

Statement of Issues

Farmlands / Seales Winslow

7 February 2024

Introduction

1. On 8 November 2023, the Commerce Commission registered an application (the Application) from Farmlands Co-operative Society Limited (Farmlands) seeking clearance to acquire 100 percent of the shares of Seales Winslow Limited (Seales Winslow) (the Proposed Acquisition).¹
2. To clear an application, we must be satisfied that an acquisition will 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 Farmlands and Seales Winslow (together, the Parties) and other interested parties can provide us with submissions relating to those issues.
4. In reaching the preliminary views set out in this Sol, we have considered information provided by the Parties and other industry participants. 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.
5. 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.

The issues we are continuing to investigate

6. Based on the evidence currently before us, we are not yet satisfied that the Proposed Acquisition would not be likely to substantially lessen competition in one or more relevant markets.
7. We are still yet to conclude on the definition of the relevant market(s) for assessing the competitive effects of the Proposed Acquisition. However, our preliminary view is that there are likely to be regional markets for the manufacture and distribution of pelletised compound feed for dairy cows and calves.
8. Regardless of the boundaries of the relevant markets we are not yet satisfied that the Proposed Acquisition would not result in the merged entity having unilateral ability to

¹ A public version of the Application is available on our website at:
<http://www.comcom.govt.nz/businesscompetition/mergers-and-acquisitions/clearances/clearances-register/>.

profitably raise prices and/or reduce service or quality in the supply of any of the relevant products. In particular, we are continuing to assess the:

- 8.1 degree of competition between the Parties that would be lost as a result of the Proposed Acquisition in different regions of New Zealand;
 - 8.2 strength of the competitive constraints on the merged entity in different regions of New Zealand from existing pelletised compound feed manufacturers and from suppliers of other types of supplementary feed for dairy cows and calves;
 - 8.3 the likelihood and sufficiency of any potential entry or expansion into the relevant markets; and
 - 8.4 the extent to which farmers and/or retailers have countervailing power to constrain the merged entity.
9. In addition, we are not yet satisfied that the Proposed Acquisition would not give rise to vertical effects, given that Farmlands is both a manufacturer and retailer of pelletised compound feed.
10. We explain our reasons for our current views below and invite submissions on them.

Process and timeline

11. We have agreed with Farmlands to extend the period in which to make a decision from the initial 40 working day statutory timeframe until 22 March 2024.
12. We 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 **21 February 2024**, including a confidential and a public version of any submission made. All submissions received will be published on our website with appropriate redactions.² All parties will have the opportunity to cross-submit on the public versions of submissions received from other parties by close of business on **28 February 2024**.
13. 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 us at registrar@comcom.govt.nz so that we can work with you to accommodate your needs where possible.

The Parties

Farmlands – the applicant

14. Farmlands is a farming co-operative with over 70,000 shareholders across New Zealand. It operates a range of agricultural businesses including its NRM division,

² 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).

which is the Farmlands division that focuses on supplying animal nutrition products to customers across New Zealand.³

15. Farmlands' range of animal nutrition products includes bulk and bagged pelletised compound feed for livestock.
 - 15.1 In the South Island, Farmlands supplies its customers with pelletised feed that it manufactures itself at mills in Rolleston and Winton.
 - 15.2 In the North Island, Farmlands currently uses a toll manufacturer (Seales Winslow) to supply it with the pelletised feed it distributes to its customers.

Seales Winslow – the target

16. Seales Winslow is the animal nutrition business of Ballance Agri-Nutrients Limited (Ballance). Ballance is one of the main suppliers of fertiliser in New Zealand. Similar to Farmlands, Seales Winslow manufactures a range of animal nutrition products, including pelletised compound feed, and supplies these to customers across New Zealand. At present, Seales Winslow manufactures its pelletised compound feed at mills located in both the North Island (Morrinsville and Whanganui) and the South Island (Ashburton).

Relevant background on pelletised compound feed

17. Farmlands and Seales Winslow are two of the main manufacturers of pelletised compound feed in New Zealand. Pelletised compound feed can be used to feed a range of livestock such as dairy cows, calves, horses, poultry, and pigs. However, the vast majority of all the pelletised compound feed made by the Parties is used to feed two types of ruminants, specifically:
 - 17.1 dairy cows; and
 - 17.2 calves, being grown to become dairy cows.
18. In order to prevent disease transfer in production animals, ruminants are unable to eat feed containing animal protein and so the pelletised compound feed supplied by the Parties does not contain any animal protein.⁴
19. In addition to the Parties, there are several other manufacturers of pelletised compound feed including:
 - 19.1 in the North Island; Takanini Feeds Limited (Takanini Feeds), Grainhub Limited (Grainhub) and Ricegrowers New Zealand Limited (trading as CopRice for the animal food division) in Waikato; and Sharpes Stock Feeds Limited (Sharpes) in Wairarapa; and

³ For example, see <https://www.farmlands.co.nz/Productsandservices/Nutrition/index.html>

⁴ For example, see Ministry for Primary Industries. (2021). Ruminant feed regulations for preventing BSE or “mad cow disease”. Available at: <https://www.mpi.govt.nz/animals/animal-feed-preventing-disease-transfer/ruminant-feed-regulations/>

