

Statement of Issues

Pact Group Holdings Limited / Flight Plastics Limited

30 October 2020

Introduction

1. On 25 August 2020, the Commerce Commission registered an application (the Application) from Pact Group Holdings Limited (Pact) to acquire the assets and business of Flight Plastics Limited in New Zealand and the packaging-related assets of Flight Extruded Plastics LP in Adelaide (together, Flight) (the Proposed Acquisition).¹
2. To clear an application the Commission must be satisfied that an acquisition would not have, or would not be likely to have, the effect of substantially lessening competition in a New Zealand market.
3. This Statement of Issues (Sol) sets out the potential competition issues we have identified following our initial investigation. This is so Pact and Flight (the Parties) and other interested parties can provide us with submissions relating to those concerns.
4. In reaching the preliminary views set out in this Sol, we have considered information provided by the Parties and other industry participants.² We have not yet made any final decisions on the issues outlined below (or any other issues) and our views may change, and new competition issues may arise, as the investigation continues.

The concerns we are testing

5. At this stage, our primary concern is the loss of competition between Pact and Flight for the supply of rigid plastic packaging products made from polyethylene terephthalate (PET). PET packaging is used to make packaging products such as meat trays, bakery containers and fruit punnets.
6. We are also testing whether the Proposed Acquisition could cause a substantial loss of current or potential competition in:
 - 6.1 the purchase of raw materials to make PET roll stock (a processed input for manufacturing PET packaging), namely:

¹ A public version of the Application is available on our website at:
https://comcom.govt.nz/_data/assets/pdf_file/0027/223875/Pact-Group-Holdings-Ltd-and-Flight-Plastics-Ltd-Clearance-application-26-August-2020.PDF.

² Pact provided a further submission to us just prior to our decision to issue an Sol, however we were not able to fully consider the submission prior to our decision. A public version of this further submission will be available on our website.

- 6.1.1 used PET packaging bales;
 - 6.1.2 PET offcuts, created as a by-product of manufacturing products made of PET; and
 - 6.2 the supply of roll stock made from used PET packaging that has been collected and recycled in New Zealand.
7. At this time, we are not investigating further the possible loss of competition from coordinated effects and conglomerate effects. We also are not investigating further any vertical effects aside from the potential follow-on impact of a loss of competition for the supply of roll stock.
8. We explain our reasons below and invite submissions on our position.

Process and timeline

- 9. We have agreed with the Parties an extension of time from the initial 40 working day statutory timeframe until 16 December 2020 in which to make a decision.
- 10. The Commission would like to receive submissions and supporting evidence from the Parties and other interested parties on the issues raised in this Sol. We request responses by close of business on 13 November 2020, including a public version of any submission.
- 11. All submissions received will be published on our website with appropriate redactions.³ All parties will have the opportunity to cross-submit on the public versions of submissions from other parties by close of business on 20 November 2020.
- 12. If you would like to make a submission but face difficulties in doing so within the timeframe, please ensure that you register your interest with the Commission at registrar@comcom.govt.nz so that we can work with you to accommodate your needs where possible.

Background to the industry

- 13. The Proposed Acquisition relates to the manufacture and supply of plastic packaging products that are most commonly used to store food. Pact and Flight both produce plastic packaging made from PET using the extrusion and thermoforming (E&T) method.
- 14. The diagram in **Attachment A** sets out the main steps to produce PET packaging through the E&T method. The main steps are listed below.

³ Confidential information must be clearly marked (by highlighting the information and enclosing it in square brackets). Submitters must also provide a public version of their submission with confidential material redacted. At the same time, a schedule must be provided which sets out each of the pieces of information over which confidentiality is claimed and the reasons why the information is confidential (preferably with reference to the Official Information Act 1982).

- 14.1 The raw material in the form of PET flake is sourced (PET flake can be sourced in several ways, which are described below).
 - 14.2 In the ‘extrusion’ stage, flake is heated, mixed with other products such as colourants and then extruded into plastic sheets, which are then rolled up (and referred to as ‘roll stock’).
 - 14.3 In the ‘thermoforming’ stage, the roll stock is heated and then stretched over a mould to form containers. Containers are then cut away from the sheet. Manufacturers that use thermoforming typically have a range of moulds that allow them to make different shapes and sizes of packaging.
15. Packaging can be made from new ‘virgin’ PET flake or recycled PET flake (known as RPET). Virgin PET flake is normally imported from overseas. Some sources of RPET flake are as follows.
 - 15.1 Collection recycling (from New Zealand or overseas).
 - 15.1.1 PET containers used by consumers are collected for recycling, sorted, and formed into bales (‘PET bales’).
 - 15.1.2 The PET bales are sent to a plant for washing (known as a wash plant) which removes food and labels. The washed PET containers are then cut into flakes.
 - 15.2 Offcuts from other packaging manufacturers. The process of thermoforming produces offcuts, which can be granulated and extruded into new roll stock.
 16. RPET flake that has come from collection recycling and processed through a wash plant is not safe to use immediately with food. We understand RPET flake from offcuts is clean so can be extruded into new roll stock immediately. RPET flake from collection recycling can be used for food applications in two ways.
 - 16.1 Flakes can be put through a decontamination plant. These flakes can then be extruded into roll stock. Such roll stock (and resulting packaging) is 100% RPET.
 - 16.2 Flakes can be extruded between two sheets of virgin PET. This is referred to in the industry as ‘ABA’ extrusion. Such roll stock (and resulting packaging) is less than 100% RPET due to the layers of virgin PET.
 17. Packaging manufacturers may be involved at different stages of the process. For example, only Flight conducts all steps in-house. Some packaging manufacturers only have thermoformers and buy roll stock from other firms. For ease of reference we refer to all such firms as ‘E&T packaging manufacturers’.
 18. Market participants have consistently told us there is a trend towards using sustainable products. This has led to an increase in demand for RPET roll stock and packaging. The use and reuse of PET containers recycled in New Zealand is referred

