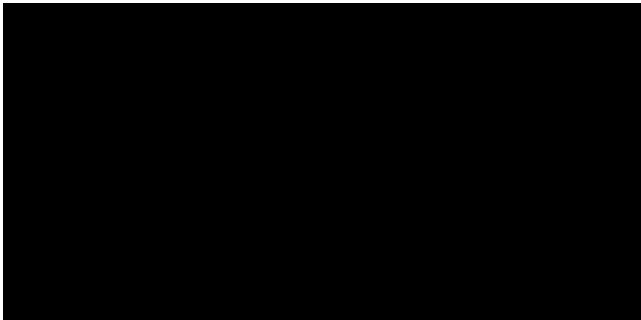


13 March 2023



Official Information Act #22.112 - Response

1. We refer to your Official Information Act 1982 (**OIA**) request received on 13 February 2023 for information about Commerce Commission (**Commission**) investigations into the acquisition of land and the lodging of land and lease covenants by the major grocery retailers: Foodstuffs North Island Limited,¹ Foodstuffs South Island Limited,² and Woolworths New Zealand Limited.³ The scope of your request is:
 - 1.1 The Commission stated in its draft market study report into the retail grocery sector that it had *“identified more than 80 restrictive covenants entered into by the major grocery retailers”* (at paragraph [6.68]) and *“Restrictive covenants and exclusivity covenants in leases may breach sections 27 and/or 28 of the Act [Commerce Act 1986 (**Commerce Act**)]”* (at paragraph [6.90]):⁴
 - 1.1.1 when did the Commission first become aware that grocery retailers had some covenants or lease agreements and that might be in breach of the Commerce Act?
 - 1.2 When did it first decide to investigate that issue?
 - 1.3 The Commission reported in June 2022 that it had decided to prioritise the investigation:

¹ <https://comcom.govt.nz/case-register/case-register-entries/foodstuffs-north-island-limited>

² <https://comcom.govt.nz/case-register/case-register-entries/foodstuffs-south-island-limited>

³ <https://comcom.govt.nz/case-register/case-register-entries/woolworths-new-zealand-limited>

⁴ Market study into the retail grocery sector: <https://comcom.govt.nz/about-us/our-role/competition-studies/market-study-into-retail-grocery-sector>

- 1.3.1 What did that prioritisation entail? i.e., what does 'prioritisation' mean in that context?
- 1.4 Since the Commission decided to investigate the issue, what resources have been applied to that investigation (e.g., number of FTEs and hours)?
- 1.5 How many meetings (either face to face or online) between Commission staff and external parties have taken place to conduct this investigation? If this cannot easily be calculated an honest estimate would be fine at this stage.
- 1.6 How many phone calls between Commission staff and external parties have taken place to conduct this investigation? If this cannot easily be calculated an honest estimate would be fine at this stage.
- 1.7 How many emails have been sent from Commission staff to external parties to conduct this investigation? If this cannot easily be calculated an honest estimate would be fine at this stage.
- 1.8 How many physical letters have been sent from commission staff to external parties to conduct this investigation? If this cannot easily be calculated an honest estimate would be fine at this stage.
- 1.9 Is the Commission in possession of any other metrics that would provide information on the workload that this investigation has entailed to date? If so, what are they?
- 1.10 If there are any obvious discrepancies between the volume of work captured in questions [1.5] to [1.9], and the resources described in question [1.4], is the Commission able to provide an explanation?
- 1.11 With regard to a potential Commerce Act breach is the relevant test that "No person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market"? If not, what is the relevant legal test to prove a breach?
- 1.12 Is it correct that in order to determine whether a breach of the Commerce Act had occurred, the Commission need only prove that the restrictive covenants it identified were likely to have had the effect of substantially lessening competition in a market, and that it does not necessarily need to prove or quantify that impact?
- 1.13 What systems does the Commission have in place to ensure investigations are carried out expeditiously?
- 1.14 How many investigative staff does the Commission employ?
- 1.15 When was the last year when any of the Commission's staff were subject to any form of performance management?

