MERGER CONTROL LAW IN AUSTRALIA AND NEW ZEALAND: SOME REFLECTIONS ON THE AUSTRALIAN REFORMS AND RECENT NEW ZEALAND DEVELOPMENTS

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There have been significant recent policy and case law developments relating to the application of competition law to mergers and acquisitions in New Zealand.

This article is in two parts. The first addresses the current policy review into both procedural and substantive issues under pt 3 of the Commerce Act 1986. This policy review follows upon the detailed review of merger controls in Australia, which was completed at the end of 2024. The key process issue under the current review relates to the pre-notification of mergers to the Commerce Commission. It is argued that the current voluntary notification regime should be retained in New Zealand, despite the recent introduction of a mandatory notification regime in Australia. This article also traces the substantive changes which are open for consultation, the most significant being the extension of the substantial lessening of competition test to capture incremental increases in market power.

The second part of this article provides critiques of two recent merger decisions of the Commerce Commission, namely the Serato *and* Foodstuffs *decisions. This critique includes discussion of the Commerce Commission's approach to the assessment of mergers where there may be different competition effects over several markets. It is argued that the correct approach under s 47 of the Commerce Act in this setting is to apply a net competition test under which both the pro- and anti-competitive effects must be balanced.*

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I INTRODUCTION

Recent developments in New Zealand's competition laws relating to merger control centre upon both policy and case law developments.

On the policy front, a substantial review of merger control was recently undertaken in Australia. These reforms were captured in the Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024 (Cth), which was passed without amendment on 28 November 2024. At the conclusion of this Australian review, a targeted review of New Zealand's Commerce Act 1986 was commenced by the Ministry of Business, Innovation and Employment on 5 December 2024 (MBIE review), inspired by and relying in significant part upon these Australian reforms.[1]

The New Zealand review is one of surprising brevity. The mergers chapter, which is the main subject matter of the MBIE review, extends only to 15 pages.[2] Submissions were due on 7 February 2025, and the timetable proposed that recommendations were to be made to the Minister in February with Cabinet decisions due in March/April 2025.[3]

This article is in two main parts:

(a) The first traces some key aspects of these Australian and New Zealand policy reforms relating to merger controls.
(b) It then discusses two recent decisions of the New Zealand Commerce Commission, namely *AlphaTheta and Serato* and *Foodstuffs North Island and Foodstuffs South Island*.[4] These decisions have attracted particular interest because they are the first to have been declined clearance since 2017.

II A COMMON STARTING POINT

For context, New Zealand's competition laws have been largely based on the Australian model. The Commerce Act when first enacted mirrored the key substantive provisions contained in the Trade Practices Act 1974 (Cth). Goals of legislative uniformity have been pursued in New Zealand for a variety of reasons. Alignment of competition laws has been viewed as consistent with the promotion of the Single Economic Market between the two nations.[5] Further, the development of jurisprudence

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1 Ministry of Business, Innovation and Employment "Promoting competition in New Zealand - A targeted review of the Commerce Act 1986" (5 December 2024) [MBIE review].

2 At ch 2.

3 At 8.

4 *Re AlphaTheta and Serato* [2024] NZCC 14; and *Re Foodstuffs North Island Ltd and Foodstuffs South Island Ltd* [2024] NZCC 22.

5 See generally New Zealand Foreign Affairs & Trade "Single Economic Market" <www.mfat.govt.nz>.

in Australia has always been viewed as informative in the application of competition laws in New Zealand.[6]

Originally the merger prohibition under s 47 of New Zealand's Commerce Act related to the acquisition or strengthening of a dominant position in a market. This dominant position threshold test involved a high degree of market power and was established where a firm had sufficient market power to enable it to act "to an appreciable extent in a discretionary manner".[7]

However, since 2001, this competition threshold has been amended to the conventional substantial lessening of competition test.[8] Accordingly, there is harmony relating to the legislative test for mergers in both Australia and New Zealand. Section 50(1) of the Competition and Consumer Act 2010 (Cth) (CCA) and s 47(1) of the Commerce Act both prohibit the acquisition of assets and shares which have, or are likely have, the effect of substantially lessening competition in any market.

The counterfactual methodology for the application of these provisions is also in harmony. Merger analysis in both jurisdictions is based on a forward-looking assessment of competition both with and without the merger. This inquiry requires an assessment of the likely future state of competition without the merger (the counterfactual) compared with the state of competition if the merger proceeds (the factual).[9]

A challenge in the application of both these provisions is the assessment of the substantiality test. There is legislative and case law guidance on this test, however, not surprisingly, these formulations are of limited assistance. To the extent there is such guidance, "substantial" means real or of substance, material, meaningful and other similar dictionary definition formulations.[10] In the New Zealand context, this test has also been described as involving an assessment of the extent to which there will likely be a change in market power along the spectrum from perfect competition to monopoly.[11] Ultimately, this inquiry requires a judgement call, and the complexity of this will depend upon the difficulty of the predictions that may be required.

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6 See generally Chris Noonan *Competition Law in New Zealand* (Thomson Reuters, Wellington, 2017) at 39–41.

7 *Telecom Corp of New Zealand Ltd v Commerce Commission* (1991) 4 TCLR 473 (HC) at 507–510.

8 For background to this amendment, see Mark Berry and Morag Bond "The Redirection of the Merger Threshold" in David Rowe and Cynthia Hawes (eds) *Commercial Law Essays: A New Zealand Collection* (Centre for Commercial and Corporate Law, Christchurch, 2003) 119.

9 See for example *Australian Gas Light Company v ACCC (No 3)* [2003] FCA 1525, (2003) 137 FCR 317 at [352]; and *Commerce Commission v Woolworths Ltd* [2008] NZCA 276 at [63].

10 See for example Australian Competition and Consumer Commission *Merger Guidelines* (November 2008) at [3.16]–[3.19]; and Noonan, above n 6, at 745–746.

11 *Commerce Commission v New Zealand Bus Ltd* (2006) 11 TCLR 679 (HC) at [121].

III THE POLICY DEBATE

The following discussion focuses upon some key aspects of the current MBIE review paper. These topics are common to the recent Australian reforms, and accordingly, this discussion also includes comparative observations on these from a New Zealand perspective.

This section addresses:

(a) notification regimes;
(b) the extension of the substantial lessening of competition test; and
(c) partial acquisitions and the definition of "assets".

A Notification Regimes

Different paths have been followed in respect of the procedural approaches taken for the notification of mergers to the competition law authorities in Australia and New Zealand. In Australia, the Australian Competition and Consumer Commission (ACCC) has for many years administered an informal review process. In New Zealand there have been legislative clearance and authorisation application procedures which, although voluntary, have been actively pursued.[12]

The Australian review has resulted in the introduction of a new mandatory notification and suspensory administrative regime. The question is being asked in New Zealand whether a mandatory notification regime should be adopted or whether the existing voluntary regime should remain.[13]

To answer this question, it is informative to trace the operation of the New Zealand regime in a little detail. This, followed by a comparative review of the Australian reforms, will hopefully serve to provide some insights into the potential operation of the new Australian regime, and to answer this reform question in the current New Zealand review.

1 Notification options in New Zealand

Merger parties can approach the Commerce Commission either for clearance or authorisation. Clearance applications are made where it is submitted that no substantial lessening of competition is likely to result. Authorisation applications are an option where the parties realise that reliance may need to be placed upon the establishment of countervailing public benefits.

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12 New Zealand did, before 1986, have a mandatory notification regime under s 67 of the previous Commerce Act 1975. This regime applied to mergers that came within the classes described within the Third Schedule. The Third Schedule was based on identified industry sectors and the value of the assets and turnover of the merger parties.

13 The MBIE review also raises several other questions for consideration: (a) should the Commission be granted stay and/or hold separate or call-in powers which require an application; and (b) should there be mandatory notification for certain acquirers with substantial market power or of a certain size? See MBIE review, above n 1, at 7. These issues are touched upon in the discussion in this part of the article.

(a) The clearance application setting

From the outset, there are three procedural options open to parties proposing to merge in New Zealand: (1) mergers can be implemented without any reference to the Commission; (2) courtesy letters can be sent to the Commission outlining the proposed transaction and advising that no clearance application will be made based upon a self-assessment; or (3) an application can be made to the Commission for clearance.

A significant number of mergers are undertaken without reference to the Commission, but the scale of this is difficult to know. The Commission monitors market developments and there is always the prospect that mergers can come to the Commission's attention through complaints or other referrals. The Commission actively reviews non-notified mergers and, where such reviews are escalated to formal investigations, this is transparently revealed in the case register on the Commission's website.[14]

The courtesy letter option has no formal status. The Commission may on occasions provide an indication that, based on the information that is available, no investigation will be undertaken. This will most likely occur where the Commission already has some current detailed information on the industry in question, or where no apparent concerns appear to arise. However, where the Commission considers that competition issues may potentially arise, it will likely indicate that the proposal needs to be tested in the marketplace before it can reach any view. Often there will be barriers to the Commission testing the proposed merger in this setting if the merger proposal is confidential. Typically, this impasse will lead to the merger parties following the clearance path option, particularly where the Commission indicates that it may seek injunctive relief.[15]

As a result, mergers which may involve potential competition law concerns in New Zealand are most likely to involve applications for prior clearance or authorisation.

Section 66 of the Commerce Act provides the legislative basis for the clearance regime. The Commission's clearance processes have evolved based upon the requirements of this provision and procedural protocols which the Commission has developed over time. The Commission's *Mergers*

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14 Commerce Commission "Case register" <www.comcom.govt.nz>. Proceedings have been commenced in respect of four non-notified mergers, namely Wilson Parking Ltd's acquisition of a long-term lease to operate the Capital Car Park (resulting in a divestment settlement); *Commerce Commission v First Gas Ltd* [2019] NZHC 231 ($3.4 million penalty); *Commerce Commission v Objective Corporation Ltd* [2022] NZHC 1864 ($1.545 million penalty) and *Commerce Commission v Alderson Logistics Ltd* (pending). Seven other investigations since 2018 have resulted in no further action.

