Foodstuffs North Island and South Island Merger

Statement of Unresolved Issues Response

Mā te aroha me te pono

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Executive Summary:

Through a thorough investigation, we demonstrate through a highly evidence-based approach that the lessening of competition is already occurring, and it is impacting New Zealanders, disproportionately Māori, Pasifika, low income, and marginal groups. New Zealand is currently at market failure pre-merger, and if the merger goes ahead, it will be very hard to reverse due to the concentration of power, as illustrated by Finland which is over 20 years into its market failure. We propose remedies on how to help the regulators efficiently regulate this industry, and the powers it must request from the courts to adequately regulate it. We provide examples of powers to request and why, and solutions for regulators to enforce. This is driven by the need to save taxpayer money, so it can go towards essential government services which are currently being cut.

Disclaimer:

The authors of this submission have not been paid by any entity or individual to do this. This report is based on empirical work in progress from academic research, in addition to publicly available facts, news, peer reviewed and published research by other academics and appropriately referenced.

The author Lisa M. Katerina Asher is Māori. Through her whakapapa she is of Ngāti Tūwharetoa iwi, Ngāti Kurauia hapu, and Ngāti Turangitukua hapu by her father and grandfather. Of Ngāti Tahu and Ngāti Whaoa by her great grandmother Paekitawhiti Ngakuru Asher. Of Ngāti Pukenga iwi by her great grandfather John Atirau Asher, great-great grandmother Katerina Te Atirau Asher, and great-great-great grandfather Hone Te Atirau. She is of Ngati Pikiao iwi by her great-great-great grandmother Rāhera Te Kahuhiapō,

The authors choose to invest their time in opposing this merger for free, as there is deep concern of the social costs from structural market change this merger will create. Concern then on how this will continue to fuel the rising poverty and cost of living challenges faced by so many New Zealanders, and particularly Māori, Pasifika, low income, and minority groups. Competitive markets allow for fair competition and competitive prices, as entities must be better to compete. A simple, but well supported premise within Business, Law, and Economic research, literature and practice. Therefore, this research is funded by the conviction to help others who are suffering from the current industry structure and lack of competition. Food and groceries are a basic necessity and access to it, should not be for the wealthy, it should be for all.

Contents:

1. Concentrating for Power, not for the Customer

Academic literature and research for decades supports that concentration increases profit for those concentrating, and generally for those higher up in Oligopolies (Carlton & Perloff, 2015; Goolsbee et al., 2020; Shepherd, 1972). When we consider how this can be applied to the New Zealand market. Foodstuffs North Island has the highest market share, followed by WWNZ, then Foodstuffs South Island. According to Shepherd (1972), this means profit goes to Foodstuffs as a combined entity, and then also increases barriers to entry. This is a strong argument which challenges the basis of where the allocation of "efficiencies" mentioned by Foodstuffs North Island and Foodstuffs South Island will be allocated. According to Shepherd (1972), it will be retained by the merged entity. This does not appear to be in the best interest of the New Zealand public, or the action required to reduce prices in the market, as incentive to compete is largely absent with two firms, as discussed further in economic literature.

2. Market Concentration and Abuse of Market Power

Based on ongoing empirical work, it is important the public and the Commerce Commission is advised of where New Zealand sits within the global context of market concentration, and how it is so different to the rest of world, which is why it should not be allowed to concentrate further. Concentration further at these levels are not for customers or efficiencies, but merely profit for shareholders, and move the market into market failure (Carlton & Perloff, 2015; Goolsbee et al., 2020; Tirole, 1988).

Below we show HHI which is an economic measure of market concentration (Herfindahl, 1950; Miller, 1982). This is calculated by understanding market share of all the supermarket players within a market, we have chosen national market for ease of comparison. It can however be used on lower regional levels as effectively. The market share as a decimal place is then squared, which then provides a number which better conveys concentration of power than C4 and C8 ratios, which merely sum the top 4 firms or top 8 firms' market share (Pavic et al., 2016). The analysis on developed nations with populations over 5m are below:

Supermarket HHI in Developed Markets				
Country	**2015**	**2024**	**Change 2015 - 2024 BPS**	**Concetration Level**
Australia	0.33	0.32	-0.01	Highly Concentrated
Austria	0.29	0.28	-0.01	Highly Concentrated
Canada	0.24	0.22	-0.02	Moderately Concentrated
Czech Republic	0.17	0.17	0.00	Moderately Concentrated
Denmark	0.28	0.26	-0.02	Highly Concentrated
Finland	0.54	0.56	0.02	Highly Concentrated
France	0.14	0.14	0.00	Not Concentrated
Germany	0.15	0.17	0.02	Moderately Concentrated
Greece	0.17	0.27	0.10	Highly Uncompetitive
Ireland	0.19	0.18	-0.01	Moderately Concentrated
Italy	0.10	0.11	0.01	Not Concentrated
New Zealand	0.39	0.39	0.00	Highly Concentrated
New Zealand (post merger)	**0.39**	**0.50**	0.11	Highly Concentrated
United Kingdom	0.13	0.12	-0.01	Not Concentrated
USA	0.15	0.14	-0.01	Not Concentrated

Table 1 Source: Excerpt from authors' empirical work in progress of market concentration issues for supermarkets globally.

Whereby <0.15 not concentrated, 0.15-0.25 moderately concentrated, >0.25 highly concentrated (Pavic et al., 2016). We can see here clearly New Zealand before the merger is highly concentrated, and second only to Finland. If the merger is to go ahead, New Zealand will start to rival Finland as the most concentrated market, which is not a compliment. What is also interesting is more countries over the last 10 years are improving competition, which is causing their HHI to trend backwards. This is not present in the two most concentrated markets which are Finland and New Zealand. Why?

As we can see only those highly concentrated markets such as New Zealand and Finland, appear to be concentrating, despite their high levels of market concentration. Finland was concentrated back in 2000s (Aalto-Setälä, 2002) and it has concentrated further since then. When we see retailers expand into neighboring countries which improves competition, we do not see this occur within Finland, however Lidl is present. Is this because such high levels of market concentration are a barrier? The barriers to entry for this market seem unusually high and preventing market entry and expansion. The same can be said of New Zealand. These numbers are very compelling in that they demonstrate in the public domain, how concentrated the New Zealand market is. This is not a consequence of low population density (which is explored and presented in our research being prepared for publication), but a product of creeping conduct over time within the cooperatives to remove competition, including the land covenants which will be discussed now.

An abuse of market power by Foodstuffs North Island has been discovered and reported in the news 8th August 2024, where the high court has determined[1]:

> "New Zealand's biggest supermarket business has been fined $3.25 million for imposing anti-competitive land covenants to try to block competition in the lower North Island. The fine for Foodstuffs North Island is the biggest imposed for anti-competitive land covenants. The Commerce Commission said the High Court at Wellington imposed the fine.
>
> It said the co-operative's actions were called "deliberate" and serious and showed an effort to hinder rivals from opening new stores or expanding existing ones in Wellington's Newton and Petone as well as in south Napier's Tamatea.
>
> "By blocking other supermarkets from opening new stores or expanding existing ones, the covenants hindered competition for Kiwi shoppers," he said.""

These moves have been found to be anticompetitive, and were in fact to block competition for 99 years. It does not sound good, but when we consider the population per store (table 2), and how this is impacting store availability, and a measure of competition, the numbers become much more telling of what this means to New Zealand households:

[1] https://www.nzherald.co.nz/business/nzs-biggest-supermarket-business-fined-325m-for-anti-competitive-land-covenants/PSI23SIWAFBLHFZB66645OVJLI/

Population per store - Developed Nations				
Country	2015	2024	Change 2019-2023	Change %
Australia	**8,968**	**8,500**	(468.38)	-5.2%
Austria	2,246	2,121	(124.22)	-5.5%
Belgium	4,991	4,679	(312.22)	-6.3%
Canada	**8,148**	**7,522**	(625.51)	-7.7%
Czech Republic	5,010	3,591	(1,418.63)	-28.3%
Denmark	2,426	2,586	160.37	6.6%
Finland	5,065	5,134	69.32	1.4%
France	6,010	5,690	(320.00)	-5.3%
Germany	2,924	3,009	85.09	2.9%
Ireland	5,675	5,563	(112.07)	-2.0%
Italy	4,727	4,505	(222.33)	-4.7%
New Zealand	**12,228**	**12,871**	643.17	5.3%
United Kingdom	6,136	6,391	255.06	4.2%
USA	6,532	5,439	(1,092.77)	-16.7%

Table 2 Source: Excerpt from authors' empirical work in progress of market concentration issues for supermarkets globally.

Population per stores is calculated at country level by population, divided by the total number of supermarkets in the country, it provides us with a measure we have called "population per store". This is a measure of store availability and somewhat store choice to the population. It does not include Costco or warehouse style clubs which also cater to Foodservice and B2B, and it also does not include small format convenience stores.

New Zealand has 12,871 people per store, versus 3,009 per store in Germany, 7,522 in Canada and 8,500 in Australia. What is concerning about these numbers, is that most countries are seeing a rise in store numbers, which is decreasing the population per store. That is in most countries EXCEPT New Zealand and the UK. As the UK has half the number of population per store, it is not considered an issue, nor are Denmark, Finland or Germany, based on their current low values. What is striking about the numbers provided, and how they build on the previous numbers of market concentration (table 1), is not only is New Zealand the second most concentrated developed market in the world, pre-merger, it has the highest population per store than any other developed nation. When we layer in the recent news of restrictive land covenants and that being "anti-competitive" as described by the Commerce Commission – this really drives home the point that Foodstuffs North Island have played a very strong role, in these numbers, and potentially restricting sites which increases revenue per store, to the benefit of the store owners. New Zealanders have the least amount of choice for shopping in the developed world. Other numbers have been run in our empirical analysis, and population size, density or terrain have nothing to do with this number. It actually is directly related and correlated with market concentration, and thus power (table 1).

Therefore since Foodstuffs Auckland and Foodstuffs Wellington have combined, they have participated in slowing store choice and availability to the detriment of the New Zealand public. One last number to consider is how does the revenue per store in New Zealand compare to other developed nations (table 3)?

When we control for currency in $USD, developed nations with populations over 5m (as has been done with previous data tables), we find supermarkets when all are converted into $USD, generate the highest revenue per store in New Zealand at $USD27.94m, outranking the US which includes Walmart data at $USD19.56m, who are HUGE big box players and grocery players. Australia comes in second at $USD22.75m, again due to the lack of competition, before the US and UK, where they both have strong currencies. The statistics appear favourable for store owners, and not the public, when we consider all tables together.

Sales Per Store - Developed Nations		
Country	**sales/store $USD m**	
Australia	**$**	**22.75**
Austria	$	6.43
Belgium	$	12.30
Czech Republic	$	5.94
Denmark	$	8.50
Canada	$	17.29
Finland	$	16.97
France	$	17.22
Germany	$	7.70
Ireland	$	17.02
Italy	$	8.06
New Zealand	**$**	**27.94**
United Kingdom	$	19.52
USA	**$**	**19.56**

Table 3 Source: Excerpt from authors' empirical work in progress of market concentration issues for supermarkets globally.

