

## COMMERCE ACT 1986: BUSINESS ACQUISITION

### SECTION 66: NOTICE SEEKING CLEARANCE

Date: 19 September 2023

The Registrar  
Mergers and Acquisitions  
Commerce Commission  
PO Box 2351  
Wellington

Pursuant to section 66(1) of the Commerce Act 1986 notice is hereby given seeking clearance of a proposed business acquisition.

Information confidential to Sealord is marked yellow. Information confidential to both Sealord and IFL is marked in green.

## Part 1: Overview

### 1 Overview of the application

1.1 This is an application for clearance pursuant to section 66(1) of the Commerce Act 1986 made by Sealord Group Limited (**Sealord**) for the acquisition of:

1.1.1 Assets of Independent Fisheries Holdings Limited (**IFHL**) being quota as defined in the Fisheries Act 1996 and IFHL's interest in a lease of premises at 15 Dublin Street, Lyttelton (the **Lyttelton Premises Lease**).

1.1.2 100% of the shares in Independent Fisheries Limited (**IFL**), which is a 100% subsidiary of IFHL.

1.1.3 The assets include annual catch entitlement (**ACE**) as defined in the Fisheries Act 1996 from IFL and IFHL.

1.1.4 The land, buildings, plant and equipment, and approvals for a cold store (the **Cold Store**) situated at 17 Broad Street, Woolston, Christchurch from Staunton Investments Limited (**SIL**), a company related to IFHL and IFL.

1.1.5 Business records relating to the above.


(Together, this acquisition is called the **Proposed Acquisition** and the shares and assets being acquired the **Independent Fisheries Business**).

#### *Executive Summary*

1.2 New Zealand's marine economy, including commercial fisheries, contributes an estimated \$3.8 billion to the economy, making it one of the largest industries in New Zealand.<sup>1</sup>

1.3 The industry fishes both inshore and deepwater areas, across a range of fish stocks, some of which are under the Quota Management System (**QMS**) and some which are not. A very large percentage of the fish caught in New Zealand (around 70%) is sold overseas, where it is subject to strong competition. Fishing is carried out by a range of different kinds of companies, from large deepwater fishing companies, who are generally reasonably vertically integrated, to medium sized companies fishing a number of areas, to fishers with single vessels fishing inshore areas. Some companies operate across all of deepwater and inshore fisheries, as well as in aquaculture. Fish and fish products sold in New Zealand are sold in markets that have strong competition between domestic suppliers and imported product with some customers, such as the supermarkets, having strong market positions.

1.4 The Proposed Acquisition concerns two participants in the deepwater sector of the fishing industry, Sealord and IFL. Sealord sells multiple species of fish through its deepwater fishing operations. The format of products Sealord sells is almost entirely frozen fish products (in whole fish, processed fish and crumbed fish), although during the winter hoki season it lands and sells small volumes of fresh hoki. Sealord has on-shore processing facilities and a coated products fish factory in Nelson. Sealord exports 90% of its catch in various frozen formats.

1.5 IFL operates out of Lyttelton. It catches a range of species, particularly hoki, southern blue whiting and squid, and exports its frozen fish products to various countries including China, Japan, South Africa and in Eastern Europe, with some sales of frozen fish products in New Zealand and crumbed products  sold by United Fisheries Limited.

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<sup>1</sup> Office of the Prime Minister's Chief Science Advisor, *Towards a Vision for Commercial Fisheries in Aotearoa New Zealand in 2040* located at: [Context – The future of commercial fishing in Aotearoa New Zealand | Office of the Prime Minister's Chief Science Advisor \(pmcsa.ac.nz\)](https://pmcsa.ac.nz)

- 1.6 The areas of overlap between Sealord and IFL's businesses are that both:
- 1.6.1 hold quota and ACE<sup>2</sup> for various finfish species;
  - 1.6.2 largely fish for the same species in deepwater areas;
  - 1.6.3 initially process the fish they catch;
  - 1.6.4 sell whole and processed frozen fish in New Zealand;
  - 1.6.5 sell coated fish products in New Zealand **[redacted]**; and
  - 1.6.6 export frozen fish in various formats to international markets.
- 1.7 Following the approach in the Commission's 2001 decision in *New Zealand Seafood Investments Limited and Basuto Investments Limited* (Decision No. 388) (the **Basuto decision**), Sealord has analysed the Proposed Acquisition in markets for finfish harvesting services, processed and whole finfish, and value-added finfish products. Sealord has also considered the effect of the Proposed Acquisition under a number of different ways that the relevant markets could be defined, in particular taking into account the provisional views expressed by the Commission in its Statement of Issues on the clearance application lodged by Aotearoa Fisheries Limited (**AFL**) on 26 May 2023 (the **Moana<sup>3</sup> Sol**). The Commission has subsequently granted the clearance to Moana but has not yet published the reasons for its decision.
- 1.8 Sealord considers that the Proposed Acquisition will not result in a substantial lessening of competition in any market in New Zealand, under any approach to how those markets might be defined. In particular, Sealord's holding of quota and ACE (which the Commission recognised in the *Basuto* decision as key inputs into the harvesting market) in total or by species post-acquisition will not reach a level that would cause competition issues, regardless of which parties are counted by the Commission as interrelated or associated with Sealord and how the Commission treats the ACE arrangements that Sealord has entered into (in terms of whether to count particular arrangements to acquire ACE as contributing to Sealord's market share).
- 1.9 In addition, in the finfish harvesting market, other key factors are:
- 1.9.1 Both Sealord and IFL are vertically integrated across the market and undertake fairly balanced ACE buying and selling, to cover their catch needs. Neither company could be seen as a significant net buyer or seller of ACE.
  - 1.9.2 Post-transaction, Sealord will most likely continue to operate the Independent Fishing Business as it is with its catch largely matching its quota holdings, with the result that there will be little difference, if any, between the amount of ACE available for sale to other parties compared to the situation if IFL continued as is or was bought by another party.
  - 1.9.3 There continues to be many other significant competitors, in particular Sanford Limited (**Sanford**) and Talley's Limited (**Talley's**), operating in the finfish harvesting market and particularly in deepwater areas. These firms operate by either using their own quota and ACE or buying ACE from other parties. Those ACE sales will continue to be available, including from Sealord, which, along with other fishing companies outlined in this application, has a strong incentive to engage in ACE trading in order to balance its catch each season.

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<sup>2</sup> Quota (specified by fish species and area) generates ACE each fishing year for that species and area, which entitles the holder to catch a specified percentage of the permitted commercial catch for a fishing year for that species and area.

<sup>3</sup> Moana is the trading name of Aotearoa Fisheries Limited.

- 1.9.4 In the downstream markets, Sealord will continue to face strong competition from both New Zealand fishing companies and overseas companies. As a result, Sealord could not exert any (hypothetical) market power in the upstream markets because Sealord would be unable to recover the costs of doing so in the country's highly competitive downstream markets.
- 1.10 In the finfish whole and processed market (or even if separated into whole and processed markets) the Proposed Acquisition would not result in a substantial lessening of competition, in particular because:
- 1.10.1 IFL sells only a very small volume of frozen whole fish in New Zealand, which will not add substantially to Sealord's share of the market (regardless of how it is defined).
- 1.10.2 There is strong competition from other suppliers of frozen and fresh, and whole fish and processed fish, from both New Zealand-sourced fish and imported fish.
- 1.10.3 New Zealand suppliers (especially Sanford and Talley's) are in a position, due to their large volume of export sales, to readily divert sales from export markets into New Zealand and imports could also readily be increased if Sealord were to attempt to increase price (which it cannot do in any case).
- 1.11 In the finfish value-added market, which includes coated fish products sold by both IFL and Sealord in New Zealand, there is also no substantial lessening of competition. Key reasons are:
- 1.11.1 IFL adds only a small amount to Sealord's market share and Sealord's combined market share would remain relatively modest.
- 1.11.2 There is a substantial level of competition from other suppliers, which will continue and imports could readily be increased in response to any attempt by Sealord to increase prices post-acquisition.
- 1.11.3 Sealord's and IFL's products are not close competitors in the retail sector.
- 1.11.4 Sealord's closest competitors for value-added products in the food service sector, Bidfood Limited and Markwell New Zealand Limited, will continue to operate.
- 1.11.5 New entry from overseas is possible, in particular through a retailer/wholesaler sourcing a new brand from overseas.
- 1.11.6 The supermarkets exercise considerable countervailing market power.
- 1.11.7 There is competition from other kinds of coated and value-added products that will continue to compete with finfish value-added products. These include other seafood products and well as products such as coated chicken breast, coated chicken portions, coated pork products, and coated plant-based products.
- 1.12 In the Moana Sol, the Commission raised the possibility that Moana (i.e. Aotearoa Fisheries Limited), post its acquisition of Sanford's inshore fishing business, could restrict the amount of ACE that is available to existing or potential competitors to Moana which could impact the ability of these competitors to compete with Moana in downstream wholesale markets, thereby increasing the wholesale price of fresh fish.
- 1.13 As noted above, the Commission has subsequently granted the clearance to Moana. In case the Commission considers that this theory of harm could arise in respect of the Proposed Acquisition, however, Sealord does not consider that it could, post-acquisition, act in the way identified by the Commission. As outlined above, there will still remain sufficient ACE held by parties other than Sealord and available for trading that such a foreclosure strategy would never work. This is especially the case as:

- 1.13.1 Most deepwater fishing companies hold sufficient quota or have other standing arrangements for ACE to cover most of their catch.
- 1.13.2 Only a small proportion of the volume of fish captured in deepwater fisheries makes it to the downstream New Zealand markets. Sealord faces strong competition from domestically caught fish and fish products, and imports, with the threat of export diversion.
- 1.14 In the Moana Sol, the Commission also expressed the provisional view that Moana could reduce 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. Sealord purchases only a limited amount of contract harvesting service from other parties [1]. IFL does not purchase any contract fishing services. Sealord does not therefore consider that it could act in the way suggested by the Commission's provisional views in the Moana application or be successful in any such strategy. Sealord also notes that the Commission has subsequent to the Sol granted Moana clearance.
- 1.15 For these and the other reasons stated in the application, Sealord submits that it would be appropriate for the Commission to grant the clearance application.

## Part 2: Party Details

### 2 Sealord

2.1 **Applicant:** This notice is given by Sealord (company number 168963). The Companies Register extract for Sealord is set out at Appendix 1.

2.2 **Contact:** The contact details for Sealord are as follows:

Principal place of business in New Zealand: Nelson

Website: [www.sealord.com](http://www.sealord.com)

Contact Person:

Tim Silverstone  
 General Counsel and General Manager Corporate Affairs  
[Tim.Silverstone@sealord.co.nz](mailto:Tim.Silverstone@sealord.co.nz)  
 Mobile: [ ]  
 Phone: +6495895342

2.3 **Correspondence:** Sealord requests that all correspondence is directed in the first instance to:

Nick Crang  
 Partner, Duncan Cotterill  
 Level 5, Chartered Accountants House  
 50 Customhouse Quay  
 Wellington 6011  
 Telephone: 04 471 9440  
 Fax: 04 499 3280  
 Email: [nick.crang@duncancotterill.com](mailto:nick.crang@duncancotterill.com)

### 3 Other parties to the acquisition:

3.1 **Vendor:** The other parties to the Proposed Acquisition are IFHL, IFL and SIL (together **Independent Fisheries**).

3.2 **Contact:** The contact details for Independent Fisheries are as follows:

Mark Allison  
 Managing Director  
 15 Dublin Street, Lyttelton  
[mark.allison@indfish.co.nz](mailto:mark.allison@indfish.co.nz)

3.3 **Correspondence:** Independent Fisheries requests that all correspondence is directed in the first instance to:

Lucy Cooper / George Spittle  
 Partner / Senior Associate  
 Chapman Tripp 20 Customhouse Quay Wellington  
 P: +64 4 498 2406 / +64 9 358 9820  
 E: [lucy.cooper@chapmantripp.com](mailto:lucy.cooper@chapmantripp.com) / [george.spittle@chapmantripp.com](mailto:george.spittle@chapmantripp.com)

### 4 Structure of the Parties

*Sealord, its shareholders and related parties*

4.1 Sealord is a wholly owned subsidiary of Kura Limited (**Kura**). Kura is a New Zealand registered company. Kura is a holding company and has no separate business operations of

its own (i.e. Sealord and its subsidiaries are the operating entities in the group). Kura is 50% owned by Nissui Corporation (**Nissui**) and 50% owned by AFL. As noted above, AFL's trading name is Moana New Zealand and, for the purposes of this Application, AFL is called **Moana**.

- 4.2 Kura and Sealord have rules around quorum and voting for Kura to ensure 50/50 decision-making between the directors of each shareholder.
- 4.3 [ ]
- 4.4 [ ]
- 4.5 Day-to-day management of Sealord sits with Sealord management.
- 4.6 Nissui is a Japanese company and is listed on the Tokyo Stock Exchange (identifier 1332). It is a widely held company. Nissui's company profile is available [here](#) and further information in relation to Nissui can be found [here](#). Nissui has no other ownership interests in the New Zealand fishing industry other than its indirect interest in Sealord.
- 4.7 Moana is a New Zealand registered company. It holds its 50% indirect interest in Sealord ultimately for the benefit of all Māori. This followed and was an important component of the settlement of Māori fisheries claims under the Treaty of Waitangi, as reflected in both the 1992 Fisheries Deed of Settlement and Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.
- 4.8 Moana's share structure comprises 125,000 voting shares and 125,000 income shares. All of the voting shares are held by Te Ohu Kai Moana Trustee Limited (**TOKMTL**). Under the Māori Fisheries Act 2004, 80% of the income shares of Moana are to be held with mandated iwi organisations, with TOKMTL holding the remaining 20%. TOKMTL is still holding 1.3% of the income shares in trust for iwi that have yet to be allocated under the Māori Fisheries Act.
- 4.9 Moana also holds quota and ACE for its own purposes and operates its own fisheries operations (but does not itself operate vessels), processing and selling finfish, crayfish, pāua and farmed shellfish in New Zealand and to export markets. Moana mostly sells fresh products but does supply some frozen fish. Moana's finfish is sourced mainly from inshore fisheries.
- 4.10 Moana has announced a proposal to acquire ACE and some fishery assets from Sanford related to Sanford's North Island inshore finfish business, which has its operational base in Auckland. As noted above, Moana has applied for a clearance from the Commission for its proposed acquisition and a clearance has been granted.
- 4.11 More information on Moana is set out in its application to the Commission and at [Moana New Zealand](#).
- 4.12 Sealord has a 50% interest in Westfleet Seafoods Limited (**Westfleet**). Westfleet is also 50% owned by Endurance Fishing Company Limited (**Endurance**). Endurance is not related to Sealord.
- 4.13 Westfleet is also a fishing company, based in Greymouth and fishing out of Greymouth and Nelson. Westfleet had total sales in FY2022 of around [ ], with around [ ] of sales in New Zealand (some of which would be subsequently exported by the buying party).
- 4.14 Westfleet owns quota and purchases ACE, which it uses for its fishing operations. Its operations are entirely separate from Sealord. Sealord and Westfleet enter into ACE and contract catch arrangements on an arms-length commercial basis as Sealord does with other third party fishing companies. It concentrates mainly on the West Coast inshore fisheries and tuna. [ ] Based on the TACCs as of March 2023 (as defined in paragraph 10.13), its quota holding sits at around 4,800 tonnes, including 1,500 tonnes of hoki.
- 4.15 Westfleet has a fleet of four fishing vessels, with a fifth vessel being built and due for completion in the second half of 2023. The vessels fish inshore species between the

shoreline and 200m depth, and also some deepwater species between the depths of 200m-1200m.

- 4.16 Westfleet owns and operates a wharf, factory, and retail premises in Greymouth. The wharf operates seven days a week, and its operations include fish processing, retrieval, and ice making. The factory processes frozen and fresh products for New Zealand and for export to overseas markets. The retail premises also have fresh fish processing facilities.
- 4.17 The shareholder arrangements for Westfleet include that:
- (a) Each shareholder has the power to appoint up to two directors of Westfleet (with four directors in total as the maximum number of directors). The rules around quorum and voting ensure 50/50 decision-making between the directors of each shareholder. Currently, each of Sealord and Endurance has appointed one director (and there is also an alternate director).
- (b) [ ]
- (c) [ ]
- 4.18 Sealord also holds a 50% interest in NZLL Quota Co Limited, with the other 50% shareholding held by Talley's. NZLL Quota Co Limited company owns king crab and ling quota which generates a total amount of 1,397 gross weight tonnage (**GWT**) of seafood based on current TACCs. It does not operate any vessels. Most of the ACE from its finfish quota is used by Sealord and Talley's with a small amount of crab ACE sold to others.
- 4.19 A structure diagram showing the ownership of Sealord (including its interest in Westfleet) and Pupuri Taonga Limited (**PTL**), all companies in which Sealord has an interest, and the arrangements for the holding of quota by PTL, is set out in Appendix 2.