Our response

2. Please find our responses below to the information you have requested.

Investigation

3. In response to paragraph [1.1] of your request, the Commission first became aware of the issue in December 2020 and January 2021 in the context of the market study into the retail grocery sector. It came through the responses from grocery retailers to our requests for information (our requests were issued in November 2020). We issued further targeted requests for information about the land and lease covenants in March 2021 and received responses from grocery retailers in April and May 2021.
4. In response to paragraph [1.2] of your request, in January 2022, the Commission decided to conduct a prioritisation exercise across the land and lease covenants identified in the market study to identify the places in which the land and lease covenants affecting supermarket development were more likely to give rise to concern under the Commerce Act. This work occurred between February to April 2022.
5. In response to paragraph [1.3] of your request, following the completion of preliminary investigative steps and the prioritisation exercise, in late May 2022, the Commission decided to conduct a more in-depth assessment of the impact of the land and lease covenants affecting supermarket development in specific places. This resulted in three investigations being opened into land and lease covenants, relating to each of Foodstuffs South Island, Foodstuffs North Island and Woolworths NZ (i.e., one investigation for each supermarket retailer) relating to nine sites in total.
6. A decision to prioritise a preliminary matter by then opening an in-depth investigation means having regard to our Enforcement Response Guidelines⁵ and enforcement criteria,⁶ Commerce Act prioritisation criteria, current workload and priorities.⁷ Further information on this process is set out in the following paragraphs:
 - 6.1 The Commission's Commerce Act Division, which is responsible among other things for the performance of the Commission's functions under Part 2 of the Commerce Act (including sections 27 and 28), approves enforcement criteria and an annual business plan. These inform prioritisation of complaints received and matters investigated by the Competition Branch. The Commission updated its Commerce Act prioritisation criteria in 2021 to give greater and more specific guidance. The revised criteria are attached at **Appendix A** for your information.

⁵ Enforcement Response Guidelines: <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines>

⁶ Enforcement criteria: <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-criteria>

⁷ Our priorities: <https://comcom.govt.nz/about-us/our-priorities>

- 6.2 Also in 2021, we updated our process for Commerce Act low-level (preliminary) investigations and how they are prioritised for further investigation. Some of the changes included:
- 6.2.1 A clear theory of harm from the outset that will continue to be developed if an investigation progresses.
 - 6.2.2 A more delineated investigation system is used, where low-level or preliminary investigations are opened and reviewed within a specified timeframe. These low-level investigations are then assessed within that timeframe and may be prioritised for further investigation after consideration of a range of factors such as available resourcing and the nature of other existing and potential in-depth investigations. This prevents low-level or preliminary investigations remaining open for long periods without focussed resource or timeframes for reassessment or completion.
- 6.3 A key decision stage for prioritisation is whether or not to elevate a matter to an in-depth investigation. There are two key decisions built into this stage:
- 6.3.1 The first is the assessment of the evidence from a particular low-level investigation and a breach of the Commerce Act may be made out. This results in a decision on the **merits** of opening an in-depth investigation, which is made by the relevant investigations manager with advice from other managers; for example, legal and economic managers.
 - 6.3.2 If a matter progresses beyond the initial merits decision, the Competition Branch leadership team also discusses prioritisation of the matter. This includes consideration of such things as the merits of undertaking further work, particularly investigative work, and other work already underway in the competition space. This process ensures greater visibility and ability to shift resources as needed (particularly investigative resources) between different matters depending on their prioritisation.
- 6.4 Every two months, the Competition Branch provides reporting to the Commerce Act Division, including an update on the matters being investigated.
- 6.5 The Competition Branch operates regular strategic planning in relation to which matters in our investigation portfolio are to be given priority and the resources applied.

Resource

7. In response to paragraphs [1.4] of your request, the Commission has recorded 1,112.03 hours to the three projects, broken down as follows:⁸

Role	Hours
Evidence Systems Coordinator	2.5 hours
Investigator	742.03 hours
Senior Investigator	157 hours
Principal Investigator	88.5 hours
Senior Legal Counsel	15 hours
Principal Economist	107 hours
Total	1,112.03 hours

8. In response to paragraphs [1.5] and [1.6] of your request, the Commission has had three meetings (via Microsoft Teams) with external parties to as part of conducting our investigations.⁹
9. In response to paragraphs [1.7] and [1.8] of your request, the Commission has sent 61 emails and nine letters to external parties as part of conducting our investigations.¹⁰
10. In response to paragraph [1.9] of your request, the Commission is not in possession of any other metrics that would provide information on the workload that these three investigations have entailed to date.
11. In response to paragraph [1.10] of your request, there are a number of factors which have contributed to the both length and complexity of these investigations:
- 11.1 Firstly, the nature of information required to analyse the effect or likely effect of a land or lease covenant in a particular geographic area is significant and includes information on likely market definition, alternative land availability, location of competitors in the particular region, historic documents showing rationale for the covenant, and is a fact-specific analysis unique to each site. This also involved seeking expert real estate assistance regarding alternative site availability.