As it appears the lack of stores available to New Zealanders, mean a supermarket in New Zealand generates more revenue in $USD by 42.8% than a store in the US. The US is renowned for large stores, yet in New Zealand, this number looks "supersized".

The numbers are deeply concerning and demonstrate statistically, that New Zealand is so highly concentrated from the current market structure, that it provides the basis for the Commerce Commission to request powers from the court which allow it to have divestiture powers to regulate this market failure. These divestiture powers, will be discussed further in this report, however should allow the Commerce Commission to break up existing players, which would be PaknSave in both the North Island and South Island, to create their own entities. Then require a name change, so they stop confusing themselves and the public that they are legally separate entities, and not simply separated by the Cook Strait. This strongly recommended name change allows each entity without confusion, to enter the other island. We could move from having 3 entities to 5 entities relatively quickly with such a change, and not be dependent on overseas investment.

Divestiture powers are not draconian but appear to be effective in the UK and USA markets where they have markets which are competitive and not concentrated as defined by HHI <0.15, and divestiture powers with regulators[2].

[2] https://www.accountingtimes.com.au/economy/labor-the-last-holdout-against-accc-divestiture-power

Within our statistical analysis we look at banner data by island, where the PaknSave banner has more strength by island than other banners. The recommendation is evidence based and fact based, that these stores have significant revenue moving through them, and therefore have significant market power as a sub-banner of each Foodstuffs co-operative. The centralised buying of the groups through from the current centralised buying of Foodstuffs North Island and South Island distribution centres, they can stand on their own two feet as a separate group, as one per island. The proposed name change for each will then allow each group to then expand into the other island with no name confusion for them or their customers. Perhaps this is the reason why they are not expanding into other islands? Foodstuffs denies "cartel conduct"[3], so perhaps the legally separate entities should have very different looking names to prevent confusion and potentially expansion into other islands through competitive measures, as opposed to consolidation measures? The market study advised we needed competition, this could help facilitate this.

[REDACTED]

This recommendation is driven by facts. WWNZ is certainly not fairing as well as the PaknSave island banners, as can be seen by their modest 2% growth in the last 9 years (table 4). The high growth is driven out of the PaknSave banners across both islands, and it's very substantial. This recommendation is based on them not being negatively impacted by this proposed change from a buying power perspective. To allow New World and FourSquare to remain as part of the Foodies Co-op/Grocers Co-op group together, will allow them the buying power similar to the large box retailers who should be legally separate.

3. Economic Theory - Applied to the Foodstuffs North Island and Foodstuffs South Island Merger

To understand the strategic implications of the merger, it is surprising that Houston Kemp, a firm of economists, have yet to discuss game theory and its application within this merger's context. With one exception in the body of the report, in relation to bargaining power only[4]. It should be noted that they are paid by Foodstuffs through their lawyers, and perhaps a conflict of interest to be fair and balanced with economic theory, which will not undermine the merger. There was a long but perhaps unnecessary discussion of monopsony buyer power within a submission[5] [6]. There are currently three buyers of products in the market. To argue for one through monopsony power, seems unrelated to the discussion of lessening of competition. This is of course unless they are expecting there to be only one buyer left in the market, of which perhaps Foodstuffs North Island and South Island are considering buying out WWNZ at a later point in time. Given the Market Study, this does not seem likely[7]. Foodstuffs North Island and South Island lawyers when challenged with the balanced and relevance of their paid service by Houston Kemp responded in a subsequent submission to this as:

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[3] https://www.thepost.co.nz/business/350167078/foodstuffs-co-ops-reject-allegation-they-are-operating-cartel

[4] https://comcom.govt.nz/__data/assets/pdf_file/0023/346181/Houston-Kemp-Economic-effects-of-the-proposed-merger-of-Foodstuffs-North-Island-and-Foodstuffs-South-Island-7-March-2024.pdf p.8

[5] https://comcom.govt.nz/__data/assets/pdf_file/0014/351104/Houston-Kemp-economic-effects-of-proposed-merger-of-FSNI-and-FSSI-review-of-statement-of-issues-26-April-2024.pdf p.7

[6] https://comcom.govt.nz/__data/assets/pdf_file/0023/346181/Houston-Kemp-Economic-effects-of-the-proposed-merger-of-Foodstuffs-North-Island-and-Foodstuffs-South-Island-7-March-2024.pdf p. 6

[7] https://comcom.govt.nz/__data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf

> *"The Houston Kemp reports contain expert economic evidence, into which the Parties have provided input based on their commercial experience and are supplemented by the Parties' own submission[8]".*

What is surprising of this, is that Economists are generalists, and these generalists do not reside in New Zealand, they are an Australian company. They are providing "expert evidence" of which they are not experts of when it comes to New Zealand or supermarkets. It must be asked, why New Zealand economists were not considered for their "expert opinion" on the merger? It is <u>strongly recommended</u> that the Commerce Commission request if Foodstuffs North Island and South Island, or their lawyers attempted to engage any local economists on their "expert opinion". If they did not, why was this? If they did, why was Houston Kemp decided as the preferred vendor? It is <u>strongly recommended</u> evidence be requested by the Commerce Commission to Foodstuffs North Island and Foodstuffs South Island or their lawyers be provided, and rationale for their decision be substantiated and declared full and complete. It is also strongly recommended the Commerce Commission request correspondence between Foodstuffs North Island, South Island, their lawyers on the "brief" provided to this company. This should include emails, briefs, contracts, logs of verbal calls or meetings, and meeting minutes. The Houston Kemp consultant online profiles, show one of the three consultants completing their Bachelor of Economics in Auckland, before leaving relatively soon after 37 years ago. The second author gaining a Bachelor of Economics at the University of Sydney in 2017 then joining the firm. Neither appear to have resided in New Zealand for 7 to 37 years. Both spending most of their adult life outside of the country, and unfamiliar with the market[9].

4. Game Theory Applied to Mergers and Acquisitions

Game theory within economics is used by bodies such as the European Commission to analyze mergers and acquisitions, assessing how they may later change the market dynamics and competitive equilibrium (Buchanan, 2001; Church & Ware, 2000; Goolsbee et al., 2020; Rabin, 1992, 1993; Samuelson, 2016; Tirole, 1988). Again, it does seem highly unusual an agency of "expert economists" did not consider this more broadly, as it is a fundamental in first year Microeconomics at the University of Sydney[10]. By considering the game players, then consideration of their strategies such as pricing, output levels, product differentiation, investment and innovation. The European Commission would then consider pre-merger and post-merger scenario of their payoffs such as market share, consumer surplus, profits, and overall welfare. The Market Study has already made it clear there is not enough competition, and there are excess profits being made by the existing three major players. Pre-merger for Foodstuffs North Island and Foodstuffs South Island, the consideration of Nash equilibrium should be made (Goolsbee et al., 2020; Tirole, 1988; Young, 1991). The Nash Equilibrium is defined as firms or players expect their opponents to independently set strategies and thus prices as a form of strategy to maximize profits. Post merger, we can expect the new merged entity which would be the combined Foodstuffs North Island and South Island, will adjust its strategy based on its new market power.

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[8] https://comcom.govt.nz/__data/assets/pdf_file/0023/352562/FSNI-and-FSSI-Cross-submission-in-response-to-FSNI-and-FSSI-statement-of-issues-6-May-2024.pdf p. 26
[9] https://houstonkemp.com/people/dylan-frangos/
[9] https://houstonkemp.com/people/greg-houston/
[9] https://houstonkemp.com/people/nick-twort/
[10] https://www.sydney.edu.au/units/ECON1001/2024-S2C-ND-CC

In the case of three buyers in market to two buyers in market (as we consider legally separate entities to qualify as a different buyer), with the information put forward by Foodstuffs lawyers to justify the separate entities merging, it appears based on their submissions, they are already sharing information, and resources which influence their strategies. This is captured in their own words which will be discussed, including their store brand/private label program and their corporate social responsibility (CSR) reports.

We consider information sharing, in their own words through their application:

> *"The Parties provide support and assistance to each other as required in order to optimise their overall competitive proposition. The co-operatives share brands and heritage, and work together in a range of ways including in relation to marketing, product range, brand alignment and initiatives, as well as shared ownership of trading and non-trading entities. Nevertheless, each co-operative operates its own support centre (with supporting supply chain infrastructure) to serve members' stores in the island the co-operative serves."*[11]

Based on the above, strategies which should be employed by legally separate entities within game theory and the law, should apply to Foodstuff North Island and Foodstuffs South Island. However, as has been concisely provided here, and in various other statements to the Commerce Commission they are sharing marketing, product range, brand alignment and initiatives across entities, which are strategies in the context of the Nash Equilibrium (Goolsbee et al., 2020; Young, 1991). These are all strategies which should be separate when entities are legally separate. This is very concerning. To admit to sharing information when firms are legally separate is a very dangerous precedent, in supermarkets and for all markets in New Zealand.

4.1 Store Brands / Private Label

"Pams" is an own brand/private label product assortment which is developed for national distribution by two firms who are legally separate entities, via Foodstuffs Own Brand Label. The strategies of creating, procuring, and managing a store brand, private label or house brand seem converged and coordinated already, when legally they should be separate, as they are legally separate firms, and thus should be considered competing firms. The Warehouse in their submission raised concerns over this[12]:

> *"Ranging decisions are governed by the best price margin, which can often disadvantage new or small brands, and lead to consolidation of the market to big, well-known brands, or private label products. There is a possibility that the increased market power of the Merged Entity may allow Foodstuffs to expand their own private label group offering at the expense of a wider range of other products or brands. This would have negative outcomes for suppliers who would be squeezed out of supplying products under their own brands, and also for customers who would have reduced product choice."*

The concern of the Warehouse Group is with absolute merit. We have seen this occur rapidly throughout the developed world. The key difference though, is a standard grocery retailer like the banners within Foodstuffs North Island and South Island are "dual stockers" of brands and store brands. They exist in a

[11] https://comcom.govt.nz/__data/assets/pdf_file/0027/338436/FSNI-FSSI-clearance-application-14-December-2023.pdf

[12] https://comcom.govt.nz/__data/assets/pdf_file/0032/354488/FSNI-and-FSSI-cross-submission-in-response-to-FSNI-and-FSSI-statement-of-issues-31-May-2024.pdf

market with no Hard Discounter (Aldi or Lidl). The absence of a Hard Discounter means the push for store brands, is to drive "profit" and "loyalty" at the expense of brands, and ultimately food sovereignty (Hoch, 1996; Hoch et al., 1999; Hyman et al., 2010; Sethuraman & Gielens, 2014).