#### *Independent Fisheries*

- 4.20 IFL is 100% owned by IFHL. The shares in IFHL are 60% owned by Mark Keith Allison (a director of IFL and IFHL) in his personal capacity and 40% owned by Hamish Cameron Taylor, Kevin Mark McDonnell and Mark Keith Allison (who are all New Zealand individuals) as trustees of the C H Shadbolt Family Trust No 2. Mark Keith Allison in his personal capacity owns 15,000 cumulative preference shares and the trustees of the C H Shadbolt Family Trust No. 2 own 10,000 ordinary shares. [ ]
- 4.21 SIL is a related entity to IFL and owns a cold and dry store at Woolston, Christchurch, that is used by IFL. The store, associated plant and equipment, and approvals and asset records will be acquired by Sealord as part of the overall acquisitions, but clearance for that acquisition is not sought as part of this application. SIL also holds other assets, but those assets are not being acquired by Sealord.
- 4.22 SIL is 83.33% owned by the same individual trustees referred to above of C H Shadbolt Family Trust No 2. The remaining 16.67% interest is held by IFL. [ ]

#### *Common ownership*

- 4.23 There is no common ownership between Sealord and the Vendor.

## **5 Overview of the Parties**

### *Sealord*

- 5.1 Sealord was established and incorporated on 24 October 1961 in Nelson, New Zealand. Previously known as Wonderfoods Limited, and then as Sealord Products Limited, Sealord was renamed Sealord Group Limited on 19 September 1996. The company's head office continues to be in Nelson, New Zealand.



- 5.2 The Sealord Group is one of the largest seafood businesses in the Southern Hemisphere. The Group employs over 1,000 people in New Zealand and 240 people overseas.
- 5.3 Sealord holds quota amounting to around 111,260 metric tonnes (**MT**) of quota for the 2022 fishing year (there are small changes to this amount occurring from time to time as a result of small acquisitions outside the Proposed Acquisition).
- 5.4 Sealord owns a number of Australian-based aquaculture companies. One is Petuna Aquaculture Pty Limited (**Petuna**), which farms salmon and ocean trout in Tasmania, and another is Sealord King Reef Pty Limited (**King Reef**), which farms barramundi in Queensland. Sealord also owns a number of Australian fishing companies, including Petuna Sealord Deepwater Fishing Pty Ltd (**PSDF**), which owns Australian statutory fishing rights. PSDF operates in the Australian blue grenadier fishery. Sealord also owns shares in Australian Longline Fishing Pty Limited (**Australian Longline**), which is a longline fishing company that fishes for toothfish.<sup>4</sup>
- 5.5 The Sealord Group operates a fleet of eight deepwater vessels, seven of which operate in New Zealand waters, and one that is owned and operated by a subsidiary, United Fame Investments (Cook Islands) Limited (**UFI**), in the Southern Indian Ocean. The Sealord Group fishing fleet is described on its website. All aspects of Sealord's deepwater fishing operations (other than in relation to the vessel owned and operated by UFI) are managed in Nelson, New Zealand.
- 5.6 Sealord has three land-based processing operations, all of which are located at Vickerman Street, Nelson. The first is a wet fish factory that processes fish species such as hoki, orange roughy, dory, and ling. The second is a coating factory that produces products like coated dory filets, battered and crumbed hoki, and fish fingers. The third is a fishmeal plant that processes fish parts into fishmeal, mainly for export, for use in products like animal feed, cosmetics, and fertiliser.
- 5.7 Sealord sells multiple species of fish through its deepwater fishing operations. The main format of products Sealord produces are frozen fish products. Sealord exports 90% of its products in various frozen formats.
- 5.8 In the year to 30 September 2022, the Sealord Group (i.e. Kura and subsidiaries) owned assets worth NZ\$1,062M, made a revenue of NZ\$461M and had a net profit of NZ\$6.7M.
- 5.9 In New Zealand, Sealord sells a range of products at wholesale, mostly in frozen formats. This includes whole fish, gutted fish, HGT (headed, gutted and tailed) fish, coated fish and other products (with Sealord's New Zealand sales of fish dominated by hoki). **¶** Sealord also sells canned tuna and salmon imported from overseas. **¶** Sealord's New Zealand retail range (some of which is sold in Australia) is set out in detail at [Our Retail Range | Sealord](#). Most of Sealord's export products are at [Our B2B Range | Sealord](#).
- 5.10 Sealord's main New Zealand customers are the Foodstuffs companies, Woolworths New Zealand Limited (**Woolworths**), Bidfood Limited (**Bidfood**), Service Foods Limited (**Service Foods**) and Food Chain Limited (**Food Chain**). **¶** More information on these customers is set out below.
- 5.11 Sealord also sells fishmeal to overseas customers. A small amount of fishmeal is occasionally sold in New Zealand each year for use in fertiliser.
- 5.12 Fishing quota is held for use by Sealord by PTL as trustee under a trust (the **Quota Trust**) established in 2001 to hold the quota. Sealord and PTL entered into **¶**.
- 5.13 Sealord belongs to the following New Zealand-based trade organisations: Seafood NZ (including the Deepwater Council), New Zealand International Business Forum, the Japan New Zealand Business Forum, Business NZ, EMA, NZ Food and Grocery Council, NZ

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<sup>4</sup> Neither Petuna, King Reef, PSDF nor Australian Longline operate in New Zealand.

Marketing Association, The New Zealand Nutrition Foundation and The New Zealand Pet Food Association.

#### *Independent Fisheries*

- 5.14 IFL is the fourth largest deepwater fishing company operating in New Zealand.
- 5.15 IFL operates two owned and one chartered vessel and fishes under the QMS, catching a range of species and exporting internationally to its major markets comprising China, Japan, South Africa, and Eastern Europe. IFL has circa 754.2 million quota shares and circa 46,000 MT of quota.
- 5.16 The main species fished by IFL are hoki, southern blue whiting, and squid.
- 5.17 IFL uses a cold and dry storage facility in Woolston, Christchurch, that is owned by SIL, and that is to be acquired by Sealord. IFL also uses toll processing plants based in Shandong Province, China. Fish is processed on vessel, then shipped frozen to the Woolston Cold storage before being shipped to China for further processing. [REDACTED]
- 5.18 IFL's full range of products can be found at: [www.indfish.co.nz](http://www.indfish.co.nz).
- 5.19 IFL catches all its fish in New Zealand waters. Almost all fish caught by IFL, once processed, is sold overseas (around [REDACTED] of IFL's catch). [REDACTED] On domestic sales, IFL advises that:
- 5.19.1 A small amount of IFL frozen fish is sold into the domestic market for food related purposes. For FY2022, this amounted [REDACTED].
- 5.19.2 A small amount of IFL frozen fish that is processed [REDACTED] sold as value-added product to United Fisheries Limited, which then sells to the New Zealand market to wholesale or supermarket butchery and delis. [REDACTED]
- 5.19.3 A small of frozen fish is sold to [REDACTED] for use in [REDACTED] pet food products. [REDACTED]
- 5.20 IFL has over 500 staff and vessel crew. IFL generates revenue of circa [REDACTED] per annum and had a FY2021 EBITDA<sup>5</sup> of [REDACTED].
- 5.21 IFHL is the holding company for IFL and also holds the relevant fishing quota, from which ACE is granted to IFL. IFHL also holds a small amount of quota and ACE for long-finned and short-finned eels. Neither IFHL nor IFL have participated in the eel business for at least 5 years.
- 5.22 IFL belongs to Seafood NZ (including the Deepwater Council).

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<sup>5</sup> Earnings Before Interest, Taxes, Depreciation and Amortization

## Part 3: Transaction Details

### 6 Proposed Acquisition

6.1 The Proposed Acquisition involves Sealord acquiring:

6.1.1 From IFHL, quota, [REDACTED] Agreement for Sale and Purchase of Quota and Shares in IFL (the **Quota and Shares Agreement**) in confidential Appendix 7.

6.1.2 From IFL, the unused balance of the ACE generated from the [REDACTED] the Proposed Transaction occurs (together, the **IFL ACE**).

6.1.3 [REDACTED]

6.1.4 From IFHL, all of the shares on issue in IFL (the **Shares**).

6.1.5 From IFHL, IFHL's interest in the Lyttelton Premises Lease.

6.1.6 From SIL, the land and buildings comprising the Cold Store, and the approvals, plant and equipment relating to the Cold Store, as identified in the Agreement for Sale and Purchase of Land and Specified Assets set out in confidential Appendix 7 (together the **Cold Store Assets**).

6.1.7 Business records relating to the above.

6.2 Settlement of the transactions above, [REDACTED], will occur on satisfaction of the conditions in clause 3.1 of the Quota and Shares Agreement, including the Commerce Act Condition (as defined in the Quota and Shares Agreement). The parties are aiming for a settlement date of 30 November 2023.

6.3 [REDACTED]

6.4 [REDACTED]

6.5 This application seeks a clearance for the Proposed Acquisition.<sup>6</sup>

6.6 As noted, the Proposed Acquisition is conditional on Sealord obtaining clearance from the Commission and other conditions.

### 7 Commercial rationale for the Proposed Acquisition

7.1 The commercial rationale for the Proposed Acquisition is as follows:

7.1.1 The Independent Fisheries Business, as the fourth largest quota holder in New Zealand, presents Sealord (with PTL) with an opportunity to increase its deepwater fishing capacity, through the acquisition of quota, ACE, vessels and related assets (through the purchase of the Shares and the Cold Store Assets), enabling it to catch and export a greater amount of fish to overseas markets.

7.1.2 The Independent Fisheries Business has a good strategic fit with Sealord. IFL's focus on deepwater fishing aligns with Sealord's own focus on deepwater fishing, and its quota holdings and fishing vessels will add capacity to Sealord's catch plan. Maximising Sealord's deepwater fishing business has been identified by Sealord as a strategic priority. [REDACTED]

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<sup>6</sup> Sealord does not consider that a clearance is required for the acquisition of quota by PTL from Sealord as PTL and Sealord are not actual or potential competitors in any relevant market. [REDACTED]

7.2 Post-acquisition, Sealord intends to operate the Independent Fisheries Business largely as it is, through IFL, which will become a 100% subsidiary of Sealord. Product will be processed and packed on vessels, stored at the Cold Store and exported for processing in China as at present before being sold to overseas customers in current formats [redacted] [redacted] there will likely be no change to the processing arrangements in China.

7.3 The IFL products will likely be sold in same format as at present, to both existing IFL customers and existing Sealord customers (and new customers).

## **8 Control of target company/assets**

8.1 As noted in paragraph 4.20, IFL is 100% owned by IFHL. IFHL, which holds the Quota and the Retained Quota, is 60% owned by Mark Keith Allison in his personal capacity and 40% owned by Hamish Cameron Taylor, Kevin Mark McDonnell and Mark Keith Allison as trustees of the C H Shadbolt Family Trust No 2. Mark Keith Allison in his personal capacity owns 15,000 cumulative preference shares and the trustees of the C H Shadbolt Family Trust No. 2 own 10,000 ordinary shares. [redacted]

## **9 Relevant ancillary agreements**

9.1 The Parties have signed the following agreements to support the Proposed Acquisition:

9.1.1 [redacted]

9.1.2 [redacted]

9.2 [redacted]

9.3 Copies of these agreements are included in confidential Appendix 7.

## Part 4: The Industry

### 10 Description of the industry

*What is the commercial fishing industry?<sup>7</sup>*

- 10.1 **General:** The commercial fishing industry comprises of fishing, aquaculture and processing activities.
- 10.2 **Deepwater operations:** The deepwater sector of the industry involves large vessels that primarily fish between 12 nautical miles (NM) and 200 NM offshore, and sometimes beyond that distance. The fish caught by these vessels are usually fished at depths between 200m and 1,600m. Deepwater vessels often have processing operations onboard in order to process and freeze fish quickly in order to keep it in the best possible condition.
- 10.3 **Inshore operations:** The inshore fishing sector involves smaller vessels that fish between 0 NM – 12 NM offshore, as well as within New Zealand waterways. Inshore vessels typically do not have processing operations onboard and so rely on processing facilities on land.

*Size of the fishing industry<sup>8</sup>*

- 10.4 **Export earnings:** Sources vary but there is a general consensus that the commercial fishing industry generates around \$1.5b - \$2b in export earnings. A report commissioned by Fisheries Inshore New Zealand in 2022 (the **BERL Report**) stated that in 2020, fish exports were New Zealand's seventh largest export commodity by value and accounted for 3% of total exports in New Zealand. Fisheries New Zealand (a branch of the Ministry for Primary Industries) has also reported that, in 2020, deepwater fisheries contributed approximately \$700M in export earnings to New Zealand's economy.
- 10.5 **Employment:** Again, sources vary but tend to report that the commercial fishing industry employs between 13,000 – 16,500 employees across fishing, processing and aquaculture operations. The BERL Report stated that around 8,500 of these employees were involved in deepwater fishing and processing operations.

*Who operates in the fishing industry and what does each entity do?<sup>9</sup>*

- 10.6 **Companies in the sector:** Cumulatively, as of 2017, there were around 2,200 individuals and companies that owned quota, around 1,500 registered fishing vessels, and 239 licensed fish receivers and processors working in New Zealand. The three largest companies in the commercial fishing industry in New Zealand, measured by annual turnover, are Sanford, Sealord and Talley's. A 2017 MBIE report stated that the three largest companies together account for around 45% of employment in the commercial fishing industry, and some of the other fishing companies also employ large numbers of staff.
- 10.7 A number of companies beyond the largest three have large-scale fishing and processing operations, onboard their vessels and on land.

<sup>7</sup> Sources used: [Deepwater fishing industry worth \\$2.7b – BERL 2022 report \(deepwatergroup.org\)](#); [Seafood NZ - Seafood NZ](#); [Annual Operational Plan for Deepwater Fisheries 2021/22 \(mpi.govt.nz\)](#)

<sup>8</sup> Sources used: [The Investor's Guide to the New Zealand Seafood Industry 2017 \(mbie.govt.nz\)](#); [The economic contribution of commercial fishing \(deepwatergroup.org\)](#)

<sup>9</sup> Sources used: [The Investor's Guide to the New Zealand Seafood Industry 2017 \(mbie.govt.nz\)](#); [Taking The Best NZ Seafood To The World | Talleys \(English\)](#); [Welcome to Sanford, The Home of Sustainable Seafood](#); [Commercial operators \(fish.govt.nz\)](#); [Seafood Processing in New Zealand - Industry Data, Trends, Stats | IBISWorld](#)

- 10.8 **Māori:** Māori are an important stakeholder in the fishing industry, including as a result of fishing rights contained in the Te Tiriti o Waitangi.
- 10.9 **Organisations:** Also involved in the commercial fishing industry are various organisations who are responsible for representing specific industry sector interests. These organisations include Seafood New Zealand (and its Deepwater and Inshore Councils), Aquaculture New Zealand, New Zealand Rock Lobster Industry Council, and Paua Industry Council. For more information, see: <https://www.seafood.co.nz/about-us/seafood-nz>.

#### *Quota and ACE*

- 10.10 **Quota Management System:** Fish species that are important to New Zealand's commercial fishers are managed under the QMS. If a species is managed under the QMS, then the species is divided into individual fish stocks. There are 98 species of fish in the QMS, and these species are divided in 642 separate fish stocks.
- 10.11 **Quota generally:** Quota means a share in a fish stock. Each fish stock has 100 million quota shares issued across individuals and companies. There are limits on how much quota an individual or company can own, with some exceptions (one of which applies to the Proposed Acquisition).<sup>10</sup> Quota for most commercially fished species has been allocated, and new quota for additional species is released only occasionally.
- 10.12 Appendix 9 sets out information on changes in quota holdings for the larger holders (plus Moana) over a period of time from 2013 to 2023. The most significant change was a reduction in SQU1J in 2016 when the TACC was reduced from 50,000 tonnes to 5,000 tonnes owing to changes to foreign charter vessels fishing in New Zealand. The other variable has been the hoki fishery where the TACC over 15 years has risen 60,000 tonnes only to end up back at the 100,000-tonne level it started at. United Fisheries previously had been involved in the deepwater fishery operating foreign charter vessels. It exited this at the time of the foreign charter vessel legislation changes referenced above. After this exit United Fisheries entered a quota swap with Independent Fisheries exchanging deepwater stocks for inshore. In 2018, Sanford sold approximately 15,000 tonnes of its east coast North Island pelagic stocks to Pelco Fishing.
- 10.13 **TAC and TACC:** There is a limit as to how much of a species managed under the QMS can be caught annually, known as the total allowable catch (**TAC**). Once customary and recreational fishing interests are accounted for, a total allowable commercial catch (**TACC**) forms the remainder of the TAC. It is expected that the TACC for two orange roughy stocks will reduce in FY24 and FY25, respectively, because of potential decreases in orange roughy fisheries. The TACC for hoki will likely increase in the future as positive catch rates and survey results are now occurring. This follows drops to the hoki TACC in earlier years.
- 10.14 **Deemed value:** Where a fishing company catches more fish than permitted under the ACE it holds or is able to acquire for a fishing year, deemed values apply and these are paid directly to the Government.
- 10.15 **Interaction between quota, ACE, and TACC:** At the start of each fishing year each quota holder receives an ACE. This is the right of a quota holder to catch a certain amount of fish stock during a fishing year, proportionate to the amount of quota they hold. The TACC determines the amount of that fish stock that can be fished over the fishing year, and then ACE is divided between companies that hold quota in that fish stock, depending on how much they own. In other words, quota owned represents the shares (proportion) in that fish stock

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<sup>10</sup> Section 59 of the Fisheries Act 1996 restricts the amount of quota shares any person may own. However, section 59(8A)(c) of the Fisheries Act provides a statutory exemption, one of which applies to the Proposed Acquisition. That is, the statutory exemption applies to quota purchased by AFL and its "subcompanies" after the Maori Fisheries Act 2004 came into effect and Sealord falls within the definition of a "subcompany" of AFL under the Maori Fisheries Act.

the company owns, and then ACE is the actual amount of that fish in kilograms that the company can catch in a fishing year based on their quota and based on the TACC.