to as ‘closed loop’ recycling, as PET packaging can be continually recycled within New Zealand (for the purposes of the analysis, we refer to such PET as ‘NZ RPET’). NZ RPET is viewed as the most environmentally friendly form of PET packaging as it minimises the transportation of plastic. An E&T packaging manufacturer must have a wash plant to make NZ RPET flake.

19. Another common way to make plastic packaging is through ‘injection moulding’ (IM). In this case, heated plastic material is injected into a mould. IM packaging is thicker, stronger, more microwave-resistant and more expensive to make than E&T packaging. It is also more customisable (eg, for specifically designed shapes).⁴ Examples of IM packaging include yogurt pots and ice cream tubs.
20. For ease of reference, we use the below terms throughout this Sol to refer to the different varieties of PET roll stock and packaging described above.
 - 20.1 ‘Virgin PET’: PET roll stock or packaging made from new raw material (ie, PET that has not been recycled).
 - 20.2 ‘RPET’: PET roll stock or packaging made from recycled materials (ie, PET packaging bales).
 - 20.3 ‘NZ RPET’: RPET roll stock and packaging specifically made from recycled material that has been collected and processed in New Zealand.

The Parties

21. Pact is a packaging solutions business with over 100 sites and 6000 employees worldwide. Its primary focus is the manufacture and supply of rigid plastic packaging for customers in the food, beverage, chemical, industrial and agricultural sectors. In New Zealand, Pact manufactures and supplies plastic packaging products for a range of customers including supermarkets, meat processors and fruit growers.
22. Pact operates E&T plants in Albany and Hastings. In July 2019 it was announced that Pact had successfully applied to the Ministry for the Environment for a grant to buy and install a decontamination unit.⁵ This new equipment will enable it to extrude its RPET flake into 100% RPET roll stock that is safe for food applications.⁶ This is expected to be operational in []. Pact also operates injection moulding plants in New Zealand.
23. Flight is a manufacturer of plastic sheets and packaging in Australia and New Zealand, including for fruit and produce, bakery, meat and seafood, and nursery and

⁴ IM packaging can also be made so that it closely resembles E&T packaging. For example, in the Application the Parties submit that Bonson makes IM packaging that is identical in appearance and function to their E&T products. The Application at FN 5.

⁵ Pact Group “Pact Group receive New Zealand Government funding to transition to 100% recycled PET in its food packaging range” (15 July 2019) <<https://pactgroup.com.au/news/pact-group-receive-government-funding-to-transition-to-100-recycled-rpet-in-its-food-packaging-range/>>.

⁶ Pact Group “Pact Group receive New Zealand Government funding to transition to 100% recycled PET in its food packaging range” (15 July 2019) <<https://pactgroup.com.au/news/pact-group-receive-government-funding-to-transition-to-100-recycled-rpet-in-its-food-packaging-range/>>.

horticulture. Flight is the only manufacturer in New Zealand that has a wash plant. Its plant also has a decontamination unit, extruders and thermoformers.

24. The assets that Pact is seeking to acquire from Flight are:⁷
 - 24.1 the plastic packaging plant in Wellington (including the wash plant); and
 - 24.2 plastic packaging-related assets from Flight's plant in Adelaide.

The relevant markets

Background

25. 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.
26. When assessing relevant markets we consider:
 - 26.1 whether customers could easily switch to alternative products in response to a price increase (known as 'demand side' substitution); and
 - 26.2 whether suppliers could easily switch their manufacturing process to produce different products (known as 'supply side' substitution).

The supply of rigid plastic packaging

27. The main area where the Parties currently overlap is in the supply of plastic packaging for food. Specifically, both Parties supply PET packaging made using the E&T method.⁸ We are considering the relevant market(s) in which they compete.

The Parties' view of the relevant market

28. In the Application, the Parties submit that the Proposed Acquisition should primarily be assessed in a broad market that includes all small rigid packaging and alternatives (eg, rigid plastic, cardboard, corn starch).⁹
29. The Parties argue that customers can switch between different packaging types and materials.¹⁰ In the Application, the Parties provide examples of products that can be stored in different packaging materials.¹¹

⁷ The Application at [2].

