

Statement of Issues

Moana/Sanford

27 July 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 quota) and certain fishery assets that relate to Sanford's North Island inshore finfish business (the Proposed Acquisition).¹
2. To clear an application we must be satisfied that an acquisition would not have, or would not be likely to have, the effect of substantially lessening competition in a New Zealand market.
3. This Statement of Issues (Sol) sets out the potential competition issues we have identified following our initial investigation. This is so the parties and other interested parties can provide us with submissions relating to those concerns.
4. In reaching the current views set out in this Sol, we have considered information provided by Moana, Sanford 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 satisfied that the Proposed Acquisition would not be likely to substantially lessen competition in one or more relevant markets.
7. We are still to conclude on the definition of the relevant markets and our investigation is focusing on potential upstream markets for the supply of ACE and the acquisition of inshore fish harvesting services.
8. The main issues we are continuing to test relate to the fact that, with the Proposed Acquisition, Moana would be allocated a large share of the ACE that commercial

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/>.

fishing businesses need to harvest fresh fish off the North Island for supply to wholesale and retail customers. We are considering whether the increase in the amount of ACE that is allocated to Moana could substantially lessen competition due to unilateral, vertical or coordinated effects by:

- 8.1 restricting the amount of ACE that is available to existing or potential competitors to Moana which could impact on the ability of these competitors to compete with Moana in downstream wholesale markets, thereby increasing the wholesale price of fresh fish; and/or
 - 8.2 Moana reducing the amount paid to the harvesters of fresh fish for harvesting services off the North Island, which could impact on these harvesters ability and incentive to harvest fish for supply to downstream wholesale markets.
9. At this stage, we do not have concerns about, and we are planning no further investigation into, whether the Proposed Acquisition would substantially lessen competition in downstream markets for:
- 9.1 the supply of toll processing services relating to fresh fish; and
 - 9.2 the retailing of fresh fish.
10. We explain our reasons for our current views below and invite submissions on them.

Process and timeline

- 11. We have agreed with Moana to extend the period in which to make a decision from the initial 40 working day statutory timeframe until **12 September 2023**.
- 12. We would like to receive submissions and supporting evidence from Moana, Sanford and other interested parties on the issues raised in this Sol. We request responses by close of business on **10 August 2023**, 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 **17 August 2023**.
- 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.

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).

The parties and the Proposed Acquisition

14. Moana and Sanford are operators of vertically integrated commercial fishing businesses in New Zealand. Both parties' businesses include inshore fishing operations. Inshore fishing is used to describe the harvesting of fish that is brought inshore for consumption and/or further processing on land.³
15. 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. Moana has 58 mandated iwi organisations as shareholders. Moana's inshore fishing business operates out of Auckland.⁴
16. Sanford is an NZX-listed seafood company. It has inshore fishing businesses in both the North Island and the South Island.
17. The Proposed Acquisition involves Sanford selling its North Island inshore fishing business to Moana but it would continue to operate the Auckland Fish Market, its Sanford and Sons retail operation, and its salmon and mussel operations, deepwater fishing and South Island based inshore fishing business units.
18. While the Proposed Acquisition includes the sale of some of Sanford's other fishery assets,⁵ at this stage, we are not considering further the sale of these other assets. Rather, our current issues relate to the sale of ACE relating to Sanford's North Island inshore fishing business to Moana.

Relevant background

19. Moana and Sanford both operate inshore fishing businesses. Based on the feedback from various industry participants, competing in the inshore fishing industry appears to relate to two main types of markets, namely:
 - 19.1 upstream markets, involving the harvesting⁶ of wild caught fresh fish and landing⁷ such fish onshore; and

³ Inshore (as well as offshore) fishing is often called 'wild catch' fishing because the fish is harvested (or caught) from the ocean rather than farmed.

⁴ We note that Moana holds a 50% shareholding in Kura Limited (Kura), a 50/50 joint venture with Nippon Suisan Kaisha Limited. 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.

⁵ The other fishery assets being sold as part of the Proposed Acquisition are ancillary equipment, including two fishing vessels (which Moana has informed us it intends to on-sell), gear, nets and equipment in respect of those vessels, and unused marine farms at Croiselles Harbour. It is not necessary to consider this ancillary equipment for the purposes of our determination as it does not form a material part of the Proposed Acquisition, nor does the sale of these assets have a material impact on any of the markets relevant to the Proposed Acquisition.