- 10.16 In addition to quota held by fishing companies operating vessels, there is a significant proportion held by non-fishing parties, including iwi and private companies and individuals. The iwi holdings largely result from the Treaty of Waitangi fisheries settlement but some iwi have also acquired quota on the market. The ACE from this quota is made available to fishing companies.
- 10.17 In Sealord's case, it has made arrangements with a group of iwi to acquire ACE. This is known as Nga Tapuwae o Maui (**NTOM**). The NTOM arrangements are summarised in a Terms Sheet (see confidential Appendix 10). [redacted]. The NTOM arrangements are discussed further below.
- 10.18 Trading of ACE occurs regularly in the industry. For example:
- 10.18.1 Sealord does not own all the ACE required for the fish stocks that form part of the Sealord vessels' annual catch plans, for example, [redacted]. For key species, annual ACE trades between third party companies occur. Sometimes ACE is paid for in cash and at other times it is swapped for ACE owned by the counterparty. An example of this is [redacted].
- 10.18.2 ACE trading occurs in a closed market between willing buyers and sellers, each of whom is a client with FishServe (a seafood industry owned company that provides statutory registry-based services to support the operation of the QMS).<sup>11</sup> All ACE trades are registered with ACE holdings visible through an online application managed by FishServe allowing a prospective buyer to contact the ACE holder to arrange a trade. Trading generally follows a pattern of high trades at the commencement of the October fishing year where companies and individuals trade ACE they know they will require for their fishing activities. From October, ACE trading moves into a monthly cycle where companies will trade ACE to balance their reported catch to avoid incurring a deemed value penalty for catch over ACE owned. A number of ACE brokers operate in the fishing industry who will also facilitate trades for a commission. The largest volumes of trades occur for ACE held in deepwater fish stocks where TACCs are between 10,000 GWT to 110,000 GWT.
- 10.18.3 ACE trading occurs all year round with the surplus volumes of ACE for fish stocks sometimes dictated by the abundance of stocks targeted and fleet capacity. There is also often a stronger trading session towards the end of the fishing year, as companies look to obtain ACE to cover all their fish caught through the fishing year, in case this did not turn out as originally planned. This is preferable to paying deemed value.
- 10.18.4 All quota holders are motivated to sell as much ACE from the quota they cannot catch to ensure they get some financial return as all quota attracts levies, which are substantial.
- 10.18.5 Appendix 11 sets out an analysis of ACE trading and quota utilisation for the major quota holders from 2018 to 2020.
- 10.19 Deepwater fishing companies generally hold enough quota to cover most of their anticipated catch (both target species and by-catch), with ACE trading as described above occurring in small volumes relative to overall quota holdings, such that the availability of ACE does not place a material additional constraint on operators (rather it is the total TACC of some species that creates constraints on what can be caught). Fishing companies effectively seek to design and manage their fleet to catch the greatest percentage of the quota they own and the volumes of ACE that they expect to be traded. Large TACC changes, whilst relatively rare, are also considered when deepwater fishers plan their future fleet configuration. As the TACC

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<sup>11</sup> Source used: [FishServe - About Us](#)

and quota holdings have stayed fairly stable, companies' fleet and ACE arrangements are fairly stable.

- 10.20 Quota is reasonably tightly held. Minimal buying and selling of quota occurs and even then it is on an infrequent basis.

#### *Species of fish*<sup>12</sup>

- 10.21 **Species in QMS:** There are 98 species of fish in the New Zealand QMS and these species are divided into 642 separate fish stocks.
- 10.22 **Deepwater species:** Deepwater fish species are those generally fished between 12 NM and 200 NM offshore, and found at depths between 200m and 1,600m. The species can be divided into QMS and Non-QMS species, with the QMS species being the species that are fished with catches of non-QMA species being relatively small. The main QMS deepwater species are hake, hoki, jack mackerel, ling, orange roughy, oreo, scampi, southern blue whiting, squid, alfoncino, barracouta, black cardinal fish, deepwater crab, English mackerel, frostfish, gemfish, pale ghost shark, dark ghost shark, lockdown dory, Patagonian toothfish, prawn killer, redbait, ribald, rubyfish, sea perch, silver warehou, spiny dogfish, and white warehou.
- 10.23 In the year 2020, Fisheries New Zealand reported that five deepwater species accounted for 45% of total seafood export earnings. These five species were hoki, squid, ling, jack mackerel and orange roughy.
- 10.24 **Inshore species:** Inshore fish species are those generally fished between 0 NM – 12NM offshore, as well as those fished from waterways within New Zealand. The tier system does not apply to inshore fish stocks. Examples of species fished from inshore fisheries include ocean finfish such as snapper, blue cod and flatfish, freshwater finfish such as longfin and shortfin eels, shellfish such as cockles, pip, pāua and rock lobster, and other aquatic life like seaweed varieties.
- 10.25 **Fishing techniques:** The most common fishing methods used in New Zealand fishing industry are trawling and longlining. Trawling is the most common method, with this method used in both inshore and deepwater fisheries, and catching the majority of fish.
- 10.26 Most deepwater fishing vessels operating in the New Zealand fishery, which are trawlers, can catch most species. An exception is that not all vessels have the speed/engine power to catch pelagic species such as jack mackerel. Some finfish are sometimes caught by different methods, for example ling is a target species for longline vessels.
- 10.27 Deepwater vessels target stocks within the fishery complexes outlined below that splits the stocks into deepwater trawl and middle depth trawl. Some of those stocks are fished inside the 12NM territorial sea area due to the deep canyons that occur near the coast, with Cook Strait being the most obvious example.

#### 10.27.1 Deepwater trawl

- North Island Deepwater (ORH 1,2A, 2B & 3A, BYX 2, CDL 2)
- Chatham Rise Deepwater (ORH 3B, OEO 3 & 4, BYX 3)
- Sub-Antarctic Deepwater (ORH 3B, OEO 1 & 6)
- West Coast Deepwater (ORH 7A)

#### 10.27.2 Middle-depth trawl

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<sup>12</sup> Sources used: [FishServe - Quota Species List](#); [Fish Quota Management System | NZ Government \(mpi.govt.nz\)](#); [Annual Operational Plan for Deepwater Fisheries 2021/22 \(mpi.govt.nz\)](#); [Deepwater fisheries | NZ Government \(mpi.govt.nz\)](#); [National Fisheries Plan for Deepwater and Middle-depth Fisheries - Part 1A \(mpi.govt.nz\)](#)



- West Coast North Island (JMA 7, BAR 7, EMA 7)
- West Coast South Island (HOK 1, HAK 7, LIN 7, SWA 1)
- Chatham Rise Middle depths (FMA 3 & 4) (HOK 1, HAK 1 & 4, LIN 3 & 4, SWA 3 & 4, JMA 3, BAR 1 & 4)
- Sub-Antarctic Middle depths (ex. SQU/SBW) (FMA 5 & 6) (HOK 1, HAK 1, IN 5 & 6, SWA 4, WWA 5B, JMA 3, BAR 5)
- Southern blue whiting (all)
- Squid (SQU 1T, SQU 6T)
- Cook Strait HOK
- WCSI HOK (Inside the line)

10.28 **Vessels:** Inshore is predominantly fishing that takes place inside the 12 mile line from land and deepwater outside the 12 mile line all the way to the edge of the exclusive economic zone. After that the primary difference between inshore and deepwater vessels is the size of the vessels (with inshore vessels being considerably smaller than deepwater vessels). Under New Zealand fishing regulations, the size of the vessel also constrains where the vessel can fish. Within deepwater, there are also constraints with vessels that are over 46 metres in length not being permitted to fish inside the 12 mile line and, additionally, being prohibited from fishing within 25 miles of the coast of both islands. Most inshore vessels operate with only a handful of crew, while deepwater vessels typically have between 25 and 84 crew. Inshore vessels typically land their catch fresh and unprocessed. On the other hand, deepwater vessels have factories (of varying degrees of complexity) for processing and freezing fish. It is necessary for deepwater vessels to freeze their catch given that their fishing trips can last several weeks.

10.29 It would be rare to convert a vessel from one purpose to another, because they are designed to catch certain types of species. For example, generally speaking it would not be practical to convert an inshore vessel to become a deepwater vessel because it would not have the size to install a factory and freezing plant. On the other hand, fisheries regulations would restrict most deepwater vessels being operated in the inshore fishery.

### 10.30 [ ]

10.31 The biggest driver of decisions to retire vessels from fishing is the economic returns that are possible to be achieved. With recent cost increases rising at significantly faster rates than pricing, it is becoming harder to make an economic return from low catch, high fuel platforms. For instance, low catch rates on orange roughy combined with potential decreases in the TACC of two orange roughy fisheries has meant some vessels will be retired from fishing. Historically their cost base would have allowed them to continue with lower catch plans (less volume) until the TACC increases again.

#### *Processing of fish<sup>13</sup>*

10.32 **How fish are processed:** There are generally two types of seafood processing, being primary and secondary processing. Primary processing in terms of fish includes heading, gutting and filleting fish, and tubing squid. Secondary processing includes acidification, salting, brining, smoking, thermal processing, refrigeration and storage, extraction, drying, blending of powders from fish, and adding non-animal product ingredients to fish such as breadcrumbs, batters, and sauces.<sup>14</sup>

10.33 **When and where fish are processed:** Fish are processed on vessels and on land. Generally, smaller inshore vessels do not have processing facilities on board and only chill fish on board before returning to processing facilities on land after 1-2 days, whereas

<sup>13</sup> Sources used: [National Fisheries Plan for Deepwater and Middle-depth Fisheries - Part 1A \(mpi.govt.nz\); 388.PDF \(comcom.govt.nz\)](https://www.mpi.govt.nz/388.PDF)

<sup>14</sup> Sources used: [Land-based seafood processing and food safety | NZ Government \(mpi.govt.nz\)](https://www.mpi.govt.nz/land-based-seafood-processing-and-food-safety)

deepwater vessels have full-scale processing systems so they can process and freeze fish as soon as they catch it. On land processing facilities are bigger than those on vessels.<sup>15</sup>

- 10.34 **Risk Management Programme:** Most vessels and land-based factories that process fish will need a food safety risk management programme (**RMP**) in place. Generally, the activities that will need an RMP in place are those that involve filleting fish onboard vessels, primary processing in land-based factories, any processing premises that handle seafood products that will be exported, and any seafood operations for animal consumption. Activities that do not need an RMP include inshore vessels that do not fillet fish on board, limited processing fishing vessels (**LPFVs**) that operate under a different scheme, fish farmers, fish retailers, fish depots, whitebait harvesters, and fish-related tourism activities.<sup>16</sup>

## 11 Main competitors

- 11.1 The main competitors to the parties as relevant to this application are:

### *Fishing companies*

- 11.1.1 **Sanford Limited.** Sanford is New Zealand's largest seafood company. It has a diversified fishing and aquaculture business, which includes a large deepwater fishery business. It operates 15 deepwater and inshore vessels. It is a publicly listed company on the NZX. It currently owns circa 20.8% of finfish quota in New Zealand. Shareholders of Sanford that are also involved in the fishing industry include Ngāi Tahu Investments Limited, which owns 19.97% of Sanford shares, and Maruha Nichiro Corporation (parent company of Maruha (N.Z.) Corporation Limited (see further below)), which owns 4.84% of Sanford shares. More information on Sanford is set out in the Moana clearance application and also see [Welcome to Sanford, The Home of Sustainable Seafood](#).

Contact details: 22 Jellicoe Street, Freemans Bay, Auckland 1010, New Zealand.

- 11.1.2 **Talley's Limited.** Talley's is New Zealand's third largest fishing company. It is a privately-owned company. It has a deepwater fleet based in Nelson. It uses contract fishers to catch its inshore ACE. It has a diversified fishing business, which includes a large deepwater fishery business. It currently owns circa 13.9% of finfish quota in New Zealand and Sealord understands that it has a commercial relationship with Ngāi Tahu Seafood Limited from whom Talley's purchases approximately 7,000 MT of deepwater and inshore ACE. The Talley's group has significant holdings in other industries including Affco, Open Country Dairy and vegetables. See [Bringing You The Best Of New Zealand | Talleys \(English\)](#).

Contact details: Talley's Group Limited, Port Motueka, Motueka, New Zealand.

- 11.1.3 **Vela Fishing Limited** and the Vela Fishing Trust (together **Vela Fishing**). Vela Fishing holds around 4.5% of finfish quota. It also acquires additional quota from time to time. Vela Fishing does not fish itself but makes ACE available from that quota for purchase by fishing companies. Sealord understands that Vela has a commercial arrangement with Sanford to whom it sells approximately 13,000 MT of ACE annually. Sealord understands that Vela Fishing takes some of the fish caught under that ACE itself and sells that fish, as far as Sealord is aware, for export. Information on Vela Fishing is available at: [Vela Fishing | Wholesale New Zealand fish & green mussels | Vela Fishing](#).

Contact details: Vela Fishing Limited, 12 Sir Tristram Avenue, Te Rapa, Hamilton, New Zealand

<sup>15</sup> Sources used: [National Fisheries Plan for Deepwater and Middle-depth Fisheries - Part 1A \(mpi.govt.nz\)](#)

<sup>16</sup> Sources used: [National Fisheries Plan for Deepwater and Middle-depth Fisheries - Part 1A \(mpi.govt.nz\)](#); [Land-based seafood processing and food safety | NZ Government \(mpi.govt.nz\)](#)

- 11.1.4 **Moana.** As noted above, AFL operates a fishing business under the Moana New Zealand trading name. It does not have any vessels of its own, but holds quota (around 1.4% of finfish quota, mainly for inshore fishing areas). It contracts independent fishers to catch fish and supply it to Moana. Moana sells its fish and processed fish products fresh in New Zealand markets. Despite being a 50% joint shareholder in Sealord, both Sealord and Moana operate independently in the relevant markets and do not make any decisions about how they operate in those markets jointly.

Contact details: 1-3 Bell Avenue, Mt Wellington, Auckland 1080, New Zealand.

- 11.1.5 **Westfleet.** As noted above, Westfleet operates a fishing business out of Greymouth and Nelson. It holds around 0.8% of finfish quota, with a concentration on inshore West Coast areas. It fishes mainly in that area. Westfleet sells fresh and frozen fish and processed fish products in New Zealand and for export. Despite being held 50% by Sealord, it operates independently in the relevant markets from Sealord and does not make any decisions about how they operate in those markets jointly.

Contact details: 84 Gresson Street, Greymouth 7805, New Zealand.

- 11.1.6 **Pelco NZ Limited.** Pelco NZ Limited (**Pelco**) is a pelagic fish focused family-owned business based in Tauranga. The company owns circa 3.1% of finfish quota in New Zealand, predominantly in the pelagic space. See [The Website of Pelco NZ Limited : \(pelco-nz.com\)https://www.pelco-nz.com/](https://www.pelco-nz.com/).

Contact details: 2 Portside Drive, PO Box 4472, Mount Maunganui, Tauranga 3116, New Zealand.

- 11.1.7 **United Fisheries Limited.** United Fisheries Limited (**United Fisheries**) is a family-owned private company based in Lyttelton. United Fisheries owns circa 2.6% of finfish quota in New Zealand. Most of their quota holdings are for the inshore areas. The company sells processed and whole fish in New Zealand and for export, and also sells value-added fish products in New Zealand, which it purchases from IFL as noted above.

- 11.1.8 See [United Fisheries Ltd – Home of New Zealand's Finest Seafood. | United Fisheries](#).

Contact details: 50 – 58 Parkhouse Road, Wigram, Christchurch 8042, New Zealand.

- 11.1.9 **Ngāi Tahu Seafood Limited.** Ngāi Tahu Seafood Limited holds about 2.5% of finfish quota in New Zealand. It manages fisheries assets on behalf of Ngāi Tahu. It harvests seafood under contract, with approximately 100 independent and experienced fishers and fishing companies. Sealord understands that Ngāi Tahu Seafood sells fish and fish products in New Zealand and for export. Ngāi Tahu Seafood is headquartered in Christchurch and owns facilities in Bluff, Christchurch, Kaikōura and Picton. It generated around \$320M in revenue for the year ended 30 June 2022. See [Ngāi Tahu Seafoods \(ngaitahuseafood.com\)](https://ngaitahuseafood.com) and [Ngāi Tahu Seafood » Ngāi Tahu Holdings Limited \(ngaitahuholdings.co.nz\)](https://ngaitahuholdings.co.nz).

Contact details: 6 Bolt Place, Christchurch, New Zealand

- 11.1.10 **Maruha (N.Z.) Corporation Limited.** Maruha (N.Z.) Corporation Limited (**Maruha NZ**) is a 100% New Zealand subsidiary of the Japanese company Maruha Nichiro Corporation. It owns circa 1.6% of finfish quota in New Zealand. Sealord understands that it sells fish for export. It operates two vessels (one of which is owned by Maruha NZ and one of which is chartered).

Contact details: Level 13, Swanson House, 12 – 26 Swanson Street, Auckland 1010, New Zealand.

