ISBN 978-1-991085-16-0

Statement of Preliminary Issues

Moana/Sanford

12 June 2023

Introduction

1. On 26 May 2023, the Commerce Commission registered an application (the Application) from Aotearoa Fisheries Limited, trading as Moana New Zealand (Moana) seeking clearance to acquire from Sanford Limited (Sanford) certain Annual Catch Entitlement (ACE) (which is derived from fishing quota) and certain fishery assets that relate to Sanford's North Island inshore finfish business (the Proposed Acquisition).[1]

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.[2]

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 **26 June 2023**.

The parties

5. Moana and Sanford (together, the Parties) are operators of vertically integrated commercial fishing businesses in New Zealand.

Moana

6. Moana is a Māori-owned fisheries company, which was established under the Māori Fisheries Act 2004 to be the custodian of commercial fishery assets returned to Māori under Treaty of Waitangi fisheries settlements with the Crown.[3] Moana has 58 mandated iwi organisations as shareholders.[4] Moana's primary operations include:

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[1] 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/.

[2] 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.

[3] The Application at [C].

[4] Ibid.

6.1 an inshore fishing business, which operates out of Auckland;[5]

6.2 a Pacific oyster business;

6.3 a pāua business; and

6.4 a ready-to-eat meals business.

7. Moana holds a 50% shareholding in Kura Limited (Kura), a 50/50 joint venture with Nippon Suisan Kaisha Limited.[6] Kura has a 100% shareholding in Sealord Limited which is also a commercial fishing company. Sealord Limited has a 50% shareholding in Westfleet Seafoods Limited, which operates an inshore fishing business from Greymouth.[7]

Sanford

8. Sanford is an NZX-listed seafood company and its primary operations in New Zealand include:

8.1 a North Island inshore fishing business (which is the subject of the Proposed Acquisition);

8.2 a South Island inshore fishing business;

8.3 a deepwater fishing business;

8.4 aquaculture operations (mussels and salmon);

8.5 the Auckland Fish Market; and

8.6 a retail fishmonger, Sanford and Sons.

9. Moana submits that the Proposed Acquisition relates only to the sale of ACE and other fishery assets of Sanford's North Island inshore fishing business.[8] Sanford will continue to operate its other businesses following the Proposed Acquisition.

Relevant industry background – commercial fishing

10. Both Moana and Sanford operate commercial fishing businesses. Our current understanding of the commercial fishing industry, based on the Application, is that there are four main supply chain activities related to commercial fishing (noting that a commercial fishing business may only carry out one, or a couple, of these) being:[9]

5 Inshore and offshore fishing is often called 'wild catch' fishing because the fish is harvested (or caught) from the ocean rather that farmed. Inshore is used to describing the harvesting of fish that is brought inshore for consumption and/or further processing on land.

6 The Application at [1.15].

7 The Application at [1.16].

8 The Application at [3.1].

9 The Application at [5.4].

10.1 obtaining the legal right to harvest fish: the commercial fishing industry in New Zealand is regulated. We set out the key legal requirements for a registered entity to harvest fish commercially further below;

10.2 harvesting fish: a fishing entity may own its own boats and employ crew (like Sanford), while other entities may contract with independent fishers to harvest fish on their behalf (like Moana). The size of the fishing vessel and the volume of fish caught can vary depending on the species and location of the fish being harvested;

10.3 processing fish: inshore fishing businesses (such as Moana) process their fresh fish on shore, as opposed to deepwater fishing vessels which have processing facilities on board. Similar to harvesting, some fishing entities operate their own processing facilities while others contract third parties to process their fish. Non-fishing entities also engage in fish processing; and

10.4 selling fish: fishing entities supply processed and unprocessed fresh fish to New Zealand consumers via several sales channels. These include (but are not limited to) supermarkets, specialty fish retailers and fishmongers, seafood wholesalers and auction markets, such as the Auckland Fish Market which is operated by Sanford.

Requirements to harvest fish commercially in New Zealand

11. The legal requirements for commercial fishing in New Zealand include holding quota (also known as quota shares) or having access to ACE. These requirements come from the Quota Management System and the Fisheries Act 1996.

12. Quota generates ACE for a particular 'Fishstock' at the beginning of each fishing year.[10] Each person (or entity) who owns quota shares in a Fishstock will be allocated a corresponding amount of ACE for that Fishstock at the beginning of each fishing year. The amount of ACE allocated for each Fishstock in any given fishing year will be determined by the total allowable commercial catch for that Fishstock, during that fishing year.[11]

13. The inshore waters off New Zealand's coast are divided into regions called Fishing Management Areas. The Commission understands that there are over 40 fish species caught from Fishing Management Areas located off the North Island and the number of Fishing Management Areas can vary between the different fish species.