⁶ Harvesting fish refers to catching fish at sea. The fish harvested may be intended catch or bycatch.

⁷ Landing fish refers to bringing harvested fish to shore and surrendering the corresponding ACE for that fish to a licensed fish receiver. All commercially harvested fish must be landed to a licensed fish receiver,

- 19.2 downstream markets, involving the processing, wholesaling and retailing of fresh fish to consumers after the fish has been received by a licensed fish receiver⁸.
20. At this stage, the issues we are continuing to assess relate mostly to upstream markets.
21. The two main requirements to operate in upstream markets are:
- 21.1 obtaining ACE, which gives the legal right to land a certain amount of a particular fish stock⁹ during the fishing year¹⁰; and
- 21.2 physically catching, or harvesting, the fish.
22. We discuss each of these requirements in turn below.

Obtaining ACE

23. The legal requirements for commercial fishing in New Zealand include holding quota and/or having access to ACE. These requirements come from the Quota Management System (QMS) under the Fisheries Act 1996.
- 23.1 Quota is a share in a fish stock. Quota generates ACE for a particular fish stock at the beginning of each fishing year. Each individual or entity who owns quota in a fish stock will be allocated a corresponding amount of ACE for that fish stock at the beginning of each fishing year.
- 23.2 Each fish stock represents a specific fish species in a defined geographic area, known as a quota management area (QMA).¹¹
- 23.3 The amount of ACE allocated for each fish stock in any given fishing year is determined by the total allowable commercial catch for that fish stock, during that fishing year. The amount of ACE a quota owner receives depends on how much quota they own and the total allowable commercial catch for that fish stock in that fishing year.
24. ACE can be obtained:

and if the ACE Fisher does not have the corresponding ACE to land the fish, a deemed value penalty is required to be paid.

⁸ A licensed fish receiver is an entity that is licensed to receive commercially harvested fish. Only a licensed fish receiver can receive commercially harvested fish.

⁹ Fish stock is a separate categorisation of ACE based upon a specific fish species in a specific geographic area.

¹⁰ Fishing year is a period of 12 months beginning on October 1.

¹¹ We understand that there are 98 species (or species groups) in the QMS and these species are divided into 642 separate fish stocks, due to there being defined QMAs for each species.

<https://www.mpi.govt.nz/legal/legislation-standards-and-reviews/fisheries-legislation/quota-management-system/>

- 24.1 by owning quota at the beginning of the fishing year, which then generates ACE; or
- 24.2 by purchasing ACE from another ACE owner before or after fish is caught.

Harvesting of fresh fish

- 25. Many commercial fishing businesses, particularly those with inshore operations, do not own inshore fishing vessels. Rather, the commercial fishing business will contract with a third-party inshore harvester (ACE Fisher), and under its contract, the ACE Fisher is supplied with ACE by the commercial fishing business to land fish.
- 26. There tend to be no formal long-term arrangements between the commercial fishing business and the ACE Fisher. Rather, the ACE Fisher typically enters into an annual contract commonly known as an annual catch plan to harvest fish for the relevant commercial fishing business.¹² That said, we understand that many ACE Fishers have harvested fish for the same commercial fishing business for a long period of time.
- 27. Once fish has been commercially harvested, it cannot lawfully be dumped or returned to the sea. All commercially harvested fish must be landed, and ACE must be surrendered for all such fish stocks landed. While ACE Fishers will try to harvest and land the intended catch, it is almost impossible to target individual species. As a result, ACE Fishers also require ACE for any fish they may inadvertently harvest (known as bycatch) and be legally required to land.
- 28. The QMS creates a fixed annual supply of ACE for each fish stock. If there is a shortfall of ACE for fish that has been landed, the commercial fishing business or the ACE Fisher is liable to pay a deemed value penalty to the Ministry for Primary Industries *Manatu Ahu Matua* (MPI) for the quantity of fish for which ACE is not surrendered. In order to avoid deemed value penalties ACE can be traded between industry participants.

Market definition

- 29. 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.¹³
- 30. We have yet to reach any definitive views on the relevant markets for assessing the Proposed Acquisition. At this stage, the issues we are continuing to assess relate mostly to the boundaries of upstream markets relating to the supply of ACE and the

¹² Annual catch plan refers to an allocation of ACE (by a commercial fishing business to an ACE Fisher) for a fish species or a combination of fish species which the ACE Fisher can use to plan their fishing year. It sets out the intended catch for a fish stock, and the supply of corresponding amounts of ACE required to land the fish.