- 19.2 in the South Island; Advanced Feed in Canterbury; and Sgt Dan Stockfoods Limited (Sgt Dan) and Winton Stock Feed Limited (Winton Stock Feed) in Southland.
20. Most manufacturers of pelletised compound feed distribute their products to farmers through two channels:⁵
- 20.1 by making bulk deliveries of their pellets directly to end-customers, who tend to be farmers (for example, in 1 tonne, 2 tonne, or 5 tonne loads etc). This is the predominant delivery mechanism for feed for dairy cows. For these deliveries the manufacturers tend to use third party transportation companies; and
- 20.2 selling pelletised compound feed in smaller bags, typically through rural merchant stores (in either 20kg or 25kg bags). This is the predominant delivery mechanism for feed for dairy calves.
21. We understand farmers use supplementary feed, such as pelletised compound feed, produced off-farm to boost production by providing additional nutrition to farm animals over and above that available on-farm from pasture and foraging crops. Farmlands estimates that supplementary feed accounts for approximately 20% of the total feed consumed by dairy cows.⁶
22. In addition to pelletised compound feed, there are several other types of supplementary feed sold in New Zealand. These include:⁷
- 22.1 Grains: There are a range of domestically produced grains including maize, barley, wheat and oats fed to farm animals in New Zealand in raw form;
- 22.2 Straights: There are a range of predominantly imported straight feed commodities fed to farm animals in a raw form, including tapioca, soya bean meal, soy hulls, canola meal, cottonseed, brewers' grain and, most significantly, Palm Kernel Extract (PKE). PKE is a dry, gritty meal widely used by New Zealand farmers;
- 22.3 Blends (standard and complex): Blended feed is essentially a mix of ingredients (say, for example PKE and molasses) produced in a raw (non-pelletised) form;
- 22.4 Silage / baleage: Many farmers grow grass on their own land for the purpose of harvesting as silage and baleage for use as supplementary feed for their own animals or otherwise for sale to other farmers; and
- 22.5 Other supplements: There are other supplements fed to farm animals in New Zealand, including liquid stock feed, molasses, and waste manufacturing products like biscuits, chips, waste vegetables and fruit.

⁵ See, for example, interview with [] (28 November 2023).

⁶ The Application at [16].

⁷ The Application at [19].

The relevant markets

23. Market definition is a tool that helps identify and assess the close competitive constraints a merged entity is likely to face. We define markets in the way that we consider best isolates the key competition issues that arise from a specific merger or 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 1986, as a matter of fact and commercial common sense.⁸
24. We have not reached any definitive views on the relevant markets for assessing the Proposed Acquisition. At this stage, the issues we are continuing to assess relate to the boundaries of the relevant product and customer market(s) as the evidence we have received to date tends to indicate that the relevant markets may be narrower than those submitted by Farmlands.
25. Currently, we consider that the competition issues that may arise from the Proposed Acquisition are best assessed and isolated by defining regional markets for the manufacture and wholesale supply of:
 - 25.1 pelletised compound feed for calves, which tend to be supplied in bags; and
 - 25.2 pelletised compound feed for dairy cows, which tend to be supplied in bulk.
26. We invite submissions on these proposed market definitions. In particular, we invite submissions on:
 - 26.1 the extent of switching between pelletised compound feed and other types of supplementary feed, including in response to relative price changes;
 - 26.2 the extent to which the supply of bulk pelletised compound feed for dairy cows should be assessed separately from the supply of bagged pelletised compound feed for calves;
 - 26.3 the boundaries of the relevant geographic markets and the extent to which pelletised compound feed produced in a mill in one region is supplied to customers in an adjacent region(s), or would be in response to relative price changes; and
 - 26.4 the extent to which pelletised compound feed suppliers can price discriminate between individual farmers or types of farmers.

Farmlands' submission

27. Farmlands submits that all types of off-farm supplementary feed should be included in the same market. It submits the relevant markets are:⁹

⁸ Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81] and Commerce Commission, Mergers and acquisitions Guidelines (May 2022) at [3.7]-[3.10].

⁹ The Application at [15].

- 27.1 the North Island market for the production and distribution of off-farm supplementary livestock feed; and
- 27.2 the South Island market for the production and distribution of off-farm supplementary livestock feed.

Product and customer dimensions

- 28. In considering the product dimension of the market(s) and the substitutability of different supplementary feeds, we have focussed our assessment:
 - 28.1 on the demand side understanding how farmers choose between different types of supplementary feed, the importance of factors such as cost, time, willingness to switch to other types of feed in response to relative price changes; and how this varies between feed for dairy calves and cows; and
 - 28.2 on the supply side the ability and incentive of suppliers to switch in response to relative price changes between supplying:
 - 28.2.1 manufacturing pelletised compound feed containing animal protein to pelletised compound feed for ruminants; and
 - 28.2.2 manufacturing blended feed to manufacturing pelletised compound feed for ruminants.
- 29. For the purposes of the Sol, we consider it is appropriate to consider the competition effects that may arise from the Proposed Acquisition by assessing:
 - 29.1 pelletised compound feed separately from all other types of supplementary animal feed;
 - 29.2 pelletised compound feed for ruminants separately from types of feed that contain animal protein; and
 - 29.3 pelletised compound feed for dairy cows separately from pelletised compound feed for dairy calves.
- 30. We discuss each of these issues below.

Pelletised compound feed appears separate to other types of supplementary animal feed

- 31. Farmlands submitted that all types of supplementary feed are substitutable as a matter of fact and common sense and that switching between supplementary feeds is straightforward.¹⁰ However, it is not clear from the evidence currently before us that other types of supplementary feed are sufficiently close substitutes to be in the same market.

¹⁰ The Application at [27].