Of which Foodstuffs North Island and South Island lawyers responded:

> *"Both Parties make ranging decisions based on customer demand, as well as other considerations including profit margin. • The Proposed Transaction should not give rise to any material effect on private label. Evidence is provided in the Parties' submission in response to the statement of issues from paragraph."*

Store brands or private label are not consumer demand driven brands, but one which are owned, controlled and pushed by retailers (Gómez Suárez, 2005; Grewal & Levy, 2007; Hyman et al., 2010; Kumar & Steenkamp, 2007), while replacing national brands when they are dual stockers of brands and private label/store brands. This is quite different to business models such as Aldi and Lidl who predominantly focus on these types of products as their core business model, with minimal choice, but great prices (Steenkamp & Sloot, 2019). They can achieve these cheap prices through operational efficiency, which is dramatically different to dual stockers such as PaknSave and New World. The Warehouse in their submission pointing to their concerns of the merged entity with its concentration of market power using it further to force suppliers into producing their store brands which deliver higher margins, at the expense of brands. Suppliers may have their brands deleted, then supply store brands on terms set by the retailer. Studies on this is well researched, and evidence based (Grimmer, 2018; Hyman et al., 2010; Kolk & Pinkse, 2006; Pepe et al., 2012; Sethuraman & Gielens, 2014; Wu et al., 2021). The Commerce Commission should take note that the merged entity of Foodstuffs Auckland and Wellington has been able to push its agenda for its own brand at the expense of brands, to increase its margin, as it is well researched and documented that store brands deliver higher profitability than national brands. Therefore, additional concentration of market power of Foodstuffs North Island and Foodstuffs South Island, will allow them to use their power to push their store brands harder at the expense and freedom afforded to brands, by removing brands and replacing it with products which are dictated to suppliers, and awarded based on a tender of 12 months – 24 months. It would be hard for a business to invest and grow when it has minimal security on continued business within such short contracts, as there is a high chance it will lose its branded presence if it is not a multinational supplier, risking food sovereignty challenges to New Zealand, as innovation will be impacted (part of our empirical research). Foodstuffs promotion of their Pams brand, is not a source of innovation, as it largely runs the copycat strategy (ter Braak & Deleersnyder, 2018). There is academic research and evidence from 23 countries which demonstrates when store brands dominate categories, they have low innovation (Kumar & Steenkamp, 2007). There are countless others, but a 23-country study seems relatively robust.

4.2 Food Production Being Shut Down

New Zealand continues to see trouble in its food production, as we have seen with Synlait[13] and their liquidity issues[14]. We then see one of our largest companies Fonterra, wish to sell Fonterra Brands[15] to

[13] https://www.afr.com/companies/agriculture/the-a2-milk-co-s-main-supplier-synlait-needs-china-rescue-package-20240603-p5jiri

[14] https://www.finnewsnetwork.com.au/archives/finance_news_network470230.html

[15] https://theconversation.com/farewell-anchor-freshn-fruity-and-mainland-whats-behind-fonterras-decision-to-sell-its-consumer-brands-230401

focus on selling a commodity (milk powder)[16]. To sell their downstream value-added business seems an odd move, as vertical integration helps them achieve efficiencies from this. These two entities having financial challenges at the same time, points to market issues within the sector, where a commodity can be seen as globally more competitive yet is a commodity. Contrast – what if Australia stopped processing wheat and just sold it while importing cereal and bread? This seems absurd but could be what New Zealand has instore.

Sanitarium have also recently announced they will be shutting down factory lines, due to "changing consumer demands"[17]. It is strongly recommended that the Commerce Commission or Grocery Commission request to see all correspondence between Foodstuff North Island and Sanitarium, Fonterra Brands and Synlait including emails, call logs, minutes of those discussions and in person meetings held for any meeting. The authors have reviewed the national breakfast cereal data, the category appears in growth over the last two years, the data does not support this "change in consumer demand", therefore it is strongly recommended the Commerce and Grocery Commission should understand why lines are being shut down, when it is counter to the data and thus evidence. It is much harder to get production back once it is lost. Something does not stack up when three major food companies (and no doubt more) must make these challenging decisions, which impact their employees and New Zealand sovereignty in producing its own food. [REDACTED]

4.3 Sharing Information Between Legally Separate Entities, Acting as One..

We can also see between these legally separate entities additional sharing of information and coordination of activity through the current issues of a **JOINT** corporate social responsibility statement (CSR). This joint statement demonstrates these two legally separate entities are acting as one, when they are legally two[18]. We can see these reports across 2023[19], 2022[20], 2021[21], and 2020[22]. It seems highly unusual legally separate entities are collaborating on CSR reports. I suspect if Coles and Woolworths or Coles and Aldi did this in Australia, it would not be viewed favorably. Why is it when this occurs in other industries, the words potential "cartel conduct" are allowed to be used or suggested? A recent example, which was then proven by the New Zealand courts is in construction[23]. "Cartel conduct" is very hard to prove, often due to the absence of a formal arrangement and inherent secrecy[24]. Global examples of

[16] https://www.afr.com/companies/agriculture/fonterra-says-it-wants-to-sell-its-australian-dairy-assets-20240516-p5je29
[17] https://www.newshub.co.nz/home/new-zealand/2024/03/cereal-killers-sanitarium-to-stop-production-of-many-iconic-kiwi-breakfast-foods.html
[18] https://theconversation.com/supermarket-concentration-benefits-stores-not-shoppers-its-time-to-split-foodstuffs-not-make-it-stronger-234150
[19] https://www.foodstuffs.co.nz/-/media/Project/Sitecore/Corporate/Corporate-North-Island/Foodstuffs-Sustainability-Report-FY23.pdf
[20] https://www.foodstuffs.co.nz/-/media/Project/Sitecore/Corporate/Corporate-North-Island/Who-we-are/FS133300---FSNZ_FY22-CSR-Report_web.pdf
[21] https://www.foodstuffs.co.nz/-/media/Project/Sitecore/Corporate/Corporate-North-Island/Here-for-NZ/FS128697---FY21-National-CSR-Snapshot_LR_FINAL-compressed.pdf
[22] https://www.foodstuffs.co.nz/-/media/Project/Sitecore/Corporate/Corporate-North-Island/Who-we-are/Performance-and-reports/foodstuffs-csr-report-2020-looking-after-our-patch.pdf
[23] https://www.minterellison.co.nz/insights/the-commerce-commission-files-charges-in-new-zealand-s-first-ever-criminal-cartel-prosecution
[24] https://theconversation.com/white-collar-criminals-benefit-from-leniency-provisions-in-nz-law-why-the-disparity-with-other-kinds-of-crime-205283

proven cartel conduct would be the laundry cartel that occurred in the EU in 2011[25] and Australia in 2013[26]. These were both due to whistleblowers who engaged in the cartel conduct and cooperating to hand over evidence. Those involved in the EU were Henkel receiving immunity, while P&G and Unilever fined €315.2 million. Unilever however was then whistleblower in Australia, with Colgate being fined $18m[27] and Woolworths fined $9m[28]. A whistleblower can provide relevant documentation, and further evidence to "prove". However, this example has provided insight into the details and agreements to not be in writing and thus proof absent. When it is suggested within the context of New Zealand supermarkets this could be occurring, as entities agree they are sharing information and maintaining separate geographies, the suggestion of such a word is met by a legal letter, threat of defamation to remove the use of this word from articles or submissions. There is censorship of the word in the media and press, including a submission to the Commerce Commission. We saw this with the change in wording from a submission by Ernie Newman[29] to the Commerce Commission in his original February 2024 submission, with Foodstuffs then claiming they reject allegations they are engaging in operating as a cartel[30].

4.4 Censorship of Experts

Nick Hazledine, an Emeritus Professor of Economics from the University of Auckland has used his vast knowledge, based on decades of independent economic research, literature and theory[31], which has been robustly tested and peer reviewed[32]. On 21st June 2024, he published an opinion piece through the University of Auckland, on his concerns drawing from his vast knowledge base, where he used the term "cartel conduct". This article was swiftly removed when a legal letter sent by Foodstuffs lawyers on behalf of Foodstuffs North Island to the University of Auckland, over the use of the term as "defamation", of which these events were documented in the news[33]. If we have a highly accomplished academic based in New Zealand, with his life's work embedded in the domain of industrial organization literature (this merger topic), research, and theory, we should consider him an expert in this country, perhaps more so than those paid at Houston Kemp in Australia. The profiles of the consultants which produced the reports at Houston Kemp have a fraction of this experience. The use of the "C" word should not be censored by lawyers or entities who do not wish to consider this term linked to these entities as potential wrongdoing, but perhaps consideration of something potentially overlooked.

A suggestion of anti-competitive conduct should therefore require further investigation, and not be censored by those wishing to disassociate from it, if they are the suspected entities. The Commerce

[25] https://ec.europa.eu/commission/presscorner/detail/en/IP_11_473
[26] https://www.accc.gov.au/media-release/accc-takes-action-against-alleged-laundry-detergent-cartel
[27] https://www.accc.gov.au/media-release/woolworths-ordered-to-pay-9-million-in-penalties-in-laundry-detergent-cartel-proceedings
[28] https://www.accc.gov.au/media-release/woolworths-ordered-to-pay-9-million-in-penalties-in-laundry-detergent-cartel-proceedings
[29] https://comcom.govt.nz/__data/assets/pdf_file/0024/342384/Ernie-Newman-submission-on-SoPI-revised-5-February-2024.pdf
[30] https://www.thepost.co.nz/business/350167078/foodstuffs-co-ops-reject-allegation-they-are-operating-cartel
[31] https://www.researchgate.net/scientific-contributions/Tim-Hazledine-20020474
[32] https://www.thepost.co.nz/nz-news/350284911/foodstuffs-wants-merge-its-co-ops-consumers-need-opposite
[33] https://businessdesk.co.nz/article/retail/foodstuffs-north-island-alleges-defamation-over-merger-opinion-piece

Commission has appropriately advised us, **the decision for this sits with the courts**[34] in their Statement of Issues. Therefore, censorship of this term in the media limits investigation, however mentioning it, does not determine it, until it reaches the courts.

It is therefore strongly recommended, the safety of suggesting such conduct be allowed in the media, and this should not result in defamation letters to scare individuals or academic institutions. The Commerce Commission should request the courts allow them the powers within the criminalization of cartel conduct, that the term is lawful as a suggestion within the public domain, and not be considered defamation when in the press or public domain, with adequate causation. If it suggests, but does not determine, it should therefore be allowed to maintain freedom of speech, adequate investigation when there is potential wrongdoing, and removal of censorship. Additionally, the Commerce Commission should also recommend to the courts, proven censorship in this capacity is liable for large fines and penalties enforceable by the Commerce Commission, to the entities censoring, including the PR firms employed by them to carry this out. Perhaps the entities involved in the construction industry recently lacked the resources to censor this term.

If Emeritus Professor Nick Hazledine, who is a highly accomplished individual who has looked at such conduct across many industries, including markets outside of New Zealand, is concerned with what he sees appears to be a cartel, then perhaps this should be a moment to stop and think why he would say this, he has nothing to gain. The merging or convergence of activity **over time** gradually, is perhaps how this has occurred, over more than 50 years. New Zealand is not isolated in such a phenomenon occurring. Finland which is the most concentrated supermarket market in the world, is dominated by two cooperatives. These cooperatives have engaged in creeping convergence of conduct over time. Merging, then removing competition and increasing control over the grocery market to be more concentrated, even 20 years after it was determined to be too concentrated (Aalto-Setälä, 2000, 2002).

