

Determination

Allied Foods (N.Z.) Limited and Dad's Pies Limited [2021] NZCC 21

The Commission:	Dr Derek Johnston Dr John Small Vhari McWha
Summary of application:	An application from Allied Foods (N.Z.) Limited to acquire 100% of the shares of Dad's Pies 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:	3 November 2021

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

The proposed acquisition

1. On 7 October 2021, the Commerce Commission registered an application (the Application) from Allied Foods (N.Z.) Limited (Allied),¹ the parent company of George Weston Foods (NZ) Limited (GWF), seeking clearance for Allied to acquire 100% of the shares of Dad's Pies Limited (DPL) (the Proposed Acquisition).
2. Allied would acquire the assets of DPL, including its factory in Silverdale, together with DPL's "Dad's Pies" and the "Baker's Son" pie brands.

Our decision

3. The Commission determines to give 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 a market in New Zealand. We reach this view because Allied and DPL (the Parties) are not close competitors, and after the Proposed Acquisition, the merged entity would be constrained by strong existing competition.

Our framework

4. 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. 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

The parties

6. Allied is the parent company of GWF.
7. GWF is one of the largest food manufacturers in Australasia. It is headquartered in Australia and offers a range of brands including Bûrgen and Tip Top. Relevant to the clearance application, Allied (through GWF) supplies savoury pies⁴ and sausage rolls in New Zealand, under the brand name "Big Ben®".

¹ The Application was originally for George Weston Foods (NZ) Limited to carry out the Proposed Acquisition. On 18 October 2021 the Application was varied so that clearance was sought for Allied Foods (N.Z.) Limited to make the acquisition. Allied owns 100% of George Weston Foods (NZ) Limited.

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

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

⁴ All references to "pies" in this document are references to savoury pies, and do not include sweet or dessert pies.

8. DPL is a New Zealand-owned baker and supplier of pies and pastries. It began as a single pie shop in Auckland and has expanded to a company employing 138 staff and a factory at Silverdale in Auckland.
9. Like GWF, DPL sells pies and sausage rolls. In addition to this, it also sells ready-made meals.

Background to the industry

10. The Parties manufacture pies and sausage rolls and wholesale them to retailers, who in turn sell them to consumers. Our market enquiries indicated that the wholesale level can be segmented into four sales channels, as listed out below.
 - 10.1 The grocery channel. This comprises sales to supermarkets. Key customers in this channel are Foodstuffs North Island, Foodstuffs South Island, and Woolworths NZ. Sales in the grocery channel make up 50% of all sales in the Wholesale Pie Market.⁵
 - 10.2 The fuel channel. This comprises sales to fuel retailers. There are five major fuel customers: BP, Z, Caltex, Night 'n Day@Gull, and NPD (South Island). Sales in the fuel channel make up ~20-25% of sales in the Wholesale Pie Market.
 - 10.3 The food service channel. This comprises sales to restaurants, cafes, and similar. Sales in this channel often occur via intermediaries. Bidfood is one of the key intermediary customers in this channel, with other significant food service intermediaries being Service Foods, Gilmours and Trents,⁶ Foodfirst, Moore Wilsons, Davis Foods, and Foodchain.
 - 10.4 The route trade channel. This comprises sales to dairies and similar. Key customers in this channel include at least some of the intermediaries active in the food service channel, including Bidfood.
11. The Parties are each active in the sales channels above to different extents.

With and without scenarios

12. With the Proposed Acquisition, Allied would acquire the assets of DPL and [].⁷
13. Allied submitted that if the Proposed Acquisition does not proceed, the most likely counterfactual is:

⁵ As defined in [17].

⁶ Gilmours is a North Island-based wholesaler owned by Foodstuffs North Island. Trents is its sister-company, based in the South Island and owned by Foodstuffs South Island.

⁷ The Application at [10.1]

13.1 DPL continuing to trade;⁸ and

13.2 [].⁹

14. Accordingly, we have performed our competition analysis on the basis of a counterfactual in which the Parties continue to compete as separate entities.

Market definition

15. Market definition is a tool that helps identify and assess the competitive constraints the merged firm would face. Determining the relevant market requires us to judge whether, for example, two products are sufficiently close substitutes as a matter of fact and commercial common sense to fall within the same market.
16. 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 the market, but which would still impose some degree of competitive constraint on the merged entity.
17. For the reasons we have set out below, we have assessed the effect of the Proposed Acquisition on national markets for the wholesale supply of:
- 17.1 savoury pies (the Wholesale Pie Market); and
- 17.2 sausage rolls (the Wholesale Sausage Roll Market).