32. At this stage, we consider it appropriate to assess pelletised compound feed separately from all other supplementary feeds. This is based on our understanding that:

32.1 farmers may buy a range of different supplementary feeds at the same time,¹¹ indicating the feeds may be complementary rather than close substitutes;

32.2 pelletised compound feed is a premium product and typically priced substantially higher than other types of supplementary feed;¹²

32.3 pelletised compound feed suppliers typically view the Parties and other geographically close pelletised compound feed suppliers as their primary competition;¹³ and

32.4 some farmers' business models and feed systems are set up in a way that means they have a strong preference for purchasing pelletised compound feed. In this respect, we received feedback that:

32.4.1 pelletised compound feed can result in higher yields than other supplementary feeds and so existing purchasers may be reluctant to switch to another product;¹⁴ and

32.4.2 some farmers' feeding systems are only able to operate with pelletised feed and costs would be incurred in modifying these systems to allow for other types of feed.¹⁵

33. However, the evidence collected to date is mixed, and there is evidence indicating that other products are substitutes for some customers of pelletised compound feed. For example:

33.1 feedback from nutritionists suggests that it is possible for dairy cows and calves to obtain sufficient supplementary nutrients without using pellets;¹⁶

33.2 there has been a decline in overall sales of pelletised compound feed as PKE has gained in popularity in New Zealand;¹⁷

33.3 some suppliers of pelletised compound feed, in addition to the Parties, advised they sometimes lose customers to suppliers of other types of

¹¹ The Application at [29].

¹² Interview with [] (13 December 2023).

¹³ Interviews with [] (4 December 2023) and [] (13 December 2023).

¹⁴ Interviews with [] (13 December 2023 and 14 December 2023); [] (19 December 2023).

¹⁵ Interviews with [] (19 December 2023), [] (5 December); and [] (16 January 2024).

¹⁶ Interviews with [] (13 December 2023 and 14 December 2023).

¹⁷ Interview with [] (28 November 2023); [] .

supplementary feeds when the relative price of their pelletised compound feed changes compared to the other types of feed;¹⁸ and

33.4 suppliers of pelletised feed indicating that their sales representatives are often seeking to convince farmers to switch away from other supplementary feeds.¹⁹

34. We are seeking further information on:

34.1 the types of customers that are unable to easily switch between pelletised compound feed and other types of feeds;

34.2 the cost of switching feeding equipment between different types of feed; and

34.3 the extent to which compound pellet suppliers may be able to price discriminate between different types of customers.

Pelletised compound feed for ruminants appears to be in a separate market to compound feed for monogastric and other animals

35. Farmlands stated that, while there are different feed requirements for ruminants compared to monogastric animals, it does not consider these differences require defining separate markets as they only relate to pelletised compound feed and blends.²⁰

36. From our discussions with industry participants, we understand that:

36.1 ruminants are unable to eat feed containing animal protein;²¹ and

36.2 switching from production of pelletised compound feed containing animal protein to production of animal feed for ruminants is not a straightforward process due to regulatory requirements,²² and therefore firms would not be able to easily, profitably and quickly switch production from feed containing animal protein to feed for ruminants in response to a small but significant price increase.

36.3 there are some manufacturers of pelletised compound feed for monogastric animals that do not use animal protein in their product. For these manufacturers, switching feed production to ruminant feed (which cannot contain or be contaminated by animal proteins) is relatively simple.²³

¹⁸ Interview with [](29 November 2023).

¹⁹ Interviews with [](29 November 2023) and [](13 December 2023).

²⁰ The Application at [34].

²¹ Ministry for Primary Industries

<https://www.mpi.govt.nz/animals/animal-feed-preventing-disease-transfer/feeding-cattle-sheep-goats-or-deer-and-preventing-disease/>

²² Interviews with [](29 November 2023) and [](28 November 2023).

²³ Interview with [](29 November 2023).

37. For the purpose of our competition assessment at this stage we consider that the pelletised compound feed for ruminants should be assessed separately from pelletised compound feed that includes animal protein.

Pelletised compound feed for calves appears to be in a separate market to pelletised compound feed to dairy cows

38. All industry participants advised that the two main end customers of pelletised compound feed for ruminants are owners of dairy cows and calves, with pellets for dairy cows purchased and supplied in bulk while pellets for calves are typically purchased and supplied in bags.²⁴
39. We have considered whether we should define separate product or customer markets for pelletised compound for, separately, dairy cows and calves.
40. There is some evidence that it could be appropriate to consider calf and dairy feed as part of the same market for the supply of pelletised compound feed because there appears to be supply side substitutability between them. In particular, we have found that:
- 40.1 all suppliers of pelletised compound feed for ruminants appear to produce both calf feed and dairy feed;²⁵ and
- 40.2 it appears relatively easy to switch production between the two.²⁶
41. Nevertheless, we have received feedback that there are several differences in competitive conditions for the supply of pelletised bagged feed for calves compared to pelletised feed in bulk to dairy cows. For example:
- 41.1 bagged calf feed is often distributed through retail stores whereas dairy cow feed is more often delivered in bulk directly to farms;²⁷
- 41.2 due to the different delivery mechanisms, mills supply a wider geographic area for bagged feed than bulk deliveries;²⁸
- 41.3 the demand for calf feed is particularly seasonal with demand peaking in the spring calving season;²⁹ and
- 41.4 there are certain types of feed like PKE that are not recommended to be fed to calves until they have reached a certain stage of development, which means there are fewer potential options for farmers.³⁰

²⁴ Interviews with [] (1 December 2023) and [] (19 December 2023).

²⁵ RFI responses from [].

²⁶ Interviews with [] (29 November 2023) [] (1 December 2023) and [] (28 November 2023).

²⁷ Interviews with [] (1 December 2023) and [] (19 December 2023).

²⁸ Interviews with [] (29 November 2023), [] (13 December 2023) and [] (29 November 2023).

