

SANFORD LIMITED

14 AUGUST 2023

RESPONSE TO STATEMENT OF ISSUES DATED 27 JULY 2023

Introduction

1. This submission ("**Submission**") sets out Sanford Limited's ("**Sanford**") response to the Commerce Commission's (the "**Commission**") Statement of Issues dated 27 July 2023 ("**SOI**") in relation to Aotearoa Fisheries Limited's ("**Moana**") application for clearance to acquire certain fisheries annual catch entitlement ("**ACE**") rights and other assets from Sanford (the "**Transaction**").
2. Sanford is grateful for the opportunity to respond to the SOI, and to provide further evidence in this Submission to assist the Commission in its analysis. Sanford considers that there is no realistic prospect that a substantial lessening of competition will arise in any market as a result of the Transaction, and trusts that this further information will assist the Commission to satisfy itself of the same.
3. In particular, it is apparent from the SOI that the Commission has satisfied (or is close to satisfying itself) that many aspects of the Transaction do not give rise to potential competition concerns, including the Commission:
 - (a) not having any horizontal competition concerns in relation to the supply of fresh fish toll processing services;¹
 - (b) not having any horizontal competition concerns in relation to the retailing of fresh fish;² and
 - (c) indicating that it does not consider that the Transaction is likely to give rise to any horizontal competition concerns in the wholesale supply of processed / unprocessed fish, including due to the competition from wholesalers in the South Island and the competition across fish species.³
4. Sanford agrees that there are no competition concerns in such markets, including Sanford's experience being consistent with the Commission's finding that competition in the downstream wholesale market includes:
 - (a) wholesalers from both the South and North Islands (which includes numerous other commercial fishing businesses, including Talley's, United Fisheries, Ngāi Tahu Seafood, Lee Fish (FSNI), Westfleet, Gisborne Fish, Sanford's other inshore, deepwater, and salmon operations (which comprise more than []⁴ of its business), and many others); and
 - (b) competition across a range of different fish species.
5. The above demonstrates that it is only a very narrow aspect of the Transaction that the Commission is still considering, namely testing the potential for any issues in relation to

¹ Paragraph [9.1] of the SOI.

² Paragraph [9.2] of the SOI.

³ Paragraphs [87] to [89] of the SOI.

⁴ []

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"upstream" aspects of the supply chain. This Submission provides further information addressing those remaining "upstream" aspects, including outlining the reasons why the Transaction does not give rise to competition concerns:

- (a) in any "upstream markets for the acquisition of inshore fish harvesting services";⁵ or
- (b) in any "upstream markets for the supply of ACE".⁶

No competition concerns in any upstream markets for the acquisition of inshore fish harvesting services

6. The suggestion in the SOI that the Transaction could result in potential competition concerns in the acquisition of inshore fish harvesting services fundamentally misunderstands:
 - (a) how inshore fish harvesting services are provided; and
 - (b) the nature of the relationship between a commercial fishing business and fishers.
7. With the proper context outlined, the evidence demonstrates that the Transaction will not give rise to any potential competition concerns in the acquisition of inshore fish harvesting services. That is for the following reasons.
8. The prices and terms ("**T&Cs**") that fishers receive for providing fish harvesting services is not driven by "acquisition competition" between Sanford and Moana (or competition between Moana and any other commercial fishing businesses). Rather, as the SOI notes "ACE Fishers tend to have a very close working relationship with commercial fishing businesses with many fishing for the same commercial fishing business for a significant period of time".⁷ That statement is correct and reflects that there is **significant mutual dependency** between a commercial fishing business and fishers – requiring long-standing relationships of trust and confidence (a **sybiotic relationship**). That is because:
 - (a) a commercial fishing business cannot (obviously) operate without fish. Therefore, a commercial fishing business is as reliant on having trustworthy, reliable, efficient, and viable fishers as the fishers are reliant on contracting with that commercial fishing business;
 - (b) the relationship between a commercial fishing business and contracted fisher is not only symbiotic (for the reasons outlined above), but requires close and ongoing logistical coordination (including to ensure that the right volumes are caught in the right week, and that excess volumes are not caught – which not only would result in potentially unsaleable volumes, but would consume ACE required for subsequent weeks in a fishing year);
 - (c) the number of fishers offering their services in the industry is trending down naturally (as existing operators retire, and are not replaced by the next generation), and a commercial fishing business needs to ensure it offers sufficient remuneration and T&Cs to incentivise sufficient fishers to continue to harvest fish for it;

⁵ Response to paragraph [8.2] of the SOI.

⁶ Responding to paragraph [8.1] of the SOI.

⁷ Paragraph [83] of the SOI.