¹³ Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

harvesting of fresh fish where the evidence we have received to date has not tended to support Moana's views in the Application.

31. For the purposes of the Sol, we have analysed the competitive effects of the Proposed Acquisition in relation to:
 - 31.1 upstream national markets for the supply of ACE for individual fish stocks;
 - 31.2 an upstream market (or markets) for the acquisition of inshore harvesting services from ACE Fishers;
 - 31.3 downstream national wholesale markets for the supply of the most popular species of:
 - 31.3.1 unprocessed fresh fish caught from inshore fisheries; and
 - 31.3.2 processed fresh fish caught from inshore fisheries.
32. We also identified several other wholesale and retail markets but, at this stage, we are not proposing to consider the impact of the Proposed Acquisition on these markets any further.
33. We invite submissions on these proposed market definitions. In particular, we invite submissions on:
 - 33.1 whether the allocation of ACE should be assessed by individual fish stocks;
 - 33.2 how easily ACE Fishers can switch from harvesting inshore fish species to other methods of fishing such as deepwater fishing;
 - 33.3 how easily ACE Fishers can switch between harvesting in one particular fishing and/or quota management area off the North Island and another area;
 - 33.4 how easily ACE Fishers can switch between harvesting inshore fish species for different commercial fishing businesses;
 - 33.5 the extent to which frozen fish and salmon are substitutes for any freshly caught inshore fish species in any potential upstream or downstream market; and
 - 33.6 the extent to which the different freshly caught inshore fish species are substitutes for one another in any potential upstream or downstream market.

Upstream markets for the supply of ACE

34. At this stage, we consider there are likely to be separate product markets for the ACE that is generated annually for each fish stock. This is because:
 - 34.1 to land commercially harvested fish, industry participants are required to surrender ACE for that fish stock, which is generated annually from quota for a specific species in a defined QMA;

- 34.2 on the demand side, ACE for a particular fish stock, such as SNA1 for snapper, has no substitute. For example, an ACE Fisher that has caught snapper from the SNA1 fish stock must land the snapper using SNA1 ACE. ACE for SNA2 or any other snapper fish stock is not an acceptable replacement; and
- 34.3 on the supply side, substitution in the usual sense is not possible because ACE for each fish stock is in fixed supply each year and no holder of quota can create ACE for a fish stock (for example SNA1 ACE) in response to an increase in its demand.
35. We understand that ACE for individual fish stocks is regularly traded between industry participants. In terms of the geographic dimension of the product markets for ACE, ACE can be traded electronically between parties located anywhere in New Zealand. As a result, trading ACE does not depend on the physical location of counterparties. To this extent, any geographic dimension is likely to be national.
36. Accordingly, at this stage, we consider that there are likely to be national markets for the supply of ACE for each fish stock.

Upstream markets for the acquisition of inshore harvesting services

37. At this stage, we consider there are likely to be market(s) for the acquisition of inshore harvesting services from ACE Fishers based in the North Island.
38. As noted above, many commercial fishing businesses contract with, or acquire harvesting services from, ACE Fishers. Both Moana and Sanford acquire harvesting services but Moana considers that Sanford is largely not a competing buyer of such harvesting services.¹⁴
39. To date, we have received consistent feedback that harvesting services for inshore fishing are distinct from other harvesting services for other types of fishing, such as deepwater fishing or pelagic fishing,¹⁵ and our current view is that inshore harvesting services are separate from other fishing services.
40. We are continuing to assess the relevant geographic market for inshore harvesting services. We understand that:
- 40.1 inshore ACE Fishers tend to specialise fishing in the waters that are close to their home port, such as the Auckland East Fishing Management Area (FMA1) for those ACE Fishers based in Auckland or the Challenger/Central Fishing Management Area (FMA7) for those ACE Fishers based in Westport; and
- 40.2 commercial fishing businesses tend to contract with ACE Fishers that are located close to their operations.

¹⁴ Clearance application from Moana (26 May 2023) at [O].

¹⁵ For example, see

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41. To date, we have received limited evidence to indicate that commercial fishing businesses based in the North Island are acquiring inshore harvesting services from ACE Fishers based in the South Island (and vice versa).¹⁶ Moana and Sanford (with regards to its North Island inshore business) appear to only acquire inshore harvesting services from ACE Fishers based in the North Island.
42. As such, our current view is that the geographic market for inshore harvesting services in relation to the Proposed Acquisition is likely to be, at its widest, the North Island.
43. We are also continuing to consider whether it may be more appropriate to assess narrower geographic markets, such as those based on the fishing and/or quota management areas¹⁷ relevant to the Proposed Acquisition off the North Island.