The last and most recent example of censorship of the "c" word, is the reprinting of the authors' article from "The Conversation"[35] in the NZ Herald[36]. "The Conversation" is an academic news source which is highly evidence based, and in this instance highly sourced for legal reasons, as described above. NZ Herald published the original article from "The Conversation" as it was written, which is a condition of republishing from this source for circulation, and how it this enters the mainstream news. An update occurred sometime later, where the reference to Ernie Newman's submission change was removed and updated with a statement appearing at the bottom of the article as:

> *"Correction: A previous version of this article stated that a submission to the Commerce Commission had claimed the two Foodstuffs co-operatives were behaving as an unofficial cartel. However, the commission has since stated: "Based on the evidence before us, we do not consider that there are any arrangements between the parties to not compete, or that prevent them from competing, in any retail grocery markets."*

[34] https://comcom.govt.nz/__data/assets/pdf_file/0037/348859/FSNI-and-FSSI-Statement-of-Issues-4-April-2024.pdf p. 6-7
[35] https://theconversation.com/supermarket-concentration-benefits-stores-not-shoppers-its-time-to-split-foodstuffs-not-make-it-stronger-234150
[36] https://www.nzherald.co.nz/business/supermarkets-foodstuffs-merger-should-not-go-ahead-say-experts/C2G2MRK6TFC67PWRHEBOKDKWKA/

The statement reads as though the Commerce Commission has provided it. Within the Commerce Commission's review of "The Statement of Issues", we see the below quote:

> *"Finally, several submissions query whether the Parties' current relationship amounts to cartel conduct (which would be in breach of Part 2 of the Act).* ***To this end, we note that only a Court can decide whether a breach of cartel laws has occurred.*** *Our role in this context is to determine whether or not we are satisfied that the Proposed Merger is not likely to substantially lessen competition. Evidence relating to the existing relationship between the Parties may be relevant to that decision including because it informs what may occur in the factual (with the Proposed Merger) and counterfactual (without the Proposed Merger)."* [37]

A fair interpretation of this statement is only a court can decide if there has been a breach of cartel conduct[38]. This is an interesting statement as they go on to discuss lessening of competition being their focus, when cartel conduct is lessening of competition. Could the Commerce Commission provide a response in their review, on whether this statement was provided to the NZ Herald? These words do not exist in the public domain and seem quite different to their published statement. Again, it is strongly recommended that the Commerce Commission request the powers, and be given the powers by the courts, to investigate and determine cartel conduct and be given powers to remedy such conduct. This then removes the reliance on further government resources, taxpayers' money and time to determine something itself as the Commission of Commerce could do in a more efficient manner. The European Commission do this through Antitrust rules in the Article 101 of the Treaty[39], as well as the FTC[40] in the US, currently blocking Albertsons and Kroger[41] [42]. It is strongly recommended the Commerce Commission request from the courts the power to improve efficiencies in its ability to keep markets competitive, and not waste resource deferring something which it could easily determine itself. Given we were recently told through the media the cost to the Commerce Commission for the Serato merger application costing $500k[43], the Foodstuffs North Island and South Island merger will cost considerably more, additionally more so once it reaches the courts. As New Zealand grapples with budget cuts to many essential government services[44], it is important that the government empower regulators to stop costs escalating at the cost of other services. Again, this is why the Commerce Commission should request adequate powers to ensure competitive markets, which includes divestiture powers.

With the admitted coordination of conduct over time, as what appears to be creeping coordination of joint activity, we also have Foodstuffs lawyers place in writing in their counter submission to individual submissions on 7th March 2024:

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[37] https://comcom.govt.nz/__data/assets/pdf_file/0037/348859/FSNI-and-FSSI-Statement-of-Issues-4-April-2024.pdf p. 6-7
[38] https://comcom.govt.nz/__data/assets/pdf_file/0037/348859/FSNI-and-FSSI-Statement-of-Issues-4-April-2024.pdf p. 6
[39] https://competition-policy.ec.europa.eu/antitrust-and-cartels_en
[40] https://www.just-food.com/news/kroger-albertsons-court-battle-with-ftc-set-for-august/
[41] https://www.seafoodsource.com/news/foodservice-retail/us-legislators-urge-court-to-block-kroger-albertsons-merger
[42] https://www.reuters.com/markets/deals/kroger-albertsons-amend-asset-sale-agreement-with-cs-wholesale-2024-04-22/
[43] https://www.nbr.co.nz/tech/serato-merger-investigation-cost-comcom-500k/
[44] https://www.rnz.co.nz/news/political/518376/line-by-line-the-coalition-s-budget-cuts-in-one-list

> *"As a result of the position described above, there is only one realistic counterfactual against which the Commission should consider the competition effects of the Proposed Transaction. That is the status quo, including its current trajectory for each co-operative (e.g. FSSI would continue to progress its centralised buying programme, noting FSNI is adopting a similar programme but is more progressed with rolling it out)."* [45]

This seems to describe Foodstuffs South Island following Foodstuffs North Island in what could be described as a successful strategy (defined by their profit on financial statements) to centralise their buying from suppliers through their distribution centres, which is improving their profitability. To improve profitability is to capture a higher proportion of the value equation, through either greater concessions as discounts from suppliers[46], or higher prices to shoppers. Foodstuffs South Island appears to be following this approach based on their own words in the submission by their lawyers, and this is considered the only proposed alternative if they are not allowed to merge. This is factually incorrect. It is strongly recommended the Commerce Commission request the powers to reverse mergers or force divestiture, should it be found that entities are engaging in anti-competitive behaviour. To share information between two legally separate entities to increase profitability, suggests the Nash Equilibrium is already at post-merger status.

The use of the term "shared heritage" in the original submission by Foodstuffs North Island and Foodstuffs South Island, could also be used by Foodstuffs North Island and WWNZ if they were seeking to merge. They each have a shared heritage of being on the same island and providing groceries to New Zealanders for decades. However, if such a merger based on this described scenario was in front of the Commerce Commission, it is suspected this would be rejected at the first application in January, rather than now in August, still considering facts. This should then draw the attention to the need for a name change of these two legally separate entities, so that the confusion of them being legally separate entities is no longer confusing for any stakeholder, including themselves, and rightfully conveys their status, which is they are legally separate entities, and should therefore act as such. It is strongly recommended the Commerce Commission request powers to be able to enact such a change, with its request for divestiture powers. To have these powers is a deterrent for bad conduct but should be efficient if it is found they are required to fix competition issues in the market.

4.5 Cooperatives allow for heavy concentration globally

It is very interesting to see those markets with the highest degree of concentration of supermarkets, are those which are dominated by cooperatives which are Finland and New Zealand. Where these business models had origins in banding local supermarkets together for purchasing power, have evolved over time to merge to a point of dominance over markets, as we can see by the market share of any of these cooperatives in their relevant markets. When this is contrasted to the US market which based on the HHI analysis in table 1, this is a competitive supermarket industry not dominated by co-ops. Competitive markets deliver lower prices, as firms are forced to compete and be better. Not many competitors? Not a lot of competition....

5. Market Failure

[45] https://comcom.govt.nz/__data/assets/pdf_file/0022/346180/Foodstuffs-Cross-submission-in-response-to-Statement-of-Preliminary-Issues-7-March-2024.pdf p. 13
[46] https://comcom.govt.nz/__data/assets/pdf_file/0023/253148/NZFGC-Members-Survey-February-2021.pdf

For a trained economist, if they were to view the New Zealand supermarket industry as a case study, and asked what they see, it would not be out of the question to deem it as "market failure". This sounds like quite a large statement to make, but when we consider definitions, it is not. What contributes to market failure is based on (Carlton & Perloff, 2015; Goolsbee et al., 2020):

- Externalities- such as inadequate regulation to stop conduct which causes societal harm, which is why the Commerce Commission requires further powers.
- Information asymmetry- when one party has more and better information than the other, such as the case with Foodstuffs and their data discussed in section 6 when using AI, and this is not shared. This asymmetry of power favours the entity with the information.
- Market power- where a firm or group can influence prices and quantities in a market such as that of a monopoly or oligopoly, such as the New Zealand supermarket industry in its current form.

Rather than argue over the use of academic and theoretical terms which has been applied for decades, we must consider what can be done to address and fix this market failure. Acknowledging that lessons from the past should help us understand how to stop this occurring in the future, and this information be freely shared, so that we can all be invested in maintaining competitive markets which are good for society and maintain consumer welfare.

6. Market Power in Action – Machine Learning and AI Determining Ranging and Assortments – Where are the Controls for Bias and Discrimination?

The concentration of power, and how it is being used is currently going unchecked by regulators, yet discussed freely in the media in terms of what it is doing in a crafted narrative that appears approved for communication. Chris Quin, the CEO of Foodstuffs North Island recently gave an interview which was reported on 08/08/24. An important quote from this interview in his own words:

> *"We have pumped years of product sales data into an AI led machine, and basically it's telling us that by every category, what product must be on the shelf, what products choices are on shelf and where the positioning and value needs to be to work for customers."* [47]

What Chris Quin fails to mention, is what chunk of the value that customers need or are willing to pay goes to Foodstuffs North Island and its members, versus that of the supplier. Or how this has changed over time, which is the use of market power in favour of Foodstuffs North Island at the expense of its suppliers. The supplier survey, which was done by NZFGC, talks to this ranging process which Chris discusses in this interview, however suppliers, do not speak so fondly or positively of this process[48]. This is due to the fact that suppliers are told to increase the % given to Foodstuffs for the same retail price referred to as "margin", which means the supplier is taking a lower proportion of the value the customer pays, and Foodstuffs a higher proportion of that value, to stay on shelves in the centralizing review process, and range decision outcomes which impact what we can buy[49].

Chris Quin also goes on to say in this interview:

[47] https://www.nzherald.co.nz/business/supermarket-boss-chris-quin-on-cost-of-living-crunch-money-talks/DRXJJ5WRWJFLXMEJJ4OT5COBEU/
[48] https://comcom.govt.nz/__data/assets/pdf_file/0023/253148/NZFGC-Members-Survey-February-2021.pdf
[49] https://comcom.govt.nz/__data/assets/pdf_file/0023/253148/NZFGC-Members-Survey-February-2021.pdf

"There is a lot of science in the ranging, and when we do a review of the category that's what we are using, customer driven data to do it"[50]

Machine learning is a branch of AI that allows computers to learn from data without being consistently programmed, based on what the computer is taught in the beginning (computer teaching). It's about teaching computers to recognize patterns and make decisions based on data. The machine learning and origin algorithms identify correlations, classify data and make predictions. There is a new body of work emerging on algorithms and AI/machine learning, bias, ethics, and discrimination. Including at the University of Sydney on how flawed and biased these algorithms and computer teaching can be, and more scrutiny should be applied before adapting them, as they can be racist and reinforce social stereotypes (Abebe et al., 2020; Giovanola & Tiribelli, 2023; Jobin et al., 2019; Mittelstadt et al., 2016).