²⁹ Interviews with [] (1 December 2023) and [] (19 December 2023).

³⁰ Interviews with [] (19 December 2023) and [] (4 December 2023).

42. We are continuing to consider the options available to customers of pelletised compound feed for ruminants but, at this stage, we consider it is appropriate to consider the supply of bulk pelletised compound feed for dairy cows separately from the supply of bagged pelletised compound feed for calves.

Geographic scope of the markets

43. Currently, we consider that the competition issues that may arise from the Proposed Acquisition are best assessed and isolated by defining regional markets.
44. Farmlands submits that the geographic scope of the markets should be defined as North Island and South Island.³¹
45. In assessing the geographic scope of the relevant markets, we are investigating the extent to which customers in one region would be able to viably switch to a supplier in a different region or for a supplier to enter another geographic area in response to a SSNIP.³² So far, the evidence gathered is consistent with there being regional markets.
- 45.1 We understand from all industry participants we have spoken with that the cost of freight constrains the travel distance for both bagged pelletised compound calf feed and bulk pelletised compound dairy feed.³³
- 45.2 Overall, the evidence indicates that, irrespective of whether the pelletised compound feed is bagged or bulk, the maximum distance is around 200km from the mill.³⁴
46. While we have not attempted to precisely define the relevant geographic boundaries, from interviews with industry participants we broadly understand the relevant regional markets to be:
- 46.1 Auckland/Northland;
- 46.2 Waikato/Bay of Plenty;
- 46.3 Hawkes Bay/East Coast;
- 46.4 Taranaki/Manawatu;
- 46.5 Nelson/Tasman;
- 46.6 West Coast;
- 46.7 Canterbury; and
- 46.8 Otago/Southland.

³¹ The Application at [15].

³² *Mergers and Acquisitions Guidelines* above n8 at 20.

³³ For example, see Interviews with [] (29 November 2023), [] (29 November 2023), [] (4 December 2023), [] (13 December 2023).

³⁴ For example see Interview with [] (29 November 2023), [] (4 December 2023) and [] (28 November 2023).

Functional levels

47. At this stage, we consider there are two main relevant functional levels in the supply of the different types of pelletised compound feed.
- 47.1 The manufacturing and wholesaling level, which includes manufacturing pelletised compound feed and selling the feed to retailers (including rural merchant stores) or directly to end users (farmers) in large quantities.
- 47.2 The retail level, which include the sale of pelletised compound feed to end customers (farmers) through retail channels such as rural merchant stores.
48. Our primary concern is with the manufacturing and wholesaling level as this appears to be where the majority of potential overlap would be as a result of the Proposed Acquisition. We note that it may be possible to separate out manufacturing and wholesaling but for the purpose of our analysis we do not consider it necessary to distinguish between manufacturing and wholesaling at this stage.
49. We understand that in some cases manufacturing is done via toll arrangements. For example, Farmlands does not have a manufacturing plant in the North Island and its pelletised compound feed sold to customers in the North Island is manufactured under an arrangement by Seales Winslow.³⁵ In the past, Farmlands has used another manufacturer under the same type of toll arrangement.³⁶

With and without scenarios

50. Assessing whether a substantial lessening of competition is likely requires us to:
- 50.1 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
- 50.2 determine whether competition is likely to be substantially lessened by comparing those scenarios.

The factual

51. With the acquisition, Farmlands would own Seales Winslow and so it would own compound feed mills in both the North and South Island.³⁷ We understand that the merged entity would seek to:³⁸
- 51.1 continue operating the mills as a vertically integrated feed supplier;

³⁵ In our competition assessment to avoid double counting, and to capture the competition which is occurring between the Parties in the North Island, we have included volumes produced under toll manufacturing arrangement under the relevant wholesaler rather than the manufacturer.

³⁶ The Application at [13].

³⁷ The Application at [10].

³⁸ For example, [

].

51.2 [

51.3]

The counterfactual

52. The Parties stated that the status quo is likely to continue absent the acquisition with Farmlands continuing to use a toll manufacturer in the North Island and Seales Winslow continuing to compete as an independent entity.³⁹

53. Based on our current assessment we also consider that the most competitive likely scenario is the status quo. We considered whether there were any other likely counterfactuals that are more competitive than the status quo, including whether absent the transaction:

53.1 Farmlands would seek to organically enter the North Island; and/or

53.2 there would be an alternative buyer of the Seales Winslow’s assets.

54. Based on our initial review of [

].⁴⁰

55. We also understand that [

41

]

56. In addition to considering the potential for the Parties operations to change in the Counterfactual (as well as the Factual) we are also considering whether there is the potential for a new entrant to enter irrespective of the merger.⁴²

Competition assessment

57. At this stage we are continuing to assess the potential for unilateral and vertical effects as a result of the Proposed Acquisition.

57.1 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 prices above the level that would prevail without the merger, without the

³⁹ The Application at [12]-[13]

⁴⁰ For example, []].

⁴¹ []

⁴² For example; Application at [70] and Application Appendix H

[] See also []

profitability of that increase being thwarted by rival firms' competitive responses.⁴³

- 57.2 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 vertical or conglomerate effects. This can occur where a merger gives the merged entity a greater ability or incentive to engage in conduct that prevents or hinders rivals from competing effectively (which we refer to as 'foreclosing rivals').⁴⁴
58. The main competition issue we are not yet satisfied on relates to the loss of existing competition between Farmlands and Seales Winslow. All industry participants contacted to date, other than the Parties, consider that Farmlands and Seales Winslow are likely to be each other's closest competitors as they are the two main suppliers of pelletised compound feed for both dairy cows and for calves. We are continuing to consider whether the removal of the existing competition between Parties in regional markets across the country would substantially lessen competition as a result of unilateral and/or vertical effects.
59. We explain our reasons for our current views below and invite submissions on them.