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- (d) both fishers and commercial fishing businesses have aligned interests / incentives in obtaining quality catch (to realise downstream value), and a commercial fishing business seeking to push harvest prices below competitive levels would risk lowering the quality of the fishers' catch, which is not in a commercial fishing business' interests; and
- (e) most offences under the Fisheries Act are strict liability,⁸ and a commercial fishing business that owns the ACE is responsible for ensuring that all obligations as ACE holder are met. Accordingly, a commercial fishing business can effectively be liable for the acts of its contracted fishers and / or its contracted fishers must be able to assist the commercial fishing business to meet its obligations as ACE holder (such as reporting of catch, avoiding over-fishing, etc).

9. For these reasons a commercial fishing business, such as Sanford, needs to be very selective in choosing which fishers it contracts with, whilst also needing to ensure that the prices and T&Cs on which it contracts with its fishers not only enable that fisher to be successful, viable and efficient (for the success of the commercial fishing business), but also sufficient to obtain quality catch and avoid any incentives on the fisher to "cut corners" (given, as noted, the commercial fishing business can face liability for any breaches of the Fisheries Act). That is why Sanford's relationships with its fishers are long-standing, as illustrated in Figure One below.

Figure One – Diagram showing the tenure of Sanford's relationship with its fishers

[] ⁹	[]	[] years
[]	[]	[] years
[]	[]	[] years
[]	[]	[] years
[]	[]	[] years
[]	[]	[] years

10. Furthermore:

- (a) there is also very little "switching" of fishers between commercial fishing businesses. The fact that the Commission may have identified limited examples of fishers contracting to more than one commercial fishing business¹⁰ is not evidence of "competition" in the acquisition of such services, but rather is more consistent with being evidence that certain fishers may have sufficient capacity to maintain simultaneous long-standing (symbiotic) relationships with two or more commercial fishing businesses. Indeed:
 - (i) Sanford cannot recall having "lost" a fisher to Moana (or vice versa) due to competition between them;¹¹ and
 - (ii) Sanford is not aware of any evidence of fishers playing off commercial fishing businesses against one another to obtain better prices / T&Cs, nor

⁸ Section 240.

⁹ []

¹⁰ Paragraph [84] of the SOI.

¹¹ []

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of any evidence of fishers switching between commercial fishing businesses in response to changes in prices or T&Cs;

- (b) the fact that there is not any material competition between commercial fishing businesses is also reinforced from an economics perspective by the fixed nature of quota (and therefore ACE), which means there is a capacity constraint in the market, such that once a commercial fishing business has its relationships with fishers established, there is little incentive to compete for "more" fishers as a commercial fishing business cannot expand the volume of fish it catches without acquiring more quota or ACE;¹²
- (c) []¹³ [];
- (d) a commercial fishing business would also have no incentive to depress prices / T&Cs to fishers below competitive levels, as any reduction in the viability and number of efficient fishers would reduce the commercial fishing business's access to fish, and the commercial fishing business could not recover the loss of those volumes through increased downstream wholesale prices given the competitive nature of those downstream markets (as acknowledged in the SOI), which makes a commercial fishing business a price taker in those downstream markets. The Commission has previously observed similar dynamics in the dairy industry as supporting findings that Fonterra would not have an incentive to depress raw milk acquisition prices paid to farmers below competitive levels:¹⁴

"The likelihood of such a price decrease being profitable is reduced by the fact that... []% of Fonterra's milk solids are exported and it is largely a pricetaker in these markets. As such, any reduced downstream sales consequent upon reduced farm gate purchases would be unlikely to be accompanied by increased downstream prices."

11. Accordingly, the evidence demonstrates that:

- (a) there is not any material "existing competition between Moana and Sanford to acquire harvesting services from ACE Fishers";¹⁵ and
- (b) it is not the case that Sanford's presence in the inshore sector places any "significant competitive constraint on the price that Moana would pay for harvesting services".¹⁶

12. Finally, []¹⁷ []:

- (a) [];
- (b) []:

¹² In addition, even to the extent ACE could be said to be tradeable, that does not undermine this point from an economics perspective because if ACE "trades hands", the previous holder would no longer have a need for the fishers who were harvesting the ACE it just lost (so it would presumably stop contracting with some of its fishers as it does not have the ACE for them to catch, so the purchaser of that ACE would not need to "compete" to acquire those fishers' harvesting services).

¹³ []

¹⁴ (6 November 2015). Commerce Commission. Review of the state of competition in the New Zealand Dairy Industry. Draft Report. https://comcom.govt.nz/_data/assets/pdf_file/0022/88312/Draft-report-Review-of-the-state-of-competition-in-the-NZ-dairy-industry-6-Nov-2015.PDF

¹⁵ Paragraph [85] of the SOI.

¹⁶ Paragraph [85] of the SOI.

¹⁷ []

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- (i) [];
- (ii) []; and
- (iii) [].

13. Accordingly, Sanford considers that the evidence plainly demonstrates that:

- (a) it is not "competition" between commercial fishing businesses that drives fish harvesting acquisition prices and T&Cs;
- (b) Moana would not have any incentive to seek to depress fish harvesting prices and T&Cs below competitive levels; and
- (c) [].