14. All commercial fishing operators require ACE to harvest and supply fish. ACE is most commonly obtained either by:

[10] We understand the commercial fishing year typically starts on 1 October.

[11] The total allowable commercial catch for a Fishstock for any given fishing year is set by the Ministry for Primary Industries (MPI). In managing Fishstocks under the Quota Management System (including setting total allowable commercial catch), MPI is guided by the Fisheries New Zealand Harvest Strategy Standard guide.

14.1 owning quota shares at the beginning of a fishing year, which then generate ACE; or

14.2 purchasing, leasing or trading ACE from another party.

15. When ACE transfers to another party (as would occur under the Proposed Acquisition), the new owner is entitled to take the amount of ACE that is to be transferred and the previous owner's catch right is reduced by the same amount.

16. As part of our consideration of the Proposed Acquisition, in line with our framework set out below, we will assess:

16.1 the relationships between the different entities that hold quota shares;

16.2 the amount of ACE that is allocated to quota holders each fishing year;

16.3 the amount of ACE that quota holders supply to and from third parties; and

16.4 the ability of non-quota holders to access ACE.

Our framework

17. Our approach to analysing the competition effects of the Proposed Acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.[12] As required by the Commerce Act 1986, we assess mergers and acquisitions using the substantial lessening of competition test.

18. 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).[13] This allows us to assess the degree by which the Proposed Acquisition might lessen competition.

19. If the lessening of competition as a result of the Proposed Acquisition is likely to be substantial, we will not give clearance. When making that assessment, we will consider, among other matters:

19.1 constraint from existing competitors – the extent to which current competitors compete and the degree to which they would expand their sales if prices increased;

19.2 constraint from potential new entry – the extent to which new competitors would enter the market and compete if prices increased; and

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12 Commerce Commission, *Mergers and Acquisitions Guidelines*, May 2022. Available on our website at www.comcom.govt.nz

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

19.3 the countervailing market power of buyers – the potential constraint on a business from a purchaser's ability to exert substantial influence on negotiations.

Market definition

20. 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 1986, as a matter of fact and commercial common sense.[14]

21. As Moana and Sanford operate vertically integrated commercial fishing businesses in New Zealand, the Proposed Acquisition has the potential to result in overlap at different levels of the commercial fishing supply chain set out at paragraph 10.

22. In the Application, Moana submits that the relevant markets for the Commission's assessment of the Proposed Acquisition are:[15]

22.1 a national market for the supply of finfish harvesting services;

22.2 a national market for the wholesale supply of unprocessed finfish;

22.3 a national market for the wholesale supply of processed finfish (including gutted, filleted with skin on and filleted with skin off);

22.4 a national market for toll processing of fish; and

22.5 a market or markets in which processed finfish products are supplied to retail customers, including wild and farmed fish and both saltwater and fresh-water species, noting that retail processed fish products are likely also part of a broader market of supermarket goods.

23. In making its submission, Moana considers that from the demand perspective:

23.1 customers' (including end consumers and wholesale consumers) preferences indicate that the different finfish varieties are substitutable with one another and are likely linked through a chain of substitution.[16] In this respect, Moana submits that all finfish varieties such as snapper, trevally, gurnard, tarakihi as well as salmon (amongst others) should be assessed in the same product market; and

23.2 customers' preferences indicate that the level of processing that occurs once the fish is caught does not impact on the substitutability of the different finfish varieties. In this respect, Moana submits that whole and filleted forms

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14 Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].
15 The Application at [5.14].
16 The Application at [5.15(a)(ii)].

of both fresh and frozen fish should be assessed in the same product market.[17]

24. Further, Moana considers that, from the supply perspective, fishing companies compete with one another on a national basis. Moana submits that this is because fishing companies located in different parts of the country catch and sell a range of different finfish species and regularly trade ACE with other parties to ensure they comply with the Quota Management System.[18] In addition, once the fish is harvested and landed onshore, it can be easily transported around the country so fishing entities are not restricted to any particular region of New Zealand.[19]

25. We will test whether the markets proposed by Moana are the most appropriate for assessing the competitive effects of the Proposed Acquisition, or whether the impact of the Proposed Acquisition is more appropriately assessed with reference to other markets. In particular, we will consider:

25.1 the relevant product markets, particularly the extent to which different finfish species compare with, and are substitutable for, one another. Based on the evidence we receive, we will then consider whether it is appropriate to define a narrower product market (such as separate markets for individual species and/or smaller groups of species) or a broader product market (such as a market including all species of inshore finfish, deepwater finfish and farmed fish such as salmon);

25.2 the relevant functional levels, particularly;

25.2.1 the extent of overlap between the Parties;

25.2.2 how different industry participants compete with one another at different levels of the supply chain;

25.2.3 whether the effects of the Proposed Acquisition in relation to any other relevant and/or appropriate functional levels of the supply chain in the commercial fishing industry should be considered;

25.3 the relevant geographic boundaries of any product or functional markets, particularly;

25.3.1 the extent to which the geographic dimension of any market is national; and

25.3.2 whether industry parties based in one region compete with parties based in other regions.