Downstream wholesale supply markets for unprocessed and processed fresh fish

44. At this stage, we are of the view that there are likely to be national markets for the wholesale supply of:
 - 44.1 unprocessed fresh fish landed using ACE from upstream national markets for the supply of ACE; and
 - 44.2 processed fresh fish landed using ACE from upstream national markets for the supply of ACE.
45. We set out our reasons for this view below. As indicated, we are still considering whether separate markets for processed and unprocessed fish should be defined for each separate inshore species.

Product dimension - unprocessed and processed fresh fish

46. At this stage, we consider that there are likely to be separate wholesale markets for the supply of unprocessed fish and processed fish. This is because once fresh fish is landed, some downstream wholesale and retail customers prefer to purchase fresh fish unprocessed (whole) while others prefer to purchase it processed (for instance, de-boned, gutted and/or filleted). Further, fresh fish processing has particular methods that appear quite distinct from other food processing services.
47. However, as discussed below, it appears any competition assessment would be similar regardless of whether we define separate wholesale supply markets for unprocessed and processed fish or a broad market that includes both types. This is because:

¹⁶ For example, see
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¹⁷ We note that, while MPI defines ten core Fishing Management Areas, QMAs are defined for each species which can mean that an QMA can be different to one of the ten core Fishing Management Areas.

- 47.1 most commercial fishing businesses supply both unprocessed and processed fish to their wholesale and retail customers; and
- 47.2 wholesale customers that purchase unprocessed fish are likely to be able to, and often do, enter into toll processing service arrangements with a third party toll processor, if they do not have their own processing facilities.

Product dimension – inshore fresh fish

- 48. At this stage, we are of the view that the wholesale supply of fresh fish landed using ACE from national upstream inshore markets is likely to be separate from the wholesale supply of other types of fish such as frozen fish or salmon.
- 49. Moana submits that the product dimension of downstream wholesale supply markets includes all species of fish.¹⁸ In its view:
 - 49.1 on the demand side, wholesale customers consider;
 - 49.1.1 freshness to be more important than species and, while some consumers prefer certain species, there is a chain of substitution between them; and
 - 49.1.2 salmon and frozen white fish are substitutes for fresh white fish because salmon is priced on a continuum with other fish, and that the chain of substitution includes salmon along with other fish.
 - 49.2 on the supply side, given that bycatch is unavoidable, most commercial fishing businesses supply a range of inshore species.
- 50. The evidence we have received is that most consumers do not consider salmon or frozen fish to be good substitutes for fresh fish caught from upstream inshore markets. This is because both salmon and frozen fish are generally brought for different occasions than fresh fish.¹⁹ Rather, many industry participants note that:
 - 50.1 inshore species such as snapper, gurnard and tarakihi (which are widely considered to be the most popular inshore fresh fish species) are typically considered to be good substitutes for each other by most consumers;²⁰ and
 - 50.2 other inshore fresh fish species, such as gemfish, red cod or warehou (amongst others), are less preferred than snapper, gurnard or tarakihi but

¹⁸ Clearance application from Moana (26 May 2023) at [5.15] and the Castalia Report at Section 4.2.

¹⁹ For example, see [].

²⁰ For example, see [].

they are still closer alternatives than either frozen fish or salmon because consumers are typically seeking a fresh white fish.²¹

51. At this stage, we are of the view that the product market for the wholesale supply of inshore fresh fish is separate from the wholesale supply of other fresh fish (such as salmon) or frozen fish. We are still assessing whether the relevant product market includes all inshore fresh white fish species or whether it is more appropriate to define separate wholesale markets for the supply of each particular species (such as snapper, tarakihi and gurnard).

Geographic dimension – wholesaling of inshore fresh fish

52. At this stage, we consider that there are likely to be national markets for the wholesale supply of unprocessed and processed fresh fish.
- 52.1 Moana submits that all downstream markets are national on the basis that fish can be transported around the country at costs that are small relative to the prices of processing fish or that customers pay for wholesale and retail supply.
- 52.2 The evidence we have gathered to date suggests that once landed, commercial fishing businesses appear to compete with one another on a national level to supply both unprocessed and processed inshore fresh fish to wholesale customers.²² While Moana and Sanford are based in Auckland, commercial fishing businesses operating in the South Island regularly send fresh fish to customers in the North Island in competition with Moana, Sanford and other commercial fishing businesses based in the North Island.