Therefore, it is strongly recommended that the Commerce Commission do three major things. First, they should stop the allowed use of such machine learning and AI, until it can deemed as safe, based on the following conditions. The Commerce Commission or Grocery Commission should first request detailed information on the "computer teaching" for machine learning and algorithms being used to determine these assortments, the original learnings, values, and assumptions, and what controls are in place to ensure fairness free of bias. This could represent biases in the *lessening of competition within suppliers and manufacturers*, which is part of the basis for declining the merger as it reduces competition. Secondly and importantly, the Commerce Commission should request, what controls and changes have been made over time to ensure fairness and removal of bias in the use of machine learning to determine assortments for stores and most importantly customers. If there is emerging literature on issues with the use of technology, and companies having no controls in place to ensure no discrimination, free from bias and therefore has controls for fairness, then the Commerce Commission should have knowledge and oversight of what is being done to protect customers, consumer welfare, and the New Zealand public. This point can be illustrated with the facial recognition technology deployed by Foodstuffs North Island in 25 stores as part of their theft prevention measures[51], has been trained to identify facial features based on machine learning/AI. The article acknowledges the system Foodstuffs North Island is using is "trained" on international datasets, and western European facial features (western bias). It is not trained to detect non-western European facial features. The misidentified woman was then issued a trespass notice for the store. This is concerning as she showed identification, and therefore human verification and intervention occurred, yet the technology discriminated, and the staff do not appear to be trained to understand this and exercise their own judgement. This statement is made, as the evidence of identification shown should have been enough to resolve the issue. Therefore, the overall evidence suggests, how these machines are trained, is not understood, and there are not appropriate controls in place to remove discrimination and bias.

These needs to be corrected and demonstrated via specific controls and their outcomes. The cost and burden of proof that adequate controls to prevent discrimination and bias, should be on the organization wishing to incorporate this into their business model, when it impacts almost every New Zealander, as supermarkets are the access point to basic necessities. This is stated as the Commerce Commission and Grocery Commission is a government funded organization, and as we see in the change with the

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[50] https://www.nzherald.co.nz/business/supermarket-boss-chris-quin-on-cost-of-living-crunch-money-talks/DRXJJ5WRWJFLXMEJJ4OT5COBEU/

[51] https://www.nzherald.co.nz/kahu/foodstuffs-facial-recognition-trial-maori-woman-mistaken-as-thief-not-surprising-experts-say/3DH6KYDHZ5GNVDUBHW5PARFGDM/

Australian Commerce Commission, the burden and cost of proof is moving to the companies wishing to make changes, which helps speed up approval process and reduce costs to regulators[52].

The third and last important element within the unregulated technology being used by Foodstuffs North Island to determine our food, is the potential for the "values and effects that are operational in data technologies as they sustain colonial and imperialist legacies while also highlighting strategies for resistance to autocratic regimes and pathways toward decolonizing efforts" (Filimowicz, 2023), More simply put, these models can and do perpetuate racism, marginalization and perpetuation of oppression, and exploitation of our vulnerable communities, particularly those of low income, indigenous, elderly, or those trying to actively move out of poverty. If we are to evolve as people in the future collectively, then controls and past exploitation should not be the teaching or basis for how we shape variety and food by store for the future. It is strongly recommended the Commerce Commission should request the information as detailed above from Foodstuffs North Island, and we suspect Foodstuffs South Island in their collaboration of sharing information. If the Commerce Commission does not have the power to stop such practice in use, it should therefore URGENTLY request these powers from the court, to understand and then ensure it is safe for New Zealanders, consumer welfare, and society, before it is introduced into the system and determining our food availability. This is no different to a novel food introduction under FSANZ[53].

7. Barriers to Entry are High

When overseas supermarket retailers are considering entry into other markets, it was concluded to enter international markets with caution (Gielens & Dekimpe, 2007). The study looked at 75 instances of European Grocery Retailers entering 11 Central Eastern European markets (CEE). The caution was based on the failure seen over time, with an inverted u-shaped relationship of success overtime, due to costs to execute and build infrastructure relevant to that retailer (Gielens & Dekimpe, 2007). When we consider the risk identified in failure, this represents the high value of risk for foreign players to enter geographically isolated New Zealand. We saw this caution occur in a larger market such as Australia, where Kaufland decided to pull out of the market after investing $500m[54], to refocus their strategy in markets close to home. It is therefore very important for the Commerce Commission to consider this study of the risks inherent in expecting other global retailers to enter New Zealand, as the risk for them expanding in markets which are geographically accessible by land, still hold a high level of risk. This study highlights those retailers which are created from the local market, have a much higher rate of success and remaining in market. Although Supie[55] is an example of a local failure, different business models besides another version of WWNZ, PaknSave, or New World, such as a Hard Discounter like Aldi and Lidl, or Farmer Joe's which is a US specific creation by Aldi Nord, or Costco as a Club Warehouse, are the only models currently working for global expansion. A grocer such as PaknSave and New World of store brands and branded products, is a highly undifferentiated model, therefore has minimal opportunities to expand beyond its home country, as the risk of failure is there. Therefore, for this entity to make more profit, we see them be "innovative" in their asks from suppliers (oligopoly conduct) and the technology

[52] https://www.theguardian.com/australia-news/2024/apr/10/labor-government-australia-competition-laws-mergers-jim-chalmers
[53] https://www.foodstandards.gov.au/business/novel
[54] https://www.news.com.au/finance/business/retail/experts-reveal-why-kaufland-sensationally-pulled-the-pin-on-australia/news-story/502dda31f183743fd3e289a05dddddef
[55] https://www.nzherald.co.nz/business/supie-collapse-liquidators-first-report-reveals-why-grocer-failed-how-much-it-owes/6JVB3GW455CUJF5FALGQCC7CZA/

employed, which adds to their cost of doing business, at their customers' expense in price. It is therefore strongly recommended the Commerce Commission again request divestiture powers, to spur competition with existing entities, and the name change of both cooperatives, and demerger of the large low-priced banner PaknSave from each centralized buying network to form its own. How to do this will be discussed more in the recommendations section, but it will certainly assist the public, regulators and entities themselves to stop confusing the fact that they are legally separate entities, and not the same. Therefore, they should engage in this manner.

8. Press – The New Information Age

The way in which news is communicated, continues to change and evolve. This presents challenges, however more so in smaller nations which is what we are seeing in New Zealand. To contextualize this point, let's consider "misinformation" or alternate facts[56] as words now embedded in our vocabulary, based on 24-hour news cycles, and the new ways to influence press and its narrative. The rise of Donald Trump with his career as a sales pitch of his projected "competence", by spinning inadequacy and failures[57] and misrepresentation of fortune[58] to appear powerful and embedding the American Dream, when it is deemed fraudulent by the courts[59].

Through recently published research which provides a general theory of information, there is a prevalence of misinformation in the news, and the dissemination of fake news or alternate facts, is greater than the creation of it (Lim, 2023). This draws strong points on the power of the press to spread information and narratives which achieve purposes outside of objective reporting. This is not a new phenomenon, the previous term used for this was propaganda, however with the internet, many narratives are carried through internet and media now (Herman & Chomsky, 2021). When we consider New Zealand, Covid-19 has caused damage to the press in this nation, which is profound in its consolidation of the sector. Bauer closed during covid-19[60], "Stuff" sold for $1[61], Newshub and TV3[62] have just closed, and TVNZ can no longer support some current affairs show with long histories[63]. We are seeing competition for advertising revenue for viability with Google and Meta playing a large role in this decline[64]. The Australian government backed by 25m people, fighting for press revenue by these US dominant giants[65], but New Zealand government absent from such action. Is this due to size, fear, or not seeing the big picture actualizing around politicians tasked with protecting the nation?

[56] https://edition.cnn.com/2017/01/22/politics/kellyanne-conway-alternative-facts/index.html
[57] https://time.com/4343030/donald-trump-failures/
[58] https://fortune.com/2024/02/17/trump-finances-new-york-fraud-case-ruling/
[59] https://abcnews.go.com/US/live-updates/trump-fraud-trial/?id=103642561
[60] https://www.theguardian.com/world/2020/apr/02/bauer-shuts-new-zealand-magazine-operation-amid-coronavirus-downturn
[61] https://www.nzherald.co.nz/business/stuff-sold-for-1-to-ceo-sinead-boucher-by-nine-entertainment/WSETW73L7M7VV2FCP4PZ6LCSHY/
[62] https://www.newshub.co.nz/home/entertainment/2024/04/newshub-closure-confirmed-warner-bros-discovery-announces-july-5-as-final-day.html#:~:text=Credits%3A%20Newshub.-,Warner%20Bros.,day%20will%20be%20July%205.
[63] https://www.theguardian.com/world/2024/apr/10/new-zealand-warner-bros-discovers-closes-newshub-tvnz-programs-bulletins-cuts#:~:text=By%20the%20afternoon%20TVNZ%20%E2%80%93%20the,of%20another%2068%20media%20roles.
[64] https://www.afr.com/companies/media-and-marketing/inside-google-s-mothballed-plans-to-quit-search-in-australia-20231108-p5eil7
[65] https://www.abc.net.au/news/2024-03-02/facebook-google-news-media-deal-media-pay-meta/103534342

What is often not discussed, is the effectiveness of public relations and how this shapes the media narrative. Throughout the merger submission process, we have seen carefully crafted narratives by those associated with Foodstuffs North Island, to paint a positive picture of why they are great, and how they are helping New Zealand. There is also interesting censorship of narratives which do not support their position, accused of being "defamation". Is this censorship of free speech?

Again, this is illustrated by the use of the "C" word, and its swift removal from press. Ernie Newman in his unpaid crusade for what he believes to be right, Emeritus Professor Nick Hazledine of Economics and this author all censored using the "C" word[66] in the public domain in relation to these entities.

Foodstuffs North Island have invested heavily in public relations. This seems very interesting, that a large management team internally and externally is required for public messaging. If it was true and accurate, would it need so many people? Or is this a factor of shaping a suitable narrative to justify a means?

When considering a post on how Foodstuffs North Island is helping suppliers understand how to get ranged in their stores[67], this appears to be a recent "innovation". Suppliers used to be able to speak directly to stores, considered the decision makers. Now they have teams located at head office to carry out a simple discussion, as it travels around the country? The cost will be built into Foodstuffs North Island "cost of doing business", it seems to have become more expensive than before to understand.

Then 10 reasons why they should merger[68]. This will be discussed in section 10.

We were nicely advised that Foodstuffs owners had voted to merge[69] only 1 month ago. What seems strange as December 2023 they advised the market they were preparing to merge and notify the regulator. It seems odd such a conversation happens 8 months into the process. Or it could have been another call together to create a positive news story. The rationale provided:

> "More efficiency = lower cost = better value and innovation for our customers"

New Zealand shoppers were promised this in 2013[70] and have continued to see prices go up quickly including the costs for Foodstuffs North Island to now run their large, centralized office. This is reflected in the SG&A (sales general and administration costs) line of their financial P&L freely accessible on their corporate website, which has grown faster than sales. This suggests no efficiency was realized, only higher head office costs. This statement has been made before, and not proven, therefore it is merely a statement, not one Foodstuffs is bound to, simply to influence the public on a positive perception of what will be market failure.