⁸ The Application at [6.1].

⁹ The Application at [6.1].

¹⁰ The Application at [6.2].

¹¹ The Application at Appendix Four.

Our current views and evidence on the relevant product dimension

30. We have not reached any final views on the relevant product markets. However, we currently consider that the potential competition issues arising from this overlap may be best assessed using a market narrower than the product market suggested by the Parties.
31. On the demand side, we have spoken to customers about their packaging requirements and what they consider suitable alternatives to PET. From these discussions, we understand that each material has different attributes. Customers weigh the importance of these attributes differently. However, many customers considered there are no good competitively-priced alternatives to PET packaging for their requirements. Compared to other materials, PET has the following attributes.
 - 31.1 PET is more effective at protecting and maintaining products compared to some other materials.
 - 31.1.1 Meat is normally packaged in PET because PET is water resistant and PET packaging can be sealed airtight to maintain freshness.
 - 31.1.2 Some types of fresh fruit are normally packed in PET. Cardboard and corn starch packaging are less effective than PET in preserving products, resulting in shorter shelf-life and leading to more food waste.
 - 31.2 PET is transparent which is important for certain products (eg, bakery products, meat, and fresh produce) so customers can inspect the food before buying. PET is more transparent than other materials (including other plastics such as polypropylene).
 - 31.3 For some customers, PET is the most suitable material for their packing machines. Some customers use specialist machines for packaging their products that can only process PET. Such customers would need to make changes to their processes to use other materials.
 - 31.4 PET has better sustainability credentials than many other materials. We have heard consistently that demand for sustainable packaging is increasing over time. We understand that PET is more attractive than certain other materials to customers that value sustainability, as used PET containers can be collected from the kerbside and then remade into new packaging.
32. Even within product categories, customers seem to weigh factors differently, and view the substitutability of different packaging types differently. For example, Pact has provided examples (including for meat, fruit and bakery) where packaging has been made from materials other than PET.
33. We recognise that not all customers would need to view alternatives to PET as substitutes to justify a wider market. We continue to assess the alternatives available to customers and how many customers would likely switch to those alternatives if

faced with a price increase. If we find that there is a narrower product market (such as “all small rigid packaging made from PET”) than the Applicant has proposed for packaging, we would still factor any competitive constraint from alternative packaging options into our assessment.

34. Conversely, some customers have indicated preferences that may suggest a market even narrower than PET packaging. The demand for sustainable packaging has meant some customers are seeking to go further than using PET, by seeking RPET and in some cases NZ RPET.

[

¹²] At this point it is unclear whether the demand for RPET or NZ RPET is sufficient to justify separate markets. However, we adopt a forward-looking analysis. We are currently considering the demand for RPET and NZ RPET, and remain open to the possibility that there are separate markets for packaging made from these materials.

35. On the supply side, we have spoken to E&T packaging manufacturers. At this point we consider that:

- 35.1 there is unlikely to be supply-side substitution between:

35.1.1 IM and E&T manufacturing, as these are separate processes that need different equipment;

35.1.2 the manufacture of packaging of different material types (eg, cardboard), as the manufacturing processes are very different; and,

35.2 there is likely to be some supply-side substitution between packaging of different forms made from the same material (eg, PET) but there may be some limits. E&T packaging manufacturers seem to focus on particular product categories (eg, meat trays or bakery containers) or types of customers. If they have a mould that is suitable for a particular category, it would be easy for the E&T packaging manufacturer to switch to supply that category. If the E&T manufacturer does not have a mould, then there are some barriers.

35.2.1 They must incur fixed costs to make new moulds.

35.2.2 In some cases (such as meat trays) there is innovation in the design of trays, which may affect incentive to invest in new moulds.

36. We invite further views and information from the Parties and interested parties on the relevant product markets in which the Parties compete to supply plastic packaging, including on expected future demand for RPET and NZ RPET.

¹² []

Our current view on geographic dimension

37. Our current view is that the geographic dimension of the relevant product market(s) is likely to be national. Local suppliers we have spoken to say they can supply across New Zealand. While some suppliers have said they have a small cost advantage when competing for customers that are nearer to them, it has not been suggested that this materially impacts their competitiveness outside their local areas.

Other markets we are considering

Raw materials markets

38. Our investigation has indicated that the Proposed Acquisition may impact markets for the purchase of raw materials. We are currently considering the relevant market(s) in which the following products may fall:
 - 38.1 PET bales, that is, bales of post-consumer PET recycled waste (such as used soft drink bottles, meat trays, etc) which are typically made by waste management firms that collect PET waste, sort it, and then make into bales for sale to local and overseas buyers; and
 - 38.2 offcuts of post-industrial PET waste, such as offcuts from plastic packaging manufacturing.
39. At this stage, we consider the relevant geographic markets for the purchase of PET bales and PET offcuts are likely to be national. This is because our current evidence suggests that these raw materials are bought and sold between firms located across New Zealand rather than on a more limited regional basis.
40. However, there also appears to be demand from overseas purchasers for PET bales, and it is possible that PET offcuts could also be exported. We are continuing to assess the extent to which export sales are an alternative option to domestic sales for sellers of PET bales and offcuts.