Product dimension

18. We considered whether there is any basis on which to define the product market more narrowly than pies.¹⁰

What Allied submitted

19. Allied submitted that the appropriate product dimension encompasses all pies. It said that:¹¹
- 19.1 in New Zealand, wholesale customers are unlikely to switch from pies to other products in response to a small but significant non-transitory increase in price (SSNIP); and
- 19.2 pies are “must stock” items, and wholesale customers would likely pass on price increases to downstream consumers.

⁸ The Application at [10.4(b)]

⁹ The Application at [10.4(a(i))].

¹⁰ We consider pies to exclude other pastry products such as sausage rolls.

¹¹ The Application at [14.3].

20. Allied also considered whether there is any reason to define narrower product markets based on:¹²
- 20.1 the size of the pie;
 - 20.2 the ‘format’ in which the pies are sold (ie, single versus multi-packs); and/or
 - 20.3 actual or perceived quality segments (which translate to different price points).
21. Ultimately, Allied submitted that these distinctions are “mere differences, and not sufficient to demarcate market boundaries”, because:¹³
- 21.1 from a supply-side perspective, the plant and equipment used to manufacture pies can readily be employed to bake all sorts of pies, packaged however the customers choose;
 - 21.2 many competitors bake a full range of pies (ie, different sizes, quality levels and price points). Those who do not could do so if they chose;
 - 21.3 sellers of premium pies are constrained by the prices offered by sellers of other pies;
 - 21.4 variations in format of the pie (ie, whether the pies are supplied to customers individually or in multi-packs) only occur in the grocery channel, and this is simply a packaging difference that allows for differentiation and added consumer choice; and
 - 21.5 bakers attempt to differentiate through actual, and perceived quality differences, usually through the choice of standard or premium ingredients. This creates choice and promotes competition between brands, but the pies are still close substitutes, and pricing is constrained.
22. On that basis, Allied submitted that the product dimension encapsulates all pies, of different sizes, formats, and quality/price points.
23. The Parties also manufacture and supply sausage rolls. They were described as “ancillary products”, which are sold as an extension of the “core” pie brand in question.¹⁴ Allied further submitted that the Parties, and most of their competitors, manufacture sausage rolls in similar relative proportions to pies.¹⁵ It therefore did not define the market in which sausage rolls were a component product or set out a full competition analysis in respect of sausage rolls.

¹² The Application at [14.5].

¹³ The Application at [14.8].

¹⁴ The Application at [18.2].

¹⁵ The Application at [18.1(a)].

The Commission's view

24. To mitigate the risk of wrongly clearing the Proposed Acquisition, we have treated the supply of pies and sausage rolls as separate product markets. As a general matter, potential competition problems are less apparent in more broadly defined markets.

Pies

25. We also considered whether there should be narrower product markets for pies. Evidence gathered over the course of our investigation indicates that there is likely to be supply-side substitutability between pies of different sizes and formats.¹⁶ While precise sizes and formats differ across manufacturers, most major pie manufacturers supply pies in a range of sizes and formats.
26. With regard to quality/price distinctions, we heard that wholesale customers generally view pies as falling into one of three quality/price levels:¹⁷
- 26.1 an entry level, or, base pie;
- 26.2 mid-range pies; and
- 26.3 premium, or gourmet, pies.
27. Pies in each category do not appear strongly substitutable for each other on the demand side, with one interviewee saying “pies are very parochial, people will have customers who like their specific pies from specific areas, and to get people to change from one pie to another is not easy”.¹⁸ This evidence points toward separate, quality-based pie markets.
28. On the supply side, while it is possible to switch between production between these quality/price levels, given enough lead time,¹⁹ there may be other supply-side obstacles to substitutability. For example, a brand that becomes strongly associated with pies of a ‘base’ quality/price may find it more difficult to switch to supplying a premium pie without investment in re-branding or creating and promoting a separate brand entirely.
29. However, we received consistent feedback indicating that the products supplied by the Parties fall into different price/quality categories. We were told that GWF’s Big Ben pies fall into the ‘entry level’ or ‘base’ category; its Big Ben XXL range falls into the ‘mid-range’ category, and Dad’s Pies products fall into the ‘premium’ or

¹⁶ Commerce Commission interview with [].

¹⁷ For example, Commerce Commission interview with [] and Commerce Commission interview with [].

¹⁸ Commerce Commission interview with [].