15 As noted above at n 13, the MBIE review raises the question whether stay and/or hold separate powers and call-in powers requiring a clearance application should be conferred on the Commission. The threat of injunctions in practice already serves this goal, so any such amendment would not likely result in any change from the current operation of the clearance regime. Further, these powers would not resolve the problem of the implementation of mergers which are unknown to the Commission prior to completion.

and Acquisitions Guidelines set out the processes to be followed for clearance applications, from the point of pre-application meetings through to the final determination.[16]

The clearance process is typically viewed by market participants as involving high compliance costs. Detailed information requirements are imposed by the Commission in respect of applications[17] and the passage of most investigations will involve significant interaction with the applicants and interested parties.[18]

The Commission has established two potential tracks for clearance applications.[19] The first involves applications which may be decided within the initial statutory timeframe of 40 working days. The second track relates to more complex clearance applications which cannot be determined in this initial 40 working day period. In this setting, the Commission has set out the following indicative timetable:

(a) By the 50th working day, a Statement of Issues is published, and submissions and cross-submissions are invited in respect of this.
(b) If the matter cannot be determined by the 100th working day, a Statement of Unresolved Issues is published, and a further round of submissions follows with a target decision date of 130 working days.

The Statement of Issues and Statement of Unresolved Issues papers are typically detailed outlines of the Commission's analysis up to these points of the investigation, and the latter often takes on the appearance of a draft determination.

A significant feature of the New Zealand clearance regime is that the Commission can extend the deadline for the final decision beyond any statutorily set completion date. Section 66(3) and (4) provide that a decision is required within 40 working days or such longer period as many be agreed between the Commission and the applicant, and that if there is no clearance by this date, then the application is deemed to be declined. These provisions mean that the Commission can unilaterally dictate the timetable.

The Commission has issued performance data which reveal that, in the latest 2022–23 financial year, the average time taken to reach a clearance decision was 43 working days in the case of applications where no Statement of Issues or Statement of Unresolved Issues was issued. In the phase 2 setting, the data over this period for the Statement of Issues and Statements of Unresolved Issues

16 Commerce Commission *Mergers and Acquisitions Guidelines* (May 2022) at ch 6 [NZCC *Merger Guidelines*].

17 At Attachment B.

18 The number of clearance applications is not significant. The number of applications for the last three calendar years are as follows: 16 in 2022, 14 in 2023 and 8 in 2024.

19 NZCC *Merger Guidelines*, above n 16, at [6.28]–[6.29].

settings was aggregated at 94 working days.[20] Obviously, the Statement of Unresolved Issues cases involved longer periods for decision.

(b) The authorisation option

There is a separate track for authorisation applications under which mergers can be approved on grounds of countervailing public benefits. An application for authorisation can be made as an originating application, without the need for a prior clearance application assessment. If in the course of considering the application no substantial lessening of competition is found, then clearance will be granted.[21]

The procedures here largely follow the clearance application precedent with the addition of a conference option.[22] These applications are few and, in the typical authorisation case, the Commission will undertake an extensive investigation followed by the release of a draft determination.[23] Submission rounds and a conference follow. The conference is typically in the nature of a two- or three-day "hot tub" hearing, and this provides an opportunity for opposing views of industry participants and experts to be tested.[24]

The Commission is again effectively in control of the timelines for these applications. Section 67(3) and (4) mirrors s 66 and provides that a decision is required within 60 working days of the registration of the application or such longer period as may be agreed between the Commission and the applicant, with the application being deemed declined if this deadline is not met.

The limited number of such applications means that there is little performance data on timelines, however the timelines for the two most recent significant authorisation decisions were 221 working days in 2016–17 and 252 working days in 2015–16.

For completeness in the present context, two other related points pertaining to the New Zealand regime are noteworthy.

First, the Commission can accept undertakings to dispose of assets or shares when granting clearances and authorisations.[25] The acceptance of behavioural undertakings or the imposition of

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20 Commerce Commission "Mergers and trade practices statistics" (7 July 2025) <www.comcom.govt.nz>.

21 Commerce Act 1986, s 67(3)(a).

22 See Commerce Commission *Authorisation Guidelines* (June 2023).

23 There have only been six authorisation applications since 2010 (two in 2011 and one in each of 2016, 2017, 2018 and 2024).

24 The last occasion that this occurred was in relation to the NZME and Fairfax New Zealand application which was lodged in 2016. For commentary on this case, see Mark Berry and George Spittle "Media Mergers and the Critical Impact of Nonprice Considerations: A New Zealand Case Study" (2019) 10 JECL & Pract 101.

25 Commerce Act, s 69A.

other conditions is not currently within the Commission's jurisdiction, but this issue has been raised in the MBIE review, and it is predictable that the approach taken in Australia to such undertakings may well be adopted in New Zealand.[26]

Secondly, there are rights of appeal to the High Court against Commission merger decisions and the procedure on appeal is generally by way of rehearing.[27] It is also required that the judge be assisted in such cases by a lay member.[28] At present all lay members appointed to the High Court for this purpose are economists.

2 *Some observations on the Australian reforms*

There is considerable detail in the Australian amendments relating to the notification aspects of this new regime.

(a) The mandatory notification requirement

The starting point is the notification thresholds which have yet to be set by the Minister.[29] There are two ways that these thresholds may be set.

The first set of criteria includes the value of the acquisition, the turnover and assets of the merger parties and the level of concentration in the market in question. The second criteria can attach to a class of acquisition, for example for a particular industry or market. In this second setting, the Minister may seek advice from the ACCC on matters relating to the interests of consumers, the promotion of competition and the public interest.[30] There is scope for the waiver of notification requirements.[31]

The set and review of these thresholds will be an evolutionary process, with scope for adjustments to be made.[32] Ideally, the regime will set thresholds where all mergers that may raise significant competition concerns will require notification. However, realistically the regime is likely to capture proposals that do not raise any meaningful concerns and the ACCC will be able to exercise an appropriate discretion and exempt the notification in this situation.[33] There is also scope in this setting for the ACCC to moderate the level of information gathering that may be required.

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26 See MBIE review, above n 1, at 7–9.

27 Commerce Act, s 91. For further discussion on appeals, see Noonan, above n 6, at 1064–1073.

28 Commerce Act, s 77(9).

29 Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024, cls 51ABO–51ABQ.

30 Clause 51ABR.

31 Clause 51ABU.

32 A mandatory review is required after three years: cl 51ABZZU.

33 Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024 (explanatory memorandum) at 8 [2024 Bill explanatory memorandum].

One matter that does not appear to have been expressly addressed is the situation where a merger raising competition concerns does not trigger the notification requirements. Presumably the ACCC would still assert jurisdiction under s 50(1) in this situation, and it would be open to the ACCC to set its own processes for the consideration of such mergers. There would presumably be logic in the ACCC adopting the new mandatory notification procedural steps in such cases.

(b) Processes and timelines for decision-making

The Bill sets out in Division 4 some considerable detail regarding processes for the consideration of notified acquisitions. There are potentially four main procedural steps under the new regime:

(i) Phase 1 (30 business days): A notified acquisition may be determined within 15–30 business days from the effective notification date.[34] The ACCC may determine that the acquisition may be put into effect (with or without conditions) or, if there are competition concerns, then the application progresses to Phase 2.

(ii) Phase 2 (90 business days, from day 30 to day 120): If the ACCC is of the view that the proposal could have or would likely have the effect of substantially lessening competition in any market, the ACCC can advise in writing that the notification is to be subject to phase 2 investigation. This will result in the application extending for a further 90 business days.[35] Under phase 2, the ACCC is required to give a Notice of Competition Issues within no later than 25 business days after the phase notice is given (ie by the 55th business day) and the notifying party has up to another 25 business days to make submissions in response.[36] If approval is not granted by the conclusion of phase 2, then the notifying party may proceed to make a public benefit application within 21 days after the ACCC's phase 2 determination.[37]

(iii) Public benefit application (a further 50 business days, from day 120 to day 170):A public benefit application extends the timeline by a further 50 business days[38] and the ACCC is required to provide a public benefit assessment within the first 20 business days of this public benefit application, with rights to make submissions in response within a further 15 business days.[39]

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34 Clause 51ABZI(1) and (4).

35 Clause 51ABZI(5).

36 Clauses 51ABZK(4) and 51ABZL.

37 Clause 51ABZP.

38 Clause 51ABZZ(2).

39 Clauses 51ABZZA(3) and 51ABZZB(1).

(iv) Applications for review (business days 170–230): Applications can be made to the Tribunal in respect of any acquisition determination of the ACCC.[40] The Tribunal is required to determine any review within 90 business days.[41]

Two other points are noteworthy in respect of this cursory outline of what are extensive procedural provisions.

Unlike in New Zealand, if the ACCC does not make a determination within the determination period, then it is deemed to have made a decision that the acquisition may be put into effect.[42] However, timelines can be extended, for example, if the ACCC requests further information.[43] It is also open to the Tribunal to extend its decision date on the basis of the complexity of the matter, the volume of evidence and where new evidence has been admitted.[44] Presumably, the legislative differences in these deeming provisions are unlikely to operate differently in practice.

3 Should New Zealand adopt a mandatory notification regime?

The above comparative outline of New Zealand's current voluntary clearance and authorisation regimes, and Australia's new mandatory notification regime, reveal that in practice the differences between the operation of the two will not be significant.

Mergers in Australia which do not meet the thresholds or are granted waivers by the ACCC, or otherwise do not raise competition concerns, will not require notification. In New Zealand, the self-assessment and courtesy letter options will apply in much the same way.

There are also likely to be similarities between the workings of the two Commissions where applications for approval are made. The similarities are that:

(a) The Australian phase 1 (30 days) mirrors the Commission's initial 40-day review.
(b) The Australian phase 2 (up to 120 days) mirrors the Commission's two-step Statement of Issues and Statement of Unresolved Issues processes (up to 130 days).
(c) Public benefit authorisations can be granted in both jurisdictions (Australia's target of 170 days is more ambitious than New Zealand's most recent actuals of 221 and 252 days).
(d) There are rights of review and appeal in both jurisdictions.