11.1.11 **Solander Limited.** Solander is owned by the Hufflett family, which has ownership of circa 1.6% of deepwater stocks in New Zealand. Solander has a jointly-owned vessel with Maruha NZ and recently announced it had commenced building a new \$80M vessel ([Notice Regarding Construction of a New Vessel at an Affiliate Company \(maruha-nichiro.com\)](#)). See [Welcome to Solander Seafood & Fishing, New Zealand](#). Sealord understand that it sells fish for export.

Contact details: 4 Cross Quay, Port Nelson, Nelson 7011, New Zealand.

#### *Processed and coated fish products*

11.1.12 **Simplot New Zealand Limited.** Simplot New Zealand Limited (**Simplot**) imports value-added fish products into New Zealand from Australia and has become a large supplier of value-added fish products at wholesale, mainly to supermarkets.

Contact details: Ground Floor, Building 2, 666 Great South Road, Penrose, Auckland 1642, New Zealand.

11.1.13 **Foodstuffs companies and Gilmours.** Sealord understands that Foodstuffs North Island Limited (**Foodstuffs North**) and Foodstuffs South Island Limited (**Foodstuffs South**) import processed fish products through Gilmours (see paragraph 12.1.2(a)(3) below). Gilmours also sells at wholesale. They may also import value-added products.

Contact details:

Foodstuffs North: Foodstuffs Landing Drive, 35 Landing Drive, Mangere, Auckland 2022.

Foodstuffs South: 167 Main North Road, Redwood, Christchurch 8052.

Gilmours: See [Contact Us | Gilmours](#) for contact details for Gilmours.

11.1.14 **Bidfood Limited.** Sealord understands that Bidfood imports product under the Seafrost brand for the food service sector.

Contact details: Level 3, Building 8, 660 Great South Road, Ellerslie, Auckland 1051, New Zealand.

11.1.15 **Markwell New Zealand Limited.** Markwell New Zealand Limited trades as Markwell Foods and is an Australian owned business. They own the Shore Mariner brand and import fish products from Asia, including prawns. See [Frozen Food | Frozen Food Wholesaler | Markwell Foods New Zealand](#).

Contact details: Level 3, Building D, Ascot Business Park, 95 Ascot Avenue, Remuera, Auckland 1051.

11.1.16 **United Fisheries.** United Fisheries (described above) sells coated fish products in New Zealand.

11.1.17 **Seafood Marketing.** Seafood Marketing appears in the supermarket sales data for value-added fish products (see paragraph 16.65 below). Sealord does not have any other information on Seafood Marketing.

## 12 Customers

12.1 The principal customers for the parties are/can generally be classified into the following groups:

12.1.1 **Offshore (export) customers:** These are purchasers of processed and value-added products, and include fish brokers, wholesale distributors, retail chains and others. As the parties sell their products to those customers offshore, Sealord has not provided contact information for those customers, but can do so on request from the Commission.

12.1.2 **New Zealand customers:** These are purchasers of processed and value-added products, and can be described in two categories:

(a) **Food service sector:** The principal customers in the food service business are wholesalers who on-supply to the food service sector:

(1) **Bidfood Limited.** Contact details above at paragraph 11.1.14.

(2) **Service Foods Limited.** Service Foods buys product from Sealord and other fishing companies wholesale.

Contact details: 221 Ihumatao Road, Mangere, Auckland 2022.

(3) **Gilmours.** Gilmours is a number of companies throughout New Zealand trading under the Gilmours brand. Gilmours Wholesale Limited is owned by Foodstuffs North, with each Gilmours store owned locally (but Sealord understands they are associated with the Foodstuffs co-operative). Gilmours buys products from Sealord and other fishing companies at wholesale, as well as importing itself as discussed above. Contact details above at paragraph 11.1.13.

(4) **Toops.** Sealord understands that the Toops stores are associated with the Foodstuffs cooperative and operate in the lower North Island. Sealord suggests using the contact details for Foodstuffs North to contact Toops.

(5) **Trents Wholesale Limited.** Trents Wholesale Limited (**Trents**) is a South Island wholesaler of food products. It is owned by Foodstuffs South. See [Wholesale Foodservice Supplier » Trents Wholesale](#) for more information and contact details.

(6) **Food Chain.** Food Chain's work includes distributing food to the hospitality industry. See [Home Foodchain](#) for more information.

Contact details: 40 Honan Place, Avondale, Auckland 1026.

(7) **Foodfirst Limited.** Foodfirst is a cooperative established in 1987 in Whangarei but that now operates across New Zealand. See [Homepage – Foodfirst](#) for more information.

Contact details: Level 5, 5 Short Street, Newmarket  
Auckland 1023.

All the above wholesalers buy product from Sealord and other fishing companies at wholesale.

(b) **Food retail sector:** The principal customers in the food retail business for both parties are supermarket chains, namely:

(1) **Foodstuffs North.** Foodstuffs North supplies Pak'nSave, New World and Four Square stores.

Contact details: Foodstuffs Landing Drive, 35 Landing Drive, Mangere, Auckland 2022.

- (2) **Woolworths.** Woolworths includes Countdown, Fresh Choice and Super Value stores.

Contact details: 80 Favona Road, Mangere, Manukau 2024.

- (3) **Foodstuffs South.** Foodstuffs South supplies Pak'nSave, New World and Four Square stores.

Contact details: 167 Main North Road, Redwood, Christchurch 8052.

Some of the wholesale suppliers to the food services sector also supply to the retail sector.

## Part 5: Competition Analysis

### 13 Overview of competition issues

- 13.1 Sealord considers that the Proposed Acquisition will not result in a substantial lessening of competition in any market.
- 13.2 Sealord has adopted the Commission's approach in the *Basuto* decision and has considered the effects of the Proposed Acquisition in the following markets:
- 13.2.1 The market for the harvesting of finfish in New Zealand.
- 13.2.2 The market for the processing and wholesale supply of whole processed and unprocessed finfish in New Zealand.
- 13.2.3 The market for the processing and wholesale supply of coated finfish products in New Zealand.
- 13.3 Sealord has also considered the effect of the Proposed Acquisition in a number of different ways that the relevant markets could be defined, taking into account some of the issues raised by the Commission in the *Moana Sol*, but noting that the Commission has subsequently granted the clearance to *Moana*.

#### *The finfish harvesting market*

- 13.4 In the *Basuto* decision, the Commission took a practical approach, defining this market as extending across all finfish including both inshore and deepwater species, and involving the harvesting of finfish by both deep-sea and inshore vessels. At a functional level, the holding of quota and ACE were considered to be key inputs into the harvesting market because it enables the catching of fish in New Zealand.
- 13.5 The Commission also considered all major finfish species to fall within the same product market because it is likely that each species will compete with others at its price level and in the immediately adjacent price level, and this overlapping substitutability between species at adjacent quality/price levels should result in a chain of substitutability stretching from the premium quality to the budget quality species.
- 13.6 Sealord notes that this market also captures a key area of overlap between its business and the Independent Fisheries Business, which it seeks to acquire.
- 13.7 Sealord submits that the Proposed Acquisition will not result in a substantial lessening of competition in the finfish harvesting market. This is because:
- 13.7.1 In relation to ACE, both Sealord and IFL are vertically integrated across the market and undertake fairly balanced ACE buying and selling, to cover their catch needs. Neither company could be seen as a significant net buyer or seller of ACE.
- 13.7.2 Post-transaction, Sealord will most likely continue to operate the Independent Fishing Business as it is, with its catch largely matching its quota holdings. As a result, there will be little difference, if any, between the amount of ACE available for sale to other parties compared to a scenario where IFL continued as is or was bought by another party.
- 13.7.3 There will continue to be other significant competitors, in particular Sanford and Talley's, and many other companies operating in the finfish harvesting market. They will have either their own quota and ACE available or the ability to buy ACE from other parties, which will continue to be available, including from Sealord (which will continue to have a strong incentive to engage in ACE trading in order to balance its catch each season).

- 13.7.4 In the downstream markets, Sealord will continue to face strong competition from both New Zealand fishing companies and overseas companies. As a result, Sealord could not exert any (hypothetical) market power in the upstream markets because it would be unable to recover the costs of doing so in the downstream markets.
- 13.8 In the Moana Sol, the Commission raised the possibility that Moana, post-transaction, could restrict 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.
- 13.9 Sealord does not consider that it post-acquisition could act in the way identified by the Commission in these provisional views. As outlined above, there will still remain sufficient ACE held by parties other than Sealord and available for trading that such a foreclosure strategy would never work. This is especially the case as:
- 13.9.1 Most deepwater fishing companies hold sufficient quota or have other standing arrangements for ACE to cover most of their catch.
- 13.9.2 Only a small volume of fish captured in deepwater fisheries makes it to the downstream New Zealand markets. Sealord faces strong competition from domestically caught fish and fish products, and imports, with the threat of export diversion.
- 13.10 In the Moana Sol, the Commission also expressed the provisional view that Moana could reduce 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. Sealord purchases only a limited amount of contract harvesting services from other parties [1]. IFL does not purchase any contract fishing services. Sealord does not therefore consider that it could act in the way suggested by the Commission's provisional views in the Moana Sol or be successful in any such strategy.
- 13.11 The position above is the same if the Commission were to take a species-by-species approach, define deepwater and in-shore markets separately or if it were to define a market for the provision of ACE, as the Commission indicated it was considering in the Moana Sol (although Sealord considers that it would be incorrect and unnecessary to use such a market definition). The position is also unaffected by whether or not Moana and Westfleet's quota and ACE interests and position in the harvesting market are counted with Sealord's, and regardless of whether or not the NTOM ACE is counted with the ACE provided to Sealord by PTL.

*The finfish processed and unprocessed market*

- 13.12 As in the *Basuto* decision Sealord has defined this market to include whole and processed fresh and frozen fish sold in New Zealand.
- 13.13 In the *Basuto* decision, the Commission found that, for the retail buyer and end consumer, finfish may be distinguished by the degree of processing it has undergone resulting in two end-product markets: 'basic processed' product, where the finfish is marketed as either whole or filleted wet fish, is important for restaurants, fish and chip shops, seafood shops and (to a degree) supermarkets, and 'value-added' product, which has undergone further processing, is marketed predominantly through supermarkets and other retail outlets as convenience food items.
- 13.14 In addition to this, Sealord notes that a number of parties sell both fresh and frozen finfish at the wholesale level in New Zealand, that there is more sale of frozen whole and processed fish products today than there was in 2001 at the time of the *Basuto* decision, and that customers often consider fresh and frozen fish to be alternatives.
- 13.15 The Proposed Acquisition will not result in a substantial lessening of competition in this market because:



- 13.15.1 IFL sells only a very small volume of frozen whole fish in New Zealand, which will not add substantially to Sealord's shares of the market (regardless of how it is defined).
- 13.15.2 There is strong competition from other suppliers of frozen and fresh, and unprocessed and processed fish products, from both New Zealand-sourced fish and imported fish.
- 13.15.3 New Zealand suppliers (especially Sanford and Talley's) are in a position, due to their large volume of export sales, to readily divert sales from export markets into New Zealand and imports could also readily be increased if Sealord were to attempt to increase price (which it cannot do in any case).

*The finfish value-added market*

- 13.16 In the *Basuto* decision, the Commission relied on the same factors for selecting this market as the finfish processed and unprocessed market and Sealord has proposed this market for the same reasons.
- 13.17 This market includes all the value-added products sold by the parties, including the coated fish products sold by IFL in New Zealand and the coated fish products sold by Sealord under the Sealord and Captain's Choice brands.
- 13.18 The Proposed Acquisition will not result in a substantial lessening of competition in this market because:
- 13.18.1 IFL adds only a small amount to Sealord's market share and Sealord's combined market share would remain relatively modest.
- 13.18.2 There is a substantial level of competition from other suppliers, which will continue and imports could readily be increased in response to any attempt by Sealord to increase prices post-acquisition.
- 13.18.3 A number of significant competitors will remain in the market, notably Simplot, Markwell, Bidfood, United Fisheries, Seafood Marketing, Talley's and Pams (Foodstuffs).
- 13.18.4 Sealord's and IFL's products are not close competitors in the retail sector. Sealord sees its closest competitors for value-added products in the food service sector as being Bidfood and Markwell.
- 13.18.5 New entry from overseas is possible, in particular through a retailer/wholesaler sourcing a new brand from overseas.
- 13.18.6 It is also possible that any of the other fishing companies, given their existing New Zealand businesses, could look to import value-added fish and other seafood products, manufactured overseas.
- 13.18.7 The supermarkets exercise considerable countervailing market power.
- 13.18.8 There is competition from other kinds of coated and value-added products will continue to compete with finfish value-added products. These include other seafood products and well as products such as coated chicken breasts, coated chicken portions, coated pork products, and coated plant-based products.
- 13.19 These and other matters are set out further below.

## **14 Previous Commission consideration**

- 14.1 The Commission granted clearance for a relatively similar (in nature) acquisition in 2000 in the *Basuto* decision. The transaction involved the proposed acquisition by New Zealand Seafood

- Investments Ltd (**NZSI**) of a 100% share of Basuto Investments Ltd (**Basuto**). At that time, Basuto controlled 50% of the shares in Sealord.
- 14.2 In the *Basuto decision*, NZSI was 50% owned by Amaltal Corporation Limited (**Amaltal**) and 50% by Sanford. In turn, Amaltal was owned 50% by Talley's. Sealord, Sanford, Amaltal and Talley's were all considered associated companies as a result of the proposed Basuto transaction.
- 14.3 In that decision, the markets considered by the Commission that are relevant to the Proposed Acquisition were:
- 14.3.1 The market for the harvesting and supply of finfish in New Zealand.
- 14.3.2 The market for the processing and wholesale supply of finfish in New Zealand.
- 14.3.3 The market for the processing and wholesale supply of value-added finfish products in New Zealand.
- 14.4 The Basuto harvesting market included both inshore and deepwater species, and inshore and deepwater quota areas.
- 14.5 In that decision, there was significant consolidation in quota and ACE, with the associated companies owning between 53% and 55% of quota and ACE, depending on how it was counted.
- 14.6 The Commission granted clearance. Key points were:
- 14.6.1 The concentration in the harvesting market share/quota did not necessarily translate to market power, as most harvested product is exported.
- 14.6.2 Export substitution and the position in the downstream markets (i.e. the processing and value-added markets) potentially limited the exercise of any market power in the harvesting market.
- 14.6.3 In the downstream markets, the strong possibility of export substitution from other operators (90% of fish was exported) meant that other operators had significant capacity to divert exports into the domestic markets, if the associated parties sought to increase price in the domestic markets, and the possibility of imports would add a further constraint.
- 14.7 The Commission also noted that in addition to the presence of other branded fish products, supermarkets and other industry sources considered that value-added fish products compete with other value-added frozen products, such as crumbed chicken portions.
- 14.8 The other relevant Commerce Commission decision is the decision in 2005 to grant clearance to the acquisition in *Sanford Limited and Simunovich Fisheries Limited* (Decision No 544). That acquisition involved Sanford acquiring scampi and trevally quota from Simunovich Fisheries Limited, among other things. The acquisition of the scampi quota raised potential competition law issues because it increased Sanford's holding from 34.9% to 42.66% of the scampi TACC.
- 14.9 In the *Simunovich* decision, the Commission considered the effects of the acquisition in the markets for:
- 14.9.1 The catch and domestic wholesale supply of scampi in New Zealand; and
- 14.9.2 Rights to harvest scampi in New Zealand waters for export.
- 14.10 As noted above, Moana has applied for, and been granted, a clearance in relation to its proposed acquisition of Sanford's inshore fishing business and ACE relating to that business.

The Commission has not yet released the reasons for its decision but Sealord has considered some of the provisional views expressed by the Commission in the Moana Sol, despite those views now having been superseded by the granting of the clearance, in case the Commission wishes to enquire into similar issues in respect of Sealord's clearance application. Key points in the Moana Sol were:

14.10.1 The Commission's provisional market definitions, which include the possibility of an upstream market for the supply of ACE by individual fish stocks as a separate market level to the inshore harvesting market in the North Island, which it provisionally considered should also be separated into individual markets by individual fish stocks.

14.10.2 The Commission's provisional view that there are likely to be separate wholesale markets for the supply of processed and unprocessed fresh fish.

14.10.3 The Commission's provisional view that the wholesale supply of fresh fish landed using ACE from national upstream inshore markets is likely to be separated from the wholesale supply of frozen fish, with the Commission considering the possibility that it should be separated into individual markets by individual fish stocks as well.

14.10.4 The Commission's concern that an industry participant with a large ACE holding in respect of a particular species (for example, SNA1 ACE for snapper in respect of the Moana Sol) may be able to profitably increase prices charged for surplus ACE or withhold supply, which could have the effect of increasing prices in the downstream market.

14.10.5 The Commission's provisional view that inshore contracting for harvesting services are separate from harvesting services for other types of fishing such as deepwater fishing or pelagic fishing.

## 15 Counterfactual

15.1 Taking a conservative competition law approach initially for this clearance application, Sealord considers the proposed acquisition is best assessed against a status quo counterfactual (or at least, a counterfactual in which the parties continue to operate independently of each other) with that counterfactual reflecting IFL retaining the Quota, ACE and Shares.

15.2 That counterfactual would capture the most competitive of the likely scenarios for Commerce Act purposes, simplifying the Commission's analysis.

15.3 [ ]

15.4 [ ]

## 16 Relevant markets

16.1 Adopting the Commission's approach in *Basuto*, Sealord has considered the effect of the Proposed Acquisition in the following markets.