¹⁹ Commerce Commission interview with [].

'gourmet' category.²⁰ One customer we spoke to indicated that they make an effort to stock a range of pies that cover all of these categories.²¹

30. On that basis, if we defined separate product markets based on price/quality level, there would be no overlap between the Parties. In order to best isolate the key competition effects of the Proposed Acquisition, we have therefore adopted a product market which encompasses pies of all price/quality levels, and factor in the different focuses of the Parties in this regard in our assessment of closeness of competition.

Sausage rolls

31. We tested Allied's submissions regarding sausage rolls with market participants, to assess whether it was necessary to define a separate market and undertake a separate competition analysis for sausage rolls.
32. While feedback from interviewees (discussed later in the competition analysis section) supported Allied's submission that sausage rolls are ancillary products to a core pie range, we have defined a separate product market for sausage rolls to mitigate the risk of wrongly clearing the transaction. However, we have not reached a definitive view on whether sausage rolls constitute a separate market.

Functional dimension

33. The Parties both manufacture pies and sausage rolls and supply them to wholesale customers, and do not overlap at any other functional level of the supply chain.²²
34. For the purposes of our assessment, the relevant functional dimension is therefore manufacturing and wholesale supply.

Geographic dimension

35. We have considered whether supplies from different locations are sufficiently close substitutes to be in the same market.

What Allied submitted

36. Allied submitted that:²³
- 36.1 customers do not need to travel to purchase, as sellers' representatives visit customers;
- 36.2 grocery, fuel, route trade, and food service purchasers acquire pies locally and nationally (and even internationally from Australia). Those who purchase locally could easily switch to a national supplier, if they so desired; and

²⁰ Commerce Commission interview with [] and Commerce Commission interview with [].

²¹ Commerce Commission interview with Foodstuffs North Island [].

²² DPL has a small retail café onsite at its Silverdale factory, but GWF is not active at the retail level.

²³ The Application at [14.9]-[14.11].

- 36.3 not all competitors trade nationally but all the major competitors do so, and others could. The ability to do so is enhanced wherever customers have their own distribution infrastructure and networks or can readily access distribution networks through food service businesses.

The Commission's view

37. We consider that the geographic scope of any markets for the supply of pies and sausage rolls is national in scope, because:
- 37.1 large suppliers supply on a national basis, and while there are smaller regional players as well, the level of competitive constraint that these manufacturers provide appears to be similar across different regions; and
- 37.2 large customers operate nationally and acquire on a national basis, and small customers can acquire pies on a national basis, either directly from the manufacturer, or through the use of an intermediary.

Customer dimension

38. As noted above, both Parties (independently from each other) segment customers at the wholesale level into four sales channels:
- 38.1 grocery (sales to supermarkets);
- 38.2 fuel (sales to petrol retailers);
- 38.3 the route trade (sales to dairies and similar); and
- 38.4 food service (sales to intermediaries who distribute to cafes and similar).
39. We have considered whether there are any customer channels that should be treated as distinct markets.

What Allied submitted

40. Allied submitted that competitors can compete in all sales channels, for customers of all sizes.²⁴

The Commission's view

41. The evidence that we received indicates that there may be some differences in the range of competitors active in each sales channel. For example, competitors in the grocery and fuel channels may need greater scale and capacity to supply those large customer groups. As sales are made in the fuel channel by way of competitive tender, suppliers are typically also required to meet additional criteria that smaller

²⁴ The Application at [14.15].

suppliers may struggle to meet.²⁵ However, one interviewee told us that capacity can be acquired fairly quickly to meet large orders.²⁶

42. Ultimately it has not been necessary to reach a concluded view on the scope of the customer dimension, because we do not consider that competition issues arise under any possible market definition. We have analysed the Proposed Acquisition with reference to a single customer market encompassing all customer channels.

How the Proposed Acquisition could substantially lessen competition

43. We considered whether the Proposed Acquisition would be likely to substantially lessen competition due to:

- 43.1 horizontal unilateral effects in the Wholesale Pie Market or the Wholesale Sausage Roll Market (ie, whether the loss of direct competition between the Parties in the supply of savoury pies or sausage rolls would enable the merged entity to profitably raise prices or reduce quality by itself); and
- 43.2 coordinated effects in the Wholesale Pie Market (ie, whether the Proposed Acquisition would change the conditions in the relevant market so that coordination is more likely, more complete, or more sustainable).