The most significant differences between the two regimes attach to the public benefit test phase. Under the New Zealand authorisation option, this can be applied for as an originating application

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40 Clause 100C.

41 Clause 100P(2).

42 Clause 51ABZI(2).

43 Clause 51ABZB(3).

44 Clause 100P(5).

which may be more efficient. The scope for Commission conference hearings provides an additional step which can be important in the testing of the evidence and submissions. Further, the authorisation assessments in New Zealand typically involve attempts to quantify benefits and detriments. The courts have directed that rather than relying on a purely intuitive judgement, attempts must be made as far as possible to quantify the benefits and detriments. However, a qualitative decision is ultimately required.[45]

A further factor to consider in making the election is whether Australia's mandatory regime will be more likely to capture problematic mergers which are unlawfully implemented before affected parties or the ACCC or Commission become aware of them. It appears equally open under both regimes for merger parties to attempt to follow a path of evasion if that is their strategy. The extent to which divestiture will in this situation be a workable remedy will depend on the length of time it takes to discover the non-notified merger, and the ease with which it may be possible to unravel the merged business.

All these factors suggest that the Australian reforms do not highlight any real need for changes to the current voluntary merger regime in New Zealand.

Before leaving this subject, there is a related topic that is perhaps worth some brief comment in passing. This relates to the exemption of minor acquisitions from the application of s 47. This issue is not raised in the MBIE review.

In small market economies like New Zealand, there can be "smallness" of transactions which may translate only into a limited scale of consumer harm should competition law issues arise. The problem is that where competition law authorities are required to assess such mergers, they can often involve layers of complexity which arise because of the smallness of the markets at issue. This can have serious resource allocation consequences for regulatory agencies which are disproportionate to the consumer harm which may be at issue. Unlike in the case of restrictive trade practices investigations, there is no similar scope to exercise enforcement discretion to screen out such cases on the basis of the limited extent of the consumer harm.[46]

A case in point is the Commission's *Hamilton Radiology* decision.[47] Hamilton Radiology Ltd was the major provider of radiology services in the Waikato region. In 2006, one of the radiologists at this practice decided to set up a new practice, namely Medimaging Ltd. By 2012, this radiologist, who had remained the sole practitioner at Medimaging Ltd, decided to return to his old practice and clearance was sought by Hamilton Radiology to acquire the assets of this practice. The merger was

45 *Godfrey Hirst NZ Ltd v Commerce Commission* [2016] NZCA 560 at [35]–[37].

46 See Commerce Commission *Enforcement Response Guidelines* (October 2013) at 5.

47 *Hamilton Radiology Ltd and Medimaging Ltd* [2013] NZCC 7.

declined because it would have resulted in the number of MRI providers in the region decreasing from two to one in a market characterised by high entry barriers.

The sequel to this matter is unknown, but there is also the prospect that this decision could have resulted in perverse outcomes. For example, the stranding of assets precedent in this case could well disincentivise attempts by other medical specialists to set up new practices in small markets with few rivals.

Serato, which is discussed below, is another case study which in the New Zealand context raises similar issues. This case related to a market for the supply of software used by providers of DJ services. The number of professional DJ customers for New Zealand is not apparent from the *Serato* decision, but presumably is very small. The remainder of affected consumers are those for whom this is a discretionary entertainment spend. The case for the prioritisation of this merger based on the scale of potential consumer harm is not clear.[48] Further, this case involved a significant diversion of Commission resources over 10 months resulting in a 110-page decision.

Cases like these need to be viewed in the context of the competing demands faced by the Commission. Timeliness and quality of decision-making issues are at stake. The Commission has over the last few decades faced a significant increase in the scale of regulatory pressures over a wide range of tasks. Its functions extend over competition and consumer laws, market studies, credit contracts and a vast and increasing array of regulatory functions over many key sectors of the economy.

From an analytically pure position, all potential consumer harm attributable to mergers should be captured under our competition laws.[49] However, exemptions are an option and a notable occasion on which this did occur was the policy decision to exempt the Fonterra merger from the application of the Commerce Act's merger rules.[50] It is suggested that there is reason to explore the exemption of minor transactions from the application of s 47. This could be based on low domestic turnover criteria.

B The Extension of the Substantial Lessening of Competition Test

The MBIE review explores the case for reform to New Zealand's substantial lessening of competition test, based on the amendments to this test under s 50(1) of the CCA.[51] Two amendments to the Australian test, which are to apply only to the merger context, are of particular significance.

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48 The turnover for Serato software for the last calendar year was said to be around only a single day's revenue for a single large supermarket: see Serato "Submission on Statement of Unresolved Issues" (17 June 2024) at [1].

49 For a discussion on principles applying to competition law exemptions, see R Shyam Khemani *Application of Competition Law: Exemptions and Exceptions* (UNCTAD/DITC/CLP/Misc.25, 2002).

50 A new regulatory regime relating to the purchase of raw milk was introduced as part of this package under the Dairy Industry Restructuring Act 2001.

51 MBIE review, above n 1, at 2–3.

First, cl 51ABZH(4) of the Bill provides that an acquisition may contravene s 50(1) of the CCA if it would "in all the circumstances, have the effect, or be likely to have the effect, of creating, strengthening or entrenching a substantial degree of power in the market". Secondly, there is a new proposed cumulative effects provision. Clause 51ABZH(6) provides in outline that the ACCC may treat the effect of the acquisition as being the combined effect of the acquisition and any other transactions put into effect during the preceding three years.

The explanatory memorandum to the Bill elaborates further on the operation of these proposed extensions.[52] Within the broad context of relevant matters, the explanatory memorandum notes that these amendments emphasise the importance of market structure. This point is made in the context of the wide-ranging non-exhaustive list of economic factors that may be considered including, for example, the economic and financial power of the parties, whether a vigorous competitor would be removed, conditions of entry and expansion, the nature and strength of competitive constraints, countervailing market power and so on.

In this context, the explanatory memorandum also observes, in line with cl 51ABZH(3)(b) of the Bill, that changes in market conditions may arise through commercial relationships and that this is a factor to be taken into account. Such relationships may arise, for example, in respect of vertical integration in supply chains or where they may heighten barriers to entry.

These high-level observations concerning market structure and changes in market conditions do not raise new considerations.

Turning to the new proposed "creating, strengthening or entrenching", test the explanatory memorandum importantly provides the following guidance:[53]

> The specific mention of "creating, strengthening or entrenching a substantial degree of power in a market" is intended to increase the focus on the market power of the parties to the acquisition and to clarify that even an incremental change in market power may still amount to a substantial lessening of competition, if the acquisition strengthens the acquirer's market power (that is, their ability to act with a degree of freedom from competitive constraints).

The new "creating, strengthening or entrenching" market power test is therefore intended materially to impact on the substantiality test under section 51ABZH(4) of the CCA with the capture of incremental changes in market power.

A question that awaits judicial interpretation is what level of aggregation will be required to trigger this prohibition. Interestingly, there is some New Zealand precedent on this point which may be relevant. Under s 47 of the Commerce Act, when first enacted, the prohibition was against the

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52 2024 Bill explanatory memorandum, above n 33, at 52–57.

53 At [4.41].

acquisition or strengthening of a dominant position, as earlier noted. There are parallel considerations under the old s 47 of the Commerce Act and new s 51ABZH(4) of the CCA. Both cover the situation where the acquirer has a high degree of market power and may as a result of the merger strengthen this power.

New Zealand courts have held that, for the strengthening limb of s 47 to apply, it will need to be established that a change in market power will likely be more than de minimis.[54] The application of de minimis tests is not without difficulty, and finely balanced judgement calls will often be required. However, this authority is suggestive that at least some meaningful increase along the market power spectrum will be required to satisfy this test. The manner in which Australian precedent develops under this new test will be of particular interest in the New Zealand setting.

Turning to the cumulative effects provision, cl 51ABZH(6) requires that the acquisition be treated as the combined effect of the acquisition and any one or more acquisitions that are put into effect in the preceding three years. The explanatory memorandum provides the following background:[55]

> This is intended to allow the Commission to be able to take into account the impact of serial acquisitions, which are a series of acquisitions by parties which individually may not substantially lessen competition, but may have the effect of substantially lessening competition when considered as a whole. Acquisitions in small, local markets can have a significant impact on competition in local areas, as well as national, regional and/or State-wide competition.

It is not altogether clear that, in the New Zealand context, this cumulative effects provision would likely spell any change. The current law has the potential to apply to creeping acquisitions. Each acquisition is to be assessed against the factual matrix of the acquirer's current market position. In this context, the acquirer's starting position will include the sum of all past acquisitions, and not just those undertaken in the preceding three years. There will, against this background, be a point at which the level of competition under counterfactual analysis will reduce to such an extent that the substantial lessening of competition provision will be triggered through the potential removal of one more rival. Therefore, it is arguable that the standard counterfactual analysis already accommodates this concern.

C Partial Acquisitions and the Definition of "Assets"

For completeness, two other matters raised in the MBIE review are worth noting.

The first matter relates to the application of s 47 of the Commerce Act to partial acquisitions.[56] The question that arises in the acquisition of shares is whether the level of acquisition would be such

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54 See *New Zealand Co-operative Dairy Co Ltd v Commerce Commission* [1992] 1 NZLR 601 (HC) at 619–620; and *Telecom*, above n 7, at 510–511.

55 2024 Bill explanatory memorandum, above n 33, at [4.46].

56 MBIE review, above n 1, at 3–5.

that the acquirer would achieve a substantial degree of influence over the target. The MBIE review addresses the absence of legislative guidance on this test for influence.

It has been recognised in the New Zealand context that this inquiry should be based on a wide-ranging review of factors, with the most important being the distribution of shareholdings and board representation.[57] The courts and the Commission have decided such matters on a case-by-case basis. The absence of legislative guidance has not acted as a barrier to the assessment in these cases. While it is not apparent that there is any obvious case for legislative reform, the articulation of an inclusionary list of relevant factors could be helpful but may not further advance certainty into what will always be a fact-intensive assessment.