Unilateral effects - regional markets for the supply of pelletised compound feed for dairy cows and for calves.

60. At this stage, we are not yet satisfied that the Proposed Acquisition would not lead to a substantial lessening of competition due to the unilateral ability of the Parties to profitability increase prices or lower quality. This assessment takes into account:
- 60.1 the very high concentration and low number of suppliers of pelletised compound feed in several regional markets for both pelletised compound feed for calves and for dairy cows;
- 60.2 that the Parties are the most similar suppliers in terms of their scale and ability to wholesale regional markets in both the North and South Islands;
- 60.3 there appears to be relatively high barriers to entry and expansion to manufacture pelletised compound feed for calves and for dairy cows;
- 60.4 the mixed evidence as to the extent to which other supplementary feeds would act as a constraint on the merged entity; and
- 60.5 that farmers and/or retailers might not have countervailing power to constrain the merged entity.
61. As discussed above, we are still considering the boundaries of the relevant markets particularly in relation to whether, in individual regional markets, it is appropriate to

⁴³ *Mergers and Acquisitions Guidelines* above n8 at [3.62].

⁴⁴ *Mergers and Acquisitions Guidelines* above n8 at [5.1-5.5]

assess the supply of bagged pelletised compound feed for calves separately from the supply of bulk pelletised compound feed for dairy cows.

62. However, given the apparent similarities between these markets, this section sets out our preliminary views on the unilateral effects from the Proposed Acquisition in relation to the relevant markets.⁴⁵

Farmlands' submission on unilateral effects

63. Farmlands submitted that the Proposed Acquisition would not be likely to substantially lessen competition in any relevant market due to unilateral effects because:⁴⁶
- 63.1 the aggregation in both the North Island and South Island in the supply of supplementary livestock feed is minimal;
 - 63.2 in all types of supplementary feed, Farmlands would be constrained by strong competitors and there are minimal barriers to these competitors expanding; and
 - 63.3 farmers and wholesale suppliers can exercise countervailing market power because:⁴⁷
 - 63.3.1 farmers have an ability to substitute away from pelletised compound feed to a large range of alternative feed types including planting their own crops; and
 - 63.3.2 national wholesale suppliers are able to leverage purchases in one region with those in another (to the extent that there is a difference in competition in one region compared to another region).

Closeness of competition between Farmlands and Seales Winslow

64. All industry participants contacted to date, other than the Parties, consider that Farmlands and Seales Winslow are likely to be each other's closest competitor as they are the two main suppliers of pelletised compound feed for dairy cows and for calves.⁴⁸
- 64.1 Farmlands and Seales Winslow each have well established brands and supply a full range of pelletised compound feed;
 - 64.2 Farmlands and Seales Winslow are the only two pelletised compound feed suppliers with a presence across all regions of New Zealand; and

⁴⁵ As indicated above, there is likely to be regional overlap in at least eight regions namely: Auckland/Northland; Waikato/Bay of Plenty; Hawkes Bay/East Coast; Taranaki/Manawatu; Nelson/Tasman; West Coast; Canterbury; and Otago/Southland.

⁴⁶ The Application at [41].

⁴⁷ The Application at [71]-[74].

⁴⁸ For example, see Interviews with [](01 December 2023), [](29 November 2023).

- 64.3 currently the manufacturing of their supply in a number of regions is done in close proximity.
65. This closeness of competition is also reflected in the internal documents of both Farmlands and Seales Winslow.⁴⁹ Further, while each of the Parties' presence varies in each region, the closeness of competition between Farmlands and Seales Winslow does not appear to be impacted by the presence, or otherwise, of a manufacturing plant.
66. We are continuing to investigate the closeness of competition between Farmlands and Seales Winslow, and therefore the competition that would be lost as a result for the Proposed Acquisition, in different regional markets across New Zealand.
67. We invite submissions on the closeness of competition between Farmlands and Seales Winslow in different regions of New Zealand.

Constraint from existing competitors in regional markets

68. At this stage, we are not yet satisfied on the degree of constraint the existing manufacturers of pelletised compound feed would impose on the merged entity in regional markets in the supply of bulk pellets for dairy cows and bagged pellets for calves.
69. There are several competing pelletised compound feed mills located in different regions of New Zealand.⁵⁰ These manufacturers include:
- 69.1 in Waikato/Bay of Plenty, Takanini Feed, Grainhub and CopRice;
- 69.2 in Taranaki and Manawatu, Sharpes;
- 69.3 in Canterbury, Advanced Feed; and
- 69.4 in Southland, Sgt Dans Stockfeed and Winton StockFeed
70. In their respective regions, the suppliers above, as well as some others, are likely to provide a degree of constraint on the merged entity. However, some of the information that the Commission has obtained to date indicates that these manufacturers' presence in the supply of pelletised compound feed, even when aggregated together, is significantly smaller than the presence of Farmlands and Seales Winslow.⁵¹
71. The Parties submitted that the Proposed Acquisition would only result in a relatively modest [] market share aggregation in pelletised compound feed for ruminants (based on current sales) in the North Island (giving Farmlands a post-acquisition share of []). The Proposed Acquisition would result in a larger market share aggregation in the South

⁴⁹ []

⁵⁰ The Application at [59]-[60]

⁵¹ For example, Interviews with [].

Island as it would combine Farmlands' [] share with Seales Winslow's [] share to give a [] share.

