

## Statement of Preliminary Issues

### Allied Foods (N.Z.) Limited / Dad's Pies Limited

20 October 2021

#### Introduction

1. On 7 October 2021, the Commerce Commission registered an application (the Application) from Allied Foods (N.Z.) Limited (Allied),<sup>1</sup> 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).<sup>2</sup>
2. The Commission will give clearance if it is satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
3. This statement of preliminary issues sets out the issues we currently consider to be important in deciding whether or not to grant clearance.<sup>3</sup>
4. We invite interested parties to provide comments on the likely competitive effects of the Proposed Acquisition. We request that parties who wish to make a submission do so by **3 November 2021**.
5. The Commission acknowledges that some interested parties may face challenges during some COVID-19 alert levels. This may impact their ability to submit within these timeframes. 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](mailto:registrar@comcom.govt.nz) so that we can work with you to accommodate your needs where possible.

#### The parties

6. Allied is the New Zealand subsidiary of George Weston Foods Limited, one of the largest food manufacturers in Australasia, which offers a range of brands including

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<sup>1</sup> 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 is now sought for Allied Foods (N.Z.) Limited to make the acquisition. Allied owns 100% of George Weston Foods (NZ) Limited and so this variation is unlikely to affect our substantive analysis.

<sup>2</sup> 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/>.

<sup>3</sup> The issues set out in this statement are based on the information available when it was published and may change as our investigation progresses. The issues in this statement are not binding on us.

Burgen and Tip Top. Allied in turn owns GWF, which manufactures and supplies savoury pies and sausage rolls in New Zealand under the brand name “Big Ben®”.

7. DPL is a New Zealand-owned manufacturer and supplier of pies and pastries. It began as a single pie shop in Auckland and has expanded to now operate a factory at Silverdale in Auckland, employing 138 staff.

## Our framework

8. Our approach to analysing the competition effects of the Proposed Acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.<sup>4</sup> As required by the Commerce Act 1986, we assess mergers and acquisitions using the substantial lessening of competition test.
9. We determine whether an acquisition is likely to substantially lessen competition in a market by comparing the likely state of competition if the acquisition proceeds (the scenario with the acquisition, often referred to as the factual), with the likely state of competition if the acquisition does not proceed (the scenario without the acquisition, often referred to as the counterfactual).<sup>5</sup> This allows us to assess the degree by which the Proposed Acquisition might lessen competition.
10. If the lessening of competition as a result of the acquisition is likely to be substantial, we will not give clearance. When making that assessment, we consider, among other matters:
  - 10.1 constraint from existing competitors – the extent to which current competitors compete and the degree to which they would expand their sales if prices increased;<sup>6</sup>
  - 10.2 constraint from potential new entry – the extent to which new competitors would enter the market and compete if prices increased; and
  - 10.3 the countervailing market power of buyers – the potential constraint on a business from the purchaser’s ability to exert substantial influence on negotiations.

## Market definition

11. We define markets in the way that we consider best isolates the key competition issues that arise from the Proposed Acquisition. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Commerce Act, as a matter of fact and commercial common sense.<sup>7</sup>

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<sup>4</sup> Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2019. Available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz).

<sup>5</sup> *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

<sup>6</sup> References to price increases in this document should be taken to include a reduction in quality, service or innovation.

<sup>7</sup> Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

12. In the Application, Allied submitted that the relevant affected market is a national market for the wholesale distribution of savoury pies in New Zealand (the Wholesale Market),<sup>8</sup> encompassing the supply of pies:
- 12.1 of all different temperatures, sizes, and quantities, and at different price points; and
  - 12.2 to all four wholesale channels identified in the Application<sup>9</sup> (ie, supermarket, fuel, route trade, and food service).
13. To assess the product dimension of the relevant market(s), we will consider the extent of supply- and demand-side substitution between pies of different sizes, pack quantities, and price/quality points.
14. To assess the customer dimension of the relevant market(s), we will investigate whether the merged entity would have any ability to discriminate between customers in different sales channels (ie, grocery, fuel, food service, or route trade), because their competitive alternatives vary compared to customers in another sales channel.

### **Without the Proposed Acquisition**

15. We will consider what Allied and DPL (together, the Parties) would do if the Proposed Acquisition did not go ahead. We will consider the evidence on whether the without-the-acquisition scenario is best characterised by the status quo.