A problem does arise, however, in the case of the definition of "assets" under s 47(1) of the Commerce Act where the partial acquisition of assets is at issue. The term "assets" is defined under this provision as "assets of a business". There are no further internal definitions which assist.

Attempts to interpret this test have centred upon inquiries into the nature of the activity involved, and whether this is capable of being operated independently as a business. The application of this test involves significant complexity and uncertainty.[58] There is therefore merit in the current review in New Zealand into whether this term should be amended simply to refer to "assets" or to be more expansively defined along the lines of the "assets" definition contained in cl 51ABN of the recent Australian amendments.[59]

IV NEW ZEALAND CASE LAW DEVELOPMENTS

A Serato

1 Background

In the early 2000s, two University of Auckland classmates identified an opportunity to develop software for use by DJs. Up to this time, DJs had struggled to make their way to events carrying crates of vinyl. Serato saw the opportunity for all of this content to be loaded, with increasingly sophisticated applications, in software used in laptops.

Serato managed by 2004 to launch software that changed the way that DJs conducted business. Serato's software soon achieved prominence overseas. It achieved first-mover advantage and has become the leading international brand. Serato remains based in Auckland and the vast majority of its

57 For discussion of these factors, see Mark Berry and Anne Riley "Beware the new business acquisitions provisions of the Commerce Amendment Act 1990" (1991) 21 VUWLR 91 at 110–115.

58 At 104–106.

59 MBIE review, above n 1, at 5–6.

sales are obviously made overseas. Its flagship DJ software is Serato DJ Pro which offers music management and music analysis functions, along with playing and mixing music.

There are various types of software that can be used for DJing. To date, Serato has concentrated on software for use on laptops or desktop computers. Software can also be developed for use on mobile phones or tablets and can also be embedded in DJ hardware.

AlphaTheta Corporation (ATC), formerly known as Pioneer, is based in Japan and applied for clearance to acquire all the shares in Serato. ATC develops, manufactures and sells DJ hardware and DJ software.

ATC's hardware products include DJ players, mixers, controllers, all-in-one systems, turntables and audio interfaces. ATC's DJ software, rekordbox, is free when used with ATC's DJ hardware and it can also be used with some non-ATC hardware. ATC has also developed a mobile app version of rekordbox.

The customers relevant to this merger are DJs ranging from beginners, potentially performing on a social scale, through to DJs making a full or partial living from DJing.

2 International market dimension

The development and production of DJ software and hardware occurs on an international basis. Serato's software is the only New Zealand component of this international market.

The other participants, apart from Serato and ATC, include three vertically integrated companies producing both DJ software and hardware, namely:

(a) Native Instruments, which is based in Germany. Native Instruments produces the Traktor laptop application which is integrated with its own controllers and mixers. This software is also compatible with third-party controllers from other brands such as Pioneer DJ, Denon DJ, Numark, Reloop and Rane.
(b) inMusic, which is based in the United States. This company produces Engine DJ software which is available as a laptop application and embedded software, and this integrates only with inMusic's own hardware (namely the Denon and Numark brands).
(c) Hercules, a French-based company, which produces laptop application DJ software that only integrates with its own hardware.

There are four other industry participants, with two each being dedicated to DJ software and DJ hardware as follows:

(a) Virtual DJ is a French DJ software company that produces laptop application software that is not integrated with any hardware prior to that hardware's release. It is compatible with all main DJ hardware brands.

(b) Algoriddim is a German company that produces software that is available as a laptop application and a mobile app. It is integrated with certain hardware, including the Pioneer, Reloop and Hercules brands.
(c) The remaining non-integrated DJ hardware brands are Reloop (based in Germany) and Roland (based in Japan).

As will be apparent from this outline, there are various approaches for the connectivity of DJ software to DJ hardware. Software can be designed to be operable only in that company's hardware or to be capable of connection across a range of hardware. Some customers will prefer the seamlessness of purchasing a product where DJ software and hardware brands are partnered and integrated, as the functions will be ready to use. This integration can happen before or after the DJ hardware launch. Where it happens beforehand, there can be collaboration between the DJ software and hardware manufacturers in the development stage.

DJ software manufacturers can also make their products compatible with DJ hardware without such co-ordination, however further steps, known as "MIDI mapping" or "configuring", will need to be undertaken in this situation.

3 Theories of harm

This clearance application involved both horizontal and vertical merger dimensions, from which three areas of concern were explored, namely:

(a) Horizontal unilateral effects for the supply of DJ software.
(b) Vertical input foreclosure effects relating to the potential leverage by the merged entity in the supply of critical software to ATC's rival hardware competitors.
(c) The issue of potential access by ATC to commercially sensitive information conveyed by its rivals to Serato during and after hardware product development.

4 Horizontal unilateral effects

The Commission identified two markets as relevant for assessment, namely the national market for the supply of DJ software and the national market for the supply of DJ hardware (including controllers, to which software is connected; and all-in-one systems, to which software is embedded).[60] The market at issue for the assessment of horizontal unilateral effects was the software market.

Vast sections of the submissions and the Commission's decision have been redacted for confidentiality reasons, and this poses real limitations on possible commentary on the decision. Nonetheless, some broad observations can be made.

The key battleground in this case was the product market definition for DJ software. The applicants submitted that this market included mobile apps, but the Commission did not accept these

60 *Re AlphaTheta and Serato*, above n 4, at [40]–[90].

to be a credible alternative for the purposes of analysis and regarded them as out-of-market constraints only.[61]

Taking this narrow approach to the DJ software market, the Commission found that there was likely to be a substantial lessening of competition due to unilateral effects for the following main reasons:[62]

(a) Serato and rekordbox are the closest competitors for the supply of DJ software, with Serato being the market leader for professional DJs and rekordbox the next best alternative.
(b) Market shares are not revealed but it is indicated that the merged entity would have a "high market share".
(c) Rival products were viewed by the DJs interviewed to be either primarily for beginners or more entry-level focused and less feature-rich.
(d) The integration of Serato software with DJ hardware was preferred by professional DJ customers.
(e) The market is mature and there has been no significant new entry since the launch of rekordbox in 2009. DJs are generally reluctant to change software providers, in particular from Serato, and this contributes to the risks of assuming fixed and sunk costs for the development and promotion of new DJ software.

Within the confines of a narrow market for laptop applications, this reasoning appeared to be open. However, the applicants' position was that this market included mobile apps and this, they considered, did much to change the analytical landscape.

Global technology markets are highly problematic to assess in the context of forward-looking predictions. Further, the traditional two-year timeline for the predictive assessments of mergers makes this task even more problematic.

The analysis here was even more difficult because an assessment was required to be made in respect of the research and development plans of the principal rivals based in Germany, France, the United States and Japan, as earlier noted. This proposed transaction did not, it appears, attract the scrutiny of the competition law authorities of those nations.[63] Rather, the evidence before the Commission comprised a cross-section of the views of local DJ customers, some conflicting evidence and opposing submissions made by parties with a commercial incentive to frustrate the merger. With

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61 At [158]–[170].

62 At [109]–[199].

63 The only other jurisdiction to have examined this merger was the United Kingdom, and their Competition and Markets Authority decided to refer this matter to a phase 2 assessment prior to the New Zealand Commission's decision: Competition and Markets Authority "AlphaTheta / Serato merger inquiry" (22 July 2024) GOV.UK <www.gov.uk>.

the exception of inMusic, which has a New Zealand subsidiary, none of the other major international rivals in this market appear to have made submissions opposing this merger.

The Commission found that mobile apps are not sufficiently close substitutes for laptop applications, such that they do not belong to the relevant DJ software market for four reasons.[64] The Commission's reasoning here, as evident from the redacted public version of the decision, is open to question in a number of respects.

The Commission's first reason was that mobile apps have less functionality than laptop apps. In particular, the Commission was concerned that mobile apps do not currently have all the features of laptop applications, have reduced display space on mobile devices and that most mobile devices have less processing power than laptops.[65] However, it was acknowledged that Algoriddim was the most feature-rich rival mobile app with stems capability and that it is well placed to innovate.[66] It was also acknowledged that screen size issues were not significant given that mobile apps can be used on tablets.

The second concern was that mobile apps are less likely to be integrated with DJ hardware. The focus was upon the current capability of integration, it being noted that Algoriddim was submitted to be compatible with many controllers.[67] However, there was no apparent suggestion based on evidence from ATC and Serato's rivals that integration of their software and hardware was, over the relevant time, technically insurmountable.

The Commission's third reason was based on interviews with local DJs who viewed mobile apps as being targeted at beginners rather than professional DJs. However, it was acknowledged that DJ K-Swizz had won the 2022 DMC World DJ Championship using a mobile app and had stated that using a mobile phone would not "hold you back".[68] The Commission downplayed this evidence on the basis that mobile apps are currently targeted at beginners because the DJ hardware that is compatible with these apps tends to have fewer features.[69] The weight to be given to perceptions is, however, problematic when exposed to evidence to the contrary.

The fourth main reason for the Commission's rejection of mobile apps being in the market is based on the static assessment that these apps do not currently impose a strong constraint. The Commission

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64 *Re AlphaTheta and Serato*, above n 4, at [61]–[80].

65 At [64].

66 At [170].

67 At [67].

68 At [71.6].

69 At [72].

noted that early versions of mobile apps were released back in 2012 and that there had only been limited investment in their development since then.[70]

The extent of redactions in the decision makes analysis difficult, but questions arise in respect of likely responses by the global rivals of ATC and Serato. If the merger was to proceed, these global hardware rivals would likely give priority to strategies to retreat from dependency on Serato software, including for partnering and vertical integration. Algoriddim already appears to have reached a position of some sophistication in the production of mobile apps, as acknowledged by the Commission.

While mobile DJ apps may be in their infancy, it is difficult not to envisage that they may become a significant competitive threat, and that rivals to the merged entity would have the ability and incentive to respond. While admittedly competition authorities are faced with difficult judgement calls in this setting, global technology markets are seldom static.