9. Press to Shape a Narrative

The timing of articles which are curated for the press to shape a narrative, seem uncanny. We saw this in the last week as two articles dropped in the mainstream media on 08/08/24 at 3am, when the

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[66] https://www.thepost.co.nz/business/350167078/foodstuffs-co-ops-reject-allegation-they-are-operating-cartel
[67] https://www.linkedin.com/posts/foodstuffs-auckland-limited_over-the-last-few-months-our-emerging-supplier-activity-7227521216369106944-o1cK?utm_source=share&utm_medium=member_desktop
[68] https://www.linkedin.com/posts/foodstuffs-auckland-limited_10-things-to-know-about-the-merger-activity-7218830631869325313-9l7r?utm_source=share&utm_medium=member_desktop
[69] https://www.linkedin.com/posts/foodstuffs-auckland-limited_10-things-to-know-about-the-merger-activity-7209677822133428224-ztN-?utm_source=share&utm_medium=member_desktop
[70] https://www.stuff.co.nz/business/9107913/Foodstuffs-merger-good-for-customers

Commerce Commission released its press statement on land covenant at 11.23am via email[71] , which was then released in the press at 11.54am in the NZ Herald[72]. The ruling communicated via the Commerce Commission on the land covenant charge. The words of the judgement state:

> "The co-operative's actions were called "deliberate" and serious and showed an effort to hinder rivals from opening new stores or expanding existing ones in Wellington's Newton and Petone as well as in south Napier's Tamatea. The covenants were of very long duration, up to 99 years, and lodged with the purpose of hindering competitors in local towns and suburbs where consumers buy their groceries," said John Small, commission chairman.
>
> *"By blocking other supermarkets from opening new stores or expanding existing ones, the covenants hindered competition for Kiwi shoppers," he said.*
>
> *In June, the commission said parties had entered into a settlement to resolve proceedings on terms acceptable to them. A spokeswoman for Foodstuffs North Island said it accepted the penalty. The three covenants originated before Foodstuffs Wellington merged with Foodstuffs Auckland in 2013.*
>
> *"While there was no intent to act unlawfully, we acknowledge the covenants had the purpose of lessening competition," she said."*

To break down what is described here, is an abuse of market power discovered now in 2024 dating back to before the merger of Foodstuffs Auckland and Foodstuffs Wellington in 2013. Before Foodstuffs North Island was created, anti-competitive conduct was already occurring when there were three Foodstuffs separate legal entities, yet there is a 9-year lag on conduct being detected and appropriate action taken. This does not sit well for what we will find in one decade of the conduct of Foodstuffs North Island before it merges with the separate legal entity that is Foodstuffs South Island. The commerce Commission Fined Foodstuffs North Island $3.25m[73], but this would be marginal to a store, let alone an entity that helps 300 stores[74]. The impact appears negligible, as the public relation internal and external stakeholders for Foodstuffs North Island appear to be well at work, to push content through the media which are pro the merger, and provide positive sentiment in press, which is opinion based. These puff pieces come in the form of two articles on the same day. The first by the Executive Director of the New Zealand Institute Oliver Hartwich. Hartwich discloses that Foodstuffs North Island is a member of the Institute which he heads up, but fails to disclose they pay his wages, and that Chris Quin the CEO of Foodstuffs North Island is also on the board overseeing the Institute, Hartwich reports to the board. Hartwich argues with carefully curated language what appears to be an injustice that Foodstuffs North Island and South Island are forced to be separate by the Cook Strait. He fails to acknowledge the origins of their business structure, when they were simple regional operators, then as Wellington, Auckland

[71] https://comcom.govt.nz/news-and-media/media-releases/2024/foodstuffs-north-island-hit-with-$3.25m-fine-for-blocking-rivals
[72] https://www.nzherald.co.nz/business/nzs-biggest-supermarket-business-fined-325m-for-anti-competitive-land-covenants/PSI23SIWAFBLHFZB66645OVJLI/
[73] https://www.nzherald.co.nz/business/nzs-biggest-supermarket-business-fined-325m-for-anti-competitive-land-covenants/PSI23SIWAFBLHFZB66645OVJLI/
[74] https://www.foodstuffs.co.nz/#:~:text=With%20300%20stores%20and%2024%2C000,New%20Zealanders'%20lives%20since%201922.

South Island. He does not touch on the past, simply on the convergence in the future, as if it is ridiculous, it is not one already. This is creeping conduct overtime, and what appears conditioning language which supports a merger by someone who is far from independent of the payroll or influence of Foodstuffs North Island. How can someone be objective with multiple ties to the entity they are writing about in the mainstream press?

Hartwich also argues:

> "It is worth considering whether attempting to maintain an artificially fragmented market structure might deprive consumers of the benefits these economies of scale can provide.
>
> A larger, more efficient organisation might be better positioned to invest in new technologies and services that could benefit consumers."

It is unclear, with over $9b in revenue for the centralised office and distribution centre alone (which excludes store revenue), why Foodstuffs North Island cannot continue as it has been in investing in new technology and the customer experience. The timing of this article in addition with Chris Quin's interview and the Commerce Commission media release on the abuse of market power decision by the high court on the same day, suggests "positive opinion" needed to tackle the bad press on this particular day from Foodstuffs North Island's conduct.

10. Press to Manufacture Consent

On 24th May 2024, Chris Quin wrote an article in The Post to support the merger application[75], which was adeptly titled "Why the Foodstuffs merger is the right option". It has been detailed below in *italics and quotation* marks with considerations, via indentation and in grey:

> *"New Zealand needs an efficient, well run, locally owned grocery co-op that keeps profits in New Zealand and employs almost 35,000 New Zealanders."*
>
> > This is an interesting statement, since it got more powerful, less people can afford to shop there, and ultimately eat. There appears to be a relationship with their evolution over time, and high prices in the market.
>
> *"To keep improving for customers over the past 100 years, the co-operatives have never stood still, merging smaller regional co-ops in 1958, 1988 and 2013 into what are now two."*
>
> > This is three defined stages of consolidation of power, quote from Chris Quin. It's a weak statement to suggest 3 events occurring over 55 years is "never standing still". I suspect even a 55-year-old New Zealander could easily demonstrate and dispute this.
>
> *"We never went into this merger process because it was an easy option. We believe it's the right option and the next logical step – so we can be more agile, more competitive, more efficient, and better able to deliver value and innovation for New Zealanders. It makes sense – that's why all other major retailers operate nationally, not as two regional island businesses."*
>
> > It is unclear what books or articles Chris Quin is reading to suggest this, but basic microeconomics state: concentrated markets = higher prices (Goolsbee et al., 2020). The logic of taking a highly concentrated market to an even higher concentrated market, what does this suggest? Consolidation of power for profit. Who wins? The owners (Cotterill, 1986).

[75] https://www.thepost.co.nz/nz-news/350287317/why-foodstuffs-merger-right-option

"There's a huge amount of detail that goes into a process like this. Our application, submissions and economic analysis set out why the merger won't substantially lessen competition in any market, and that having one 100% NZ-owned nationwide co-op will deliver benefits to all our stakeholders: customers, co-op members, teams, suppliers and communities."

Detail suggests there are many paid entities and actors to come up with a narrative that can curate enough positive noise (spin) to deflect what is factually going on.

If we were to ask a first-year economics student to answer a simple question: "If two separate legal entitles, share information and don't compete in each other's territories, what is this called?" "Cartel". The concept of collusion with cartels is more possible when information is easily trackable, such as within the supermarket industry. Particularly as Chris Quin has also in a subsequent article discussed the tracking of information used.

"But here are 10 things to know about why we believe this merger is the right thing to do now:

1. *"The Foodstuffs co-ops are 100% New Zealand owned by the local grocer families who are on the shop floor every day. That's a great thing for New Zealand, as too few of our key industries remain New Zealand owned."*

2. *"Our two current regional co-ops share strong values and trusted brands like Pak'nSave, New World and Four Square, but are operated as separate companies that only trade in their respective islands and have separate boards, management structures, supply chains and support centres."*

   This draws attention again to the fact that the entities seem to be confused that they are legally separate, and therefore not the same. This is why a proposal to force a name change for both which demonstrates they are separate, and so are the banners that fall within their group also requires a name change.

3. *"The merger would see us realise the efficiency of operating as one national business, like most major New Zealand companies in a market of this size do, including our Australian and globally owned competitors."*

   This is what changing what is an oligopoly to formal duopoly, concentration and easier to coordinate as there are less entities to do this. The proposed name change, and divestment of the big box PaknSave from each island entity, will fix this and allow each big low-cost supermarket to enter the other island, and they would have different names to prevent confusion for all.

4. *"It would change the way the co-operatives are governed, and stores supported – but for customers, we'll still be a 100% New Zealand-owned co-operative."*

   This is deeply concerning and will be discussed in section 12 on why the name has changed from owner operator to franchisee, and the potential implications for New Zealand.

5. *"It wouldn't change how we help small New Zealand suppliers to grow by enabling them to supply locally to a single local store (or number of stores) and grow into many stores or test a new product in a smaller store to prove itself. Our commitment to supporting the growth of emerging New Zealand suppliers remains."*

   It is unclear from this statement, how it is more beneficial than the current arrangement of speaking to a store. To defer the stores decision to head office which is centralised and removes understanding of that community and their needs, seems to hold more cost and less accountability as people you deal with, become numbers and people on the phone, who rotate through roles relatively frequently, and do not know your community.

6. *"We need to be more efficient because we are up against other national, Australasian, and global competitors. They don't and won't operate as two regional businesses separated by the Cook Strait like we currently do."*

   Nothing is stopping this entity from cutting costs from their business now and being more efficient as they are. Except a lack of competition.

7. *"Our boards have been clear that a merger must deliver meaningful benefits for all stakeholders: customers, co-op members, teams, suppliers and communities. We're accountable for making sure it does."*

   With this accountability statement, is the board open to personal fines imposed on each individual if this does not occur? The public requires more specifics and commitments in writing and signed with penalties to move this from a statement, to factually driven and enforceable to deliver.

8. *"Working as one will make it easier and faster to invest and innovate in what our customers care about: value, quality, and convenience."*

   Again, it is unclear how a $9b revenue business cannot be efficient or innovative. In 2010, $9b was the size of the supermarket industry excluding fresh across all banners and islands. Therefore, this appears to be a statement with no factual backing.

9. *"It's the right time after the significant changes over the past four years to make sure we're doing the best for New Zealanders. Following the 16-month long market study by the Commerce Commission into the grocery sector, our co-ops are two of the most scrutinised businesses in New Zealand. As a result, New Zealand is now one of the most regulated grocery markets in the world, after legislation enacted following the market study."*

   This is not 100% factually accurate. NZ has a new comprehensive code of conduct which just went live, which is based upon the flawed grocery code of conducts originating in the UK and Australia which are being updated. There are no divestiture powers currently with the NZ regulator, unlike the UK. Therefore, this statement appears to be a conclusion that is not factually correct.

10. *"We are now a Regulated Grocery Retailer with a mandatory Grocery Supply Code that came into force on March 31 to promote competition and efficiency in New Zealand's grocery market, ensuring we are fair, clear and transparent in our dealings with our suppliers and promoting a diverse range of suppliers. We believe this new regulation supports an environment for fair dealings between retailers and suppliers."*

    This is an interesting interpretation of a mandatory code that was not of their choosing. How might the push for the inclusion of merchandising terms, which are considered a cost of running a store, be firmly negotiated into trading terms as an "Agreed term" prior to this date stack up? It seems more like coercion prior to formal date of enforcement.