16.1.1 The market for the harvesting of finfish in New Zealand (**harvesting market**). This includes squid and fish harvested for supply both overseas and in New Zealand.

16.1.2 The market for the processing and wholesale supply of whole (described by the Commission as "unprocessed" in *Basuto*) and processed finfish in New Zealand (**whole and processed market**).

16.1.3 The market for the processing and wholesale supply of coated finfish products in New Zealand (**value-added market**).

16.2 Taking account of the Commission's provisional views in the Moana Sol, Sealord has also considered the effect of the Proposed Acquisition in separately defined species markets (for the harvesting market and the processed and unprocessed market). Sealord has also

considered the effects of the Proposed Acquisition on a market or markets for the provision of ACE (in case the Commission uses that market or those markets in its analysis) in the analysis below of the competitive effects of the Proposed Acquisition on the harvesting market.<sup>17</sup> In addition, Sealord has considered the effects of the Proposed Acquisition in separately defined harvesting and whole and processed markets, and a harvesting market for deepwater areas only, excluding inshore fisheries.<sup>18</sup>

16.3 Section 3(1A) of the Commerce Act defines the term “market” as “a reference to a market in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them”.

16.4 Case law has defined a market as the area of close competition between firms or the field of rivalry between them.<sup>19</sup>

#### *Overlap between the parties*

16.5 The parties’ businesses overlap as follows:

16.5.1 Both parties hold quota and ACE for various finfish species and squid. The amounts of TACC and quota held is set out in the table at confidential Appendix 10.

16.5.2 Both parties largely fish in deepwater areas for generally the same species.

16.5.3 Both parties initially process the fish and squid caught in New Zealand (with IFL processing the fish on vessel and some additional offshore processing under contract, and Sealord undertaking a combination of on-vessel and on-shore processing in New Zealand).

16.5.4 Both parties sell whole and processed frozen fish in New Zealand to the food retail and service food sectors.

16.5.5 Both parties’ secondarily-processed coated fish products are sold in New Zealand, [ ]

16.6 Sealord occasionally sells fishmeal in New Zealand for use in fertiliser. IFL does not sell fishmeal but sells some fish products to [ ] for use in pet food, which (like fishmeal) could also be considered by-products. However, the uses of these by-products are so different that no overlap should be considered to exist between these sales.

16.7 Also, while Sealord does own or lease office premises and cold stores in other locations, these are so far removed from Lyttelton (where the Lyttelton Office Lease is situated) and Woolston (where the Cold Store is situated), that no overlap should be considered to exist between Sealord’s interests in office premises and cold stores and the Lyttelton Office Lease or the Cold Store.<sup>20</sup>

16.8 Sealord (through IFL, which will then be a subsidiary of Sealord) will continue to operate the Cold Store, post-transaction, for storage of catch from the IFL vessels and some of the product caught on Sealord’s existing vessels. Sealord currently uses other cold stores in the Canterbury region, with its volumes in those cold storage facilities fluctuating according to catch volumes and capacity at other cold stores around the country. [ ]<sup>21</sup> The Commission

<sup>17</sup> Sealord has not defined a toll processing market nor a retail market, as are defined in the Moana application, in this application as neither Sealord nor IFL participate in those markets.

<sup>18</sup> This recognises the position taken on those market definitions in the Moana clearance application, the Moana Sol, and Moana’s submissions on the Moana Sol.

<sup>19</sup> *Re Queensland Co-operative Milling Assoc Ltd* (1976) 25 FLR 169.

<sup>20</sup> In the *Lineage Logistics New Zealand and Cold Storage Nelson Limited* [2022] NZCC 23 decision the Commission took a regional approach to defining markets for cold store services.

<sup>21</sup> [ ]

can therefore be satisfied that the acquisition of the Cold Store does not or is not likely to result in a substantial lessening of competition in any market.

*Market for the harvesting of finfish in New Zealand (finfish harvesting market)*

- 16.9 Sealord has defined this market, which covers the harvesting and supply of finfish in New Zealand, taking the approach used by the Commission in the *Basuto* decision.
- 16.10 As in the *Basuto* decision, this market extends across all finfish. Sealord has therefore counted this market to include all the species fished by Sealord and IFL, including hoki, southern blue whiting, silver warehou, jack mackerel, English mackerel, and barracouta. It has also counted squid as a finfish. It includes both inshore and deepwater species.
- 16.11 The Commission described this market in the *Basuto* decision to involve the harvesting of fish by both deepwater and inshore vessels. The Commission noted that the largest operators are vertically integrated across this market and downstream markets, but that, in other cases, companies may lease quota to independent fishers who supply their catch to the leasing company, or independent processors who rely on others to supply fish. It also said that there are many small fishers who have no connection with processing other than supplying the raw fish. Sealord notes that, even itself as a large vertically integrated fishing company, sometimes contracts for other companies to carry out fishing for Sealord, using Sealord ACE, where Sealord does not have spare vessel capacity at the applicable time.
- 16.12 In the *Basuto* decision, taking a practical approach, the key factors for selecting the market for the harvesting and supply of finfish in New Zealand were:
- 16.12.1 Finfish species form neither a homogeneous group, nor discrete groupings of 'high value' and 'low value' species, but rather are graded over a range of quality, and hence of price.
- 16.12.2 From a demand-side perspective, it is unlikely that, say, all species compete closely against each other but it is likely that each will compete with others at its price level and in the immediately adjacent price level. For example, there are different specific uses by species but there are some commonalities, for example, lower value white fish will often end up in a battered or crumbed (i.e. coated) format (although this is changing in some markets). Higher value species are not coated as frequently coating can give a lower value perception.
- 16.12.3 This overlapping substitutability between species at adjacent quality/price levels should result in a chain of substitutability stretching from the premium quality to the budget quality species. For example, in Sealord's experience, there is substitution that occurs when hoki prices go up and some customers elect to switch to competing species such as pollock or basa. This is particularly the case in coated products in very price sensitive channels. Also, overseas customers will typically reference competing species prices as part of contract negotiations (for example, hoki and pollock<sup>22</sup> are often compared by customers).
- 16.12.4 On this basis, all major finfish species would fall within the same product market.
- 16.12.5 While the industry is split into inshore and deepwater fishing, with different technologies and entry costs being required in each, this has no bearing on the product market definition if, as assessed, the inshore and deepwater species compete one with another for the consumer dollar.
- 16.12.6 At a functional level, harvesting involves the catching of fish in New Zealand. Quota and ACE were seen as inputs into this market.

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<sup>22</sup> Pollock is a white fleshed finfish (not caught in New Zealand) which is commonly used in coated products in overseas markets such as Europe.

- 16.12.7 In terms of geographic extent, while on-shore processing plants did generally receive fish caught in adjacent regional waters, harvesting companies did transport fish around the country or acquired fish from other companies.
- 16.13 The Commission also considered whether there might be a separate product market for hoki, given that it was then the most important species in both tonnage and value terms, comprising about 40% of the total tonnage landed of about 600,000 tonnes (at the time of the *Basuto* decision). However, the Commission noted that the tonnages used in the domestic market are much smaller, and that other species with substantial quota volumes such as southern blue whiting, warehou and trevally are used for value added fish products besides hoki. Hence, it appeared unlikely that there could be a separate hoki-based market in New Zealand.
- 16.14 Sealord accepts that it is appropriate to define a harvest level market for the purposes of this application and considers that that market covers all of New Zealand and all finfish species for the reasons above and also because:
- 16.14.1 It captures a key area of overlap between Sealord's business and the Independent Fisheries Business.
- 16.14.2 While the price for fish in the market varies across a range (in the range of [ ] in overseas markets depending on species and format) these ranges overlap, with species being generally replaceable across the range with species that they overlap in price with and depending on season. For example, in overseas markets, hoki competes closely with different varieties of fish from other countries. In New Zealand domestic markets, frozen hoki competes closely with pollock and basa at retail, which are both imported, and fresh hoki with thawed back basa at retail. Information on retail prices of other species is set out in Appendix 13 and some information was also set out in Moana's clearance application. In the foodservice sector, basa imported from Vietnam competes most closely with hoki.
- 16.14.3 From a product market definition point of view, inshore and deepwater fisheries compete with each other with customers choosing between the species available to them on a range of factors. Sealord's research indicates that for New Zealand consumers, fish species rank as a low priority in their purchase hierarchy (see slides at confidential Appendix 14).
- 16.14.4 The key inputs to this market are the same across all species, i.e., quota (and ACE), vessels and crew. Companies must also hold a fishing permit under the Fisheries Act 1996 in order to fish or operate under another company's fishing permit.
- 16.15 In addition:
- 16.15.1 The different species are processed by companies generally in the same way, especially by the larger companies, who undertake initial processing on vessel and then undertake further processing if needed on-shore, either in New Zealand or overseas.
- 16.15.2 Quota and ACE for the different species is generally held by the same parties, especially in the larger volumes (see, for example, the table of quota holdings at confidential Appendix 12).
- 16.15.3 ACE is generally traded between the same parties' year-to-year especially in the larger volumes, noting that occasionally there will be multi-year arrangements made for ACE supply.

- 16.15.4 While prices for quota and ACE vary,<sup>23</sup> they vary across an overlapping range, which can change year to year depending on such things as catch plans, the TACC available and the volumes of fish likely to be caught and/or actually caught.
- 16.15.5 In terms of geographic extent, especially for deepwater fishing, vessels today tend to fish throughout New Zealand and even outside New Zealand waters before returning to New Zealand to unload. Sealord's Nelson-based vessels, for example, fish throughout New Zealand before returning to Nelson or whichever port they identify as appropriate to unload, containerise and export or transport to a land-based factory for further processing of fish.
- 16.15.6 For fishing companies, maximising fishing capacity and efficiency is the most important factor. This is achieved a number of ways but, most importantly and due to the finite amount of TACC available, acquiring quota or ACE across as many species as possible that can be fished from the vessels available to the fishing company, noting that many fisheries are seasonal.
- 16.16 In terms of whether or not this market includes both deepwater and inshore or whether or not they should be considered in separate markets, Sealord notes that:
- 16.16.1 While hoki is predominantly fished in the deepwater areas, hoki is found in both deepwater and inshore areas. In the inshore areas, there are lower returns on offer from hoki versus other inshore species, so inshore fishers tend to focus on those other species. That does not detract from the point that the different species might be considered to be in the same harvesting market.
- 16.16.2 Some of the by-catch species caught in deepwater areas are inshore species (e.g. snapper) albeit that the volumes caught in deepwater are relatively small, especially compared to the catch of target species. For instance, both snapper 7 and kingfish 7 (inshore species) are caught with jack mackerel 7 (deepwater species) by Sealord with the percentage catch of snapper and kingfish being 0.04% and 0.1% respectively versus jack mackerel.
- 16.16.3 Some companies target and fish both deepwater and inshore species and operate or contract vessels designed for these fisheries (e.g. Sanford and Talley's).
- 16.17 On the other hand, Sealord acknowledges that:
- 16.17.1 Most vessels fish only in deepwater or inshore fisheries due to their design, size and the regulatory regime which restricts access to certain fisheries by vessel size.
- 16.17.2 The closest competitors to Sealord and IFL are other deepwater fishing companies, such as Sanford, Talley's, and Maruha NZ.
- 16.17.3 Hoki is the only readily available deepwater species captured in New Zealand waters that can be purchased by consumers in New Zealand and is significantly cheaper than most inshore species caught in New Zealand.
- 16.18 In the analysis of the competitive effects of the Proposed Acquisition, Sealord has focussed on the effects within the deepwater sector, where Sealord and IFL compete. The inshore fisheries are comparatively small in volume relative to the deepwater fisheries, such that it does not materially affect the analysis whether or not the harvesting market includes both deepwater and inshore fisheries or these are defined in separate harvesting markets.
- 16.19 For the Commission's information, the split between Sealord's and IFL's deepwater and inshore ACE holdings and catch volumes are:

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<sup>23</sup> That is, where a price is utilised, as some trades are ACE for ACE.

FY23 ACE From Quota (MT)							
Companies	Total ACE from quota owned 7 Sep 2023	Deepwater stocks ACE volume	Inshore stocks ACE volume	Other	Deepwater stocks ACE volume <sup>24</sup>	Inshore stocks ACE volume	Other
Sealord	111,264	106,849	4,112	303	96%	4%	0%
IFL	46,129	42,806	2,443	880	93%	5%	2%

FY22 Catch Data (MT) <sup>25</sup>								
	Total ACE as at 30 Sep 2022	Total catch	Deepwater Catch	Inshore Catch (by-catch)	Other	Deepwater Catch	Inshore catch	Other
Sealord	124,073	70,135	67,172	2,691	272	96%	4%	0.4%
IFL	58,352	44,503	41,883	2,457	164	94%	6%	0.4%

16.20 It is unclear whether the *Basuto* decision included squid in the same market as finfish. Sealord considers that it is appropriate to do so, as squid is now fished by the same vessels and methods as finfish. When the *Basuto* decision was made, squid was fished in a different way (i.e. jigging at that time, rather than by trawling as is currently the case).

16.21 As stated in the *Basuto* decision, Sealord submits that ACE would be an input into the market, rather than form a market or markets for the provision of ACE itself, which was the Commission's provisional position in the Moana Sol. Sealord does not consider that defining a stand-alone market or markets for the provision of ACE makes sense or assists because:

16.21.1 The scale of ACE trading relative to overall catch is not as significant, with most fishing companies holding sufficient quota to generate sufficient ACE to largely cover their normal operations. Most ACE trading is at the margins between fishing companies seeking to balance their catch at the end of each season with the actual ACE required changing by volume, species and area each year.

16.21.2 The only parties engaging in any significant consistent trading of ACE for deepwater areas<sup>26</sup> are Vela Fishing, Sanford, Maruha NZ and Talley's. Vela Fishing, which operates no vessels, annually sells its large portfolio of deepwater dominated ACE. Commercial arrangements show annual ACE sales of approximately 20,000 MT principally to Sanford and to a lesser extent to Maruha NZ, Solander and Westfleet. Sanford appears to utilise the Vela ACE for both its own vessels catch plans and those of its deepwater foreign vessel partners, Jaico, Dong Won and Maruha NZ that operate vessels under Sanford's fishing permit.

16.21.3 Sanford has large volumes of pelagic ACE surplus due to having no vessels suitable to target fish those stocks. Sanford sells or leverages the ACE to Maruha NZ,


<sup>24</sup> As a percentage of total ACE. The data in both tables is obtained from Fishserve.

<sup>25</sup> The data is for the period for 1 October 2021 – 30 September 2022 and includes the 1 April 2022 fishing year data as the catch for that occurs in August/September each year. Catch by sector is a percentage of total catch not total ACE.

<sup>26</sup> Sealord uses 'deepwater' rather than 'offshore' as that is the term commonly used within the industry.



Solander, Sealord and Pelco. Talley's, like Sanford, also has limited capacity in its fleet to target pelagic stocks and sells large volumes of this ACE to IFL, Maruha NZ and Sealord. To support its operations Talley's has had a long arrangement with Ngāi Tahu, buying approximately 7,000 MT of ACE annually. Reciprocal ACE sales of hoki are made back to Sanford and Talley's by Maruha NZ for the pelagic ACE received.

- 16.21.4 As noted in Moana's response to the Moana Sol, ACE must be used to catch fish, which will ultimately be supplied in the wholesale or retail markets.
- 16.21.5 The competitive effects of the Proposed Acquisition can be captured adequately by considering a harvesting market that includes the provision of ACE, rather than defining a separate market for the provision of ACE.
- 16.22 In the Moana Sol, the Commission also expressed the provisional view that the market for the provision of ACE should be defined as different product markets by individual fish stocks. Regardless of the position in relation to inshore areas, Sealord suggests that it would be inappropriate to define a separate product market by species for deepwater species<sup>27</sup> for the reasons above and (addressing the reasons for the Commission's provisional view in the Moana Sol) because:
- 16.22.1 While hoki is an important species to catch (because of its year-round availability and the volume of the fishery), deepwater fishing companies need to catch fish in a range of species. However, deepwater fishers have significant discretion about which species they can target and therefore what ACE they need and past catch tends to be a strong driver when planning what stocks are targeted and when.
- 16.22.2 This is because it is possible, especially in deepwater areas, to target particular species from within a quota portfolio more precisely compared to inshore fisheries and by-catch is reasonably limited both by volume (relative to overall catch) and variety.<sup>28</sup> In particular, a number of deepwater stocks are targeted during spawn periods, which will typically yield lower by-catch species. The schools of fish in deepwater areas are also much larger than in inshore areas, with less mixing of multiple species. For example, when fishing for jack mackerel in QMA7 the main by-catch is snapper and kingfish, which form less than 1% of the total catch.
- 16.22.3 As a result, apart from hoki, no other species is so important to catch, and for which to hold quota and ACE. In hoki, there is sufficient quota and ACE available to meet the deepwater fishing companies' needs<sup>29</sup> such that it is not necessary to consider hoki as a stand-alone species at the harvesting market level. For example, both Sealord  and IFL hold enough hoki for their vessel catch and do not need to buy from the ACE market.
- 16.22.4 Defining separate product markets by species would create significantly more analytical work for the Commission and interested parties without any benefit. In particular, it would be a significant exercise to consider the effects of the Proposed Acquisition for different product markets by species as there are as many as 100 species of fish caught in New Zealand.
- 16.23 Sealord notes that the Moana clearance application attached a report from independent economic experts, Castalia, and used the Castalia findings in the application. That report

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<sup>27</sup> In making these comments, Sealord is not to be taken as accepting that the Commission's provisional views in the Moana Sol are correct in respect of the Moana clearance application. Moana's response to the Moana Sol submits on the application of the Commission's views to the Moana application.