NZ RPET roll stock

41. At present E&T packaging manufacturers other than the Parties buy their roll stock (including RPET) from overseas. To meet the growing demand for NZ RPET, a wholesale market might emerge in which domestic E&T packaging manufacturers with only thermoformers seek to buy NZ RPET roll stock (eg, from Flight). There is some evidence to suggest such wholesale demand already exists.¹³
42. As we explain in the counterfactual section below, we are considering whether Pact (or any other player) might build a wash plant, and the impact of the Proposed Acquisition on competition that might result. In this scenario, we are considering the market in which the supply of NZ RPET roll stock might fall (for example, in its own market or as part of a broader roll stock market).

¹³ See for example, Anonymous, Submission on Statement Preliminary Issues, 'Re: Heightened difficulty in accessing NZ recycled PET', 15 September 2020.

The factual and counterfactual

43. Assessing whether a substantial lessening of competition is likely requires us to compare the likely state of competition if the Proposed Acquisition proceeds (the scenario with the acquisition, often referred to as the factual) with the likely state of competition if it does not (the scenario without the acquisition, often referred to as the counterfactual) and to determine whether competition is likely to be substantially lessened by comparing those scenarios.
44. In the Application, Pact submits that if the Acquisition does not proceed, then the status quo would most likely continue.¹⁴ We are considering whether there might be changes that would occur in the counterfactual or factual.
45. Given the evidence of a trend towards sustainability and growing interest in NZ RPET, we are assessing whether Pact or any other suppliers would be likely to build a wash plant in the counterfactual. Building a wash plant involves a fixed cost, and the likelihood of Pact or other suppliers making that investment is partly affected by whether they would achieve a sufficient throughput. As part of this assessment, we are considering the below issues.
- 45.1 Customer demand for NZ RPET packaging. As noted earlier, we are still assessing the extent of current and future demand for NZ RPET.
- 45.2 The amount and availability of PET waste available in New Zealand. PET waste is the main input for making NZ RPET. A firm is more likely to build a wash plant if there will be PET waste available. At this point, we have received mixed evidence about whether the volumes of PET waste being recycled is sufficient to justify a second wash plant in New Zealand. [] Some evidence suggests there may be sufficient volumes of PET waste available to justify a second wash plant. Further, we adopt a forward-looking analysis and there is some evidence to suggest that volumes of PET waste may increase in the coming years.
- 45.2.1 The Ministry for the Environment (MfE) is putting in place new policies that may lead to an increase in the level of PET recycling. For example, MfE is:
- (a) supporting investment into optical sorting equipment that will reduce contamination in PET waste streams (increasing the yield of usable recycled PET);
 - (b) considering whether to implement a container return scheme, eg, a system in which consumers pay a small deposit on a container when they purchase a beverage or food item, and

¹⁴ The Application at [4.1].

¹⁵ []

then are refunded that deposit if they return the used container to a drop-off point;

- (c) proposing to ban the use of some other plastics (eg, oxo-degradable plastics, polyvinyl chloride, and polystyrene). This could both reduce contamination in PET waste streams, and lead to more PET being used in packaging, and consequently greater quantities of PET being recycled; and,
- (d) increasing the waste disposal levy on all waste which may divert higher value plastics such as PET from landfill disposal.

45.2.2 [

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- 46. We have sought evidence from Pact and other firms to test whether they are likely to build a wash plant in the counterfactual or factual.
- 47. Pact submits that it is not in the process of installing a wash plant.¹⁷
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- 48. We are considering whether there is evidence that Pact may build a wash plant in the counterfactual.

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¹⁷ Pact Group “Cross submission by Pact Group Holdings on Submissions received on the Statement of Preliminary issues” (5 October 2020) at [4].

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48.2 [

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49. We are also considering whether other parties could build a wash plant in the counterfactual or factual. For example, Custom-Pak has expressed interest in building a wash plant to create a closed-loop packaging system.²³ We continue to assess the likelihood of other parties building a wash plant and how the Proposed Acquisition might affect that likelihood.

50. We are seeking submissions on:

- 50.1 the likely trends in the PET waste and customer demand for NZ RPET;
- 50.2 whether Pact or any other party would be likely to build a wash plant in the counterfactual or factual. [
] and,
- 50.3 any other significant industry changes in both the factual and the counterfactual, as a result of the matters we have identified above and other government policies.

Horizontal unilateral effects relating to the supply of PET packaging

51. Horizontal unilateral effects arise when a firm merges with or acquires a competitor that would otherwise provide a significant competitive constraint (particularly relative to remaining competitors) such that a market participant can profitably increase prices above the level that would prevail without the merger (and/or reduce quality).

