any further narrowing of the market definition as proposed in paragraph 14 of the SOPI.

b. **Includes competition on patent services:** While the awards are based on the broader range of intellectual property services supplied by these firms – not just patent services – all but two of the firms listed do provide patent services and compete with AJ Park and Baldwins in the patent services market.

c. **Excludes firms physically located in Australia and full-service firms:** The relevant category covers only "specialist" intellectual property firms. This means that the competitive constraint exercised by full-service firms (eg those who provide intellectual property services as well as legal advice in other practice areas) is not reflected in the awards. Similarly, the constraint imposed by firms which are physically located in Australia but provide patent services in New Zealand is also not captured. As described in AJ Park's submissions these types of firms compete fiercely on patent services (and other intellectual property services) and will continue to do so after the Proposed Acquisition.

4. **No conglomerate effects**

4.1. Paragraphs 25 and 26 of the SOPI query whether the Proposed Acquisition could allow the merged entity to foreclose rivals through bundling or tying patent services with complementary services. Complementary services could potentially include Intellectual Property (**IP**) protection services such as trademark or design applications, and strategic IP services such as portfolio management.

4.2. There is no realistic prospect that the Proposed Acquisition will give rise to substantial lessening of competition in the market through bundling or tying, for the following reasons.

a. All of the significant existing competitors in the patent services market (including Davies Collison Cave and James & Wells) currently supply services complementary to patent services – ie, a similar range to the services the merged entity would supply. The level of competition in the supply of those complementary services is at least as competitive as the patent services market, with even lower barriers to entry and a greater number of suppliers.

b. There is a reasonable level of supply substitutability: patent attorneys can and do provide complementary services. Most firms, including the merged entity's largest competitors, also have staff who are not patent attorneys but provide complementary services (eg, as a lawyer or a trade mark executive).

c. It is common for firms to offer and/or supply both patent services and complementary services to customers already. In some instances there may be mutual advantages in doing so – such as understanding the background of a client's business. However even where this occurs, the services themselves remain quite distinct, given the tightly prescribed nature of patent processes and trade mark processes and the lack of overlap between the two. At the same time, the lack of formal relationships between the various intellectual property services means that customers can and do procure those services on an unbundled basis from multiple firms.

d. [ ]

4.3. If the merged entity attempted to bundle patent services with complementary services, then (1) competitors would be able to establish their own bundles using the range of equivalent services they already supply; and/or (2) competitors could continue offering *a la carte* services. In either case, consumers would be no worse-off than in the current market, and there would be no lessening of competition. To the contrary, this would be competition in action.

4.4. Tying is not a feature of the patent services market – not because of competition, but because a tie would be incompatible with the nature of the relevant services. Only a subset of customers ever require patent services. The purpose of patents is to protect rights in novel inventions – but many businesses do not develop patentable inventions. By contrast, most businesses will create, use or protect other forms of intellectual property (such as trade marks and copyright).

4.5. Accordingly, there would be no commercial rationale (even for a monopoly) for patent services provider to make the supply of complementary services conditional on the acquisition of patent services. And in the reverse, making the supply of patent services conditional on the acquisition of complementary services would be unworkable – because not all patent applicants have or need trade marks or only do so at a very low volume.

4.6. Notwithstanding this commercial incompatibility, if the merged entity did attempt to tie patent services with complementary services – i.e. by refusing to sell patent services to customers unless those customers also acquired complementary services from the merged entity, or vice versa – customers could continue to procure any or all of those services from the large number of competing firms who provide the full range of patent services and complementary services on an *a la carte* basis. [ ]