5 Vertical input foreclosure effects

The Commission also found that there were vertical foreclosure concerns. The Commission first considered the merged entity's ability to foreclose competition.[71] Its starting point was that Serato has market power for the supply of DJ software to DJ hardware providers. The Commission also noted that there was a consumer preference for DJ hardware that comes with Serato pre-mapped, and that while there is the ability to MIDI-map other software, this could be challenging.

The Commission noted various mechanisms that the merged entity could use to foreclose hardware competitors, including raising the cost of the software licence fee and refusing to integrate, delaying integration or integrating less completely.

The Commission also found that the merged entity would likely have the incentive to foreclose DJ hardware competitors. The analysis centred upon whether the merged entity would have an incentive to foreclose based on the expectation that profits gained in the DJ hardware market from foreclosing Serato software to rival DJ hardware providers would be likely to exceed expected profits that would be lost in the DJ software market. There are two steps to this "vertical arithmetic" analysis.

The first step is to assess the critical diversion ratio. If margins are low for software and high for hardware, then the critical diversion ratio will be low, and few customers would need to switch from rival DJ hardware providers to the merged entity to make foreclosure profitable. Conversely, the critical diversion ratio will be high where software margins are high and hardware margins are low, meaning that a significant level of switching to rival hardware providers would be necessary to make this strategy profitable.

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70 At [78]–[79].

71 At [200]–[222].

The second step is to assess whether the actual diversion ratio exceeds the critical diversion ratio. If this is likely, then this would suggest that the merged entity would have the incentive to foreclose.[72]

Not surprisingly, this is a complicated exercise when analysed in the real-world context. The Commission rejected the merger parties' assessment of the critical diversion ratio primarily because of disagreement over assumptions made in the estimation of the DJ software margin.[73] There was also no confidence that a prediction of the actual likely diversion ratio could be undertaken because of a lack of robust data, and it was concluded that the actual diversion ratio could exceed reasonable estimates of the critical diversion ratio because of the strong customer inertia attaching to Serato software.[74]

Against this background, the Commission concluded that there would be foreclosure concerns in the DJ hardware market because rival hardware providers would likely be unable to develop their own software or rely on other software in response to any foreclosure strategy.[75]

Turning to the DJ software market, the concern of rival software providers was that the merged entity could engage in artificial block strategies to close off access to the critical Pioneer DJ hardware. However, ATC is already vertically integrated and has not apparently engaged in any such approach, and so argued that if this strategy was profitable, it would have already pursued this.

It was accepted by the Commission that this form of foreclosure could be resolved through the partnering or vertical integration of existing hardware and software companies.[76] This solution raises again the question of the extent of the evidence and the predictions that can be made about the ability and incentives of the major global rivals to respond in this way.

6 Access to commercially sensitive information

The final theory of harm related to the concern that rival DJ hardware providers were dependent on sharing sensitive market information with Serato in the course of product development. This could adversely impact on rivals' incentives or abilities to compete or innovate.

There was conflicting evidence on this point. Rival hardware companies were concerned that prior to the launch of new products, they needed to collaborate closely with Serato over some time regarding the compatibility of the software and hardware. Further, they were concerned that post-launch, Serato would receive access to sensitive information about the users of their hardware.

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72 At [237].

73 At [246]–[249].

74 At [255]–[256].

75 At [265]–[266].

76 At [291.1].

The merger parties' position was that protection would be afforded under detailed confidentiality protocols. Further, if this did not provide sufficient comfort, then rivals could delay the time before launch for the sharing of information or limit the extent of information sharing to negate the potential for the merged entity to make use of this information.

This section of the decision involves heavy redaction.[77] The Commission rejected the utility of the merger parties' confidentiality protocols for reasons which are not made public.

The analysis and the conclusions reached on this subject proceed on the assumption that Serato's DJ software is a product for which there is no substitute. There is no discussion here about how rival hardware providers could overcome this information sharing concern by partnering or vertically integrating with other software companies. However, presumably the Commission would also see the potential for this development as sufficient to overcome this concern.

7 The contractual resolution option

A final matter which warrants brief mention is the attempt by the merger parties to contractually resolve competition law issues. The sale and purchase agreement (SPA) precluded ATC from refusing to allow Serato to partner with other DJ hardware providers or to make the Serato software less attractive for rival hardware providers. The term of the SPA was for five years, ending on 31 December 2028. The Commission took this contract into account as part of the counterfactual assessment.[78] The performance of ATC's obligations under the STA, including to support the growth of Serato, were not discounted, on the basis that they amounted to behavioural undertakings.

The Commission rejected this contractual resolution for both the five-year term of the SPA, and after the expiry of this term.

The Commission's concerns about the SPA were that it conferred rights only on Serato to enforce its provisions.[79] The sellers' incentives were considered to centre around the earnout entitlement based on the performance of Serato over the term of the contract. The Commission was concerned that the sellers may not seek to enforce the SPA provisions because damages would likely be an adequate remedy to compensate for this earnout entitlement. Further, the Commission was concerned that ATC could engage in more subtle forms of conduct that could adversely impact on hardware rivals and arguably not be in breach of the SPA. For example, Serato could be encouraged to develop different software versions that could contain features restricted to Pioneer DJ products.

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77 At [309]–[315].

78 At [102].

79 At [223].

Finally, the Commission considered the potential impact of the SPA on the period post-1 January 2029 because the competition impacts may not be felt until the expiry of the contract.[80] This analysis affirmed the Commission's static view of this market. The Commission's finding that "there is not a real chance that Serato will not have substantial market power for DJ software as of 1 January 2029" was based upon the historical resilience of Serato in the overall market context, and a rejection of Serato's arguments that artificial intelligence and machine learning could revolutionise the DJ software market and that demand may shift to comprehensive music creation products.[81] The Commission rejected these arguments because no evidence was proffered on these points. However, there were presumably insurmountable barriers to the provision of this evidence because it is dependent on unknown potential future innovation by rivals.

8 Concluding comments

The international context of this merger proposal is significant. Through innovation, Serato has taken a lead on the world stage as the preferred provider of DJ software. But that is the extent of participation by any New Zealand entity in the overall DJ production market. All the DJ hardware and all rival DJ software is produced overseas, principally in Europe, the United States and Japan.

This case primarily turns on the product market definition and, in particular, whether mobile apps form part of the market for DJ software. If mobile apps are included in this market, this answers the unilateral horizontal effects problem. Further, the analysis of vertical input foreclosure and access to commercially sensitive information concerns assume that Serato DJ software holds market power unimpacted to a substantial degree by mobile apps.

As noted above, the Commission's assessment of this issue is open to question. In particular, one significant rival, German-based Algoriddim, is already accepted by the Commission to have a feature-rich app which is compatible with many controllers, and that it is well placed to innovate. Further, there is also already at least some evidence that mobile apps are capable of use at the sophisticated end of the market with K-Swizz's victory at the World Championships. While this evidence may be less than ideal in its scale, this does not preclude its relevance in pointing to potential market developments.

A further matter of particular significance is the potential for the major international rivals of the merged entity to partner or vertically integrate in response to anti-competitive conduct. This prospect would also answer the competition concerns. While the Commission acknowledges that this may occur, it is not a prediction that the Commission is prepared to rely upon. To the contrary, the Commission takes a static view of this market and is not prepared even to admit the potential for erosion of Serato's market power by as far out as post-2029.

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80 At [276]–[280].

81 At [277]–[279].

Predictions about the future workings of technology markets are notoriously difficult to make and the evidential record will seldom provide insights that are ideal. There is an aspect of the record here that does, however, raise questions. Typically, where a merger with global impact raises competition law concerns, these are referred to the agencies in each jurisdiction where such concerns may arise. Collaboration between the competition agencies in each of these jurisdictions follows, with the ability of each agency to test the evidence of local market participants. Information sharing between agencies will likely follow.

There is no apparent reason to think that the impact of this merger would be any different in New Zealand to the other jurisdictions where the major rivals are based. However, apart from inMusic, none of the other major rivals in Germany, the United States, France and Japan appear to have taken steps to challenge this merger. If they have, then the competition law authorities in these jurisdictions have not, it appears, pursued the matter. If this observation is correct, there could be various explanations for it. But one interpretation that is open is that these rivals see sufficient possibilities in terms of opportunities to innovate or contractually integrate to respond to the ATC/Serato merger proposal.

B Foodstuffs

The *Foodstuffs* decision involved the upstream market for the acquisition of grocery supplies. This is the first occasion on which there has been detailed consideration of buyer power in New Zealand. This is a complex subject matter. A detailed discussion of this case is beyond the scope of this article. Rather, this section explores framework issues and makes some comments on the Commission's reasoning. Again, there are limits to the observations that can be made given the extensive redaction of confidential material from the decision.

1 Background facts

There are two major supermarket groups in New Zealand, Woolworths New Zealand Ltd (Woolworths) and Foodstuffs. Foodstuffs comprises two separate entities, Foodstuffs North Island Ltd (FSNI) and Foodstuffs South Island Ltd (FSSI). FSNI is owned by 332 co-operative members, all based in the North Island. FSSI is owned by 198 co-operative members, all based in the South Island. FSNI and FSSI applied for clearance to merge.

FSNI and FSSI have a close relationship. The members of each independently operate retail stores under several banners, the most significant being New World, PAK'nSAVE and Four Square. Each of these banners is targeted at different customer segments offering various degrees of emphasis on price, quality, range and service and locational convenience.

Given that the co-operatives operate separately in the North and South Islands, it was accepted that there would be no actual or potential loss of competition at the retail level of these markets because of this merger.[82]

FSNI and FSSI also operate wholesale grocery businesses, Gilmours in the North Island and Trents in the South Island, through which supplies are made to foodservice customers, route trade customers and other retailers. No competition issues were considered to arise in these wholesale markets.[83]

Woolworths, FSNI and FSSI operate as three vertically integrated entities. FSNI and FSSI's integration arises through contractual arrangements with its independently owned retail outlets. FSNI and FSSI each acquires grocery products domestically and overseas and has distribution centres and infrastructure through which products are supplied to retail stores and wholesale customers.