Horizontal unilateral effects in the Wholesale Pie Market

44. For the reasons set out below, we are satisfied that the Proposed Acquisition would not have, and would not be likely to have, the effect of substantially lessening competition in any customer channels in the Wholesale Pie Market due to unilateral effects.

Closeness of competition

45. Evidence received over the course of our investigation indicates that the Parties are not particularly close competitors, either in terms of the products that they supply, or the customers that they supply those products to.
46. In terms of the Parties' products, all interviewees said that the Parties' product offerings are at different ends of the price/quality spectrum, and as a result, the Parties do not compete very closely.
- 46.1 One customer said that the Parties are "not very close" competitors. It said GWF is stronger in base/mid-range pies; whereas DPL is stronger in the premium segment.²⁷
- 46.2 Another customer said that the Parties target different niches.²⁸

²⁵ For example,
[

]. Commerce Commission interview with [].

²⁶ Commerce Commission interview with [].

²⁷ Commerce Commission interview with [].

²⁸ Commerce Commission interview with [].

46.3 A competitor said that the Parties are “not close” and are in fact “distant competitors”.²⁹

46.4 A final customer told us that the Parties “wouldn’t really compete too much at all”.³⁰

47. In terms of the Parties’ sales channels, the evidence also indicates that there is minimal current overlap in the channels supplied by the Parties.³¹ As indicated in Table 1, DPL predominantly supplies the fuel channel, with some supply also into the grocery and foodservice channels. GWF supplies the grocery and route trade channels, with minimal supply into the fuel channel and no supply in the foodservice channel.

Table 1: Proportion of total sales by sales channel (%)

Channel	GWF	DPL
Grocery	[]	[]
Fuel	[]	[]
Route trade	[]	[]
Foodservice	[]	[]
Total	100	100

48. As a consequence of the above, we do not consider that the Parties are close competitors.

Constraint from existing competition

49. We also consider that the merged entity will continue to be constrained by competing suppliers of pies in New Zealand.

50. Table 2 below sets out each of the Parties’ estimates of shares for the supply of hot savoury food.³²

²⁹ Commerce Commission interview with [].

³⁰ Commerce Commission interview with [].

³¹ The Application at [15.1].

³² The data sets used for these estimates include sausage rolls and mini savouries. It also captures all sales in the grocery, fuel and route trade channels. We consider that this data set is an adequate proxy for competition in the Wholesale Pie Market, given the evidence before us (discussed later at [61]) that sausage rolls are ancillary products to pies, which are generally produced in the same relative proportions as pies. While this data set does not contain data on sales in the foodservice channel, we have been told that overall competition in the foodservice channel is similar to that in the route trade channel. See Commerce Commission interview with [].

Table 2: Market share estimates in the supply of hot savoury food (%)

Supplier	Share
Goodman Fielder	[]
GWF	[]
DPL	[]
Goodtime	[]
Gourmet Foods	[]
Others (15)	[]

Source: Parties' estimates based on internal data and IRI scanner data.

51. Allied submitted³³ that there are many competing pie suppliers that currently, and will continue to, constrain the merged entity in the Wholesale Pie Market, including Goodman Fielder, Goodtime, Westie Food Group, Couplands, and Mrs Macs.
52. In addition to these large commercial suppliers, Allied also submitted³⁴ that there are a large number of grouped bakeries and smaller retail bakeries with which the merged entity would continue to compete.
53. We spoke to market participants present in each of the four sales channels identified by the Parties. These interviews supported Allied's submission that there are many competitors active in each sales channel in the Wholesale Pie Market. One customer, for example, indicated that the Wholesale Pie Market has "always been competitive", and that there has "always been excess capacity compared to pies consumed".³⁵
54. Furthermore, several interviewees also agreed with Allied's submissions³⁶ that supply from Australia is not only possible but is acting as a current competitive constraint. For example:
 - 54.1 One customer advised that it had pre-existing relationships with three major Australian players – Mrs Macs, Patties, and Ivan's Pies.³⁷
 - 54.2 Another customer specifically identified Mrs Macs as a competitor from Australia, and further suggested that Australian suppliers will continue to want to supply into New Zealand because Australia "has more capacity than demand", and so New Zealand is "seen as a place to sell extra pies".³⁸
55. Some interviewees suggested that Australian competitors may struggle to import a full product range given potential restrictions around the importation of chicken

³³ The Application at [16.1].

³⁴ The Application at [21.11].

³⁵ Commerce Commission interview with [].

³⁶ The Application at [22.3].

³⁷ Commerce Commission interview with [].