Customer dimension – wholesaling of inshore fresh fish

53. Moana, Sanford and other commercial fishing businesses sell a range of inshore fresh fish species to wholesale customers such as the major grocery retailers, food wholesalers, fish mongers and other speciality fish retailers. Based on our interviews with such wholesale customers, their key requirements are consistency of supply and freshness.²³ To this extent, our current view is that it is not necessary to define separate customer markets for the supply of inshore fresh fish to any particular wholesale customer.

²¹ For example, see
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²² For example,
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²³ For example, see
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Markets that do not appear to raise concerns

54. We have identified several other markets but, at this stage, we are not proposing to consider the impact of the Proposed Acquisition on the following markets, namely:
- 54.1 the downstream market for the wholesale supply of toll processing services for fish; and
 - 54.2 downstream retail markets for the supply of inshore fresh fish.

Downstream market for the wholesale supply of toll processing services for fish

55. We consider that there is likely to be a national market for the supply of toll processing services for fish. The evidence we have gathered suggests:
- 55.1 most fish undergo some form of processing once it is landed. Some commercial fishing businesses have their own processing facilities but others do not. For those that do not, toll processing arrangements are typically entered into with third party processors, who will process fish on behalf of the commercial fishing businesses; and
 - 55.2 such toll processing service arrangements tend to be national in scope. We are aware of fish harvested in the South Island being regularly transported to the North Island for toll processing.
56. At this stage, based on evidence we have received, it appears that with the Proposed Acquisition there would be several options for commercial fishing businesses requiring a toll processor, and these toll processors are likely to compete with Moana in supplying toll processing services.²⁴ Given the presence of these alternative toll processors, we are not proposing to consider the impact of the Proposed Acquisition on the supply of toll processing services for fish any further.

Downstream retail markets for the supply of inshore fresh fish

57. Both Moana and Sanford operate certain retail outlets. Our current view is that retail markets for the supply of inshore fresh fish are likely to be separate from wholesale markets for the supply of inshore fresh fish. We consider it unlikely that competition in any downstream retail market is relevant to our assessment of the Proposed Acquisition for the following reasons:
- 57.1 while both Moana and Sanford operate in certain retail markets – Moana has an online store, and Sanford owns and operates the Auckland Fish Market (a spot market for the wholesale and retail supply of fresh fish which it will retain with the Proposed Acquisition)²⁵ as well as the Sanford & Sons retail stores - our inquiries indicate that:

²⁴ For example, see
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²⁵ Clearance application from Moana (26 May 2023) at [6.8].

57.1.1 there are multiple retail outlets that compete to supply fresh fish to customers; and

57.1.2 these retail outlets are not reliant on wholesale or retail supply of inshore fresh fish from Moana or Sanford.

58. At this stage, we are not proposing to consider the impact of the Proposed Acquisition on any downstream retail market any further.

Without and the without scenarios

59. Assessing whether a substantial lessening of competition is likely requires us to:

59.1 compare the likely state of competition if the Proposed Acquisition proceeds (the scenario with the merger, often referred to as the factual) with the likely state of competition if it does not (the scenario without the merger, often referred to as the counterfactual); and

59.2 determine whether competition is likely to be substantially lessened by comparing those scenarios.

With the acquisition

60. With the Proposed Acquisition, Moana would purchase, for a ten year period, all of the ACE generated from the quota currently associated with Sanford's North Island inshore fishing business.²⁶

61. While Sanford would still own its other commercial fishing business units, Sanford would no longer compete with Moana in certain upstream and downstream markets relating to the North Island inshore fishing industry. As it would not, for the duration of the arrangement, be using the ACE generated from its quota, it would no longer be:

61.1 acquiring harvesting services from ACE Fishers based in the North Island;

61.2 landing any North Island inshore fresh fish;²⁷

61.3 operating a toll processing facility in central Auckland (given it would not be landing any fresh fish into Auckland); or

²⁶ Under the Proposed Acquisition,
[].

²⁷ While in most fishing years, the ACE will relate to 100% of the North Island inshore quota owned by Sanford, []. See Clearance application from Moana (26 May 2023) at [3.1(a)].