FSNI and FSSI are intermediaries in this supply chain between suppliers and their independently owned and operated retail stores. FSNI and FSSI each provide recommended retail price lists to their members, which are largely followed.[84]

There is some existing co-ordination between FSNI and FSSI for the joint acquisition of groceries. This appears to be limited and focuses upon private label products and some other product lines such as for bananas and where the co-operatives together seek to underwrite the emergence of new product.[85]

Woolworths and Foodstuffs have held a stable combined national retail market share over the period 2019–23 in the range of 82–84 per cent.[86] The reach of other retail outlets is limited to boutique retail outlets with a focus on range and quality of products (such as Farro Fresh, Moore Wilson's and Commonsense Organics) through to other more price-conscious outlets (such as The Warehouse and Costco) which have not yet had a significant impact on the market. For the average New Zealand one-stop shopper, the reality, again viewed through the Commission's lens, is that for the vast majority of consumers the choice comes down to Woolworths or one of the Foodstuffs banners.

The comparative retail market shares for Woolworths, FSNI and FSSI are not revealed in the public version of the decision. Currently, Woolworths is the largest single buyer, given its national

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82 *Re Foodstuffs*, above n 4, at [451].

83 At [655]–[665].

84 At [582] and [593].

85 See [274]; Foodstuffs North Island and Foodstuffs South Island "Response to Statement of Unresolved Issues" (13 August 2024) at [14.2]; and HoustonKemp "Economic effects of proposed merger of FSNI and FSSI" (7 March 2024) at [49].

86 *Re Foodstuffs*, above n 4, at [38].

presence. FSSI is around one half the size of FSNI.[87] Combined, FSNI and FSSI would become a larger buyer than Woolworths, but the difference is not likely to be substantial and Woolworths' buyer power is presumably enhanced through its Australasian group structure.

The Commission's view on the current workings of this retail market, based on its 2022 grocery market study and subsequent monitoring, is that competition is muted and not working well. The Commission has also found that barriers to entry and expansion to this market are already high, and that new entry and expansion in recent times has resulted in only a minor change in the level of competition.[88]

The rationale for the FSNI and FSSI merger was largely based on operational cost reductions and buying benefits.[89] More than half the benefits were to be derived from securing better terms with suppliers. The numbers involved here are not disclosed but are said by the merger parties to be minor.

2 The nature of competition and economic framework

The Commission accepted the market for the acquisition of most grocery products was one to which a bargaining framework should be applied. FSNI and FSSI each provide bilateral supply agreement opportunities for suppliers. Such contractual outcomes are the result of negotiation, and this negotiation will set the sharing of profits that the products in question will generate. Prices agreed will logically fall within the range of the minimum price at which the seller is prepared to sell and the maximum price which FSNI and FSSI are prepared to pay.[90]

The Commission found that a significant imbalance of buyer power already existed in favour of the supermarkets and that the retailers already benefitted from prices towards the minimum that suppliers will be willing or able to accept.[91]

An understanding of the current nature of competition in the acquisition market also requires an appreciation of periodic product reviews undertaken by the supermarkets. The extension of contract terms cannot be assumed. Periodic reviews are undertaken by the major grocery retailers by product category and changes in the sourcing of product can occur for reasons including customer demand, preferences and taste and will also depend on the level of rivalry (including from product innovation) posed by other suppliers.[92]

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87 At [504.3].

88 At [514]–[524].

89 At [47]–[48].

90 At [77] and [231]–[236].

91 At [83].

92 At [234].

The acceptance of a bargaining framework is significant, because it dictates the economic framework to be applied. A distinction is made in the assessment of buyer power between monopsony power and bargaining power. Monopsony power arises where a buyer can profitably reduce price below the competitive level by purchasing less. This results in output restriction.[93] Bargaining power on the other hand involves only the threat of purchasing less.

Output restriction issues do not arise because supermarkets will need to source product to satisfy a stable consumer demand. Indeed, lower prices in the supplier market achieved through bargaining power could in theory lead to increased output in the upstream market and increase the welfare of consumers in the downstream market.

The welfare implications of the two forms of buying are therefore different. Quantity distortion and loss of efficiency in input markets will result in the monopsony situation, to the likely detriment of consumers in downstream markets. The welfare implications in bargaining markets are less clear and there is limited and divergent economic literature on the subject.[94]

The sources of bargaining power will depend on outside options for both buyers and sellers. Where the suppliers' market is competitive, buyers will have greater bargaining power. The suppliers' ability and willingness to switch to other buyers will also set the bounds of its bargaining power. The share of incremental surplus available to buyers and sellers is, therefore, the outcome of a competitive outside option process within the bounds of the range discussed above. The shift of surplus in this setting between buyers and sellers due to a reduction in purchase price is generally not regarded as a concern for competition policy.[95] However, the welfare effects here include consideration of the likelihood of the pass-through of the lower input prices to consumers downstream.

The economics literature has identified areas for competition policy concern where bargaining results in price discrimination in intermediate goods markets which may harm competition. There are two main areas for concern in this context, which both assume the presence of actual or potential small buyers who are active in the downstream market.

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93 The NZCC *Merger Guidelines*, above n 16, focus on this buyer power scenario at ch 4. The buyer power test was also framed in this way in the *Vero/Tower* decision in relation to the market for the acquisition by insurance companies of collision repair services: *Vero Insurance New Zealand Ltd and Tower Ltd* [2017] NZCC 18 at [325]. However, this matter was not analysed in any detail given that the merger in question was declined on other grounds. There was no assessment of the bargaining aspect of this market.

94 For a useful outline of the economic analysis of buyer power, including an overview of the economic literature on the subject, see OECD Competition Committee *Monopsony and Buyer Power* (Series Roundtables on Competition Policy No 98, October 2008), with background commentary prepared by Professor Jeffrey Church; and OECD *Purchasing Power and Buyers' Cartels* (OECD Competition Policy Roundtable Background Note, 2022) [OECD 2022].

95 OECD 2022, above n 94, at [2.3.1].

The first situation arises where lower wholesale prices to the large buyer result in lower prices downstream which negatively affect the profitability of its retail competitors and leads to their exit and an increase in market power downstream to the detriment of consumers. The second problem area is where the discounted price to a large buyer may result in an increase in the wholesale price to other buyers. This is known as the waterbed effect. Downstream rivals subject to higher input costs may seek to recover these through higher prices in the downstream market. The potential for this price increase, and the possible exit of rivals, may ultimately harm consumers downstream.

A final alternative theory of harm from the exercise of buyer bargaining power is that such power can reduce the incentives for upstream firms to innovate and invest. There are mixed views in the economics literature on this theory. If a supplier anticipates that a buyer may extract a large share of the gains from product innovation, then the supplier will under-invest in innovation because for them this may become unprofitable. However, successful innovation and investment can also result in reducing the buyer's outside option and so be incentivised. The relationship between these issues is complex and much will depend on the facts.

3 Legal principles

Before addressing the competition assessment undertaken, it is informative to comment on two framework issues. The first relates to the net competition test under s 47, taking into account the vertical and interdependent aspects of this market. The second involves an assessment of the criteria for the critical consideration in this case of the substantiality threshold under s 47.

(a) The approach to the competition assessment and the net competition test

The Commission's focus on the buyer power aspect of this market has had significant implications on the analytical approach undertaken. The primary focus has been upon the upstream acquisition market, with the focus solely upon the rivalry of buyers in this market. The Commission suggests that s 47 compels that this market requires assessment in isolation.[96]

Following on from this approach, the Commission denies the relevance of beneficial effects or harm to consumers in downstream markets.[97] Further, any efficiencies gained in the acquisition market are said to be limited to that market, and benefits to consumers in downstream markets are inadmissible as not being "in-market".[98]

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96 See for example at [78], [80], [82], [91], [111] and [425].

97 At [60], [104] and [426]–[427].

98 At [435].

Finally, the Commission asserted that the assessment of mergers is to be undertaken with regard to the "impact on competition, not on the impact on consumers", despite consumer welfare being viewed as the ultimate goal of the legislation.[99]

These findings are made despite the Commission accepting the highly interdependent workings of the acquisition and retail markets,[100] that harm in the acquisition market will manifest itself in the retail market,[101] that the retail markets are relevant to the assessment of the acquisition market[102] and that at least some cost savings would be passed on to consumers.[103]

The Commission's approach reads down the commercial reality that this market involves rivals that are vertically integrated in their operations being buyers in the acquisition market, intermediaries and ultimately sellers in the retail market. In the case of Woolworths, this is the case because of its corporate structure. The same market position applies to FSNI and FSSI because presumably retailers will largely follow the recommended resale price lists provided to them. There is an interdependency in the workings of markets in this situation with terms and conditions of supply in upstream markets necessarily impacting on consumers in downstream markets.

The application of s 47 is transaction-based and requires an inquiry into the impact of an acquisition on any relevant market or markets. The approach taken to the analysis of mergers involving multiple markets will depend on the facts. In the present case, the focus is upon two functional levels to the same product market which are interdependent. The ultimate assessment of the impact of this merger on consumers requires an inquiry into the parallel workings of the acquisition and retail markets. This inquiry is also relevant under a consumer welfare standard. Although the bounds of this standard are open to some uncertainty, the *NZME* decision suggests a narrow inquiry into the pass-through of gains to consumers.[104] The actual pass-through of gains to consumers need not established under this standard, but the weight to be given to such gains will depend on identifiable or potential pass-through.[105]

Further, the assessment of these markets is impacted by the net competition test under s 47. It has been long established that the substantial lessening of competition test under s 47 is concerned with the net effect on competition, taking account of both pro-competitive and anti-competitive effects in

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99 At [105] and [423].

100 See for example at [39] and [60]–[61].

101 At [106].

102 At [459] and following.

103 At [278], [428] and [536].

104 *NZME Ltd v Commerce Commission* [2018] NZCA 389 at [45].

105 At [75] and [67].

all impacted markets.[106] The practical reality of this test is that if there are no substantial anti-competitive effects, then that is the end of the inquiry. However, if there are any such anti-competitive effects then the further issue of pro-competitive effects necessarily requires examination.

