



On 1 October 2024, the Commission declined clearance for separate entities Foodstuffs North Island and Foodstuffs South Island to merge (Proposed Merger). The Commission has now released its written reasons outlining why it declined the merger.

In its written reasons, the Commission took the time to **clarify the legal test**, supported by a number of cases and economic theory. At 223 pages, it is one of the most thorough merger clearance decisions Matthews Law has seen. It cited authority for its role as an **expert regulator** and highlighted its **industry expertise**.

The Commission noted that the parties' submissions, *"including the focus on the effects on competition between suppliers, transfers of surplus, and the notion that harm to suppliers is merely a harm to competitors are based on an incorrect assumption of the statutory test. The fundamental question we need to address is whether we are satisfied that the Proposed Merger is not likely to substantially lessen competition in the market."* (emphasis added) The Commission also added that *"while cost-savings that result from merger efficiencies may be benign or pro-competitive, **wealth transfers from weaker competition postmerger are not benign or pro-competitive.**"* (emphasis added)

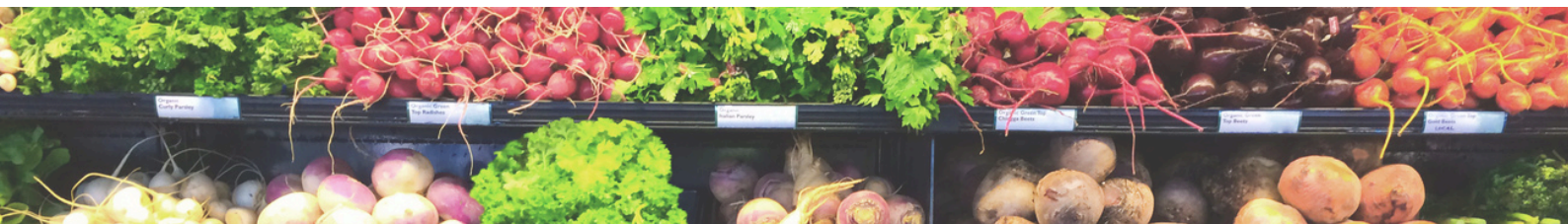
The Commission was *"not satisfied that the Proposed Merger would not have, or would not be likely to have, the **effect of substantially lessening competition in multiple acquisition and retail grocery markets in New Zealand**"* but was satisfied that the merger was *"unlikely to substantially lessen competition in any markets for the **wholesale supply of groceries**"*.

Some concerns the Commission had with the Proposed Merger include:

- That it would increase **buyer power** and **reduce the options** of who suppliers could supply to. This could result in a **decrease in innovation** by suppliers, reducing consumer choice and/or the quality of the goods. It could increase **risks for suppliers** given the persisting imbalance in market power.
- It would make **tacit collusion** between the merged entity and Woolworths more likely.
- The merger could *"increase **barriers to entry and expansion** and/or otherwise impact the ability and/or **incentives** of rival grocery retailers to enter or expand in retail grocery markets"*.

The Commission found that FSNI and FSSI are *"not in competition with each other"* in retail grocery markets, and were satisfied *"there was not a real chance of a counterfactual situation"* where either Foodstuffs entity entered the other island. As to why the parties do not compete, the Commission noted that it had *"assumed that the present arrangements between the Parties that give rise to the dynamics do not themselves contravene the Act, but this is not an issue upon which we express any conclusive view"*.

SO WHAT NOW? Read on for what the Foodstuffs entities options are.





PROCEED ANYWAY

- The two parties could **try to merge anyway**. Clearance is ultimately a voluntary process and only the Court can determine whether the merger breaches the law. However, it seems likely that the Commission would seek an injunction to prevent the merger from proceeding.
- If Foodstuffs successfully completed the merger, but it was ultimately found to be in breach of the Commerce Act, each company could face **penalties of up to the greater of \$10 million or 3 times the commercial gain** from the merger (or if that cannot be determined, 10% of turnover after the merger occurred). Individuals (eg directors) could also face penalties of up to **\$500,000** each.
- In 2006, NZ Bus applied for clearance but later withdrew its application. It then attempted to proceed with the merger. It was ultimately required to **pay \$1.1 million in penalties and litigation costs** after the Commerce Commission brought proceedings. Any penalties now would likely be much higher.



APPEAL

- Either Foodstuffs entity could appeal the Commission's decision to the High Court. The Court can **confirm, modify or reverse the determination** by the Commission and can also require the Commission to reconsider the decision.
- If Foodstuffs or the Commission were unhappy with the High Court's finding, this could be **further appealed** to the Court of Appeal and the Supreme Court.
- There is a risk that even if Foodstuffs was successful in Court, the Government could then impose **further regulation** (including structural separation).



JUDICIAL REVIEW

- Judicial review would focus on whether the Commission had **correctly exercised its powers**.
- The main focus of this would most likely be on the process the Commission undertook, rather than the clearance decision itself.
- Even if the parties succeeded, the remedy would likely be for the Court to refer the matter back to the Commerce Commission.



SEEK AUTHORISATION

- The Foodstuffs entities could apply for **authorisation** from the Commission instead, which the Commission can grant if it is satisfied that there was a **public benefit** of the merger that **outweighed the substantial lessening of competition**. This is an unusual tactic but is not unprecedented.
- Authorisation can be **slow and expensive**, and also allows all parties (including the Commission) to raise non-economic detriment arguments.