

Statement of Preliminary Issues

Farmlands Co-operative Society/Seales Winslow

23 November 2023

Introduction

1. On 8 November 2023, the Commerce Commission registered an application (the Application) from Farmlands Co-operative Society Limited (Farmlands) seeking clearance to acquire 100 percent of the shares of Seales Winslow Limited (Seales Winslow) (the Proposed Acquisition).¹
2. The Commission will give clearance if it is satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
3. This statement of preliminary issues sets out the issues we currently consider to be important in deciding whether or not to grant clearance.²
4. We invite interested parties to provide comments on the likely competitive effects of the Proposed Acquisition. We request that parties who wish to make a submission do so by **7 December 2023**

The parties

5. Farmlands is a farming co-operative with over 80,000 shareholders across New Zealand. It operates a range of agricultural businesses including its NRM Division, which is the Farmlands division that focuses on supplying animal nutrition products to customer across New Zealand.³
6. Farmlands' range of animal nutrition products include bulk and bagged pelletised compound feed for production animals.
 - 6.1 In the South Island, Farmlands supplies its customers with pelletised feed that it manufactures itself at mills in Rolleston and Winton.
 - 6.2 In the North Island, Farmlands currently uses a toll manufacturer (Seales Winslow) to supply it with the pelletised feed it distributes to its customers.⁴

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

² The issues set out in this statement are based on the information available when it was published and may change as our investigation progresses. The issues in this statement are not binding on us.

³ The Application at [1].

⁴ The Application at [13].

7. Seales Winslow is the animal nutrition business of Ballance Agri-Nutrients Limited (Ballance). Ballance is one of the main suppliers of fertiliser in New Zealand. Similar to Farmlands, Seales Winslow manufactures a range of animal nutrition products, including pelletised compound feed, and supplies these to customers across New Zealand. At present, Seales Winslow manufactures its compound feed at mills located in both the North Island (Morrinsville and Whanganui) and the South Island (Ashburton).⁵

Our framework

8. Our approach to analysing the competition effects of the proposed acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.⁶ As required by the Commerce Act 1986, we assess mergers and acquisitions using the substantial lessening of competition test.
9. We determine whether an acquisition is likely to substantially lessen competition in a market by comparing the likely state of competition if the acquisition proceeds (the scenario with the acquisition, often referred to as the factual), with the likely state of competition if the acquisition does not proceed (the scenario without the acquisition, often referred to as the counterfactual).⁷ This allows us to assess the degree by which the proposed acquisition might lessen competition.
10. If the lessening of competition as a result of the proposed acquisition is likely to be substantial, we will not give clearance. When making that assessment, we consider, among other matters:
- 10.1 constraint from existing competitors – the extent to which current competitors compete and the degree to which they would expand their sales if prices increased;
 - 10.2 constraint from potential new entry – the extent to which new competitors would enter the market and compete if prices increased; and
 - 10.3 the countervailing market power of buyers – the potential constraint on a business from the purchaser’s ability to exert substantial influence on negotiations.

Market definition

11. We define markets in the way that we consider best isolates the key competition issues that arise from the proposed acquisition. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately

⁵ The Application at [4].

⁶ Commerce Commission, Mergers and Acquisitions Guidelines (May 2022). Available on our website at www.comcom.govt.nz

⁷ *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

determined, in the words of the Commerce Act 1986, as a matter of fact and commercial common sense.⁸

12. The merging parties overlap in the supply of pelletised compound feed for livestock.⁹ Pelletised compound feed is a type of supplementary feed that farmers provide to their farm animals to supplement the nutrition their animals receive from pasture or foraging crops.
13. Farmlands considers that all types off-farm supplementary feed should be included in the same market. It submits the relevant markets are:¹⁰
 - 13.1 the North Island market for the production and distribution of off-farm supplementary livestock feed; and
 - 13.2 the South Island market for the production and distribution of off-farm supplementary livestock feed.
14. In Farmlands' view, from a farmer's perspective, all types of supplementary feed remain substitutable for each other as "a matter of fact and commercial commonsense". Noting that all types of supplementary feed will have different attributes and farmers will have individual preferences, Farmlands considers that farmers choose a range of feed types or combinations of feed types in all trading conditions.¹¹
15. We will consider whether the markets submitted by Farmlands are the most appropriate markets for assessing the competitive effects of the Proposed acquisition, or whether the competitive effects are better assessed with reference to an alternative market definition(s).
16. In assessing the products that should be included in the relevant markets, we will consider:
 - 16.1 whether it is appropriate to define the scope of the product market for specific types of supplementary feed, such as pelletised compound feed. This will include assessing;
 - 16.1.1 how easily (and readily) farmers switch between purchasing the different types of supplementary feed for their animals such as straights, blends, silage and pelletised compound feed;¹²

⁸ Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

⁹ The Application at [57].