³⁸ Commerce Commission interview with [].

products.³⁹ One of those interviewees further noted, however, that most pies sold in New Zealand are beef, rather than chicken.⁴⁰

56. Between these existing competitors, there is significant excess capacity in the Wholesale Pie Market.⁴¹
57. Taken as a whole, we are satisfied that sufficient competitive constraint would exist in the Wholesale Pie Market post-acquisition.

Entry and Expansion

58. Given the conclusions we have reached above in relation to the current lack of competitive closeness between the Parties, and the current competitive constraint in the Wholesale Pie Market, it has not been necessary to reach a view on the likelihood, extent, and timeliness of entry or expansion into or within the Wholesale Pie Market. However, we do note that our investigations suggest that existing competitors have capacity to expand.

Conclusion on horizontal unilateral effects in the Wholesale Pie Market

59. For the reasons we have set out above, we are satisfied that the Proposed Acquisition will not, or will not be likely to, substantially lessen competition through horizontal unilateral effects in the Wholesale Pie Market.

Horizontal unilateral effects in the Wholesale Sausage Rolls Market

60. For the reasons set out below, we are satisfied that the Proposed Acquisition would not have, and would not be likely to have, the effect of substantially lessening competition in the Wholesale Sausage Roll Market due to unilateral effects.
61. Because sausage rolls are ancillary products to pies, interviewees indicated that the competitive dynamics in relation to the supply of sausage rolls are similar to those in relation to the supply of pies.
 - 61.1 One customer also said it was “broadly true”, that the competitive dynamics for pies and sausage rolls would be the same, citing the similar ingredients and techniques involved in their production.⁴²
 - 61.2 Another customer said that competition in the supply of pies was an appropriate proxy for sausage rolls. Consistent with Allied’s submissions, this customer also noted that sausage roll volumes are “minuscule”, and “tiny compared to pies”.⁴³

³⁹ Commerce Commission interview with [] and Commerce Commission interview with [].

⁴⁰ Commerce Commission interview with [].

⁴¹ Commerce Commission interview with Goodman Fielder [] and Commerce Commission interview with [].

⁴² Commerce Commission interview with [].

⁴³ Commerce Commission interview with []. This is consistent with information from a competitor stating sausage rolls make up approximately 5% of the total range of savoury products

- 61.3 Another customer indicated that sausage rolls are at least as competitive as pies, and consumers will readily switch between brands as desired.⁴⁴
- 61.4 One customer agreed with Allied's submission that most pie manufacturers also make sausage rolls, and indicated further that there are also "many suppliers" that only supply sausage rolls.⁴⁵
62. Based on this feedback, we are satisfied that the competitive dynamics in the supply of sausage rolls are sufficiently similar to the competitive dynamics in relation to pies that, if the Proposed Acquisition does not, or is not likely to, raise competition concerns in relation to the supply of pies, it is also not likely to do so for the supply of sausage rolls.

Coordinated effects

63. We considered whether the Proposed Acquisition would change the conditions in the Wholesale Pie Market or the Wholesale Sausage Roll Market so that coordination is more likely, more complete, or more sustainable.
64. As above, we have analysed the Proposed Acquisition in the market for the supply of savoury pies and sausage rolls includes all sales channels. On that basis, the merged entity will compete with a range of competitors, each with different sizes/scales, and different cost bases.
65. We do not consider that the Proposed Acquisition will materially increase the risk of coordination in supply of savoury pies or sausage rolls, because:
- 65.1 post-acquisition there would be a range of competing suppliers for all channels and types of pies/sausage rolls, with different sizes/scales and cost bases;
- 65.2 consumer demand and preferences regarding distribution channels and pie types are frequently changing, which is not conducive to any potential market allocation along those dimensions;
- 65.3 there is significant excess capacity in the market, both from domestic and Australian manufacturers;
- 65.4 there are a number of large, sophisticated customers;
- 65.5 there is limited market transparency: wholesale prices are confidential and negotiated privately and bilaterally (rather than with reference to, for example a public rate card); and
- 65.6 there is significant product differentiation.

manufactured by pie companies. Commerce Commission interview with [].

⁴⁴ Commerce Commission interview with [].

⁴⁵ Commerce Commission interview with [].

Overall conclusion

66. In light of the above, we are satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in any market in New Zealand.

Determination on notice of clearance

67. Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to Allied Foods (N.Z.) Limited to acquire 100% of the shares of Dad's Pies Limited.

Dated this 3rd day of November 2021

Dr Derek Johnston
Division Chair