Based on this analysis, it is clear "opinions" placed in the news, should be heavily warned as opinion, as some of these statements are quite misleading to the press and general public.

11. Cost of Food is Very Expensive, including Healthy Food

Despite New Zealand being a food producing nation, food is still very expensive. A recent study talked to 1 in 3 adults being obese, with childhood obesity rising from 9.5% from the 2020-2021 period to 12.7%

in the 2020-2021 period, which is a 50% jump in numbers for kids (Vatsa & Renwick, 2024). Although this study used numbers from statistic NZ which tracks some prices, and they found fruit, and vegetables have gone up +40% in the last 10 years. Our own empirical work finds that junk food categories, have not only enjoyed growth to similar numbers in cost per unit, but the quantity has also increased more than most other categories in the supermarket. So, it is strange we see a decline in fresh fruit and vegetables lowering demand, yet prices of ultra processed food go up, and the volume does too. This seems counter logic, until we understand that these foods with their high sugar, fat and sodium content are highly addictive, enough so that shoppers continue to come back for more[76], despite the impact on their health and rising obesity. The use of AI for data, assortment planning, would perpetuate this. Unless of course Foodstuffs North Island can demonstrate the controls in place which ensure they are protecting vulnerable communities from being oversold junk food, which has been a historical trend in sales data, and therefore being controlled for the future.

12. When did the language change from "Owner Operators" to "Franchisees"?

The shift in language used within the press when referring to store owners within the Foodstuffs "Co-operative model" from "owner operators" to "franchisees" has been gradual. Perhaps as the author currently resides in Sydney but grew up supplying the industry knowing all the "foodies" stores were run by their "owner operators". To see such a language shift occur, which has a very different meaning, does not appear to be accidental but deliberate. Through reviewing press articles, we can determine the language change occurred around 2022.

- 19/06/19 – Behind the desk: Foodstuffs CEO Chris Quin on what it takes to be a great leader[77] – Owner Operator used
- 29/01/21 – My Net Worth: Chris Quin, Foodstuffs North Island chief executive[78] – Owner Operator used
- 31/07/22 – How rich are New Zealand supermarket owners?[79] Franchisee used
- 19/07/23 – Supermarket promos are big business, but who actually gets a deal?[80] Franchisee used
- 14/01/24 – Foodstuffs co-ops seem to be seeking permission to act as one, after the fact[81] Franchisee used

There are implications on business model and owners, which will now be discussed further and in more detail, and this is not a shift in language, which suggests changes occurring in that business model which are not transparent to the public.

13. Owner Operators are now referred to Franchisees. Why the Language Shift?

[76] https://www.youtube.com/watch?v=5QOTBreQalk
[77] https://www.stuff.co.nz/business/113587668/behind-the-desk-foodstuffs-ceo-chris-quin-on-what-it-takes-to-be-a-great-leader
[78] https://businessdesk.co.nz/article/the-life/my-net-worth-chris-quin-foodstuffs-north-island-chief-executive
[79] https://www.stuff.co.nz/business/industries/129403663/how-rich-are-new-zealands-supermarket-owners
[80] https://thespinoff.co.nz/business/19-07-2023/supermarket-promos-are-big-business-but-who-actually-gets-a-deal
[81] https://www.thepost.co.nz/business/350143238/foodstuffs-co-ops-seem-be-seeking-permission-act-one-after-fact

There has been a language shift from “owner operator” to “franchisee” by Foodstuffs. This is very interesting and suggests there are undisclosed reasons to the public for why this has occurred and not broadly discussed. Although sometimes still referring to “franchisees” as an “owner-operator”, the inclusion of the term “franchisee” is relatively new and novel.

13.1 Summary in Brief:

Aspect	Franchise Model	Co-operative Model
Regulatory Framework	Governed by general commercial law and FANZ guidelines	Governed by the Co-operative Companies Act 1996
Contractual Obligations	Detailed franchise agreements	Co-operative rules agreed upon by members
Operational Control	Franchisor maintains significant control	Democratic control by members
Profit Distribution	Profits to franchisee after royalties	Profits distributed based on member participation
Dispute Resolution	Mediation and arbitration encouraged by FANZ	Internal mechanisms, with external mediation if necessary

Sources: Franchise Association of New Zealand (FANZ), New Zealand Companies Office, Holmes, S., & Davidov, M. (2010). “Franchise Agreements: Legal and Business Perspectives,” Journal of Franchise Law, Fan, H., & Walshe, M. (2014). “Dispute Resolution in New Zealand Franchising,” International Journal of Franchising Law. Cook, M. L., & Burress, M. J. (2009). “A Cooperative Life Cycle Framework,” Journal of Co-operative Studies. Chaddad, F. R., & Cook, M. L. (2004). “Understanding New Cooperative Models: An Ownership-Control Rights Typology,” Review of Agricultural Economics.

13.2 More detailed discussion of differences between co-operative and franchisee in New Zealand:

a) **Franchise Model Offers Greater Operational Control and Standardization**[82]
   i) **Franchise Model:** The franchisor can maintain strict control over business operations, ensuring consistency in product quality, customer service, and branding across all locations.
   ii) **Cooperative Model:** While democratic control allows for member input, it can lead to variations in how operations are conducted, potentially diluting the brand’s uniformity.
   iii) **Conclusion:** Franchise model allows head office to control what is done in stores, taking power away from owner operators.

b) **Franchise Model Reduces Risk Distribution**[83]
   i) **Franchise Model:** Franchisors distribute the financial risks and operational responsibilities to franchisees, reducing the burden on the central organization. Franchisees invest their own capital and take on the direct operational risks.
   ii) **Cooperative Model:** Members share the risk, but it can be concentrated among a smaller group, particularly in smaller co-operatives.
   iii) **Conclusion:** Former owner operators now carry much more of the risk as franchisees, than the previous co-operative structure.

[82] Knight, R. (2010). "Franchising: Current Issues and Research," New Zealand Journal of Business.
[83] Kaufmann, P. J., & Dant, R. P. (1999). "Franchising and the Domain of Entrepreneurship Research," Journal of Business Venturing.

c) Franchise Model Offers Enhanced Marketing and Brand Recognition[84]

i) **Franchise Model:** With each franchise contributing to marketing funds, there is often a larger budget for national or regional advertising campaigns, enhancing brand recognition and market presence.

ii) **Cooperative Model:** Marketing efforts and budgets may be limited to what members can collectively afford, potentially reducing the scope and impact of marketing activities.

iii) **Conclusion:** This allows for the concentration of monies and funds to centralised buying and head office, to support the entity in a more coordinated way at head office, over stores. There appears to be less limits on what stores can afford, and it is simply what stores are told to pay.

d) Franchise Model Offers More "Entrepreneurial Incentives"[85]

i) **Franchise Model:** Franchisees are motivated by personal financial gain, driving them to maximize the performance of their individual franchises, which in turn benefits the franchisor. This incentivises stores to focus on instore excellence, however it also incentivises them to profiteer off community for their own financial gain.

ii) **Cooperative Model:** While members are invested in the co-operative's success, the profit-sharing model may not provide as strong a personal financial incentive for individual performance improvement.

iii) **Conclusion:** Entrepreneurial can be translated to "good operator" which means "turns a good profit". This can also mean "profiteering off operational excellence, and the community".

e) Franchise Model Offers Access to Expertise and Training[86]

i) **Franchise Model:** Franchisors typically provide extensive training and ongoing support to franchisees, ensuring they have the necessary skills and knowledge to operate the business effectively.

ii) **Cooperative Model:** While co-operatives also offer member support, the level of training and expertise provided may vary and depend on the co-operative's resources.

iii) **Conclusion:** More training to stores and franchisees to ensure "The Foodstuffs Way", which appears to be understanding and using position of power at the bargaining table with suppliers, and at the checkout with customers. This is also an added cost of doing business, which will be paid for in prices. This moves away from community focuses, to centralised values and practice through stores.

f) Franchise Model Favours Easier Exit Strategy[87]

[84] Holmes, S., & Davidov, M. (2010). "Franchise Agreements: Legal and Business Perspectives," Journal of Franchise Law.
[85] Chaddad, F. R., & Cook, M. L. (2004). "Understanding New Cooperative Models: An Ownership-Control Rights Typology," Review of Agricultural Economics.
[86] Frazer, L., Weaven, S., & Wright, O. (2008). "Franchising Australia 2008," Asia-Pacific Centre for Franchising Excellence.
[87] Fan, H., & Walshe, M. (2014). "Dispute Resolution in New Zealand Franchising," International Journal of Franchising Law.

i) **Franchise Model:** Franchisees often have clearer exit strategies through resale of the franchise, which can be appealing to investors looking for a defined end-point for their involvement.
ii) **Cooperative Model:** Exiting a co-operative can be more complex, especially in terms of retrieving invested capital and transferring ownership.
iii) **Conclusion:** Streamlining store ownership with owners who do as their told or "compliance", with easy exit. The current cooperative model, does not allow this. This appears to again be concentration of power to head office and centralised buying, and away from the stores. These moves further away from the pre 2013 degree of power over owner operators had over their stores when they were Foodstuffs Auckland, Wellington, and South Island.

13.3 Summary of Changes

In short it appears this shift in language is to move power and control away from stores, as "owner operators" and to centralised buying of head office. Foodstuffs may argue WWNZ already do this, however they are owned by one company, The Woolworths Group. When we consider some of the challenges inherent in Franchise models, we only need to look at recent news events on Dominos[88] [89] or 7Eleven[90] [91] on exploitation of staff to make a franchise model work. As control is transferred from the stores to head office, there is a serious risk here of exploitation required at store level in order to participate in the franchise network, and make it work for the franchisee.

Transitioning from a cooperative model to a franchise model in New Zealand offers more for the franchisor with centralised buying, operational control, risk redistribution, enhanced marketing capabilities, stronger entrepreneurial incentives (profiteering off the community), access to training and expertise (higher costs of doing business), and clearer exit strategies (for non-compliance). These advantages can contribute to more sustained growth and consistent business performance[92]. It does seem this language shift is deliberate, and that greater organisation and control by head office is occurring, which when looking to the press occurred between 2022-2023. The Commerce Commission should therefore request further details and transparency as recommended below, but not limited to.

13.4 Commerce Commission and Grocery Commission Should Require:

The Commerce Commission should request to see legal contracts and communication written and scheduled for verbal discussion from Foodstuffs North Island and South Island with store owners from 2010, then 2013 and now in 2024. What does the shift in language from owner operators mean in terms of the changes within their business structure to create such a shift in language to franchisee from owner operator? The centralization of operations and off location money has been called out by suppliers who

[88] https://www.rnz.co.nz/news/national/521680/domino-s-pizza-franchise-owner-gets-home-detention-on-migrant-exploitation-charges
[89] https://www.smh.com.au/interactive/2017/the-dominos-effect/
[90] https://www.smh.com.au/business/workplace/7-eleven-operator-fined-335-000-in-wage-scandals-20190118-p50s81.html
[91] https://www.theage.com.au/business/companies/years-after-7-eleven-pay-rorting-revealed-justice-finally-done-20220408-p5ac33.html
[92] Franchise Association of New Zealand (FANZ), New Zealand Companies Office - Co-operatives.

were not happy about this change[93]. Foodstuffs should provide full transparency on all contracts with stores owners. Including Jason Whitehira[94] when he purchased PaknSave Albany, and how his new contract of ownership compares to his former contract of New World Freemans Bay and the previous contract with former owners of PaknSave Albany, Paul and Elizabeth Blackwell[95]. These names are referred to, as they were disclosed on the NBR rich list. These individuals appear to be doing well within the model, so chosen as examples. Again, it does seem highly unusual for single store owners to amass huge wealth in a high-volume low-margin business that is created within one generation. This is not possible in Australia with the independent network of IGAs supplied by Metcash.