- 61.4 supplying wholesale and retail customers with unprocessed and processed fresh inshore fish landed using ACE from upstream national markets for the supply of ACE and/or harvested using ACE Fishers.²⁸

Without the acquisition

62. We are still considering what is likely to occur without the Proposed Acquisition.
63. At this stage, we consider that the without-the-acquisition is unlikely to be the status quo. We understand that Sanford's North Island inshore fishing business has been underperforming for some time and that the status quo scenario is no longer sustainable.²⁹
64. In assessing the with-the-acquisition scenario, we are required to assess the possible scenarios that might arise without the Proposed Acquisition and discard those that are unlikely (or not a real chance).
65. At this stage, we cannot exclude the real chance that, absent the Proposed Acquisition, Sanford or another party could use the ACE that is generated from Sanford's quota to compete, in some form, with Moana in certain upstream and downstream markets relating to inshore fishing in the North Island. As such, we are considering whether the following scenarios or a combination of these, and/or other potential, scenarios, would be likely scenarios. For example:
- 65.1 Sanford is not selling any quota to Moana. These shares will generate ACE every fishing year so we are considering whether, absent the Proposed Acquisition, it is likely that Sanford would use this ACE itself to compete with Moana, or potentially sell such ACE to another industry party, or parties, that would compete with Moana; and
- 65.2 we accept that there is a real chance that Sanford would close its poor performing Auckland fish processing facility in both the with and without scenarios.³⁰ However, we are considering whether, absent the Proposed Acquisition, Sanford could enter into a toll processing arrangement (or similar) with a third party processor which would mean that Sanford would

²⁸ For completeness, we note that some of the ACE will be used to supply

[]See Clearance application from Moana (26 May 2023) at [G].

²⁹ In this respect, Sanford advised its

[] Letter from Sanford to Commerce Commission (26 May 2023).

³⁰ For example, in May this year, Sanford noted that "Inshore business has been delivering a negative contribution. Increased costs, Covid impacts, lack of labour and a factory located in what is now a high density residential area, all contributing factors to a poor performance and challenges to ongoing ability to operate effectively. A number of options considered, including building a new modern site, partnering with another industry player and exiting the business completely." See Results briefing for the six months ending 31 March 2023, Sanford (22 May 2023).

continue to compete with Moana in certain upstream and downstream markets even if it closed its own fish processing facility.

66. We invite submissions on the likely without-the-acquisition scenarios.

Competition assessment

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

67.1 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 profitability of that increase being thwarted by rival firms' competitive responses.³¹

67.2 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.³²

67.3 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').³³

68. The main competition issues we are continuing to assess relate to the fact that, with the Proposed Acquisition, Moana would be allocated a large share of the ACE that commercial fishing businesses need to harvest fresh fish off the North Island for supply to wholesale and retail customers. We are considering whether the increase in the amount of ACE that is allocated to Moana could substantially lessen competition due to unilateral or vertical effects by:

68.1 restricting the amount of ACE that is available to existing or potential competitors to Moana which could impact on the ability of these competitors to compete with Moana in downstream wholesale markets, thereby increasing the wholesale price of fresh fish; and/or

³¹ Commerce Commission, *Mergers and Acquisitions Guidelines* (May 2022) at [3.62].

³² *Mergers and Acquisitions Guidelines* above n31 at [3.84].

³³ *Mergers and Acquisitions Guidelines* above n31 at [5.1-5.5]

68.2 Moana reducing the amount paid to the harvesters of fresh fish for harvesting services off the North Island, which could impact on their ability and incentive to harvest fish for supply to downstream wholesale markets.

69. We explain our reasons for our current views below and invite submissions on them.

Unilateral and vertical effects relating to upstream markets for the supply of ACE

70. At this stage, the evidence we have seen indicates that, as a result of the Proposed Acquisition, Moana would hold a significant share of the ACE for certain key inshore fish stocks, most notably snapper fish stocks, that are subsequently caught off and landed on the North Island.

71. We are not currently satisfied that the Proposed Acquisition would not be likely to substantially lessen competition in a relevant market as a result of this aggregation of ACE.

72. The Proposed Acquisition would result in aggregation of ACE for over 80 fish stocks off the North Island.³⁴ As a result, there could be a number of markets impacted by the Proposed Acquisition because both Moana and Sanford are two of the largest quota owners for each of the relevant North Island inshore species, which generates a large quantity of ACE for each fish stock, each year.