¹⁰ The Application at [15].

¹¹ The Application at [18] and [24].

¹² For example, we understand that: straights are a straight feed commodity (such as Palm Kernal Extract) that do not undergo much treatment before being feed to the animal; blends are a feed that is mix of straights and grains but they can include additional minerals; silage is a feed that which farmers can purchase or prepare from grass they grow themselves; and pelletised compound feed which is a feed that tends to be a mixture of blends and minerals but supplied in a palletised form. See for example the Application at [19].

- 16.1.2 how easily manufacturers can switch between producing the different types of supplementary feed;
- 16.1.3 how easily manufacturers of bulk supplementary feed can switch to supplying the same feed in a bagged format; and
- 16.2 whether it is appropriate to define product markets for supplementary feed for specific animals. This will include assessing how easily manufacturers can switch between producing feed for ruminants (such as sheep and cattle) and feed for monogastric animals (such as pigs and poultry), and supplying such feed to customers. For example:
 - 16.2.1 with regards to production, we understand that a mill producing feed with animal protein for monogastric animals cannot produce feed for ruminant animals;¹³
 - 16.2.2 however, with regards to supply to customers, we understand that a farmer with monogastric animals can use feed from a mill producing feed for ruminants although the reverse may not be appropriate.¹⁴
- 17. We will also assess the appropriate geographic scope of any relevant product market(s). Farmlands submits there are separate North Island and South Island markets for supplementary livestock feed. We understand that because of the high cost of transporting feed between the two islands, feed mills in one island do not tend to supply livestock feed to customers located in another island. However, we will consider whether it is necessary to assess competition on more of a regional, or localised basis. This might be the case, for example, if:
 - 17.1 customers prefer to purchase feed from manufacturers' mills located close to them; and/or
 - 17.2 it is not easy for feed manufacturers based in one region to supply other regions.

Without the acquisition

- 18. We will consider what the parties would do if the Proposed Acquisition did not go ahead. We will consider the evidence on whether the without-the-acquisition scenario is best characterised by the status quo, or whether the parties would seek alternative options such as, for example, Ballance finding a different buyer for Seales Winslow.

¹³ We understand this is due to requirements set by the Ministry for Primary Industries with regard to animal feed production and preventing disease transfer. See The Application at [35]-[36] and <https://www.mpi.govt.nz/animals/animal-feed-preventing-disease-transfer/>.

¹⁴ That is, a farmer with ruminant animals could not use feed from a mill producing feed for monogastric animals. See the Application at [37].

Preliminary issues

19. We will investigate whether the Proposed Acquisition would be likely to substantially lessen competition in the relevant market (or markets) by assessing whether horizontal unilateral, coordinated or vertical effects might result from the proposed acquisition. The questions that we will be focusing on are:
- 19.1 unilateral effects: would the loss of competition between the parties enable the merged entity to profitably raise prices or reduce quality or innovation by itself?¹⁵
 - 19.2 coordinated effects: would the proposed acquisition change the conditions in the relevant market/s so that coordination is more likely, more complete or more sustainable?
 - 19.3 vertical or conglomerate effects: would the proposed acquisition increase the merged entity's ability and/or incentive to foreclose rivals?

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

20. Unilateral effects arise when a firm merges with a competitor that would otherwise provide a significant competitive constraint (particularly relative to remaining competitors) such that the merged firm can profitably increase price above the level that would prevail without the merger without the profitability of that increase being thwarted by rival firms' competitive responses.¹⁶
21. Farmlands submits that the Proposed Acquisition would not be likely to substantially lessen competition in any relevant market due to unilateral effects because:¹⁷
- 21.1 the aggregation in both the North Island and South Island in the supply of supplementary livestock feed is minimal;
 - 21.2 in all types of supplementary feed, Farmlands would be constrained by strong competitors and there are minimal barriers to these competitors expanding; and
 - 21.3 farmers and wholesale suppliers can exercise countervailing market power because,¹⁸
 - 21.3.1 farmers have an ability to substitute away from pelletised compound feed to a large range of alternative feed types including planting their own crops; and

¹⁵ For ease of reference, we only refer to the ability of the merged entity to "raise prices" from this point on. This should be taken to include the possibility that the merged entity could reduce quality or innovation, or worsen an element of service or any other element of competition, i.e. it could increase quality-adjusted prices.

¹⁶ Mergers and Acquisitions Guidelines above n6 at [3.62]

¹⁷ The Application at [41].