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17 The Application at [6.37]

18 The Application at [5.15(a)(i)].

19 The Application at 5.15(d)].

Without the acquisition

26. We will consider what 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, or whether the Parties would seek alternative options, for example, would Sanford find a different buyer for its North Island inshore finfish business.

Preliminary issues

27. 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, coordinated, vertical or conglomerate anti-competitive effects might result from the Proposed Acquisition. The questions that we will be focusing on are:

    27.1 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?[20]

    27.2 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?

    27.3 vertical or conglomerate effects: would the Proposed Acquisition increase the merged entity's ability and/or incentive to foreclose rivals?

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

28. 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 profitability of that increase being thwarted by rival firms' competitive responses.[21]

29. In the Application, Moana submits that the Proposed Acquisition would not be likely to substantially lessen competition in any of the relevant markets due to unilateral effects because, in its view:[22]

    29.1 there is no aggregation in the supply of harvesting services, as Moana does not have any of its own fishing vessels. This is because Moana currently only contracts harvesting services from independent fishers;

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[20] 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.

[21] *Mergers and Acquisitions Guidelines* above n11 at [3.62].

[22] The Application at [O].

29.2 there is no aggregation in quota share because Sanford would retain its current quota;

29.3 while Moana would receive all of the ACE that is allocated to Sanford's North Island inshore business, this would only result in de minimis aggregation because there is a national market for this allocation and Moana would continue to compete with commercial fishing businesses located in the North and South Islands;

29.4 there would be minimal aggregation in the inshore processing of fresh finfish once it is caught, as fish can be processed in any part of the country, and suppliers are able to use toll manufacturers;

29.5 both fresh and frozen fish are exported and, because of this, Moana would be constrained by the potential for existing exporters to divert sales to New Zealand-based customers; and

29.6 the main downstream retail customers are the major grocery retailers and these retailers have significant countervailing buyer power.[23]

30. For any relevant market where the Parties currently compete, we will consider whether Moana, if the Proposed Acquisition goes ahead, would be able to profitably raise prices and/or reduce quality or innovation. In each of the markets we identify, the key issues we will be considering are:

30.1 closeness of competition: the degree of constraint that Moana and Sanford impose upon one another. To the extent that any constraint is, or would be material, we will assess whether the lost competition between the merging parties could be replaced by rival competitors;

30.2 remaining competitive constraints: the degree of constraint that existing competitors would impose on the merged entity;

30.3 entry and expansion: how easily rivals could enter and/or expand; and

30.4 countervailing power: whether customers have special characteristics that would enable them to resist a price increase by the merged entity.

31. Given the Applicant's submission that the Proposed Acquisition has the potential to impact various markets, we have expanded on the key issues above in Table 1 below to highlight some of the particular issues we will be focusing our assessment on.

23 In the Application, Moana focuses primarily on the competitive effects of the Proposed Acquisition in relation to the markets for the wholesale supply of processed and unprocessed finfish.

Table 1: Preliminary theories of harm and issues we will be considering

Level of supply chain	Preliminary theories of harm and issues we propose to consider
Harvesting services	Moana and Sanford may currently compete with one another to buy harvesting services from independent inshore fishers. With the Proposed Acquisition, Sanford may be a less active buyer of fish-harvesting services (particularly in the North Island) since it would need to catch less fish after transferring a significant proportion of its ACE to Moana. If this would reduce competition to buy fish-harvesting services, the price paid to independent fishers could be driven down. Additionally, with the Proposed Acquisition, there may be potential for some independent fishers to be excluded from any market for the supply of inshore finfish harvesting services due to an inability to access ACE, should Moana be incentivised to favour any existing independent fishers it has a relationship with. In assessing this potential impact, we will consider: • the extent to which Moana and Sanford compete with one another in the purchase of harvesting services from independent inshore fishers; • the alternative customers available to independent inshore fishers, particularly those that do not hold any of their own ACE; • the ability of fishers based in one region (or home port) to expand into providing harvesting services from another region (or port); and • the extent of any overlap, or lack of, in the relationships Moana and Sanford have when competing with one another in the purchase of harvesting services from independent inshore fishers.
Fish processing services	Moana submits that there is a national market for the wholesale supply of processed fish, as well as a national market for toll processing. It is likely that most commercial fishing operators require their fish to be processed to some degree after it is caught. However not all operators have their own processing facilities. Both Moana and Sanford operate processing facilities in Auckland. With the Proposed Acquisition, Sanford would close its Auckland processing facility. If Moana and Sanford currently compete in the relevant processing services markets, the Proposed Acquisition would remove one of the available processing options. As a result, this may increase the price paid by customers requiring fish processing services. These customers might also compete with Moana in other parts of the supply chain. In assessing this potential impact, we will consider: • the extent to which Moana and Sanford compete with one another for toll manufacturing contracts for fresh fish harvested from other suppliers; and • the alternatives available to customers requiring fish processing services.