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²³ Custom-Pak “About us” <<https://custompak.co.nz/about-us/>>.

52. We continue to test concerns about whether the Proposed Acquisition would give rise to horizontal unilateral effects due to lost competition between Pact and Flight in the supply of plastic packaging. Our analysis has focused on the supply of PET packaging, but we also take into account constraints from outside the market.

Pact and Flight appear to be close competitors

53. In the Application, Pact and Flight submit that, while they are both New Zealand-based suppliers of PET packaging, they:

- 53.1 have different focuses, that is, Pact supplies more decorated or customised products for some large customers while Flight specialises in non-decorated (or more generic) product designs;²⁴ and
- 53.2 are not each other's closest competitor in relation to any specific product category,²⁵ for example, arguing that:
 - 53.2.1 Pact has a relatively large share of sales in packaging for [], whereas Flight has a smaller share in these categories compared with other rivals; and
 - 53.2.2 compared with Pact, Flight has a relatively large share of sales in packaging used for [], and primarily competes with other rivals.

54. Pact submits that its closest competitors are [] while Flight claims its closest competitors are importers who supply non-customised PET packaging in New Zealand.²⁶

55. Despite the Parties' claims, the evidence we have gathered to date indicates that Pact and Flight may be close competitors.

- 55.1 Pact and Flight appear to be the two largest suppliers of PET packaging in New Zealand by volume of units sold. Although we are still compiling information, our inquiries are broadly consistent with the Parties' estimate that the merged entity will produce [] of E&T plastic packaging.²⁷ The merged entity is therefore likely to account for a significant share of capacity in the market.
- 55.2 Market participants view the Parties as close competitors.

- 55.2.1 Customers we have spoken to view Pact and Flight as two of the main options they have for the supply of PET packaging, particularly when larger volumes are needed.

²⁴ The Application at [7.3].

²⁵ The Application at [7.4].

²⁶ The Application at [7.3].

²⁷ The Application at [7.6].

- 55.2.2 Similarly, other packaging manufacturers have told us that the main suppliers of PET in New Zealand are Pact, Flight and Custom-Pak. They also told us when they are quoting for larger customers, they often come up against both Pact and Flight in the same tenders.
- 55.3 We have seen multiple instances where Pact and Flight have tendered for supply contracts in competition with one another. Even though the Parties may focus on different customers, they may see each other as a threat due to the capacity each player has and the ability to switch their manufacturing to compete in different product categories (eg, from biscuit trays to meat trays). While we note at paragraph 35.2 that there can be costs to changing production, Pact and Flight both appear to have a broad portfolio of moulds and so are likely to be able to compete in a range of categories.
56. We are testing whether the Parties would be close competitors for those customers that are seeking NZ RPET. At present only Flight can supply fully ‘closed loop’ NZ RPET packaging. That is, Flight can purchase PET plastic bales in New Zealand, process them entirely within New Zealand, and then turn them into RPET packaging, which can in turn be recycled. Pact does not have a wash plant and so does not have the same capability in New Zealand as Flight. However, Pact might impose a constraint under some scenarios.
- 56.1 If Pact builds a wash plant in the counterfactual, then it would be a direct competitor to Flight to supply NZ RPET.
- 56.2 [28]
- 56.2.1
- 56.2.2
- 56.2.3]
- 56.3

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Constraint from rivals

57. In the Application, the Parties submit that they compete closely with many other suppliers. They argue that the merged entity would be constrained by:²⁹
- 57.1 local manufacturers such as Custom-Pak, Formrite, Aztec, and Progressive Plastics; and
 - 57.2 importers, including Linpac, Plantic, Huhtamaki, Oppenheimer, and others.
58. We continue to consider the extent to which existing domestic manufacturers of PET packaging could constrain the merged entity.
- 58.1 Custom-Pak appears to be the next largest competitor and competes with the Parties in some (but not all) product categories. There are many other suppliers with thermoforming capacity. Some of these firms have indicated they have spare capacity available to serve other customers. However, these suppliers manufacture at a smaller scale than the Parties. We are continuing to assess whether they have sufficient capacity to impose a strong constraint on the merged entity.
 - 58.2 No other firms aside from Flight can manufacture NZ RPET packaging. However, some other firms have expressed an interest in building wash plant. We are considering whether they could impose a competitive constraint on the merged entity for NZ RPET.
59. We are still considering the extent to which import competition is a constraint. We have received feedback that imported PET packaging can be cheaper per-unit for customers than locally-produced PET packaging, if sufficient quantities are ordered. However, there are downsides to importing packaging, including:
- 59.1 the need to order in bulk (both to get lower costs and because lead times are longer);
 - 59.2 the risk of supply interruption, creating the need to hold more stock at any one time;
 - 59.3 exchange rate risks; and
 - 59.4 the trend towards sustainable packaging suggests that some customers are increasingly looking towards local options over imported packaging.

²⁹ Application at [1.3(a)].