72. Given our view that the geographic markets are regional, we have calculated regional market shares. To do so we have used volume of sales data collected from market participants.⁵² We note that there may be other smaller players for which we have not been able to obtain sales data. However, we do not think this would materially change the outcome of the merging parties having a very high share of pelletised feed sales in a number of regional markets. We found that:
- 72.1 in Hawkes Bay/East Coast and Otago/Southland the merger would likely only lead to a small increase in the Parties share and other players would have a relatively large share of the market;
 - 72.2 in the Waikato/Bay of Plenty and Taranaki/Manawatu the Parties have market shares ranging from around 50% -70% in the supply of bagged feed with the merger increasing Farmlands share by [] There is little overlap in the supply of bulk dairy product due to Farmlands limited supply in the North Island.
 - 72.3 in Canterbury the Parties have high market shares (over 50%-60%) in both bulk dairy [] and bagged calf feed []; and
 - 72.4 Northland, West Coast and Nelson/Tasman are smaller markets for which there does not appear to be an in-region manufacturer and the larger scale of the merging parties allows them to better cover the required distribution costs to service the markets. In these markets the Parties appear to have over 70%-80% share of supply of feed.

Barriers to expansion

73. We are not currently satisfied that the existing manufacturers of pelletised compound feed would impose sufficient constraint on the merged entity due to their limited existing capacity in peak times. It is also not clear they have the ability and incentive to expand their production.
74. In particular, we are assessing further whether there are any significant constraints on an existing manufacturer's ability to expand at different times of the year. If there are such constraints, this could impact on a supplier's ability to compete with the merged entity.

⁵² To accurately show market shares within the North Island for Farmlands and Seales Winslow, toll manufacturing volumes from Seales Winslow have been excluded with Farmlands' North Island sales volumes being included.

74.1 Farmlands submitted that all manufacturers are likely to have significant excess capacity.⁵³ This appears to be the case when plant capacity and plant utilisation rates are calculated on an annual basis.⁵⁴

74.2 However, several manufacturers advised that while there will be months (or seasons) when they have spare capacity, demand is very seasonal, and they tend to be significantly capacity constrained during their peak production periods of the year.⁵⁵ These periods typically relate to the spring calving season.

74.2.1 Some manufacturers advised that this variation in demand means they are less incentivised to increase their total capacity to cover the peaks in demand because this capacity would not be utilised at other times of the year.⁵⁶ Further, we understand that, given the nature of demand and short lifespan of the products it is not possible for the unused capacity in other seasons to be used when demand peaks.⁵⁷

74.2.2 Alternatively, another manufacturer advised that it did have plans to increase its capacity in order to address the increase in demand during the calving season.⁵⁸

75. We invite submissions on the constraint that existing manufacturers would impose on the merged entity, the extent to which this constraint may vary between different regions of New Zealand and whether other manufacturers would be incentivised to expand and/or increase capacity in response to a price increase by the merged entity.

The constraint from existing pellet manufacturers in other regions

76. As above, we consider it appropriate to assess regional markets for the supply of pelletised compound feed. However, we are still considering the ability and incentive on a manufacturer with a mill in one region to supply its pellets to customers in a neighbouring or adjacent region.

76.1 Given the significance of delivery costs, most industry participants advised that they tend not to supply pellets outside of the region they manufacture.⁵⁹ Further, as noted above, many suppliers have capacity constraints at certain

⁵³ As per the Application, Farmlands estimated utilisation rates of []

⁵⁴ Based on data provided by various industry parties, the Commission's estimate utilisation rates of capacity are []

⁵⁵ Interviews with [](28 November 2023), [](29 November 2023), [] (13 December 2023), and [] (04 December 2023).

⁵⁶ Interviews with [](29 November 2023), [](4 December 2023) and [] (13 December 2023).

⁵⁷ Interviews with [](29 November 2023) and [].

⁵⁸ Interview with [](29 November 2023).

⁵⁹ Interviews with [](29 November 2023), [] (13 December 2023), [](29 November 2023), and [] (04 December 2023).

times of the year and this is also likely to impact on their ability to supply customers in another region.⁶⁰

- 76.2 Nevertheless, both Farmlands and Seales Winslow, to varying degrees, supply pellets to 'out of region' customers and so we are assessing further the circumstances in which they do and the ability of other manufacturers and wholesalers to also do this.

The constraint on suppliers of pelletised compound feed from other types of supplementary feed

77. As discussed above, we are still considering the breadth of the product market, however our current view is that this is limited to pelletised compound feed for ruminants. Therefore, we are considering the potential constraint from other types of supplementary feed as an out of market constraint.
78. At this stage, we are not yet satisfied on the degree of constraint that other types of supplementary feed would impose on the merged entity in the manufacture and wholesaling of pelletised compound feed.
79. In relation to dairy cows, we understand from nutritionists and some other industry parties that dairy cows can eat a range of supplementary feed and the same nutrients in pelletised compound feed can be obtained from other products often at lower cost.⁶¹ This means that straights and blends and the other supplementary feeds listed by Farmlands in the application are likely to provide some constraint on the merged entity.⁶²
80. We are assessing the constraint that blends (and other similar alternative supplementary feeds) would have on the merged entity in different regional markets for the manufacture and wholesale supply of bulk pelletised compound feed for dairy cows. This will include understanding:
- 80.1 the proportion of farmers who would be willing to switch away from pelletised compound feed in response to a small but significant price increase; and
- 80.2 the availability of alternative supplementary feeds between regions, and the price of these supplementary feeds relative to the price of pelletised compound feeds.
81. In relation to calves, we understand from nutritionists and some other industry parties that the range of supplementary feed options is much more limited than for

⁶⁰ RFI responses []and
interview with [](04 December 2023).