<sup>28</sup> The Moana response to the Moana Sol also notes that individual species can be targeted in in-shore areas more than as described by the Commission in the Moana Sol.

<sup>29</sup> All deepwater companies own hoki quota and have long term arrangements in place for hoki ACE to support the vessels they have, predominantly supplied by Iwi and Vela.

defined a national market for the supply of finfish harvesting services but did not define a separate market or markets for the buying and selling of ACE.

- 16.24 Sealord considers that the harvesting market described by Castalia is essentially the same as the finish harvesting market proposed by Sealord in this application. Moana does not carry out fishing itself, instead contracting that to independent fishers who utilise Moana's ACE. The market description in the Castalia report reflected that. In Sealord's case, it mostly carries out its own fishing. While Sealord sometimes enters into contract catch fishing arrangements using Sealord ACE, this is at small volumes compared to the rest of Sealord's catch.
- 16.25 The harvesting market therefore covers a range of different operators on the supply side, from vertically integrated suppliers who undertake their own fishing, some operators who undertake both their own fishing and contract for independent supply, and some independent suppliers who supply to both integrated fishing companies and companies such as Moana who buy harvesting services from other fishers. Each approach is open to any fishing company and they each place competitive constraints on the other.
- 16.26 It is also clear from the Castalia report that Castalia considered that the self-harvesting approach and the purchase of harvesting services from independent suppliers place competitive constraints on each other.
- 16.27 Sealord also notes that the Castalia report supports all finfish species being treated as in the same market.
- 16.28 In case, however, the Commission is minded to define a market for the buying and selling of ACE, Sealord has also considered the effect of the Proposed Acquisition in that market.
- 16.29 Sealord has also considered the effects of the Proposed Acquisition for hoki, southern blue whiting and squid, which are all species where reasonably large volumes of fish are caught by both parties (and large volumes of quota and ACE are held) and in which the larger accumulations of quota and ACE arise from the Proposed Acquisition (although not at, in Sealord's view, a level that should cause concern even under the provisional views expressed by the Commission in the Moana Sol).
- 16.30 Sealord does not consider that the harvesting market should be divided into a market for the catch of fish for the domestic market and the catch of fish for export as in the *Simunovich* decision. The same species (particularly hoki), generally, are caught for both the domestic market and export using the same vessels and methods.

*Market for the processing and wholesale supply of whole and processed finfish in New Zealand (the finfish whole and processed market in New Zealand)*

- 16.31 Sealord has proposed this market for the same reasons as the Commission used a market for the processing and wholesale supply of finfish in New Zealand in the *Basuto* decision.
- 16.32 Sealord has treated this market as including whole and processed fresh and frozen fish sold in New Zealand. It does not include any coated or other value-added products.
- 16.33 While Sealord's proposed market definition refers to processed and whole finfish, whereas the Commission in the *Basuto* decision called it a processed finfish market, the description of that market in the *Basuto* decision clearly included whole fish.
- 16.34 In the *Basuto* decision, many of the key factors for selecting the harvesting market applied to the market for the processing and wholesale supply of value-added finfish products in New Zealand. In addition, the Commission found that:
- 16.34.1 For the retail buyer and end consumer, finfish as a product may be distinguished by the degree of processing it has undergone.
- 16.34.2 In general terms, there appear to be two major categories: 'basic processed' product, where the finfish is marketed as wet fish, either whole (or minimally/basic processed,

such as HGT), or in fillets (although it may have been frozen at an intermediate stage); and manufactured or 'value-added' product, where it has undergone further processing into coated and breaded fillets, and into frozen, branded products such as fish fingers, burgers, bites, and cakes.

- 16.34.3 The fresh, basic processed, product is important for restaurants, fish and chip shops, seafood shops and (to a degree) for supermarkets. The value-added, branded products are marketed predominantly through supermarkets and other retail outlets as convenience food items.
- 16.34.4 This suggests that there are two end-product markets, the first for fresh basic processed finfish, and the second for value-added finfish products. Both markets were recognised to operate at the wholesale level.
- 16.34.5 In the case of processing and wholesale supply, finfish in both fresh, frozen and processed forms are transported around the country, and a very large proportion of the industry's output is sold overseas. Nationwide market definitions are therefore appropriate.
- 16.35 Sealord also notes the following points:
- 16.35.1 From reading the *Basuto* decision as a whole, it appears that the Commission considered that both fresh and frozen finfish were in the same market.
- 16.35.2 A number of parties in New Zealand sell both fresh and frozen finfish (whole and processed) at the wholesale level. This includes Sanford, Talley's, United Fisheries, and Westfleet.
- 16.35.3 Overall, Sealord understands that the total volume of frozen whole fish sold at the wholesale level is relatively small, with most frozen fish undergoing some processing (e.g heading, gutting and tailing or dressed). Sealord does not have as much visibility on the fresh markets but it could be that the proportion of whole fish is higher. Regardless, for both fresh and frozen fish, Sealord does not consider, however, that the level or cost of processing should be used to distinguish between whole and processed fish at the wholesale level, as processing will need to be undertaken in most cases at some stage before the products are sold at retail, which is a cost that needs to be borne at some stage of the process.
- 16.35.4 Deepwater operators have access to some level of processing facilities, whether on-vessel or on-shore while almost all inshore-caught fish is processed on-shore, either at a fishing company's own facilities, the buyer's facilities or third party-owned processing facilities.
- 16.35.5 It considers that there is more sale of frozen whole fish and frozen processed fish products at the retail level and to the service industry than occurred in 2001.
- 16.35.6 At the wholesale level, customers often see the purchase of frozen fish as an alternative to fresh fish, and it is becoming more common to see frozen fish being thawed and sold as "wet" fish. For example, has seen for basa/pangasius imported from Vietnam being sold as a thawback in supermarkets, as well as some New Zealand species sold outside of season such as hoki.
- 16.35.7 Even if there are different fish markets at the retail level by species, the wholesalers supply, and their customers buy, a range of species.
- 16.35.8 Many wholesale customers see fresh fish and frozen fish as alternatives.
- 16.36 Sealord considers it is therefore appropriate to define the whole and processed market (which is a wholesale market) to include both frozen and fresh finfish. While IFL participates in this market only to the extent it supplies a small volume of frozen whole fish in New Zealand, and

Sealord itself sells only a small amount of fresh fish, their frozen fish sales face competition from fresh fish.

- 16.37 Sealord has included squid in this market, despite neither Sealord nor IFL supplying squid products in New Zealand. Processed and unprocessed squid products compete with some other value-added fish products. If the Commission is not minded to include squid in the same market, the Commission could still consider these squid products as a competitive constraint. Salmon should also be considered in the same market or, at least, a competitive constraint.
- 16.38 As noted above, however, Sealord has also considered in its analysis the effect of the Proposed Acquisition in separate wholesale processed and whole fish markets (although the competitive conditions in both markets are essentially the same<sup>30</sup>) and for processed and whole fish markets comprising only frozen fish. Sealord does not consider there is any need to consider the effect of the Proposed Acquisition in a market or markets for fresh fish (if separately defined), as IFL does not sell fresh fish and Sealord only sells a small amount at certain times of the year only so no aggregation would occur in that market.
- 16.39 In the Moana Sol, the Commission noted that it was assessing whether the relevant product market includes all inshore white fish species or whether it is more appropriate to define separate wholesale markets for the supply of each particular species. Sealord refers to the information and submissions provided above in paragraphs 16.12 to 16.16 above and suggest that this, on balance, supports an all of species-by-species approach.
- 16.40 The Commission may also be minded to treat there as being different processed and whole fish wholesale markets for finfish. If it does so, the Commission should note that hoki is the main species sold by deepwater fishing companies in New Zealand, including by both Sealord and IFL, and is the only species that the Commission needs to focus on (if it is minded to take a by-species approach).

*Market for the processing and wholesale supply of value-added finfish products in New Zealand (finfish value-added market)*

- 16.41 Sealord has proposed this market for the same reasons as the Commission used a market for the processing and wholesale supply of value-added finfish in New Zealand in the *Basuto* decision.
- 16.42 Sealord considers that this market includes all the value-added products sold by the parties, namely:
- 16.42.1 the coated fish products sold by IFL [redacted] in New Zealand; and
- 16.42.2 the coated fish products sold by Sealord in New Zealand under the Sealord and Captain's Choice brands.
- 16.43 Similar value-added products are sold by other parties in New Zealand.
- 16.44 In the *Basuto* decision, many of the key factors for selecting the harvesting market applied to the market for the processing and wholesale supply of value-added finfish products in New Zealand. The factors described in paragraph 16.34 above are also relevant. In addition, the Commission noted that while hoki is used extensively in the production of value-added fish products, other species such as southern blue whiting, hake, oreo dories<sup>31</sup> (smooth and black) and snapper are also used.
- 16.45 Sealord considers that this analysis remains correct and notes that Sealord operates one of the two remaining New Zealand coated product plants for value-added fish/seafood products,

<sup>30</sup> This point is acknowledged in the Castalia report, which forms part of the Moana clearance application.

<sup>31</sup> The *Basuto* decision refers to john dory being used, but oero dories are used instead. It also refers to hake being used, which it no longer is.

the other being United Fisheries. Sealord understands that Talley's still has a value-added line in its seafood manufacturing plant but made the decision to exit this market. It should also be noted that there is a substantial level of imported value-added fish products, which compete directly with value-added fish products supplied by Sealord. IFL, by way of example, [redacted].

- 16.46 Sealord also notes that while there are some differences in processing technique and product features (e.g. IFL's product is manufactured in a different way than Sealord and has a different crumb), the products are still similar enough that they are substitutable for each other in a competition sense.
- 16.47 Sealord considers that it therefore remains appropriate to define a market for the processing and wholesale supply of value-added finfish products in New Zealand for the purposes of this application.
- 16.48 Sealord has included squid products in this market, despite neither Sealord nor IFL supplying squid products in New Zealand. Value-added squid products compete with some of the other value-added fish products. If the Commission is not minded to include squid in the same market, the Commission could still consider these squid products as a competitive constraint.

#### *Estimated market shares*

##### Finfish harvesting market

- 16.49 In the *Basuto* decision, the Commission used quota shares as a proxy for market share in the finfish harvesting market. Sealord does not consider this is necessarily a good indicator of market share as the largest holders of quota are vertically integrated and mostly do not participate in this market. Sealord has nevertheless looked at quota shares held by the different companies. It has also considered hoki, by itself, as in the *Basuto* decision and looked at the species where the highest concentration of quota share would occur (southern blue whiting), in case the Commission looked at those species individually.
- 16.50 As noted above, Sealord has entered into the NTOM contractual arrangements with a number of iwi to receive ACE generated from the deepwater quota owned by those iwi participants. [redacted]
- 16.51 It is therefore unclear whether the ACE under these arrangements should be counted as part of Sealord's ACE holdings or not for competition law purposes. Sealord has considered the position under the market share and concentration indicators (see further below) both by treating the Sealord quota and the NTOM ACE separately and by counting them together.
- 16.52 Sealord considers that Moana, Sealord and Westfleet should be treated as operating separately in the harvesting and other markets. Moana has only a 50% interest in Sealord, and Sealord has only a 50% interest in Westfleet. In both cases, there is another joint shareholder with equal rights,<sup>32</sup> which significantly limits the influence a single shareholder can have. The companies all operate independently in the relevant markets, which is a reflection of this. As a result, in the figures below, Sealord has presented the market share information separately. Despite that, in the competitive analysis further below, Sealord has considered the situation that would apply if the Commission considered Sealord as associated with Moana and Westfleet.<sup>33</sup>

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<sup>32</sup> Moana holds its 50% interest in Sealord (through Kura) and, as noted above, neither Kura's nor Sealord's directors are required to act in the best interests of Moana, even those appointed by Moana. Nissui's joint venture interest in Sealord also constrains Moana's ability to constrain Sealord. Similarly, Sealord has only a 50% joint interest in Westfleet, [redacted]. In addition, the companies have a different focus, with Sealord operating on deep-sea fisheries, Moana mainly concentrating on inshore North Island fisheries and Westfleet mainly on inshore West Coast fisheries and tuna fisheries. Westfleet does catch some hoki and orange roughy. Moana generally targets different species than Sealord and Westfleet, as shown by its quota holdings and sells its fish fresh, which again differs from Sealord. Westfleet targets some different species than Sealord or Moana, [redacted].

<sup>33</sup> In short, Westfleet and Moana only provide a small addition to Sealord's market shares, if counted with Sealord, and their inclusion with Sealord's market shares does not make a material difference to the competition analysis.

- 16.53 The quota and ACE share analysis below does not take into account ad hoc or single year ACE arrangements. These are highly uncertain and change year to year both in terms of Sealord's needs for them and their availability. Also, generally, ACE that Sealord acquires under such arrangements is balanced with ACE that Sealord provides to others. For example, whilst Sealord has well-established fishing patterns tailored to core target species when they are seasonally available, ACE needs can fluctuate. For the 2022 and 2023 fishing years, Sealord purchased approximately [ ] of ACE from third parties (other than under [ ]) and sold approximately [ ] of ACE to third parties. The difference (approximately 4,000 GWT) compares to Sealord's total ACE holdings of around 111,220 GWT.
- 16.54 [ ] This is not counted in the quota share figures. Neither are the ACE arrangements entered into by other parties referring to in paragraphs 11.1.2 and 11.1.3 above.
- 16.55 Taking quota and ACE data as at 15 March 2023, Sealord calculates quota and ACE shares for finfish as:<sup>34</sup>

Entity	Quota and ACE holding
Sealord <sup>35</sup>	21.3%
Sanford	20.8%
Talley's	13.9%
IFL	8.7%
NTOM ACE arrangements	[ ]
Vela Fishing	4.5%
Pelco	3.1%
Ngāi Tahu Seafood	2.8%
United Fisheries	2.6%
Solander	1.6%
Maruha NZ	1.6%
Moana	1.4%
Westfleet	0.8%
Other	[ ]

- 16.56 Accordingly, post-transaction, Sealord's finfish quota holdings would amount to 30%. If Westfleet and Moana's quota is counted with Sealord's quota and the NTOM ACE arrangements, Sealord's pre-acquisition quota and ACE holdings would amount to [ ]. Post-acquisition, Sealord's total finfish holdings with these other parties would amount to [ ].
- 16.57 Sealord also notes that this data likely overcounts Sealord's current quota and ACE shares. For example, Maruha NZ's market share in the harvesting market is likely larger than that set

<sup>34</sup> There has been only negligible change to these quota percentages since 15 March 2023.

<sup>35</sup> This includes the quota held by PTL. At the start of each fishing year PTL transfers all of the ACE generated from the quota it holds on trust to Sealord.

out in the table due to its arrangements with Sanford (but that would lower Sanford's market shares). The data also does not take account of ACE arrangements that may be in place, whether they are longer-term ACE arrangements or ad hoc arrangements, other than the NTOM arrangements, as not all these arrangements (or their details) are necessarily known to Sealord.<sup>36</sup>

- 16.58 The quota and ACE share analysis also does not count catch that is subject to deemed value (i.e. catch in excess of ACE holdings). For most target species, Sealord is generally able to balance catch with ACE. However, as previously noted above, Sealord does not hold ACE for all stocks caught and for some stocks, particularly by-catch stocks, that have low TACCs but high abundance (e.g. snapper and kingfish). Despite Sealord's best endeavours, catch can and does sometimes exceed ACE held for some species, even though the volumes of these species caught are small relative to overall catch. In these circumstances, deemed value is paid. Sealord's catch that falls under the deemed value system, however, is relatively small (as Sealord, as a responsible operator, takes reasonable steps to minimise its deemed value obligations).
- 16.59 On the other hand, the quota and ACE share figures do not count the quota held by NZLL Quota Co referred to in paragraph 4.18 above. This, however, is only a very small amount of finfish quota. The data above also does not count within Moana's holdings the ACE to be acquired by Moana from Sanford under its proposed acquisition of Sanford's inshore fishing business. From reviewing the public version of the Moana clearance application, Sealord estimates that Sanford's North Island inshore quota will add around 1.7% to Moana's total quota holdings.<sup>37</sup> This would, if a clearance is granted, add a small amount to the quota held by Sealord if Moana's holdings are included with Sealord's quota holdings.
- 16.60 Apart from Moana,<sup>38</sup> all the companies listed above are either solely deepwater fishing companies or fish in both deepwater and inshore fisheries (or in Vela Fishing's case, hold quota and make ACE available in both, but does not itself operate vessels).
- 16.61 The quota holding amounts by percentage share and volume for all the above parties and finfish species as at 15 March 2023 is set out in confidential Appendix 12.

#### Finfish whole and processed market

- 16.62 Sealord has limited information on which to estimate market shares for this market, as it participates only in the frozen segment of this market, and not in the fresh segment. However, it estimates the market shares as:

Estimated market shares in finfish whole and processed market		
	Percentage Share (rounded)	Value NZD (rounded)
Sanford	[ ]	[ ]
Talley's	[ ]	[ ]
United Fisheries	[ ]	[ ]
Sealord	[ ]	[ ]

<sup>36</sup> The *Simunovich* decision noted that there is uncertainty with using quota and/or ACE shares as a measure of market share.