There is an inevitable overlap between this approach and the authorisation option, and some tensions arise as to duplication given that the inquiries are analytically the same in respect of economic efficiency factors. Anti-competitive effects or detriments and pro-competitive effects or benefits are to be assessed and balanced under both tests.[107]

In practice, applicants are more likely to pursue the authorisation path where dependency on countervailing public benefits may be considered necessary, and more detailed analysis of these benefits may be anticipated in this situation as a result. But the substantive analysis is not impacted by this election.

The Commission's suggestion that the pro-competitive effects in the retail market can only be taken into account under an authorisation application, rather than under the net competition test, is incorrect.[108] The Court of Appeal in *ANZCO* rejected that pro-competitive effects are to be balanced only in the context of the authorisation process.[109]

Relatedly, the Commission's position that downstream pro-competitive effects are "out of market" as a result of its narrow focus on the acquisition market is also problematic. This approach does not sit comfortably with the consumer welfare standard because it ignores the potential for gains to consumers. Further, this approach is inconsistent with previous authority. The Commission has previously considered the issue of so-called "out of market" pro-competitive effect in the authorisation context, and the logic applied there applies equally to the net competition test under s 47. In *Re Goodman Fielder*, the Commission determined that pro-competitive benefits relating to the whole of the proposal should be taken into account, and not just those benefits relating to the market in respect of which there may be competition concerns.[110] This case included counting benefits in certain product markets against detriments in different product markets. There is logic in this approach because it is simply recognising and accounting for all the impacts that may necessarily flow from any given acquisition. The application of this logic is even more relevant to the present case, because

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106 *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* [2006] 3 NZLR 351 (CA) at [249].

107 One substantive difference between the authorisation and net competition assessments, which is not at issue here, is that the public benefit test admits wider non-economic factors: see *NZME*, above n 104, at [60] and [76].

108 See *Re Foodstuffs*, above n 4, at [427] and [435].

109 *ANZCO*, above n 106.

110 *Re Goodman Fielder Ltd* (1987) 1 NZBLC (Com) 104,108 at 104,147. See also *Air New Zealand Ltd and Qantas Airways Ltd* NZCC Decision 511, 23 October 2003 at [897]; and Barry Allan and others (eds) *Gault on Commercial Law* (online ed, Thomson Reuters) at [CA27.12(4)].

the net efficiency assessment would be undertaken within the same product market, with a focus on consumer welfare in that market.[111]

(b) The substantiality test

A critical factor is the substantiality threshold under s 47. The Commission takes the approach in *Foodstuffs* that a smaller change in competition with a merger may be captured in concentrated markets than is the case in more competitive markets.[112] While there is intuitive logic in this proposition, the question remains as to the appropriate level of the smallness of change in the context of concentrated markets. The Commission appears to equate this smallness test to a low level, stating at one point that smallness applies to "even a small prospect" of change.[113] A range of other expressions of the substantiality threshold appear throughout the decision, as will be apparent from the following discussion. These formulations reveal that the Commission is approaching the matter from a very low threshold, in the nature of only a minor increment in market power.

As earlier noted, the High Court in the *Co-operative Dairy* and *Telecom* decisions found that the identification of a strengthening of dominance requires the establishment of a change in market power that is more than de minimis.[114] That precedent is of potential relevance because the test for dominance under the original s 47 required the establishment of a high degree of market power, and the test for strengthening involved an assessment of changes along the market power spectrum. It is arguable that the "more than de minimis" standard is higher than the threshold that has been applied in the *Foodstuffs* decision.

Further, the recent legislative reviews of the substantial lessening of competition test in the merger context point to the current s 47 not being applicable to a "small prospect of change" level of threshold. As earlier noted, the Australian reforms, which have essentially been proposed for New Zealand, have been premised on the basis that there is a need for legislative change to clarify the capture of incremental changes in market power. Presumably, the kind of incremental changes intended to be captured by this legislative amendment potentially include cases such as the present.

4 Competition assessment in the acquisition market

The breadth of the product market was a particular challenge in this case. Each supermarket product could be considered a separate market, as evidenced by previous Commission merger

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111 This approach to the net assessment of competition is also consistent with observations made by the Court of Appeal in *NZME* that benefits count "from the proposed transaction regardless of the market in which that benefit occurs or who it benefits": *NZME*, above n 104, at [60].

112 *Re Foodstuffs*, above n 4, at [13] and [514].

113 At [524].

114 *New Zealand Co-operative Dairy*, above n 54, at 619–620; and *Telecom*, above n 7, at 510–511.

decisions.[115] A pragmatic approach was obviously required to be taken in this case. Groups of products were identified where they exhibited common market dynamics, resulting in the Commission concluding that there were separate product markets for dry/ambient groceries (including canned goods, breakfast products, rice, pasta, flour, oils and so forth), chilled and frozen groceries, health and beauty products, beverages, snacks, meat and seafood, beer and wine and fresh produce.[116] All these markets were considered to be national, except for meat and seafood and fresh produce which were also found to have local and regional dimensions in some cases.[117]

The customer dimensions of these markets were, not surprisingly, found to be of particular significance. There was wide-ranging evidence before the Commission from suppliers with different outlet options including the three major retailers (Woolworths, FSNI and FSSI), other retail customer and grocery retailer outlets and exports.[118] In two of the identified product groups, dry/ambient goods and chilled and frozen groceries, it was found that most suppliers would be unable to substitute meaningful proportions of their supply to channels outside of the major supermarkets in response to small but significant non-transitory decreases in price.[119] The same conclusion was not reached for the other product markets, with the evidence being said to be "unclear".[120]

Against this background, the Commission's inquiry centred upon the buying power of the three major supermarkets, and the merger was characterised as a three-to-two merger of these competitors. The Commission's core conclusion was that the merger of FSNI and FSSI would result in increased buyer power which would "materially shift the balance of bargaining power in favour of the merged entity".[121] This was considered likely to result in the extraction of lower prices from suppliers, including with less favourable terms. An adverse flow-on effect for product innovation was also considered likely.

There was mixed evidence on the competitiveness of FSNI and FSSI in the acquisition market. The merger parties argued that there was no meaningful competition between them and that outside alternatives remained largely unchanged, meaning that bargaining outcomes were unlikely to shift.[122] Significantly, the merger parties provided data on the expected gains to be achieved from the merger,

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115 *Re Foodstuffs*, above n 4, at [45].

116 At [217].

117 At [148]–[156].

118 At [159]–[212].

119 At [177] and [183].

120 At [188], [192], [196], [201], [205] and [212].

121 At [225].

122 At [237]–[248].

including projected cost savings from reorganisation and product spend.[123] These numbers are redacted from the public version of the decision, but were portrayed in the case of reductions on product spend to be de minimis.

The Commission obtained extensive evidence from third parties. Apart from submissions by several trade association and industry groups, all of this evidence is not surprisingly confidential, and has also been redacted from the public version of the decision. There was apparently mixed evidence, ranging from concerns about the loss of the two Foodstuffs channels through to the identification of potential efficiency gains achievable through size and scale and the removal of duplication in the contracting process.[124]

(c) Supplier power issues

The critical aspect of this evidence in the counterfactual context is the likely loss of competition between FSNI and FSSI. The section of the decision which reviews this issue is largely based on opinions by suppliers that increased concentration would be detrimental, but these case studies do not apparently reveal compelling evidence of situations where the suppliers in question have played FSNI and FSSI off against each other.[125] Rather, this section of the decision reveals limited evidence of this occurring in times of product shortage.

Overall, the Commission accepted that the evidence established that currently suppliers lack leverage, and they consider that in practice there is no mechanism for them to play the merger parties off against each other, and that this has not occurred.

(d) Buyer power issues

Turning to the assessment of the merger parties' buying power, with or without the merger, the evidence is problematic.[126] Naturally, there are suppliers who fear that they will need to agree to the merged entity's new terms and that this may have profound consequences for them. But factual uncertainty surrounds such predictions. A review of this issue is problematic in the context of the public version of the decision because the crucial evidence of the merger parties' projected buying benefits is redacted and it is apparent that the Commission takes issue with the extent of these projections.[127] Whether the scope for price reductions is de minimis or not is obviously relevant to the substantiality aspect of the counterfactual test.

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123 At [241].

124 At [256]–[272].

125 At [279]–[289].

126 At [290]–[303].

127 At [295].

(e) Acquirer constraints and countervailing power

The Commission's remaining assessment of price and term of contract issues deals with two other aspects of the conduct of this market, namely the level of constraint provided by other acquirers and the countervailing power of suppliers.

The Commission's assessment of the constraint provided by other acquirers concluded that the only other major acquirer post-merger would be Woolworths, with all other acquirers unlikely to pose a competitive acquisition response sufficient in scope because of their small presence in the retail market.[128] The view is expressed that Woolworths would not have the incentive to offer better terms to suppliers. Rather, the incentives would be for Woolworths to offer lower prices to match those achieved by the merged entity.

Similarly, the countervailing power of suppliers was not considered by the Commission to be sufficient to constrain the exercise of market power.[129] While there may be some instances of countervailing power in the case of "must-have" products and products supplied by larger firms (such as multinationals), the Commission's view of the evidence was that suppliers otherwise have no effective countervailing power to defeat price reductions.

The Commission's decision does not reveal that any real change was likely in respect of the levels of constraint by other acquirers, or in respect of the countervailing power of suppliers.

(f) Innovation

The final issue addressed in the competition assessment in the acquisition market was the merger's likely impact on innovation. The Commission explored two ways that innovation could be negatively impacted by the merger, namely that the reduction of one sales channel and the reduction in the margins and profitability of suppliers could impact their ability and incentives to invest in innovation. The evidence on these issues was mixed.[130] Further, it was accepted by the merger parties' economic experts and the Commission that there is no apparent consensus in the economic literature on whether changes in bargaining power may stifle innovation.[131]

Nonetheless, the Commission reached adverse findings on both the matters under consideration.[132] It is difficult to attach significant weight to these reasons, given the speculative and unsettled nature of the subject matter.

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128 At [318]–[324].