### **Preliminary issues**

16. We will investigate whether the Proposed Acquisition would be likely to substantially lessen competition in the relevant market (or markets) by assessing whether horizontal unilateral or coordinated effects may result from the Proposed Acquisition. The questions that we will be focusing on are:
- 16.1 *Unilateral effects* – would the loss of competition between the Parties enable the merged entity to profitably raise prices or reduce quality or innovation by itself?<sup>10</sup>
  - 16.2 *Coordinated effects* – would the Proposed Acquisition change the conditions in the relevant market(s) so that coordination is more likely, more complete, or more sustainable?

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<sup>8</sup> The Application at [2.1], [12.4].

<sup>9</sup> The Application at [6.6].

<sup>10</sup> For ease of reference, we only refer to the ability of the merged entity to “raise prices” from this point on. This should be taken to include the possibility that the merged entity could reduce quality or innovation, or worsen an element of service or any other element of competition, i.e. it could increase quality-adjusted prices.

**Unilateral effects: would the merged entity be able to profitably raise prices by itself?**

17. Unilateral effects arise when a firm merges with a competitor that would otherwise provide a significant competitive constraint (particularly relative to remaining competitors) such that the merged firm can profitably increase price above the level that would prevail without the merger without the profitability of that increase being thwarted by rival firms' competitive responses.
18. The Parties overlap in the supply of savoury pies and sausage rolls to wholesale customers.
19. In the Application, Allied submitted that the Proposed Acquisition would not be likely to substantially lessen competition in the relevant market due to unilateral effects for the following key reasons:<sup>11</sup>
  - 19.1 there is significant competition in the Wholesale Market, and this competition will constrain the merged entity post-acquisition;
  - 19.2 major customers, such as supermarkets and fuel retailers, have significant countervailing power; and
  - 19.3 there are low barriers to entry and to expansion, including for Australian manufacturers. Competitors have significant excess capacity and could quickly increase production volumes.
20. We will consider:
  - 20.1 *closeness of competition* – how closely GWF and DPL compete with each other, and the level of competitive constraint that they exert on each other. To the extent that any constraint is material, we will assess whether the lost competition between the Parties could be replaced by rival competitors;
  - 20.2 *remaining competitive constraints* – the degree of constraint that existing competitors would impose on the merged entity;
  - 20.3 *entry and expansion* – how easily rivals could enter and/or expand; and
  - 20.4 *countervailing power* – whether customers have special characteristics that would enable them to resist a price increase by the merged entity.

**Coordinated effects: would the Proposed Transaction make coordination more likely?**

21. A transaction can substantially lessen competition if it increases the potential for the merged entity and all or some of its remaining competitors to coordinate their behaviour and collectively exercise market power or divide up the market such that output reduces and/or prices increase. Unlike a substantial lessening of competition

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<sup>11</sup> The Application at [2.3].

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.<sup>12</sup>

25. Based on the information submitted by the Parties, the market does not seem to be vulnerable to coordination. In particular, Allied submitted that:
  - 25.1 a number of strong and competitors will remain post-Transaction in the market;
  - 25.2 there are modest barriers to entry;
  - 25.3 large customers have countervailing buyer power; and
  - 25.4 there is substantial excess capacity in the market.
  
26. We will assess whether any of the relevant markets are vulnerable to coordination, and whether the Proposed Acquisition would change conditions so that coordination is more likely, more complete, or more sustainable. Factors we will consider include:
  - 21.1 whether the Proposed Acquisition removes an aggressive or destabilising competitor;
  - 21.2 to the extent that one of the Parties acts as a disrupting influence to coordinated behaviour, the number and strength of remaining rivals in the relevant market post-acquisition;
  - 21.3 how similar competitors are in terms of size and cost structure; and
  - 21.4 entry and expansion conditions.

### **Next steps in our investigation**

22. The Commission is currently scheduled to make a decision on whether or not to give clearance to the Proposed Acquisition by 3 December 2021. However, this date may change as our investigation progresses.<sup>13</sup> In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.
23. As part of our investigation, we will be identifying and contacting parties that we consider will be able to help us assess the preliminary issues identified above.

### **Making a submission**

24. If you wish to make a submission, please send it to us at [registrar@comcom.govt.nz](mailto:registrar@comcom.govt.nz) with the reference "Allied Foods (N.Z.) Limited / Dad's Pies Limited" in the subject

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<sup>12</sup> *Mergers and Acquisitions Guidelines* above n 5 at [3.84].

<sup>13</sup> The Commission maintains a clearance register on our website at <http://www.comcom.govt.nz/clearances-register/> where we update any changes to our deadlines and provide relevant documents.

line of your email, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on **3 November 2021**.

25. Please clearly identify any confidential information contained in your submission and provide both a confidential and a public version. We will be publishing the public versions of all submissions on the Commission's website.
26. 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 unreasonably prejudice the supplier or subject of the information.