No competition concerns in any upstream markets for the supply of ACE

14. The concerns being tested in the SOI in relation to "upstream markets for the supply of ACE" also fundamentally misunderstand how the sector operates.

15. First, the SOI says that the Commission is testing the removal of Sanford "as a potential seller of surplus ACE" to other fishers to cover bycatch.¹⁸ Sanford has not maintained ownership of ACE to supply it to other (non-contracted) fishers. Rather, of its Snapper ACE, only a very small portion has not been used by Sanford for its own commercial fishing business requirements (either via its company owned or contracted fishers). That is as set out in Figures Two and Three below. [].

Figure Two – Sanford Snapper ACE not "consumed" by Sanford's business 2022/23 (volumes in KG)¹⁹

	SNA1	SNA2	SNA8
Total Sanford Snapper ACE	[]	[]	[]
Volumes not consumed by Sanford:			
Volume sold via AFM (2022/23) (AFM volumes are outside the Transaction, and Sanford will continue to sell).	[] ([]% of total)	[] ([]% of total)	[] ([]% of total)
Volume sold to other fishers (2022/23) ²⁰	[] ([]% of total)	[] ([]% of total)	[] ([]% of total)

16. This demonstrates that any potential concerns about Moana withdrawing the amount of "surplus Snapper ACE" available to other fishers could, at most, have only a *de minimis* impact on fish volumes available in any downstream markets.

¹⁸ Paragraph [77] of the SOI.

¹⁹ []

²⁰ []

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17. Second, the SOI conceptualises other fishers as being "rivals" of Moana, that Moana could, therefore, have the incentive to foreclose.²¹ That does not reflect the nature of Moana's business, nor the business of most fishers in question. As the Commission is aware, Moana is a commercial fishing business that does not harvest fish itself (it processes and wholesales fish). Therefore, fishers are not "rivals" to Moana in fish harvesting, as that is not something Moana does, rather they are suppliers (or potential suppliers) to Moana of fish harvesting services. Equally, many smaller scale fishers (which is presumably the fishers the Commission is focussing on), do not themselves have any processing or wholesaling capabilities. Therefore, again it is difficult to conceptualise them as "rivals" of Moana. Accordingly, it is difficult to see how Moana could have any incentive to withhold any volumes of "surplus" ACE to raise the costs of businesses that are (actual or potential) suppliers to Moana (not competitors to it in any material sense).

18. Third, the potential concern tested in the SOI that the withholding of surplus Snapper ACE upstream could potentially also make the downstream national fish wholesaling business substantially less competitive does not make sense. In particular, in the context of a downstream national wholesaling market that the Commission has already observed is unlikely to have any horizontal effects (due to the nationwide nature of the market, including the presence of strong South Island competitors such as Talley's, United Fisheries, Ngāi Tahu Seafood, Westfleet, Sanford's South Island inshore business, and others), it is not possible to see how:

- (a) any (hypothetical) withholding of surplus Snapper ACE to smaller fishers could have any material impact on that nationwide and highly competitive downstream market;
- (b) Moana could be said to have an incentive to withhold any surplus Snapper ACE from other fishers that require it for bycatch, given:
 - (i) ACE is a key and valuable asset of a commercial fishing business, which a commercial fishing business will want to realise value from;
 - (ii) Moana would not be able to benefit from any such withholding strategy in the downstream national wholesaling market given there is no way in which Moana could obtain any ability to increase prices in that downstream competitive market through such a strategy; and
 - (iii) any ACE that is unsold or unused by Moana at the end of the fishing year (other than limited carry forward volumes) is lost at the end of that year.

Accordingly, to the extent Moana had any surplus Snapper ACE, any decision to not sell that surplus ACE to other fishers would only cost it money (through lost ACE sales), with no prospect of any recoupment.

19. Fourth, []²² []:

(a) []; and

(b) [].

20. Accordingly, Sanford considers that the evidence plainly demonstrates that:

²¹ Paragraph [77] of the SOI.

²² []

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- (a) to the extent "surplus" Snapper ACE is currently available to other fishers (i.e. fishers not contracted to a commercial fishing business), that is *de minimis* in the scheme of both the volumes of ACE used for fishing upstream and overall downstream national market (so any hypothetical withholding of "surplus" ACE could not have a substantial impact on competition in any market);
- (b) there is no evidence that Moana could be said to have any incentive to withhold any volumes of "surplus" Snapper ACE to other (non-contracted) fishers – fishers are service providers to Moana, not "rivals"; and
- (c) [].

Concluding comments

21. For the reasons outlined above, Sanford considers that there is no realistic prospect that a substantial lessening of competition could arise in any market as a result of the Transaction. Sanford trusts that the information outlined in this Submission will assist the Commission to satisfy itself of the same, and that there would be no benefits to competition of the Commission declining or delaying clearance [].