73. Further, we understand that Moana has a variety of short term and long term arrangements to acquire, and use, ACE from other ACE holders, which means that Moana tends to have access to more ACE than it is formally allocated through its quota ownership each year.³⁵

74. Moana submits that that there would be no substantial lessening of competition in downstream markets for the wholesale supply of processed fresh fish, wholesale supply of unprocessed fresh fish and retail markets for fresh fish if it were to gain a high share of ACE for certain fish stocks and increased its share in the supply of that species to customers. In particular, Moana submits that there would be no harm to competition for the supply of fresh white fish to customers because, in its view, all species of white fish are substitutable for both wholesale customers and retail consumers and so it would still be constrained by rivals supplying other species.³⁶

75. However, as indicated above, we consider that ACE for a particular fish stock can be a key input to the supply of various species of fish not just that to which it applies—because, typically, several species are caught in the same waters and harvesters targeting one species often cannot avoid making significant bycatches of other species from nearby fish stocks for which they will require ACE to land.

76. For example, in Area One of the East Coast of the North Island and Area Eight off the West Coast of the North Island, where multiple fish stocks overlap in the same waters, vessels targeting species such as gemfish, red cod or warehou, tarakihi,

³⁴ Clearance application from Moana (26 May 2023).

³⁵ Clearance application from Moana (26 May 2023).

³⁶ Clearance application from Moana (26 May 2023).

gurnard or hoki often cannot avoid making significant bycatches of snapper because snapper is highly abundant in those waters. As a result, commercial fishing businesses that operate in these areas and seek to land a range of species often need snapper ACE (either SNA1 or SNA 8 as applicable) to avoid paying potentially large deemed-value penalties for uncovered bycatch.

77. Commercial fishing businesses that lack sufficient ACE to cover their bycatch seek to buy surplus ACE from other commercial fishing businesses or brokers of ACE, at per-kilogram rates below the relevant deemed values. Since the Proposed Acquisition would remove Sanford as a potential seller of surplus ACE to such buyers, we are assessing whether Moana, post-acquisition, would be able to profitably increase prices charged for surplus ACE or withhold supply. If so, this may have the effect of raising its rivals' costs of supplying a range of fish species, rendering rivals less competitive downstream and allowing Moana to raise wholesale prices of fish to customers (both wholesale and retail). As such, if Moana is able to act in this way, the Proposed Acquisition may have an effect on competition in relevant downstream markets via vertical effects.
78. Several industry participants raised concerns with the Proposed Acquisition because, in their view, Moana's high share of snapper ACE would mean that ACE Fishers would have no alternative but to acquire surplus snapper ACE from Moana or risk paying deemed values because catching snapper is unavoidable. The only alternative for ACE Fishers would be to reduce the frequency with which they harvest or potentially cease fishing altogether.³⁷
79. We are continuing to assess the potential impact of the aggregation of ACE as a result of the Proposed Acquisition on downstream markets that require, or are potentially impacted by, the availability of surplus ACE, particularly snapper ACE. In this respect, we invite submissions on the extent to which the Proposed Acquisition would impact on:
- 79.1 the ability of commercial fishing businesses to access sufficient ACE to compete with Moana;
 - 79.2 the price of ACE, particular snapper ACE and competitors' costs to acquire ACE; and
 - 79.3 the ability of suppliers to compete with Moana in any relevant downstream market.

Unilateral effects in upstream markets for the acquisition of inshore harvesting services

80. At this stage, the evidence gathered indicates that Moana and Sanford are two of the largest acquirers of harvesting services from ACE Fishers based in the North Island.

³⁷ For example, [

As a result, the Proposed Acquisition would remove any existing competition between these two buyers.