⁸ At the date of your request. We note this does not include managerial or Commissioner time.

⁹ As at the date of your request. Foodstuffs North Island: one / Foodstuffs South Island: one / Woolworths: one.

¹⁰ As at the date of your request. Foodstuffs North Island: 14 emails and three letters / Foodstuffs South Island: 20 emails and three letters / Woolworths: 27 emails and three letters.

- 11.2 Secondly, the major grocery retailers sought significant extensions to the timeframes for responding to information requests (sent on 8 August 2022). These requests were granted. One major grocery retailer only responded on 19 December 2022, which was after the extension.

Commerce Act

12. At paragraphs [1.11] and [1.12] of your request, you have raised a number of matters in relation to the substantial lessening of competition test (the **SLC test**). The Commission does not comment on the application of legal tests during individual investigations using that test, and so the following comments are therefore general in nature.
13. The SLC test is a legal and economic test which is in a number of the provisions of the Commerce Act, including anti-competitive agreements under section 27 (cited at your paragraph [1.11]), anti-competitive covenants under section 28, and anti-competitive acquisitions under section 47.
14. The same conduct may be examined under different provisions of the Commerce Act. The relevant legal test applied in any proceedings is determined by the provisions under which the Commission brings those proceedings. The SLC test is one of many potentially determinative legal tests present in enforcement proceedings, alongside admissibility of evidence, relevant limitations periods, and procedure.
15. The SLC test is set out in our Merger and Acquisition Guidelines,¹¹ noting those guidelines are in the context of applications for the Commission to grant clearance to a potentially anti-competitive merger. The guidelines provide examples of the wide variety of matters that must be established for the SLC test to be satisfied.
16. We also set out the SLC test in our Draft Misuse of Market Power Guidelines¹². Extracts from that draft, describing how we evaluate conduct under the test, are set out below. Key elements to note are that it is a fact-specific analysis, it involves considering how conduct impacts competition in the relevant market, and taking into account other factors that influence competition in that market.

[65] *The substantial lessening of competition test is a relative standard. We ask whether conduct would increase a firm's market power relative to its market power without the conduct. That is, has the firm's market power moved along the spectrum away from perfect competition towards monopoly? To say that competition has been lessened is equivalent to saying that market power has increased. A lessening of competition could also include a firm maintaining market power in circumstances that would not have been possible without the conduct.*

¹¹ Merging or acquiring a company: <https://comcom.govt.nz/business/merging-or-acquiring-a-company>

¹² https://comcom.govt.nz/__data/assets/pdf_file/0023/295160/Draft-Misuse-of-Market-Power-Guidelines-October-2022.pdf

[66] Only a lessening of competition that is substantial is prohibited. A lessening of competition will be substantial if it is real, of substance, or more than nominal. Some courts have used the word material to describe a lessening of competition that is substantial. Others have focussed on whether the lessening is “meaningful or relevant to the competitive process”.

[67] No bright line separates a lessening of competition that is substantial from one which is not. What is substantial is a matter of judgement and depends on the facts of each case....