- 60. Some customers have chosen to import their packaging requirements. We continue to assess the degree to which this competitive threat would impose a constraint on the merged entity.
- 61. We are also considering the degree of constraint from new entry. We understand that a basic thermoforming operation can be set up relatively quickly (eg, within one or two years) and at relatively low cost. However, we are considering the extent to which such entry would impose a constraint on the merged entity.
 - 61.1 Although entry at a small scale is possible, it would likely take more time and cost for a new entrant to reach a scale at which it may impose a sufficient constraint on the merged entity.
 - 61.2 There may be some barriers to supplying certain customers who have more customised products. For example, we understand there is innovation in the moulds for meat trays.
 - 61.3 A more vertically integrated operation would take more time and cost to set up. For example, extruders, decontamination units and/or a wash plant would take more time to install, and would be a significantly larger capital investments than the thermoformers.

Constraint from packaging made from other materials

- 62. The Application identifies that in some cases customers have chosen alternative materials for their packaging. We are therefore continuing to consider whether some customers could switch to other materials if the merged entity increased prices and the degree of constraint that this would impose on the merged entity's ability to profitably do so.

Constraint from countervailing power

- 63. We are still assessing the degree to which customers for plastic packaging have countervailing buyer power that could constrain the merged entity. Customers with countervailing buyer power have special characteristics that allow them to substantially influence the prices that suppliers charge. For example, customers that can sponsor entry into a market may have countervailing power.
- 64. In the Application, the Parties submit that many of their customers are large businesses with sophisticated procurement functions and/or multinational businesses with access to international supply chains for their New Zealand packaging needs.
- 65. Some customers may be able to resist a price increase (or drop in quality) through their procurement methods or through supporting smaller suppliers in order to increase competition. However, we are still considering:
 - 65.1 whether customers would face costs in exercising those options; and

- 65.2 whether any larger customers with countervailing power could, by exercising it, protect smaller customers without such power (ie, whether the merged entity would be able to increase prices to smaller customers).

Summary of current views on horizontal unilateral effects for the supply of plastic packaging

66. We are not currently satisfied that the Proposed Acquisition would not result in a substantial lessening of competition in the supply of plastic packaging in New Zealand. This is because the Parties appear to be close competitors and we are not satisfied that this lost competition could be replaced through the combined constraint from:
- 66.1 expansion by existing rivals (domestic/importers) and new entry;
 - 66.2 suppliers of alternative packaging materials; and
 - 66.3 ability of customers to resist a price increase.
67. We invite further information and submissions on these topics.

Horizontal unilateral effects relating to the purchase of PET bales and PET offcuts

PET bales

68. Currently, Flight buys PET bales from waste management firms and councils as input for its plastic recycling plant to create RPET flake. Flight competes to buy the bales mainly with overseas purchasers. Sellers consider various factors when deciding whether to sell PET bales to Flight or to its overseas rivals, including export prices, transport costs, volumes and environmental concerns.
69. If Pact builds a wash plant in the counterfactual then it would most likely compete with Flight to buy domestically produced PET bales. We are considering the following.
- 69.1 In the counterfactual, the competition between Pact and Flight could drive the price for domestically produced PET bales above the price that could be obtained on the export market. PET bale imports may not impose a strong constraint because of import costs and/or that it would not be NZ RPET.
 - 69.2 In the factual, the merged entity could drive down the prices of PET bales relative to the counterfactual. The merged entity could even force sellers to pay for them to be collected, although if it is possible for sellers to export this may place a limit on how low the merged entity could set prices.³⁰
70. We invite any submissions that relate to how the Proposed Acquisition could impact the purchase of PET bales from New Zealand suppliers.

³⁰ A fall in the price that recyclers receive for PET waste may harm the business case for recycling.

PET offcuts

71. Post-industrial PET waste (PET offcuts) is also used as an input by plastic manufacturers. Unlike post-consumer waste, however, it does not necessarily need to be processed through a wash plant before it is processed into RPET roll stock.
72. Both Pact and Flight have extruders that can produce roll stock. The two firms may therefore compete for PET offcuts from rival plastic manufacturers who cannot process PET offcuts into roll stock. []
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73. We are assessing whether the Proposed Acquisition could result in suppliers of PET offcuts having to accept lower prices, and whether this would result in a substantial lessening of competition. As part of this, we continue to seek information on:
 - 73.1 the extent to which Pact and Flight compete for the PET offcuts; and
 - 73.2 the extent to which exports or potential domestic purchasers of PET offcuts may set a limit on how low the merged entity could set prices.
74. We invite any submissions that relate to how the Proposed Acquisition could impact the purchase of PET offcuts from New Zealand suppliers.