⁶¹ Interview with [](15 January 2024) and Interviews with [].

⁶² Application at [19.1] – [19.5].

dairy cows.⁶³ Nevertheless, we are aware of some alternative feeds specifically formulated for calves such as calf meal and/or calf muesli.⁶⁴

82. Accordingly, we are assessing the constraint that calf meal (and other similar products) would have on the merged entity in different regional markets for the manufacture and wholesale supply of bagged pelletised compound feed for calves. This will include understanding:
- 82.1 the extent to which bagged calf meal compares on price and quality⁶⁵ with bagged pelletised compound feed;
 - 82.2 whether calf meal manufacturers consider they compete with suppliers of bagged pelletised compound feed and whether they have any capacity constraints; and
 - 82.3 the extent to which calf meal suppliers impact on how the Parties set their prices for bagged pelletised compound feed for calves.

The constraint from new entry in pelletised compound feed

83. As above, we are not yet satisfied on the degree of constraint that existing manufacturers would impose on the merged entity through their ability and incentive to expand their existing production to supply customers in their incumbent region and/or an adjacent region. We are also considering whether new entry in a region would constrain the merged entity in that region and/or any other region.
84. To constrain an exercise of market power by the merged entity, entry or expansion in response to a price increase or other exercise of market power by the merged entity has to be likely, sufficient in extent, and in a timely fashion, satisfying what is termed the 'LET test'.⁶⁶ While we look at evidence of whether any other parties are already planning to enter or expand (and consider the impact of that entry or expansion), what matters for our analysis is whether entry and expansion in addition to that already planned would be likely if prices increased post-acquisition.⁶⁷
85. At this stage, we understand there are two key factors which might limit the potential for new entry.
- 85.1 There are regulatory conditions such as getting planning consent which can make finding a suitable location for a compound pellet mill difficult.⁶⁸

⁶³ Calves are still developing their rumen and they are at a stage where a calf is not able to digest feed such as PKE. Rather, one of the main purposes of feeding pelletised compound feed to calves is to assist in the development of calves' rumen; For example, see *Farmlands- Calf Rearing Guide 2022*.

⁶⁴ Interviews with [] (13 December 2023), [] (29 November 2023), and [] (19 December 2023).

⁶⁵ Quality in this case refers to the performance or benefit gained from the product.

⁶⁶ *Mergers and acquisitions Guidelines* above n8 at [3.95]-[3.96].

⁶⁷ *Ibid* at [3.99].

⁶⁸ Interviews with [] (29 November 2023) and [] (29 November 2023).

- 85.2 The cost of de novo entry may be very high compared to likely returns, as set out in the application Farmlands considers the cost of a large scale comprehensive single site plant would involve material capital investment.⁶⁹
86. We are continuing to consider whether there are any potential new entrants and invite submissions from existing industry participants or any potential new entrants about:
- 86.1 the conditions and/or cost of new entry; and
- 86.2 any entry plans into the manufacturing of pelletised compound feed and the extent that any entry would satisfy the LET Test.⁷⁰

Countervailing power

87. A merged entity's ability to increase prices profitably may be constrained by the ability of certain customers to exert substantial influence on negotiations. Countervailing power is more than the ability of customers to switch from a merged entity to competing suppliers. The size and importance of a customer is also not sufficient by itself to amount to countervailing power. Countervailing power exists when a customer possesses a special ability to substantially influence the price the merged entity charges.⁷¹
88. The two main customers of pelletised compound feed are farmers and the rural merchant stores (who in turn sell to farmers). Farmlands considers that these customers would hold countervailing power because:⁷²
- 88.1 farmers can easily substitute pelletised compound feed for a large range of alternative feed types, including crops grown on farm, for example, maize and fodder beet; and
- 88.2 rural merchants stores, being national wholesale customers, can leverage their purchases of compound feed in one market with those in another market.
89. We are not yet satisfied that customers of bulk and bagged pelletised compound feed would have countervailing power. Countervailing power exists when a customer possesses special characteristics that give that customer the ability to substantially influence the price the merged firm charges. In this case, it would be the ability to sponsor entry into the manufacturing and/or wholesale of pelletised compound feed

⁶⁹ Interviews with [](28 November 2023) and [](29 November 2023); in the order of [] the Application at [70].

⁷⁰ For example, at the Application at [70], Farmlands submits there are projects, such as with the Agri Tech Group Limited, that are in various stages of planning.
[]

]

⁷¹ *Mergers and acquisitions Guidelines* above n8 at [3.113]-[3.115].

⁷² The Application [71] – [74].

or the ability to self-supply their existing pelletised compound feed requirements. To this extent, countervailing power would be more than a farmer's ability to substitute pelletised compound feed supplied by the merged entity for on-farm crops.

90. We invite submissions on the extent to which customers might have countervailing power including:
- 90.1 whether rural merchants stores in one region (say Canterbury where Farmlands and Seales Winslow have existing compound pellet mills) could discipline the merged firm by switching or credibly threatening to switch to a pelletised compound feed supplier based in another region (say Southland, where in addition to Farmlands, Sgt Dan and Winston Stock Feed also have existing compound pellet mills); and
- 90.2 whether rural merchant stores purchase enough compound pellets feed to make it feasible for them to sponsor new entry.