81. For the reasons set out below, we are not currently satisfied that the Proposed Acquisition would not be likely to substantially lessen competition in the market for the acquisition of inshore harvesting services.
82. Moana notes that there is no aggregation in the supply of harvesting services, as it does not operate any of its own fishing vessels.³⁸ However, as noted above, both Moana and Sanford currently contract harvesting services from independent ACE Fishers.
83. Industry participants told us that most ACE Fishers own some quota themselves although the volume of their quota ownership is generally not sufficient to be commercially viable on its own. As such, ACE Fishers tend to rely on commercial fishing business, such as Moana and Sanford, to supply them with sufficient ACE (typically via an annual catch plan) to harvest fish throughout the year. As a result, ACE Fishers tend to have a very close working relationship with commercial fishing businesses with many fishing for the same commercial fishing business for a significant period of time.³⁹
84. However, some evidence gathered suggests that ACE Fishers based in the North Island can and do fish for more than one commercial fishing business based in the North Island. This suggest that there is some degree of competition between existing purchasers, such as Moana and Sanford, of harvesting services from ACE Fishers based in the North Island.⁴⁰
85. In this respect, we consider the Proposed Acquisition would remove any existing competition between Moana and Sanford to acquire harvesting services from ACE Fishers as well as any potential competition between Moana and Sanford (or another party using the ACE that is generated from Sanford's quota to compete) in the without-the-acquisition scenario. If this existing and/or potential competition is likely to place a significant competitive constraint on the price that Moana would pay for harvesting services, the Proposed Acquisition might give Moana the ability and incentive to reduce the price it pays for harvesting services. The impact of a reduction in the price paid to ACE fishers could impact on ACE Fishers ability and incentive to harvest fish for supply to downstream wholesale markets.

³⁸ Clearance application from Moana (26 May 2023).

³⁹ For example, see [

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⁴⁰ For example, see [

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86. We are continuing to assess the impact of the Proposed Acquisition on the acquisition of harvesting services from ACE Fishers and invite submissions on:
- 86.1 the current competition between Moana and Sanford, and other parties, to acquire harvesting services from ACE Fishers in the North Island; and
 - 86.2 the ability of ACE Fishers in the North Island to switch between different acquirers of their services.

Unilateral effects in downstream wholesale supply markets for fresh fish

87. As noted above, we are continuing to test the boundaries of the relevant wholesale product markets but, if the most popular species of inshore fish are close substitutes for one another, then, with the Proposed Acquisition, Moana would likely be constrained by the presence of both North Island-based and South Island-based competitors in wholesale supply markets for:
- 87.1 unprocessed inshore fresh fish; and
 - 87.2 processed inshore fresh fish.
88. For example, we have received feedback that wholesalers in the South Island, such as Talley's Group Limited and United Fisheries Limited, can and do compete with wholesalers based in the North Island, such as Moana, Sanford and Gisborne Fisheries Limited to supply a range of the most popular fish species to customers across New Zealand.
89. While the combination of species supplied by each wholesaler varies, even if the markets were to be limited to the most popular species (namely snapper, tarahiki and gurnard), it's likely the presence of existing competitors based in both the North Island and South Island would likely constrain Moana, to some degree, in the different downstream wholesale markets.
90. However, we are continuing to test the constraint that existing competitors would provide on Moana, post-acquisition, in wholesale markets. In addition, we are continuing to assess whether any customers may have any countervailing buyer power. In particular, we invite submissions on:
- 90.1 the closeness of competition between Moana and Sanford in the wholesale supply of different inshore species of fresh fish;
 - 90.2 the range of inshore species that each of the different wholesalers supply and the extent to which range impacts on how these wholesalers compete with one another; and
 - 90.3 the ability of existing wholesalers to expand the volumes of fresh fish they currently supply.

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

91. At this stage, our view is that the Proposed Acquisition is unlikely to change the conditions in the industry such that coordination is more likely, more complete or more sustainable. For example, we understand that the nature of harvesting fish, which is reliant on the weather, means that supply is subject to frequent changes which may mean that coordinated conduct is less likely in this industry compared to some others.
92. However, the amount of ACE allocated for each species is capped and industry participants can readily observe the volume of fish they each supply. We are also continuing to assess the boundaries of the relevant markets, particularly in the upstream markets relating to ACE and harvesting services.
93. Given this, we are continuing to consider whether the Proposed Acquisition would give rise to coordinated effects and we invite submissions from industry participants on whether:
 - 93.1 any of the relevant markets are vulnerable to coordination; and
 - 93.2 the Proposed Acquisition would change the conditions in any market such that coordination is more likely, more complete or more sustainable.

Next steps

94. We are currently scheduled to decide whether or not to give clearance to the Proposed Acquisition by **12 September 2023**. However, this date may change as our investigation progresses. In particular, if we need to test and consider the issues identified above further, the decision date may be extended.
95. As part of our investigation, we are identifying and contacting parties that we consider will be able to help us assess the issues identified above.

Making a submission

96. 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.
97. 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 **10 August 2023**.
98. 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.