Effects relating to the potential supply of NZ RPET roll stock

75. Some PET packaging manufacturers advised that they have been seeking to buy NZ RPET roll stock from Flight to supply customers seeking NZ RPET packaging.
76. Flight manufactures but does not currently sell RPET flake or roll-stock. If Pact builds a wash plant in the counterfactual and more PET bales become available in New Zealand, the Parties may compete to supply NZ RPET roll stock. []
77. We are assessing whether the Proposed Acquisition would create horizontal effects as result of the potential lost competition between Pact and Flight to supply NZ RPET roll stock. We note that the merged entity could (in this scenario) have an added incentive to raise prices (or withhold supply) to rivals, as this would hinder those in competing for customers seeking NZ RPET packaging.
78. Even if Pact and Flight would not be likely to compete to supply NZ RPET roll stock in the counterfactual, we are also considering whether:
 - 78.1 in the counterfactual, Flight would be likely to start supplying NZ RPET roll stock due to an increase in available waste PET bales [] and increased demand for NZ RPET roll stock and packaging generally; and

- 78.2 in the factual, the merged entity would have a decreased incentive to supply NZ RPET roll stock as it would have a larger customer base than Flight would have without the Proposed Acquisition.

79. We invite further submissions on these points.

Coordinated effects

80. An acquisition can substantially lessen competition if it increases the potential for the merged entity and all, or some, of its remaining rivals to coordinate their behaviour and collectively exercise market power such that output reduces and/or prices increase across the market. Unlike unilateral effects, which can arise from the merged entity acting on its own, coordinated effects require some or all of the firms in the market to be acting in a coordinated way.³¹
81. Coordination can take place on different elements of competition. In this case we are considering whether any markets might be vulnerable to firms coordinating to:
- 81.1 set the level of prices or volumes produced in the market; and/or
 - 81.2 pre-determine which customers to compete for (that is, allocating customers between each other).
82. As a result of the Proposed Acquisition, Flight would no longer be an independent competitor. We are considering whether this might result in coordinated effects by asking whether:
- 82.1 the markets in which the Parties compete have features that make it easy to reach, and then to sustain, an agreement and so make it vulnerable to coordination;³² and
 - 82.2 the Proposed Acquisition will make coordination significantly more likely (for example, by removing an aggressive market participant or increasing symmetry among competitors).
83. We have identified some features that could make the relevant markets vulnerable to coordination. For example, there are some barriers to new entry and there are similarities between the products that E&T packaging manufacturers make. However, at this stage, we consider it unlikely that the Proposed Acquisition would substantially lessen competition due to coordinated effects.
- 83.1 We consider the markets have features that would make it difficult to reach and sustain a coordinated agreement.
- 83.1.1 Neither price nor volumes can be easily observed. It is easier for firms to reach and sustain a coordinated agreement when they can easily

³¹ Commerce Commission “Mergers and Acquisitions Guidelines” (July 2019) at [3.84].

³² For more details on these features see Commerce Commission “Mergers and Acquisitions Guidelines” (July 2019) at [3.84].

monitor each other's prices or volumes (and therefore know whether other firms are adhering to the coordinated approach). However, in these markets, suppliers negotiate terms directly with customers, and prices and volumes are not publicly visible.

- 83.1.2 There is significant asymmetry between suppliers. It is easier to sustain a coordinated agreement when firms are similar as they are more likely to have a common view on the level (be it price, volume or other element) at which to coordinate on. In this case, suppliers are quite different in terms of business models, specialisations and cost structures.
- 83.1.3 Tender contracts differ in size, come up irregularly and are quite long. This is likely to frustrate attempts to reach and sustain agreement on the allocation of customers, as it would be difficult for suppliers to agree on a mutually satisfactory allocation. There would also be a strong temptation to "cheat" on the agreement in order to win one of the large contracts.
- 83.2 While the Proposed Acquisition would remove a significant player from the market (which in other circumstances could make coordination more likely), in this case we consider the Proposed Acquisition would have the offsetting effect of further increasing the degree of asymmetry in the market. This is because Pact and Flight are already larger (and more vertically integrated) than rival E&T packaging manufacturers, and the Proposed Acquisition would increase the difference in scale between the Parties and rivals.
- 84. For these reasons we do not plan to investigate coordinated effects further. We invite submissions on our position.

Conglomerate effects

- 85. A merger between suppliers (or buyers) who are not competitors but who operate in related markets can result in a substantial lessening of competition due to conglomerate effects. This can occur where the merging parties have complementary products. The merging parties may bundle (ie, provide together at a discount) or tie (ie, only provide one product if purchased with another) those complementary products, so that competitors are unable to provide a competitive constraint on the merged entity.
- 86. At this point, the Proposed Acquisition does not appear to raise concerns over conglomerate effects. Although the Parties offer a range of products, most customers choose to buy one type of product suitable for their needs. It is unlikely that offering bundling or tying products would materially harm rivals. No rival manufacturers we have spoken to have raised concerns over this possibility.
- 87. For these reasons we do not plan to investigate conglomerate effects further. We invite submissions on our position.