<sup>37</sup> This is based on deducting Sanford's post-transaction quota holding from Sanford's pre-transaction quota holding, as set out in table 5.3 at page 28 of the public version of the Moana application.

<sup>38</sup> Moana does catch some small amounts of deepwater fish stock.

Ngāi Tahu Seafood	[ ]	[ ]
Westfleet	[ ]	[ ]
Bidfood	[ ]	[ ]
Moana	[ ]	[ ]
Markwell	[ ]	[ ]
IFL	[ ]	[ ]
Other	[ ]	[ ]
<b>Total</b>	<b>100%</b>	<b>\$136M</b>

16.63 This estimate is based on the information and estimates set out in confidential Appendix 15. Sealord estimates that the total market size is around \$136M. The Appendix also sets out market shares estimates for the frozen and fresh sectors. Sealord does not have separate estimates for the processed versus whole fish sectors but considers that the percentage amounts of each supplier in those sectors would be the same as above.

16.64 Sealord does not believe that these market shares have changed materially over the last 5-10 years.

#### Finfish value-added market

16.65 In the finfish value-added market, Sealord estimates that the market shares of the main suppliers are as follows:

Estimated market shares in finfish value-added market		
	Percentage Share (rounded)	Value NZD (rounded)
Sealord	[ ]	[ ]
United Fisheries	[ ]	[ ] <sup>39</sup>
Markwell Foods	[ ]	[ ]
Bidfood	[ ]	[ ]
Simplot	[ ]	[ ]
IFL	[ ]	[ ]
Seafood Marketing	[ ]	[ ]
Pams (Foodstuffs)	[ ]	[ ]
Other	[ ]	[ ]



<b>Total</b>	<b>100%</b>	<b>\$83.3M</b>
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16.66 This estimate is based on the information and estimates set out in confidential Appendix 15. Sealord estimates that the total market size is around \$83.3M.

16.67 Sealord does not believe that these market shares have changed materially over the last 5-10 years.

## 17 Horizontal merger issues

17.1 Sealord has considered whether any horizontal merger issues arise that could cause, or be likely to cause, a substantial lessening of competition in any market.

17.2 Under the Commission's merger guidelines, a merger between competing suppliers is seen as having the potential to substantially lessen competition in a market if the merger:

17.2.1 removes a competitor that provides a competitive constraint, resulting in the ability for the merged firm to profitably increase prices; or

17.2.2 increases the potential for the merged firm and all or some of its remaining competitors to coordinate their behaviour so that output reduces and/or prices increase across the market.

17.3 Sealord does not consider that this will be the case, for the reasons set out below.

### *Finfish harvesting market*

17.4 Using the quota and ACE shares as a proxy for market share, the Commission's market share and concentration indicators are not exceeded for a market covering all finfish (including squid), even if the [ ] ACE is counted in Sealord's market share ([ ]).<sup>40</sup> The result is the same regardless of whether or not Moana and Westfleet's quota are counted as part of Sealord's quota (with those two companies adding only 2.2% to Sealord's quota share).

17.5 IFL adds approximately 8.7% to the quota share held by Sealord.

17.6 The indicators are exceeded for squid, hoki and southern blue whiting, if these species are taken as stand-alone markets regardless of whether or not the Moana and Westfleet quota, and the [ ] ACE is counted in Sealord's market share.

17.7 Breaching the indicators, however, does not necessarily mean that section 47 would be breached. The indicators are simply an indication to examine the competition issues more closely. Sealord also notes that there is some uncertainty in the quota and ACE shares and that they may not be a particularly good indication of market share for the reasons stated above. The fundamental question is whether the acquisition could result in the substantial lessening of competition in a relevant market. In Sealord's view, it will not have any such effect, for the reasons set out below.

17.8 As recognised by the Commission in the *Basuto* decision, the QMS places a limit on catch through the TACC. The Commission identified a theory of harm that this has the effect of limiting the supply response of other companies in a situation where one company, having aggregated quota, seeks to exploit its potential market power by restricting output and raising prices. Normally, the output-restricting power of such a company would be limited or nullified by the ability of other sizeable producers to expand production, thereby maintaining market supply.

<sup>40</sup> See confidential Appendix 17 for an application of the indicators to all finfish and to particular species.

- 17.9 The Commission theorised in 2001 that this is not possible with finfish harvesting, where the output of rival companies is absolutely restricted by the QMS (unless their quota was to some extent under-caught, thus allowing them to expand production within existing quota holdings). The Commission theorised that, in the absence of external effects – such as export diversion or imports in downstream markets – a single large firm may be able to exert significant market power.
- 17.10 Sealord does not consider that this is a concern that will occur in respect of the Proposed Acquisition, for a number of reasons, as set out below.
- 17.11 Before doing so, Sealord notes that for some species there is sufficient demand for fishing companies to catch up to the amount of TACC available, and for some species there is less demand than the TACC available. The latter is the case for squid and southern blue whiting, where much less volume is caught than the TACC available. As a result, the constraints theorised by the Commission in the *Basuto* decision and discussed above do not apply to squid and southern blue whiting. Squid and southern blue whiting can therefore be considered not to be volume-constrained and a situation where rival companies can respond to attempts to exercise market power in an unrestrained way.

Proposed Acquisition involves the merger of two vertically integrated fishing businesses

- 17.12 The first of these reasons is that the Proposed Acquisition involves the merger of two businesses that are vertically integrated across the harvesting market. Both businesses hold quota<sup>41</sup> and ACE, have their own vessels and crew, and carry out their own fishing (with IFL fishing only from its own vessels).
- 17.13 While Sealord does occasionally contract fishing to other companies, this is not at a very significant level relative to Sealord's overall catch. It is unlikely that the Proposed Acquisition would prevent that from occurring in the future because the IFL fleet that Sealord will acquire is not expected to have any significant amount of spare capacity. However, even if it did not occur in future, there would be no substantial lessening of competition because the frequency and the level of contracting is infrequent, unpredictable and relatively small. Appendix 11 sets out information on the level and pattern of ACE trading.
- 17.14 Turning to ACE, at present, the Independent Fisheries Business runs a fairly balanced ACE account with most of the ACE for the quota held by IFHL being utilised to provide ACE to IFL. While a small amount of trading does occur, this is fairly balanced and, like Sealord's trading of ACE, small in proportion to the company's total fishing volumes. Its purpose is to ensure efficient use of quota, and to ensure that catch (which fluctuates slightly year-to-year) is matched by ACE.
- 17.15 Sealord expects that post- acquisition the Independent Fisheries Business (which will continue as IFL in Sealord ownership) will continue to use all or almost all of the ACE acquired as part of the Proposed Acquisition and from the quota Sealord will acquire from IFHL.<sup>42</sup>
- 17.16 That expectation is the same as the status quo counterfactual. ■
- 17.17 Sealord considers therefore that the position on ACE would not be any different under any counterfactual.
- 17.18 The situation under this factor is also no different if the harvesting market is considered as comprising deepwater only or by different fish species. In respect of the later, both Sealord and IFL generally hold the quota they need across all species and the level of ACE trading they undertake is limited across the different species. This will not significantly change.

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<sup>41</sup> In Sealord's case, the quota is held on trust by PTL and ACE is made available to Sealord under the quota trust deed.

<sup>42</sup> As noted above Sealord and PTL ■.

- 17.19 As noted above, the TACC for certain orange roughy stocks is expected to reduce in coming years. The Proposed Acquisition will not affect the competitive position in relation to orange roughy, however, because IFL does not catch orange roughy. While the fishing companies who currently fish for orange roughy will switch to other species, there is likely to be enough quota and ACE generally available to accommodate that and the Proposed Acquisition does not affect the competitive position in relation to these other species.
- 17.20 At a practical level, even if the Commission's theory of harm from the *Basuto* decision or as set out in the Moana Sol is theoretically possible, Sealord does not see how it could arise.

#### Competition from existing New Zealand fishing companies

- 17.21 The second reason is that Sealord would continue to face strong competition from many other fishing companies post-acquisition, including Sanford, Talley's, Vela Fishing, Maruha NZ, Pelco Fishing, Ngāi Tahu Fishing and United Fisheries. These companies will all retain significant quota and ACE holdings, especially in comparison to the size of the downstream markets. While Sealord post-acquisition will hold [ ] of finfish quota and ACE under an approach where Westfleet, Moana, and [ ] quota and ACE is counted with Sealord's, that would still leave over [ ] of finfish quota and ACE with other parties. In hoki, the same measure for Sealord would be [ ], with over [ ] of ACE and quota being held by other parties. The highest concentration would occur for southern blue whiting, although over [ ] of quota and ACE would remain with other parties.<sup>43</sup>
- 17.22 Moana and, more particularly, Westfleet in the deepwater West Coast fishery also provide competition, despite the Moana 50% shareholding in Sealord and the Sealord 50% shareholding in Westfleet.
- 17.23 It is also relevant that Sealord's and IFL's ACE trading is mostly or entirely for the purposes of balancing their fishing plans, and neither company participates in the trading and selling of ACE as an ongoing and consistent business strategy.<sup>44</sup> They should not be seen as significant players in any market for the trading of ACE (however the harvesting market is defined), compared to parties (in deepwater areas) such as Vela Fishing and Sanford (i.e. the above quota and ACE shares overstate the importance of Sealord and IFL as competitors in the trading of ACE and understate the importance of other parties).
- 17.24 Sealord therefore does not consider that the Proposed Acquisition would give Sealord the ability to exercise any meaningful degree of market power in relation to the provision of ACE.
- 17.25 Further, in particular, Sanford and Talley's will retain significant market shares and are large companies, with a significant amount of assets, resources and turnover. Like Sealord, both fish the deepwater fisheries, and both are close competitors to Sealord. Sanford and Talley's are also well-diversified with interests in other fishing markets (e.g. mussel and salmon farming, and oysters). They will both continue to be strong competitors to Sealord, post-acquisition in all facets involving seafood including ACE and wholesale/retail seafood supply.
- 17.26 While the effect of Moana's purchase of Sanford's North Island fishing business, if it proceeds, will be to transfer ACE and fishing capacity from Sanford to Moana, Sealord considers that Sanford will remain as an effective competitor. This is because it will still have its deepwater fishing business, which is a close competitor to Sealord, where it will continue to hold 17.4% of quota, as well as its South Island inshore fishing business. It will also have the capital (and annual income) from its sale of the North Island fishing business to Moana.

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<sup>43</sup> As noted above, southern blue whiting is not resource-constrained.

<sup>44</sup> Sealord provides an inshore parcel of ACE to Westfleet each year (given Sealord does not operate inshore vessels).

- 17.27 This competition from other operators will restrict the ability of Sealord post-acquisition to act in the way set out in the theory of harm from the *Basuto* case and the Moana Sol.<sup>45</sup>
- 17.28 Sealord also considers that the level of competition from other parties in the market will not be different under the Proposed Acquisition from any counterfactual.
- 17.29 Sealord considers that all the above points also apply to hoki, southern blue whiting and squid, if those species were considered to be in stand-alone harvesting markets.
- 17.30 There will also continue to be competition from other parties even if the harvesting market (or even a market for the provision of ACE) is restricted to deepwater fishing and does not include inshore fishing. Sanford, Maruha NZ and Talley's are major deepwater fishing companies (with Sanford a significant provider of ACE) and the other fishing companies also operate in deepwater and/or make ACE available for sale to other parties.
- 17.31 Sealord also notes that the level of concentration of quota holdings post-merger will be significantly lower in the finfish market than the concentration levels that the Commission was comfortable with in the *Basuto* decision. The same is true in respect of hoki. (No concentration figures were given in the *Basuto* decision for southern blue whiting and squid.)

#### Constraints from competition in downstream markets

- 17.32 In the *Basuto* decision, the Commission said that, despite the limitations created by the quota system, of particular significance is the size of rivals' quota relative to the domestic demand. The Commission considered that the finfish harvesting market was an unusual case in which conventional output restriction concerns need not be given too much weight. Of particular relevance in the *Basuto* decision, was the question of the associated companies' ability to raise prices above the export price, and the likely response of incumbent rivals.
- 17.33 Sealord agrees with this analysis and considers that in the downstream markets in New Zealand, Sealord's ability to raise price will continue to be limited for the same reasons as in the *Basuto* decision. These were:
- 17.33.1 The potential for other fishing companies, particularly Sanford and Talley's, to divert exports into the local markets. Sealord estimates that around 90% of deepwater finfish captured in New Zealand is exported. Only a small amount of this needs to be diverted into local markets in order to counter any attempt by Sealord to increase price. Sealord also notes that this is not theoretical. An example of where this has occurred is Sanford over recent years entering, and building a strong market share in, the food service sector (estimated by Sealord to be around 20%).
- 17.33.2 Competition from imports. For example, as noted above, Sealord faces competition in downstream markets, especially for value-added fish products from, for example, Simplot. This level of import competition has increased since the *Basuto* decision. Supermarkets also have the ability to seek supply from overseas suppliers.
- 17.34 In downstream markets, Sealord will continue to face strong competition from both New Zealand fishing companies and overseas companies. This competition limits Sealord's ability to increase price in those markets. This is especially so as the principal fish that Sealord will sell in New Zealand post-acquisition will continue to be hoki, for which there are many existing and potential suppliers, and the strong potential for export diversion.
- 17.35 As a result, Sealord is considerably constrained in its ability to exert market power in the upstream markets, because it is unable to recover the costs of doing so in the downstream markets. This will continue post-merger and be no different under the counterfactual.

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<sup>45</sup> Sealord notes that the Moana response to the Moana Sol makes submissions that the Commission's provisional views as set out in the Moana Sol are not correct in their application to the Moana clearance application.

- 17.36 The constraints in the downstream markets also place a limit on how much fish and quota is needed. It is in Sealord's interests not to acquire any more ACE than it needs to meet demand, especially because of the pricing constraints in those downstream markets. This is demonstrated by the ACE trades and selling of ACE by Sealord/PTL.
- 17.37 Sealord considers that all the above points also apply to hoki, southern blue whiting and squid, if those species were considered stand-alone.

#### Competition from potential new entrants

- 17.38 In the *Basuto* decision, the Commission concluded that potential entry on a scale that could provide an effective constraint on incumbent operators is unlikely. While Sealord does not rule out a major new entry into the fishing industry (especially given the large overseas fishing companies that exist), noting Sealord's belief is that this would be highly unlikely, Sealord considers that entry by new smaller operators, particularly in inshore markets, remains more likely. There is generally quota and ACE available to support such entry, the costs of vessels and chartering of vessels is much less than for major deepwater fishing, and crew number requirements are lower. Given the relatively small size of the New Zealand market compared to exports, this will provide a meaningful competitive constraint on the merged entity and, again, is the same under any counterfactual.
- 17.39 In any case, Sealord notes that the likelihood of new entry is the same under any counterfactual, such that this factor is not affected by the Proposed Acquisition.

#### Incentive on Sealord to continue to trade ACE

- 17.40 Finally, there will continue to be some strong incentives on Sealord to trade ACE post-transaction.
- 17.41 As noted above, Sealord's main reason for trading ACE is to ensure, as much as possible, that it has sufficient ACE by the end of each fishing season to cover its catch each year. Sealord does not hold sufficient quota to necessarily cover all its catch in each species and area each year, especially as the species and volumes on fish can fluctuate overall and by area.
- 17.42 In order to cover all its catch Sealord needs to acquire ACE each year in different amounts and in different areas. This is often done through swaps, for which any surplus Sealord ACE is used. In other situations ACE is purchased, with Sealord selling its surplus ACE for additional revenue.
- 17.43 This position will still exist after the Proposed Acquisition, as the addition of the IFHL quota into the Sealord portfolio will predominantly only cover the catch from the IFL fishing business and any prior ACE trading done from the IFHL quota portfolio each fishing year will still occur. Both Sealord and IFL hold sufficient squid and southern blue whiting ACE to cover their respective catch. The main target species both companies purchase (generally) to meet their catch plans is jack mackerel and barracouta ACE, which is largely held by Sanford, Talley's and Vela. That trading will not change as a result of the Proposed Acquisition.
- 17.44 Sealord will have two strong incentives to trade or sell ACE, namely:
- 17.44.1 If it does not trade or sell ACE in this situation, it runs the risk of other fishing companies retaliating by not trading or selling ACE to Sealord. Sealord will then have catch that is not covered by ACE for which it will have to pay deemed values.
- 17.44.2 Sealord will miss out on the revenue from the sale of that ACE, while still incurring costs for the acquisitions of ACE from other parties (to the extent it is able to).

#### *Finfish whole and processed market*

- 17.45 Sealord's estimated market share post-merger, on the basis of the market share figures above, will not exceed the Commission's market share and concentration indicators (see

confidential Appendix 17) regardless of whether Westfleet and Moana's market shares are counted with Sealord's.