129 At [341]–[352].

130 At [356]–[380].

131 At [364] and [384].

132 At [381]–[403].

There is no necessary correlation between the loss of one acquisition channel, when two major and other channels remain. Decisions to invest in innovation are made in an environment of uncertainty, risks are taken, and those prepared to make the investment do so in the belief that they will succeed. It is difficult to see that these aspirational goals are likely to be extinguished because there may be one less buyer on these facts, and it is no surprise that the evidence is mixed on this issue.

The concern that investment decisions may be impacted by reduced margins and profitability is more plausible, but again there are mixed views. Despite the Commission finding that the merger may be likely to result in reduced investment in innovation, it also acknowledged that suppliers' incentives to invest in innovation may vary and that, even faced with increased buyer bargaining power, some suppliers may have stronger incentives to invest to "remain relevant".[133]

5 Competition assessment in the retail market

Despite the conclusion that there was no actual or potential aggregation between the merger parties at the retail level of the market, the Commission reached findings that a substantial lessening of competition was likely in this market for two reasons. The first concerned increased buying power raising barriers to entry and expansion for rival retailers, and the second related to the increased likelihood of co-ordination between the merged entity and Woolworths.

(a) Raising barriers to entry and expansion

The Commission's theory of harm concerning the increased buyer power of the merged entity was that the negotiation of better prices and terms would increase its competitive advantage, that this would give it headroom to engage in retaliatory conduct against rival retailers and that such rival retailers' knowledge of this threat would deter new entry and expansion.[134] There was mixed evidence on this point, reflective of the highly speculative nature of this concern.[135]

Speculative theories of this kind can be advanced both with and without the merger. The Commission endeavoured to satisfy the substantiality threshold under s 47 here on the basis that there may be "a reduction of even a small prospect of future entry and expansion".[136] This is a questionable formulation of the test, as noted above.

A further issue was that the increased buyer power could translate into instances of exclusive dealing. More particularly, although exclusivity may not be required by the merged entity, a greater

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133 At [395].

134 At [535]–[539].

135 At [493]–[513] and [538]–[540].

136 At [524].

dependency of suppliers on the merged entity may result in suppliers declining to supply rival retailers to preserve the relationship.

There are problems in attaching weight to this consideration. This issue arises only where there are no substitute products from other suppliers. Further, the Commission acknowledged that if this supplier conduct impacted only a small proportion of a grocery basket, then this would be less likely to impact on a retailer's decision to enter or expand.[137]

These considerations also arise in a context where current buyer power means that this concern already exists, and the Commission endeavoured to establish that the merger would substantially lessen competition because it would "exacerbate these dynamics".[138] Again, it is questionable that the evidence and analysis here satisfies the counterfactual test.

(b) Co-ordination

The Commission's concern with co-ordination in the retail market was as follows. Despite the absence of any detected explicit co-ordination,[139] the market is vulnerable to co-ordination between the merger parties and Woolworths because of the high degree of price transparency, the fewness of competitors, repeated interaction over many years, frequent interaction with common suppliers, stable demand, the ability to detect and punish deviations and the limited scope for new entry and expansion.[140] These are observations as to the current state of the market.

The critical counterfactual inquiry relates to the changes in these market conditions which would arise from the merger, and the likelihood that these would enhance accommodating conduct. The Commission's primary focus here was upon the pricing conduct of the merger parties, current and proposed, and Woolworths' pricing practices.

The concern was with centralisation of pricing by the merger parties and how this may result in alignment in prices between the North and South Islands.[141] Currently, FSNI and FSSI set prices for each island. FSNI and FSSI independently set a recommended retail price for their member stores, and it appears from the public version of the decision that, although there is the potential for deviation at these stores, this does not occur to any significant extent. Details of the price lists are not provided in the decision, but presumably given the price advantage of FSNI over FSSI through its current greater buying power, the price list for the North Island will be more competitive than for the South Island. The concern in the acquisition market that prices to the current FSSI suppliers may reduce

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137 At [550].

138 At [546].

139 At [625].

140 At [567]–[619].

141 At [636] and [647].

would likely mean that the new national price list would involve lower buying prices to FSSI member stores.

Woolworths previously set prices for its retail stores on a national basis but has recently introduced a new pricing model that sets separate prices over a range of products for the North and South Island.[142]

There is no indication that these prices are transparent as between Woolworths and the merger parties. However, their transparency will presumably become apparent on the retail shelves.

This factual pattern establishes the potential for some degree of accommodating conduct, but this is conduct of a kind which already exists.

The Commission's primary concern appears to be that if FSNI and FSSI set a centralised buyer price, then there is more likely to be price alignment between the two islands.[143] This concern relates to the unilateral decision by the merged entity as to how it proposes to set prices to its member stores. In the context of the retail market, centralised pricing may ultimately be likely to lead to lower prices in the South Island. National retail price increases are unlikely, given the Commission's acceptance that at least some of the efficiencies of the merger will be passed through.

How Woolworths would respond to a new national price list from the merged entity would be a decision made based on observations of this rival's new pricing methodology post-merger. It may be that Woolworths reverts to its national price list.

This outline indicates that the retail market will likely continue to function as it presently does, and counterfactual analysis points to no likely significant change in accommodating behaviour and co-ordination between the merger parties and Woolworths. Against this background, it is difficult to accept the Commission's concern that this merger may lead to the likelihood of increased co-ordination in the retail market.

6 Net competition test revisited

Despite the Commission concluding that it is "not relevant" to take into account whether retail consumers would benefit from the merger, it considered that "even if consumer welfare is relevant", the net assessment for consumers would be negative.[144]

The Commission's analytical framework here appears to be based on efficiencies arising only in the acquisition market.[145] While the wider discussion summarises the competition concerns that were

142 At [563], [585] and [591].

143 At [647].

144 At [406.1]–[406.2].

145 See [406].

found to exist by the Commission,[146] there is no clear articulation of pro-competitive benefits of the merger in aggregate and the anti-competitive effects in aggregate, and how the trade-off between these should be balanced and weighed.

As earlier noted, the evaluative task here under the net competition test runs analytically in parallel with the authorisation process. Observations in that context about the approach to be taken for the balancing exercise of benefits and detriments are pertinent when undertaking the net competition assessment under s 47. As the Court of Appeal affirmed in *Godfrey Hirst*, where possible, some attempt should be made to quantify these elements to reduce reliance on pure intuition. Nonetheless, qualitative judgement is ultimately the primary factor.[147]

Calculating the benefits and detriments in this case would likely pose some insurmountable difficulties, but a high-level quantification of the most readily ascertainable factors may have been of some assistance. It would, for example, have been informative to attempt to quantify a range of possible buying power gains (excluding rationalisation benefits) in respect of the acquisitions market. This would have set some boundaries for the Commission's assessment of detriments. In the benefits column, a range could have been quantified to account for reduced negotiation costs and all cost savings which may have been passed through to consumers.

This attempted quantification may well have exposed low numbers if the merger parties' and Commission's stated positions were correct that the buyer power gains (in the acquisition market) and pass-through of overall costs savings (in the retail market) were likely to be minor. Although such quantification would be unlikely to be reliable for adjudicative purposes, it may nonetheless have brought more clearly into focus the assessment of the substantiality threshold test under s 47.

7 Concluding comments

Given the level of redaction of material from the public version of the decision, it is not possible to proffer an opinion on the outcome in this case. However, the following observations can be made:

(a) There are framework issues concerning the application of the net competition test under s 47. The dual paths for the assessment of anti-competitive and pro-competitive effects under s 47 and the authorisation provisions give rise to some tensions. But for the moment, the case law is clear that pro-competitive benefits enter the equation under s 47 assessments, and the assessment of net competition under this provision is analytically parallel to the application of the public benefit test under the authorisation setting. There are framework issues pertaining to the Commission's primary focus on one functional level of the market,

146 At [428]–[429] and [436]–[438].

147 *Godfrey Hirst*, above n 45, at [35]–[37].

and the extent to which the net assessment of competition has been undertaken in all relevant markets.

(b) There are questions about whether too low a standard has been applied to the substantiality threshold under s 47.

(c) The critical counterfactual assessment is to be undertaken on the basis that the Commission currently considers that the level of competition is muted and the market is not working well. This materially impacts on the counterfactual analysis.

(d) In the acquisition market, the competitive differences to the market which would result from the merger of FSNI and FSSI, and which may not involve substantial differences to the current situation, include:

(i) Except in times of product shortage, the evidence does not appear to reveal that suppliers are currently in their negotiations attempting to play FSNI off against FSSI.

(ii) The level of increased buyer power that would likely result from the merger is a matter of difference between the merger parties and the Commission. Also, it is unknown how this would impact on suppliers within the negotiation range. Faced with stable demand for product, an assessment of the merged entity's incentives is required in this setting. It may be that the Commission holds confidential information that some suppliers fear that they may fail because of this merger. However, this evidence needs to be considered in the overall context of substitutes for the products in question, and the evidential basis for this is not apparent from the public version of the decision.

(iii) No substantial changes appear likely to result because of this merger in respect of the constraints by other acquirers or the exercise of countervailing power by suppliers in the limited circumstances where this power may exist.

(iv) It is difficult to attach significant weight to innovation concerns given the mixed views on the subject, and the landscape on this issue may well not substantially change merely because of this merger.

(e) Turning to the retail market, issues also arise in respect of differences between the current state of competition in this market and how this merger may change that. In particular:

(i) The concern about increased buyer power raising barriers to entry and expansion in the retail market is based on the threat of retaliatory action by the merged entity. However, this threat presumably is seen to exist today. From the public version of the decision, it is not apparent how the merger will be likely to substantially increase this threat.

(ii) The concerns about suppliers being more dependent on the merged entity, and the prospect that this may translate into a reluctance to supply rivals, is problematic and care is needed in attaching weight to this. If there are product substitutes and if the product represents only a small part of the shopping basket, such conduct may well not impact on entry or expansion.

(iii) It is difficult to see that the co-ordination dynamics between the merged entity and Woolworths would likely be materially different to the current workings of this market.