Next steps in our investigation

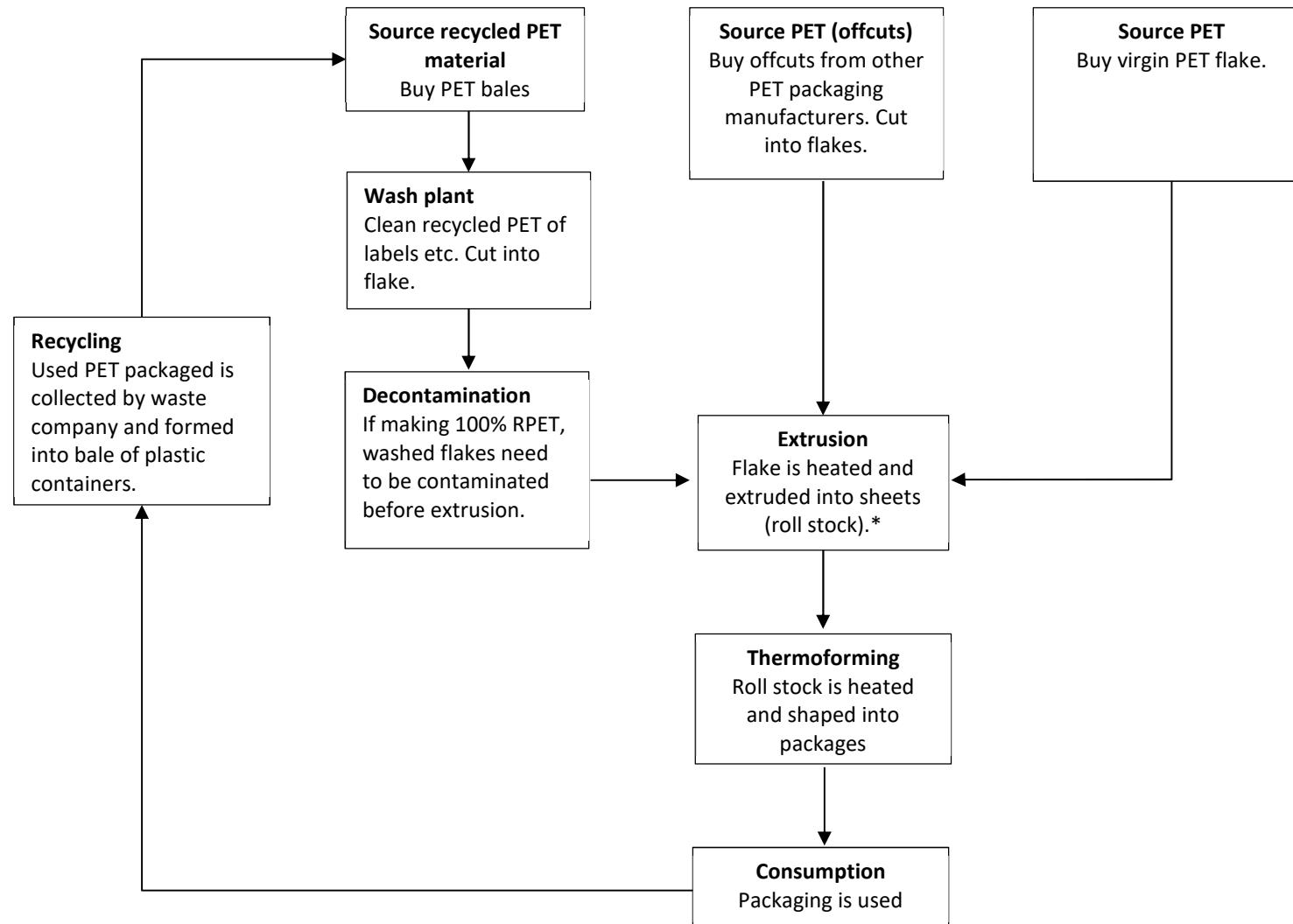
88. The Commission is currently scheduled to decide whether or not to give clearance to the Proposed Acquisition by 16 December 2020. However, this date may change as our investigation progresses.³³ In particular, if we need to test and consider the issues identified above further, the decision date may extend.
89. As part of our investigation, we are identifying and contacting parties that we consider will be able to help us assess the issues identified above.

Making a submission

90. We are continuing to undertake inquiries and seek information from industry participants about the impact of the Proposed Acquisition. We welcome any further evidence and other relevant information and documents that the Parties or any other interested parties are able to provide regarding the issues identified in this Sol.
91. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference “Pact / Flight” in the subject line of your email, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on 13 November 2020.
92. All information we receive is subject to the Official Information Act 1982 (OIA), under which there is a principle of availability. We recognise, however, that there may be good reason to withhold certain information contained in a submission under the OIA, for example in circumstances where disclosure would be likely to unreasonably prejudice the commercial position of the supplier or subject of the information.

³³ The Commission maintains a clearance register on our website at <https://comcom.govt.nz/case-register/case-register-entries/verifone-new-zealand-smartpay-holdings-limited> where we update any changes to our deadlines and provide relevant documents.

Attachment A: supply diagram



* If RPET flake is not decontaminated, the extrusion process must add a layer of virgin PET on each side of the sheet to ensure food safety.