Vertical effects

91. Mergers that occur between suppliers (or buyers) who are not competitors but operate in related markets can result in a substantial lessening of competition due to vertical or conglomerate effects. This can occur where a merger gives the merged entity a greater ability and/or incentive to engage in conduct that raises rivals' costs and prevents or hinders rivals from competing effectively (which we refer to as "foreclosing rivals").⁷³
92. Farmlands submitted that while it operates at both the production/wholesale supply and retail levels of this industry, the Proposed Acquisition will not substantially lessen competition as a result of vertical effects because it would neither have the ability nor the incentive to foreclose rival suppliers.⁷⁴ This is because:
- 92.1 at the manufacturing and supply level, Farmlands' rivals would continue to have access to other rural retail merchants, as well as retaining the ability to supply direct to farmers; and
- 92.2 at the retail level, competition from other producers and other feed types will mean that Farmlands could not raise the costs of its rivals in a way that would foreclose them.
93. At this stage, we are not yet satisfied that the Proposed Acquisition would not have the potential to give rise to vertical effects.
94. While many manufacturers and wholesalers supply pelletised compound feed for dairy cows in bulk directly to farmers, we understand that a significant portion of sales for bagged pelletised compound feed is purchased at the retail level from a rural merchant store.

⁷³ *Mergers and acquisitions Guidelines* above n8 at [5.1] – [5.15].

⁷⁴ The Application at [77-79].

95. At the retail level, Farmlands' two main competitors are PGG Wrightson and Farm Source with each having a retail presence in numerous regions of New Zealand. As both a manufacturer and retailer of bagged pellets, the merged entity might have an incentive to refuse to supply its bagged pelletised compound feed to its retail competitors or at least raise the price that Farmlands currently supplies them with bagged pelletised compound feed.
96. However, both PGG Wrightson and Farm Source stock a vast range of different products and so the Proposed Acquisition is unlikely to foreclose either of these competitors at the retail level.
97. Nevertheless, we are continuing to assess whether the Proposed Acquisition would impact on Farmlands' incentive, at the retail level, to stock competing manufacturers and wholesalers of bagged pelletised compound feed in its stores.
98. As we understand that a significant portion of bagged pelletised compound feed is purchased from a retail outlet, if there are regions in New Zealand where the merged entity would face limited competition as a manufacturer of bagged pelletised compound feed, then the merged entity may have an incentive to deny access to an important sales channel for a competitor by refusing to stock that competitor's bagged pelletised compound feed in its stores. Such a refusal could potentially impact on that manufacturer's ability to compete with the merged entity.
99. We invite submissions on the potential for the Proposed Acquisition to give rise to vertical effects in any relevant part of the supply chain.

Coordinated effects

100. An acquisition 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 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.⁷⁵
101. At this stage, we are satisfied that the Proposed Acquisition is unlikely give rise to coordinated effects in potential regional markets for the supply of pelletised compound feed. We discuss the relevant evidence below.
102. Farmlands submits that the Proposed Acquisition would not be likely to substantially lessen competition in the market for supplementary feed for livestock due to coordinated effects because, in its view:⁷⁶
 - 102.1 there are a large range of alternative options and suppliers for customers;
 - 102.2 the products are differentiated;

⁷⁵ *Mergers and acquisitions Guidelines* above n8 at [3.84].

⁷⁶ The Application [76.1] – [76.4].

- 102.3 the pricing of rivals is not easily observable, meaning that it is difficult for competitors to act in ways that promotes coordination; and
- 102.4 the different sales channels utilised by different parties make coordination difficult.
- 103. In considering the potential for coordinated effects we assess whether:
 - 103.1 a market is vulnerable to coordination; and
 - 103.2 a merger changes the conditions in the relevant market so that coordination is more likely, more complete or more sustainable.
- 104. In relation to the supply of pelletised compound feed there are some factors which make the markets vulnerable to coordination, in particular:
 - 104.1 the regional markets are typically highly concentrated;
 - 104.2 there is a high degree of engagement between competitors in different areas through toll manufacturing arrangements;⁷⁷
 - 104.3 there does not appear to have been a high degree of innovations in the market;⁷⁸
 - 104.4 the end products are relatively homogenous, particularly for bagged calf feed;⁷⁹
 - 104.5 manufacturing costs are largely similar between players; and
 - 104.6 bagged calf feed pricing is relatively transparent.⁸⁰
- 105. However, we have also found that:
 - 105.1 there appears to be a level of customisation in the manufacture of bulk pellets for individual customers and individual negotiated prices which are not transparent;⁸¹ and

⁷⁷ For example; currently
[
]; Interviews with
[
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⁷⁸ Interviews with [](28 November 2023) and [](29 November 2023).

⁷⁹ Interviews with [](28 November 2023) and [](29 November 2023).

⁸⁰ Interview with [](29 November 2023).

⁸¹ Interviews with
[
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- 105.2 the location of the mill leads to different level of transportation costs for different customers from each supplier meaning that price coordination may be difficult.
106. The merger will lead to an increase in concentration in a number of regional markets which, all else equal, could increase the risk of coordination; however, it will also increase the asymmetry between suppliers which may make coordination less sustainable.

Next steps

107. We are currently scheduled to decide whether or not to give clearance to the Proposed Acquisition by 22 March 2024. However, this date may change as our investigation progresses.⁸² In particular, if we need to test and consider the issues identified above further, the decision date may extend.
108. As part of our investigation, we are identifying and contacting other parties that we consider will be able to help us assess the issues identified above.

Making a submission

109. 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.
110. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference 'Farmlands/Seales Winslow' 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 **21 February 2024**.
111. 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 us at registrar@comcom.govt.nz so that we can work with you to accommodate your needs where possible.
112. 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.
113. 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.

⁸² The Commission maintains a clearance register on our website at <http://www.comcom.govt.nz/business-competition/mergers-and-acquisitions/clearances/clearances-register/> where we update any changes to our deadlines and provide relevant documents.