[69] To assess whether conduct has substantially lessened competition, or is likely to do so, requires us to compare the likely state of competition with the conduct (often referred to as the factual) with the state of competition without the conduct (often referred to as the counterfactual)

17. The application of the SLC test is a fact-specific analysis test, involving considering how conduct impacts competition in the relevant market and taking into account other factors that influence competition in that market.
18. Covenants that restrict the use of land for specified purposes may increase barriers to entry and expansion for competitors, enabling the party benefiting from the covenant to enjoy reduced competition. Factors relevant to understanding the effect of this type of land covenant on competition include:
 - 18.1 The boundaries (location, size, shape) of the geographic relevant market.
 - 18.2 The availability of other land in the relevant geographic market that would be suitable for the use that is restricted by the land covenant.
 - 18.3 The extent and nature of alternative competitors or potential competitors in the relevant geographic market that currently provide the goods or services that are restricted by the land covenant.
19. We note your query in paragraph [1.12] of your request, whether the Commission “does not need to prove or quantify that impact” in relation to the SLC test. The Commission must prove either the “purpose, effect or likely effect” of the conduct in issue substantially lessened competition under sections 27, 28 or 47. Determining whether a substantial lessening of competition has occurred does not require a quantification of actual or potential price increases, although we do need to establish that the restrictions had a “substantial” effect or likely effect. No bright line separates a lessening of competition that is substantial from one which is not. What is substantial is a matter of judgement and depends on the facts of each case. The effect of a lessening of competition may be to increase or maintain prices or margins.
20. Paragraph [1.12] of your request relates to section 28 (anti-competitive covenants). In addition to proving a substantial lessening of competition, the Commission must also prove the matters in sections 28(1) or 28(2) - that it was the relevant defendant who gave the covenant, or required it to be given, or carried out, or enforced the covenant. If these are not proven, then the Court will find no breach of the

Commerce Act occurred even if there has been a substantial lessening of competition.

Investigation timeliness

21. In response to paragraph [1.13] of your request, a project plan is developed at the beginning of each investigation and signed off by the Principal Investigator, in consultation with the Competition Investigations Manager. The plan sets out the key milestones and indicative timeframes for the investigation. We note that timeframes can change due to factors outside the Commission's control; for example, if parties do not respond to our requests for information in a timely way.
22. Investigations include regular stop/go checkpoints every three months to review timeliness, scope and resourcing.
23. We track and report on investigation progress and timeliness through weekly meetings with managers to discuss the status of investigations, timeliness and resource needs, and bi-monthly reporting on timeliness and investigation progress to the Commerce Act Division.
24. We publish our performance measures in our Statement of Intent.¹³ We work to a timeliness target of 75% of investigations decided within 18 months of an investigation being opened. The target for this performance measure has been exceeded for the last five years. This target is similar to those used by regulators that carry out similar complex investigations, such as the FMA in New Zealand and the ACCC in Australia.

Staff numbers and performance

25. In response to paragraph [1.14] of your request, the Commission has 75 investigative staff (68.25 FTE) across different areas - covering Competition, Fair Trading, Credit and Economic Regulation.¹⁴ You can find further information about the profile of our people in our most recent Annual Report.¹⁵
 - 25.1 The Competition Branch has three frontline areas - mergers, cartels and competition investigations, which are supported by Legal and Economics teams. The competition investigations team also carries out authorisation work.
 - 25.2 Each of the frontline areas has around ten investigative staff. At any one time, the competition investigations team supports one to two matters in litigation; carries out approximately 2-5 in-depth investigations; and manages around 5-

¹³ Statement of Intent: <https://comcom.govt.nz/about-us/strategic-planning-and-accountability-reporting/statement-of-intent>

¹⁴ At the date of your request. 70 permanent staff, two fixed term staff and three contract staff.

¹⁵ Annual Report 2021/22: https://comcom.govt.nz/_data/assets/pdf_file/0018/306036/Commerce-Commission-Annual-Report-2022.pdf

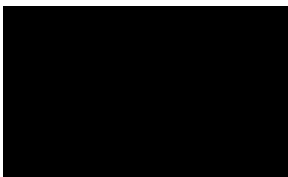
10 low-level investigations. The balance depends on the stage of litigation a matter is at, and the scale of investigations, and cases underway.