¹⁸ The Application at [71]-[74].

21.3.2 national wholesale suppliers are able to leverage purchases in one region with those in another (to the extent that there is a difference in competition in one region compared to another region).

22. We will consider the closeness of competition between the merging parties in any relevant market and therefore, what competition would be lost due to the Proposed Acquisition if clearance is granted. For example, we will look at the extent to which the merging parties compete closely to supply any type of livestock feed to customers in any particular region of New Zealand.
23. To the extent that any constraint between the merging parties is material, we will assess the impact of the loss of competition having regard to the remaining constraints in any market. In doing this, we will consider the following factors:
- 23.1 the degree of constraint that existing competitors would impose on the merged entity in the supply of livestock feed including how rivals would compare with the merged entity in regard to price; quality; service and delivery (or any other relevant factor);
 - 23.2 how easily rivals could enter and/or expand in the relevant markets; and
 - 23.3 countervailing power and whether customers have special characteristics that would enable them to resist a price increase by the merged entity.

Coordinated effects: would the proposed acquisition make coordination more likely?

24. An acquisition can substantially lessen competition if it increases the potential for the merged entity and all or some of its remaining competitors to coordinate their behaviour and collectively exercise market power or divide up the market such that output reduces and/or prices increase. Unlike a substantial lessening of competition which can arise from the merged entity acting on its own, coordinated effects require some or all of the firms in the market to be acting in a coordinated way.¹⁹
25. In the Application, Farmlands submits that the Proposed Acquisition would not be likely to substantially lessen competition in any relevant market due to coordinated effects because:²⁰
- 25.1 there is a large range of alternative options and supplies for customers of off-farm supplementary livestock feed;
 - 25.2 the relevant products are differentiated;
 - 25.3 the pricing of rivals is not easily observable meaning that it is difficult for competitors to act in ways that promote coordination; and

¹⁹ Mergers and Acquisitions Guidelines above n6 at [3.84].

²⁰ The Application at [76].

- 25.4 there are different sales channels utilised by the different suppliers, including direct sales, which would make coordination difficult.
26. We will assess whether any of the relevant market/s are vulnerable to coordination, and whether the Proposed Acquisition would change the conditions in the relevant market/s so that coordination is more likely, more complete or more sustainable.

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

27. A merger between suppliers (or buyers) who are not competitors but who operate in related markets can result in a substantial lessening of competition due to vertical or conglomerate effects. This can occur where a merger gives the merged entity a greater ability or incentive to engage in conduct that prevents or hinders rivals from competing effectively.²¹
28. Farmlands submits that, while it operates at both the production and wholesale supply and retail levels of the relevant markets, the acquisition will not substantially lessen competition as a result of vertical effects because:²²
- 28.1 it would have neither the ability nor the incentive to foreclose rival suppliers and manufacturers of supplementary feed, or rural retail merchants; and²³
- 28.2 Farmlands' rivals would continue to have access to all other rural retail merchants, as well as retaining the ability to supply direct to farmers. The acquisition will not change either of those features of the market.²⁴
29. We will consider the potential for vertical effects and whether Farmlands could potentially foreclose a competing feed supplier given its existing presence as both a manufacturer and a retailer of supplementary feed for livestock in the South Island, and, with the Proposed Acquisition, in the North Island also.

Next steps in our investigation

30. The Commission is currently scheduled to make a decision on whether or not to give clearance to the proposed acquisition by 25 January 2024. However, this date may change as our investigation progresses.²⁵ In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.
31. As part of our investigation, we will be identifying and contacting parties that we consider will be able to help us assess the preliminary issues identified above.

²¹ Mergers and Acquisitions Guidelines above n6 at [5.1]-[5.5].

²² The Application at [77].

²³ The Application at [77].

²⁴ The Application at [78].

²⁵ The Commission maintains a clearance register on our website at <http://www.comcom.govt.nz/clearances-register/> where we update any changes to our deadlines and provide relevant documents.

Making a submission

32. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference 'Farmlands/SealesWinslow' in the subject line of your email, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on **7 December 2023**.
33. Please clearly identify any confidential information contained in your submission and provide both a confidential and a public version. We will be publishing the public versions of all submissions on the Commission's website. If you make a submission and we do not acknowledge receipt of that submission within two working days, you should resubmit your submission.
34. All information we receive is subject to the Official Information Act 1982 (OIA), under which there is a principle of availability. We recognise, however, that there may be good reason to withhold certain information contained in a submission under the OIA, for example in circumstances where disclosure would unreasonably prejudice the supplier or subject of the information.