- 17.46 In any case, Sealord does not consider that the Proposed Acquisition should give rise to any concerns under section 47 of the Commerce Act 1986 for the following reasons:
- 17.46.1 IFL adds only a very small amount to Sealord's market share of around [1]. This is entirely in the frozen sector, as IFL does not provide any product in the fresh sector. Sealord's market share remains very modest.
- 17.46.2 Strong competitors, in the form of Sanford, Talley's, Ngāi Tahu Seafood, United Fisheries, Bidfood, and Markwell will remain.
- 17.46.3 In this market, most of the fishing companies have existing processing capacity on their vessels to process fish sufficiently for provision of the products to market, and some have on-shore capacity and could increase output of product to the domestic market, if needed, in response to any attempt by Sealord post-merger to increase price. The other suppliers (e.g. Bidfood and Markwell) seem to have existing processing arrangements in place, which may be able to expand, although Sealord does not know the details of those arrangements.
- 17.46.4 It is easy for the exporting New Zealand fishing companies to grow the rate of export substitution, should Sealord attempt to increase the price of fish products post-acquisition, especially Sanford and Talley's but also any of the other exporting fishing companies. Given the small volume of the domestic market compared to export sales, any of those companies has sufficient volume to divert to New Zealand in order to counter any attempt at a price rise. Only a small percentage of exports by these companies needs to be diverted in order to introduce significant new volumes into the domestic market.
- 17.46.5 There is a strong incentive for companies to do so, as New Zealand markets afford them a higher price (especially after the cost of shipping is taken into account for exports) than selling products in overseas markets. Sealord, and it assumes other companies, ensure that they have flexibility in their contractual arrangements with overseas companies to always have volume available to supply product in New Zealand, noting that the demand in New Zealand is a very small portion of overall export sales.
- 17.46.6 From Sealord's own perspective, in terms of opportunities for export diversion, this is certainly possible. [1]
- 17.46.7 As an example of the potential for diversion of exports, Sanford has in recent years significantly increased its sales into the whole and processed market by selling hoki in New Zealand.
- 17.46.8 If any existing fishing company needs to undertake on-shore processing in order to enter the New Zealand domestic market or expand its supply to New Zealand, there is spare seafood processing capacity in New Zealand where third-party manufacturing already takes place, such as at United Fisheries.
- 17.46.9 There will be continued strong competition from imports. Sealord estimates at least \$10M of frozen whole and processed white fish (not including, for the avoidance of doubt, squid and other seafood, in relation to which the value of imports is significantly higher than this figure) is imported each year (mainly by United Fisheries, Bidfood and Markwell). There are also significant volumes of imported fresh fish or fish that is imported frozen but is thawed for resale. As noted in the Moana clearance application, imports of seafood, across a range of seafood products, into New Zealand have increased sharply since 2010. Some of this comes from importers who sell into the wholesale market and some from supermarkets importing products. It is entirely possible for imports to expand, especially as there are New Zealand companies

already importing fresh and frozen products who can expand their imports relatively easily.

- 17.46.10 Salmon competes strongly with finfish products in this market, as noted in the Moana clearance application. That will continue.
- 17.46.11 New entry from overseas companies is also possible. In a brand context, this has occurred in the smoked salmon category (Ocean Blue) and, within the frozen fish category, basa is imported by wholesalers and retailers as a value proposition (e.g. thawed in supermarkets, frozen to takeaway stores). It is also possible that an existing New Zealand business could pick up a new brand on an agency basis and import products under that brand.
- 17.46.12 There are strong wholesale customers in this market, in both wholesalers such as Bidfood and Gilmours (and a large number for other smaller wholesalers) and also the supermarkets themselves. The supermarkets, in particular, exercise considerable countervailing market power as a very large proportion of products in this market are sold through supermarkets. An example of supermarkets exercising countervailing market power is given below in relation to value-added products. The Foodstuffs group also sells fish under its own brand, Pams, and Woolworths also has the ability to sell fish under its own house brand (and has established processing facilities). Both companies also import some fish products.
- 17.46.13 While neither Sealord nor IFL sell squid or prawn products in New Zealand, these products are sold by other suppliers and compete with Sealord's and IFL's value-added finfish products sold in New Zealand. There is also some competition from other proteins, such as chicken or plant-based proteins.
- 17.47 Most of these reasons are similar to the reasons set out in the *Basuto* decision for the Commission's views in that decision in relation to the finfish processed market.
- 17.48 Sealord therefore considers that the level of competition in the finfish whole and processed market (or markets) would not be substantially different under the Proposed Acquisition as opposed to any counterfactual.
- 17.49 The same analysis would also apply if the market is divided into a wholesale whole fish market and a wholesale processed market. As the Commission noted in the Moana Sol, the competition assessment in those markets would be the same.
- 17.50 The same conclusion applies whether or not frozen and fresh fish are counted in the same market. IFL does not sell any fresh fish, and even in a frozen-only market, it sells only a small volume of fish, such that it still adds only a small additional volume to Sealord's sales. Most of the points above also continue to apply in a frozen-only market.
- 17.51 The position is also no different if this downstream market is divided into separate species markets. In this regard, the only relevant market for the purposes of the Proposed Acquisition would be a market for hoki, given that this will be the fish species comprising the vast majority of Sealord domestic sales. There are many existing and potential suppliers for hoki, and strong potential for export diversion. Also, hoki still faces competition from other protein products.

#### *Value-added markets*

- 17.52 Sealord's market share post-merger will exceed the Commission's market share and concentration indicators, but only by reason of the three firms with the highest market shares having a market share that exceeds the threshold of 70% by less than 1% (see confidential Appendix 12). Sealord does not consider that this gives rise to any concern under section 47 of the Commerce Act 1986 for the following reasons:

- 17.52.1 IFL adds only a small amount to Sealord's market share being around [1]. IFL's volumes are small and Sealord's combined market share would remain relatively modest.
- 17.52.2 Sealord's and IFL's products are not close competitors in the retail sector. Sealord's products are sold in the convenience foods freezers of supermarkets, generally in cardboard packaging with a significant amount of printing, colouring and artwork on them. IFL's products are typically sold in the butchery section, in larger plastic packs, as bulk food items, with significantly less product presentation. Sealord also sells direct to supermarkets while IFL sells through wholesalers (such as Bidfood and Gilmours).
- 17.52.3 In the foodservice sector, while Sealord's and IFL's products are more similar, Sealord's and IFL's products differ in the crumb of the product, such that Sealord and IFL are not the closest competitors in that market. Sealord sees its closest competitors for value-added products in the food service sector as Bidfood and Markwell. They both import product of which the raw material (e.g. hoki) can often be the same species as Sealord's products. As their products are typically processed in low-cost countries, they are very cost competitive to Sealord's New Zealand-made product despite the input fish raw material being the same.
- 17.52.4 Simplot, Markwell, Bidfood, United Fisheries, Seafood Marketing, Talley's and Pams (Foodstuffs) will remain in the market and compete with Sealord's products in both the supermarket and food service sectors. Sealord's acquisition of IFL will not change the competitive conditions for those companies.
- 17.52.5 New entry from overseas is possible, in particular through a retailer/wholesaler sourcing a new brand from overseas and bringing this in. This has occurred within the whole and processed finfish market as discussed above and, since the *Basuto* decision, Simplot has entered the market and grown to a strong market share. It is also possible that an existing New Zealand business could pick up a new brand on an agency basis and import products under that brand.
- 17.52.6 It is also possible that any of the other fishing companies, given their existing New Zealand business, could look to import value-added fish and other seafood products, manufactured overseas either from their own fish or from fish purchased from other fishing companies. Indeed, United Fisheries already operates a significant imported seafood business as well as supplying some of its own fish into the New Zealand market.<sup>46</sup> Several fishing companies have large export volumes that can be "diverted" to New Zealand, such that price rises above competitive levels would not be possible.
- 17.52.7 The supermarkets exercise considerable countervailing market power. For example, recently as part of a category review by Foodstuffs North Island, [1]. Foodstuffs also owns the Pams brand, which currently sells value-added fish products. While Foodstuffs' house brand currently does not sell value-added fish products, it is possible that it may do in future.
- 17.52.8 While neither Sealord nor IFL sell squid or prawn products in New Zealand, these products are sold by other suppliers and compete with Sealord's and IFL's value-added finfish products sold in New Zealand. There is also competition from a range of other imported seafood products such as clams, crab, lobster, marinara mix, mussels, octopus, oysters, scallops, seafood salad, and shrimp.
- 17.52.9 Other kinds of coated and value-added products will continue to compete with finfish value-added products. These other value-added products include coated chicken

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<sup>46</sup> See <https://unitedfisheries.co.nz/?q=ajax-term-page/31&popup=yes>. Sealord estimates that United Fisheries imports are in the tens of millions of dollars in value.



breast, coated chicken portions, coated pork products, and coated plant-based products.

- 17.53 Moana's acquisition of the Sanford North Island inshore fishing business will not affect the competitive position in the value-added market as Sanford does not participate in that market, as far as Sealord is aware.
- 17.54 These reasons are similar to factors considered by the Commission in the *Basuto* decision and seen by the Commission for concluding that the acquisition considered in that decision would not, or would not be likely to, substantially lessen competition in the value-added finfish market.
- 17.55 Sealord therefore considers that the level of competition in the finfish value-added market would not be substantially different under the Proposed Acquisition as opposed to any counterfactual.

## 18 Vertical merger issues

- 18.1 The Commission's merger guidelines note that, in terms of conduct that prevents or hinders rivals from competing effectively, a vertical merger may substantially lessen competition where the merger increases the merged firm's ability and incentive to prevent or hinder competition by:
- 18.1.1 refusing to deal with competitors completely (total foreclosure); or
- 18.1.2 raising prices it charges those competitors (partial foreclosure).
- 18.2 In the Moana Sol, the Commission raised the possibility that Moana, post-transaction, could restrict the amount of ACE that is available to existing or potential competitors to Moana which could impact in the ability of these competitors to compete with Moana in downstream wholesale markets, thereby increasing the wholesale price of fresh fish.
- 18.3 Sealord does not consider that this theory of harm could arise from the Proposed Acquisition<sup>47</sup>. As outlined above, there will still remain sufficient ACE held by parties other than Sealord and available for trading that such a foreclosure strategy would never work. This is especially the case as:
- 18.3.1 Most deepwater fishing companies hold sufficient quota or have other standing arrangements for ACE to cover most of their catch. ACE trading typically occurs in relatively small volumes compared to the total TACC.
- 18.3.2 Only a small volume of fish captured in deepwater fisheries makes it to the downstream New Zealand markets. If Sealord attempted this strategy (which it would not be able to do anyway):
- (a) Any fishing company whose catch might be a limited as a result could divert more of their export volumes into the New Zealand markets.
- (b) Sealord would still face competition from imports in both the whole and processed market (or markets) and the value-added markets, such that it would never be able to profitably and sustainably achieve a price increase in those markets. This would mean it would never recover the costs of a foreclosure strategy.
- 18.3.3 Sealord is only likely, at best, to have a small amount of surplus quota (above what it acquires to cover its catch), to sell to other parties, such that it would not have any real

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<sup>47</sup> In making these comments, Sealord is not to be taken as accepting that the Commission's provisional views in the Moana SOI are correct in respect of the Moana clearance application. Moana's response to the Moana Sol submits on the application of the Commission's views to the Moana application.

opportunity to profitably increase prices for surplus ACE or withhold supply as posited by the Commission.

- 18.4 Further, as outlined above, there would remain strong incentives on Sealord to continue to trade and sell ACE in a normal competitive manner.
- 18.5 In the Moana Sol, the Commission also expressed the provisional view that Moana could reduce 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.<sup>48</sup> Sealord purchases only a limited amount of contract harvesting service from other parties [1]. This is very unlikely to change in the foreseeable future. IFL does not undertake any contract fishing. In addition, the points in paragraph 18.3.2 above would also apply. Sealord does not therefore consider that it could act in the way posited by the Commission's provisional views in the Moana Sol or be successful in any such strategy.
- 18.6 Sealord also does not consider that any vertical merger issues arise in relation to the supply of fish. The industry is characterised by a number of large, mainly vertically integrated suppliers, who largely do not provide services to other operators, and a diverse range of other operators who function largely at one level of the market. There are few examples of fishing companies supplying their competitors e.g. Sealord as well as Talley's and Sanford supply fish block to Simplot who then manufactures this into value add products for retail. In any case there is little overlap with Sealord and IFL given the formats produced by IFL.
- 18.7 Sealord considers that the above considerations apply regardless of any counterfactual.

## 19 No coordinated effects

- 19.1 Sealord considers that markets in New Zealand are not vulnerable to coordination for the following reasons:
- 19.1.1 Prices are not transparent. Arrangements are the subject of bilateral negotiations and as such there is no 'price list' to facilitate the co-ordination of, and the detection of any cheating on, a tacitly colluded price.
- 19.1.2 The relevant markets consist of competitors of different sizes, including global, regional and local players, with different cost basis and margin requirements.
- 19.1.3 The Proposed Acquisition will not result in the removal of a maverick competitor.
- 19.1.4 The relevant markets are characterised by strong customers with a substantial degree of countervailing power.
- 19.2 The Proposed Acquisition does not change any of these factors and hence cannot be said to facilitate the exercise of coordinated market power. Further, in any case, the situation would be no different under the counterfactual.

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<sup>48</sup> In making these comments, Sealord is not to be taken as accepting that the Commission's provisional views in the Moana Sol are correct in respect of the Moana clearance application. Moana's response to the Moana Sol submits on the application of the Commission's views to the Moana application.

**Part 6: Further Information and Supporting Documentation**

- 20 Copies of the most recent audited financial statements for each of the merger parties**
- 20.1 Copies of the most recent audited financial statements of each of the parties are appended to this application as confidential Appendices 18 and 19 respectively.
- 20.2 Sealord has provided copies of any documents (including planning documents, due diligence reports, strategy documents, minutes of meetings, customer research, pricing studies, reports, presentations, surveys, analyses, industry/market reports and recommendations) in its possession which:
- 20.2.1 have been prepared for, seen or considered by senior management and/or any member of the board of directors (or equivalent body) (whether prepared internally or by external consultants),
- 20.2.2 and either:
- (a) set out the rationale for the merger (including but not limited to the benefits of, and/or investment case for the merger) and/or plans following the merger, or
  - (b) assess or analyse the merger with respect to competitive conditions, competitors (actual and potential), potential for sales growth or expansion into new product or geographic areas, market conditions, market shares and/or the price to be paid, or
  - (c) within the last two years, set out the competitive conditions, market conditions, market shares, competitors, or the applicant's business plans in relation to the relevant product(s) or service(s).
- 20.3 As stated below at paragraph 21.2, Sealord seeks confidentiality in respect of these documents and requests that it be notified of any request made to the Commerce Commission under the Official Information Act 1982 for access to any of these documents or the information contained in them.

**Part 7: Confidentiality**

- 21 Confidentiality for specific information contained in or attached to the notice**
- 21.1 Confidentiality is sought in respect of the information in this application that is highlighted and contained in square brackets and for all of Appendices 3-8, 10, 12, 14-19 and part of Appendix 2. Confidentiality is sought for the purposes of section 9(2)(b) of the Official Information Act 1982 on the grounds that:
- (a) The information is commercially sensitive and contains valuable information which is confidential to Sealord (and/or Independent Fisheries); and
  - (b) Disclosure would be likely to unreasonably prejudice the commercial position of Sealord (and/or Independent Fisheries), as the parties providing the information.
- 21.2 Confidentiality is also sought in respect of all documents provided to the Commerce Commission as described in paragraphs 20.2.
- 21.3 Sealord requests that it be notified of any request made to the Commerce Commission under the Official Information Act 1982 in respect of the confidential information in the clearance application, any appendix and/or any document provided to the Commission with the clearance application, and that the Commission seeks Sealord's views as to whether the information remains confidential and commercially sensitive at the time the Official Information Act requests are considered.
- 21.4 The foregoing applies equally in respect of any additional information provided to the Commission that is expressed to be confidential.

## Schedule 1: List of Appendices

**1. Sealord Group Limited Company Extract**

2. []

3. []

4. []

5. []

6. []

7. []

8. []

**9. Quota Volume for Five Largest Owners and Moana**

10. []

**11. ACE Trading and Deepwater Quota Utilisation**

12. []

**13. Data on Fresh Fish Prices - NZ**

14. []

15. []

16. []

17. []

18. []

19. []

## DECLARATION

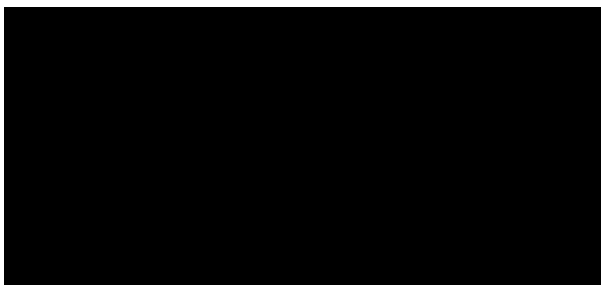
THIS NOTICE is given by **Sealord Group Limited (Sealord)**.

Sealord hereby confirms that:

- all information specified by the Commission has been supplied;
- if information has not been supplied by Sealord, reasons have been included as to why the information has not been supplied;
- all information known to Sealord which is relevant to the consideration of this application/notice has been supplied; and
- all information supplied by Sealord is correct as at the date of this application/notice.

Sealord undertakes to advise the Commission immediately of any material change in circumstances relating to the application/notice.

Dated this 19th day of September 2023.



Colin Douglas Paulin

I am the Chief Executive Officer of the company and am duly authorised to make this Application.

**Appendix 15**  
**CONFIDENTIAL**



**Appendix 16**  
**CONFIDENTIAL**





**Appendix 17**  
**CONFIDENTIAL**