- 25.3 The creation of three dedicated front-line teams for mergers, cartels, and competition investigations took place in 2021. Prior to that, approximately 20 investigative staff worked to respond to all merger, authorisation, competition investigation and cartels work. The new structure reflects the ambition of the Commission to focus more resource on a wider range of competition cases.
26. In response to paragraph [1.15] of your request, the Commission actively manages the performance of all staff through a performance management framework.
27. The Commission has for several years had a process in place to support the capability and development of staff. The process is undertaken annually and involves setting clear objectives so that staff understand what is expected of them, constructive feedback on performance, and support to plan and progress capability and development. The Commission has recently put in place a new growth and development framework. This is a tool to guide staff and their people leaders through structured conversations to identify key capabilities and suggest relevant development opportunities to continue to build capabilities in identified areas.
28. Staff meet with their people leader regularly and discuss matters such as performance, development, and the demonstration of behaviours against their objectives for the performance year, with a set mid-year check-in and an annual review cycle.
29. This approach taken is that staff can work on areas for development as they occur before they become a performance issue.
30. Where a staff member is not meeting expectations, or further development is required, an action plan may be implemented to support the individual to attain the required standard, and to ensure a fair and objective method is used to evaluate their progress.
31. Should any performance issues continue, the Commission may introduce a Performance Improvement Programme (PIP) to assist in monitoring an individual's performance. The primary purpose of the programme, and desired outcome, is to raise an individual's performance to the expected level.
32. Please let us know if you require any additional information in respect of performance management over and above what we have included above, which covers the annual capability and development cycles.

Further information

33. Please note the Commission will be publishing this response to your request in the OIA register on our website.¹⁶ Your personal details will be redacted from the published response.
34. Please do not hesitate to contact us at oia@comcom.govt.nz if you have any questions about this request.

Yours sincerely



OIA and Information Coordinator

¹⁶ OIA register: <https://comcom.govt.nz/about-us/requesting-official-information/oia-register>

Appendix A: Prioritisation Criteria	
CONDUCT	
Are there characteristics of the party's behaviour that make the conduct more, or less, of a concern.	
Seriousness of conduct: Is the behaviour deliberate, reckless, careless or inadvertent?	
Have we provided guidance to the parties in the past?	
Does the evidence suggest that they knew what they were doing was in breach of the Act?	
Are senior staff within the organisation aware of, or engaged in, the conduct?	
Has there been a history of similar conduct in the past?	
Have we previously engaged with the parties or undertaken some form of enforcement action in the past?	
Attitude to future compliance: Have we seen an improvement in the attitude of the parties towards compliance?	
Is there a willingness to change behaviour to ensure compliance with the law?	
Do the parties continue to indicate a disregard for the law?	
Have the parties taken steps to address harm?	
Have the parties been obstructive towards our investigation?	
Have the parties refused to provide evidence and information?	
Is the conduct overt or secret?	
Have the parties knowingly concealed the conduct or been transparent about what they are doing?	
DETRIMENT	
The nature and extent of harm arising from the conduct.	
What is the nature of the conduct and the harm to competition?	
Does the conduct involve: Cartel conduct – agreements to fix prices, allocate markets/customers.	
Exclusionary conduct that prevents rivals from competing on their merits – e.g., Has an innovative new competitor been foreclosed from a very concentrated market?	

Appendix A: Prioritisation Criteria	
Non-cartel coordinated conduct that softens rivalry between competitor	
What is the likely effect of the conduct - e.g., Higher prices, less choice, lower quality, less innovation?	
Are there any pro-competitive rationales for the conduct?	
The size of the affected commerce:	
What is the turnover of the relevant business?	
Do any of the parties to the conduct individually or collectively have market power?	
What is the value of the relevant market	
What is the impact on consumers in total dollar terms from the conduct eg price increases?	
Significance of the market:	
Is the market important to New Zealand's economic success?	
Does the conduct relate to essential, or widely used, goods or services?	
Duration of the conduct:	
Has the conduct been occurring over a number of years?	
Is the conduct ongoing?	
Urgency or ongoing conduct/harm.	
Do we need to act to stop ongoing harm?	
Can the harm be undone?	
PUBLIC INTEREST	
Is there a public expectation that we would act to prevent and deter such conduct? Would a failure to act undermine public confidence in our role under the Commerce Act.	
Are other regulators taking action, or able to take action, to address the conduct?	
Is it more appropriate that the affected parties take action themselves?	
How likely is it that there is a breach of the Act?	
Is this a new Law?	

Appendix A: Prioritisation Criteria	
Is this within a publicly announced priority?	
Is non-compliance common within the relevant sector?	
Is there a value in obtaining a precedent or clarifying the law?	
Is action required to maintain the effectiveness of our clearance regime?	
Is there an imbalance in bargaining power?	