Level of supply chain	Preliminary theories of harm and issues we propose to consider
Supply of processed fish	With the Proposed Acquisition, Moana would have larger amounts of ACE available to it for certain Fishstock in certain Fish Management Areas in the North Island. Accordingly, in practice, Moana would be allowed to catch greater quantities of certain fish species after acquiring Sanford's North Island inshore ACE. Moana submits that there is a single national market for the supply of all finfish in the Application. However, if instead there are narrower markets for any of the species or areas affected by the Proposed Acquisition then competition in the relevant markets may be reduced. Correspondingly, Moana may have the ability to increase prices in these markets. In assessing this potential impact, we will consider: • the extent to which Moana and Sanford compete with one another to supply specific varieties of fresh fish to retail and wholesale customers; • how easily competitors are able to increase the amount of fresh fish they supply to retail and wholesale customers; • whether the alternatives available to existing customers of fresh fish vary based on the customer's location; • the ability and incentive of exporters of fresh fish to divert sales to New Zealand-based customers; • the extent to which Moana, Sanford and other suppliers of fresh fish compete with suppliers of frozen fish and/or importers of fish; • the extent to which Moana and Sanford compete with one another in the supply of fish via the Auckland Fish Market (which is operated by Sanford); and • the extent to which supermarket customers, or other large wholesale customers, would have any countervailing power with which to constrain Moana, post acquisition.

Coordinated effects: would the Proposed Acquisition make coordination more likely?

32. 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.[24]

[24] *Mergers and Acquisitions Guidelines* above n11 at [3.84].

33. In the Application, Moana submits that the Proposed Acquisition would not be likely to substantially lessen competition in any relevant market due to coordinated effects because, in its view:[25]

    33.1 the relevant markets are highly fragmented with many market participants. Market participants have varying cost structures and business models;

    33.2 customers most value quality and consistency of supply, which affect price and would be difficult to coordinate;

    33.3 customers are sophisticated businesses, particularly supermarkets who purchase large volumes;

    33.4 there is a high level of demand side substitutability within and outside the markets;

    33.5 there is no evidence that competitors are currently coordinating in respect of either the price or the volume offered to customers in New Zealand; and

    33.6 Moana has a different pricing strategy to most market participants.

34. In each relevant market, we will assess whether any of the relevant market/s are vulnerable to coordination, and whether the Proposed Acquisition would change the conditions in the relevant market/s so that coordination is more likely, more complete or more sustainable.

Vertical or conglomerate effects: would the merged entity be able to foreclose rivals?

35. 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').[26]

36. As noted above, Moana is currently active at multiple levels of the commercial fishing supply chain and, with the Proposed Acquisition, would effectively gain market share in the supply of finfish to customers. If Moana would thereby also gain market power in any relevant product or geographic market(s) for the supply of fish to customers, we will assess whether it could also have the ability and incentive to foreclose rivals at other points in the relevant supply chains.

37. For example, if the evidence indicates that Moana would gain market power in the supply of finfish, we will assess whether it could have an incentive to withhold harvesting business from independent harvesters (such as those harvesters that Sanford may otherwise have used) with the aim of raising their costs and then being able to raise the price of fish harvesting services.

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[25] The Application at [6.62].

[26] *Mergers and Acquisitions Guidelines* above n11 at [5.1-5.5] .

Next steps in our investigation

38. The Commission is currently scheduled to make a decision on whether or not to give clearance to the Proposed Acquisition by **25 July 2023**. However, this date may change as our investigation progresses.[27] In particular, if we need to test and consider the issues identified above further, the decision date is likely to be extended.

39. 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

40. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference 'Moana/Sanford' 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 **26 June 2023**.

41. 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. If you make a submission and we do not acknowledge receipt of that submission within two working days, you should resubmit your submission.

42. 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.

[27] 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.