The Commerce Commission should be allowed to understand why this language shift has occurred. The New Zealand public should be allowed to know why Foodstuffs have shifted their language, so they can understand what this means, and whether they wish to support shopping at a supermarket that does not resonate with their values, if this transpires. The shift in language is suggestive of potentially undisclosed changes which could materially impact the market and their market power.

14. Cooperative Theory, Then Practice

Cooperative theory within economics is about the functioning and outcomes of cooperative organizations, owned and operated by a group of individuals for their mutual benefit. The key concepts of this are 1. Member Ownership and Control[96], 2. Democratic Governance[97], 3. Profit Distribution and Surplus Allocation[98], 4. Cooperative Equilibrium and Stability[99]. Some challenges of this model include collective decision-making and this leading to inefficiencies[100]. Sometimes difficulties in raising capital and potential conflicts of interest among its members.

It is therefore very interesting in the change of language from owner operator as part of a cooperative to that of franchise or franchisee, which suggests control and power is being transferred from stores through what was a democracy, to that of head office and central control, which seems more autocratic. The flexibility stores once enjoyed in 2021, will be quite different to 2024 and beyond, and this is why the Commerce Commission and the Grocery Commission, should request evidence of contracts over time from 2010, (before Foodstuffs Auckland and Wellington merged), 2020, 2022, and 2024, with specific store contracts previously mentioned. It is important the Commissions understand the language shift, and what this critically means for this business model and the welfare of consumers with their access to basic food and necessities being affordable and competitively priced.

Both Finland and New Zealand have the most concentrated supermarket markets in the world, and they are both led by cooperatives. In Finland, the cooperatives have changed over time, in a way that does not

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[93] https://comcom.govt.nz/__data/assets/pdf_file/0023/253148/NZFGC-Members-Survey-February-2021.pdf
[94] https://www.nbr.co.nz/business/nbr-rich-list-how-grocery-barons-rise-to-the-top/
[95] https://www.stuff.co.nz/business/350190400/how-supermarket-owners-came-dominate-retail-landscape#:~:text=Tahua%20Partners%20is%20owned%20by,King%20chief%20executive%20John%20Elliott
[96] Hansmann, H. (1996). *The Ownership of Enterprise*. Harvard University Press.
[97] Birchall, J. (1997). *The International Co-operative Movement*. Manchester University Press
[98] Cook, M. L. (1995). The Future of U.S. Agricultural Cooperatives: A Neo-Institutional Approach. *American Journal of Agricultural Economics*, 77(5), 1153–1159.
[99] Staatz, J. M. (1987). The Structural Characteristics of Farmer Cooperatives and Their Behavioral Consequences. *Agribusiness*, 3(1), 79–92.
[100] Vitaliano, P. (1983). Cooperative Enterprise: An Alternative Conceptual Basis for Analyzing a Complex Institution. *American Journal of Agricultural Economics*, 65(5), 1078–1083.

appear in the best interests of customers. The barriers to entry are very high, so New Zealand must look to Finland as an exemplar of what they do not wish to become.

15. 100% New Zealand Owned and Operated

As the public is told frequently by Foodstuffs PR team through the press, Foodstuffs is 100% NZ owned and operated. This statement deliberately points to WWNZ being part of the Woolworths Group which is floated on the ASX. What this narrative fails to mention, is that Foodstuffs ownership, is for the select few who prove themselves as “good operators” on a 4Square, then are allowed to buy a “New World”, once again proving themselves as a “good operator”, they can buy a PaknSave. Only a select few can be owners here, and share in what appears to be very high profits based on media articles[101]. The Woolworths Group, has many New Zealand shareholders through Kiwisaver funds, and direct retail investors. It is also run largely by New Zealanders in stores, head office, and distribution centres. This means it is not exclusively for a select few to own, but for those who are saving for their retirement through Kiwisaver, or for retail investors who own or wish to own shares themselves in the Woolworths Group listed on the ASX. The key difference here is that WWNZ can be owned by anyone, however Foodstuffs is for a select few. So WWNZ is a retailer which can be owned by all Kiwis. This contrasts to Foodstuffs North Island and Foodstuffs South Island.

16. Conclusion

Foodstuffs North Island and South Island appear to be abusing their market power. The Commerce Commission should request and insist divestiture powers from the courts. These powers should first be exercised to break PaknSave North Island and South Island away from the rest of their Island co-operative banners into two new entities. The PaknSave banner across both islands drives high value per store, and do not need the rest of the buying group to stand on their own. These divestiture powers should also be requested to change the banner names and entities across both islands, so no longer will it confuse the public or the companies themselves, that they are legally separate entities, and should identify as this, and act in accordance with this. It is important to remember, suppliers merge, demerge, locally and globally often. This practice is not too hard to execute, as it is common in business. So although they will object, it appears necessary to improve competition.

The following names could be recommended or considered to help expedite such a change and remove the confusion that exists internally and externally with their current naming conventions. By proposing ideas, helps start the process of how this could be achieved, by disestablishing the confusing names of Foodstuffs North Island and Foodstuffs South Island.

Options for each entity:

- Foodies Cooperative – All banners, head office, and DC, except the old PaknSave banner.
- Grocers Cooperative- All banners, head office, and DC, except the old PaknSave banner.
- PaknSave NI and SI name change options:
    - Fill n Save
    - Save n Pak
    - PNS
    - Save Barn
    - Grocers Barn

[101] Foodstuffs North Island Annual Reports 2023, 2022, 2021.

- New World NI and SI name change options
  - NW
  - Local Grocer
  - Your Grocer
  - Grocers Market
- Four Square name change options:
  - New Square
  - Full Square
  - Neighbourhood Grocer

The Foodstuffs North Island and South Island merger should not go ahead on the basis:

- It will substantially lessen competition in the New Zealand market at retail and supplier level.
- The structural change will increase barriers to entry, and move from market failure now, to permanent failure, as can be seen in Finland.
- Coordinated effects are already occurring, so remedies to address this rather than concentrate further are recommended.
- Lessening of competition, 3 minus 1 is 2. It is worse. We propose adding 2 entities with name changes, moving from 3 to 5, with a transition period for demergers. If suppliers can merge, demerge, why can't retailers? It happens all the time in very complicated, global businesses.
- A merger would lead to a loss of competition further, as it is quite possible holding 3 banners at Foodstuffs at high end, low end, and convenience, will dominate WWNZ to potentially lack of profit or viability. Three coordinated against 1, does not seem fair and equitable for WWNZ or the market and consumer welfare.
- Consolidated trading terms would be chosen based on the best to start with, then further asks for more will continue, in line with market power, and the power of a duopoly.
- Buyer power is prevalent now, with one less player, it will be much more.
- Foodstuffs North Island and South Island admit to the current conduct of sharing information, this does not seem to be allowable as they are two separate legal entities, so this should be explored by the courts and whether it constitutes cartel conduct.
- Foodstuffs is already coordinating effects as if it were one, so divestiture is necessary of banners to restore competition in the New Zealand market.
- The Grocery and Industry Act (GICA) 2023 should be revised and give more powers to the Commerce Commission to make judgements and be empowered by the courts, to exercise greater powers and authority to keep markets competitive in line with the UK and USA.
- Private Label expansion through Pams is reducing competition in suppliers for profit, and is detrimental to local food production viability. We are seeing major food manufacturers losing profit and risking viability, who supply large amounts of private label, this does not appear to be a coincidence.
- Centralisation of power to head office, away from stores through a "franchise" model over cooperative is happening right before our very eyes, with shift in language, and no discussion.
- This removal of power from stores is costly, built into the prices we pay, and fundamentally changes the business model of the cooperative, to gain more power.
- AI is being used which is discriminating customers, and it is determining assortment, suppliers, price and promotions. It does not appear to have adequate controls to prevent bias and

discrimination in place. This should be stopped by the Commerce Commission, and the onus of proof of safety should be on the entity wishing to use it. Particularly when it has such a material role in providing food and groceries which are necessary for our survival as humans. This is not a fashion brand, but equivalent to the need for shelter and fresh water.

- There appears to be censorship of the press by Foodstuffs North Island or the firms representing them. Censorship prevents the regulators and courts from investigating any potential misconduct. This censorship should be investigated, and the Commerce Commission should be empowered by the courts to fine entities abusing their market power to limit free speech, particularly if it is evidence based. The courts can decide if potential misconduct has occurred or not.

17. Recommendations for the Commerce Commission

A. Strongly recommend the Commerce Commission request a name change which allows each entity without confusion, to enter the other island, or the power from the courts to do this.

B. The Commerce Commission should request if Foodstuffs North Island and South Island, or their lawyers attempted to engage any local economists on their "expert opinion". If they did not, why was this? If they did, why was Houston Kemp decided as the preferred vendor?

C. With regards to hiring of "Expert Economists" it is strongly recommended evidence be requested by the Commerce Commission to Foodstuffs North Island and Foodstuffs South Island or their lawyers be provided. Including rationale for their decision to choose an Australian company over a New Zealand company, and be substantiated and declared full and complete. It is also strongly recommended the Commerce Commission request correspondence between Foodstuffs North Island, South Island, their lawyers on the "brief" provided to Houston Kemp. This should include emails, briefs, contracts, logs of verbal calls or meetings, and meeting minutes.

D. The Commerce Commission or Grocery Commission should request to see all correspondence between Foodstuff North Island and Sanitarium, Fonterra Brands, and Synlait including emails, call logs, minutes of those discussions and in person meetings held for any meeting. To understand why these large food businesses, appear to not be viable.

E. The Commerce Commission and Grocery Commission should understand why production lines are being shut down, when it is counter to the data and thus evidence. [REDACTED]

F. The Commerce Commission should request from the courts safety of suggesting cartel conduct in the media if suspected, and this should not result in defamation letters to scare individuals or academic institutions. The Commerce Commission should request the courts allow them the powers within the criminalization of cartel conduct, that the term is lawful as a suggestion within the public domain, and not be considered defamation when in the press or public domain, with adequate suggestive evidence. If it suggests, but does not determine, it should therefore be allowed to maintain freedom of speech, adequate investigation when there is potential wrongdoing, and removal of censorship. Additionally, the Commerce Commission should also recommend to the courts, proven censorship in this capacity is liable for large fines and penalties enforceable by the Commerce Commission, to the entities censoring, including the PR firms employed by them to carry this out. Perhaps the entities involved in the construction industry recently lacked the resources to censor this term.

G. The Commerce Commission should request powers by the courts, to investigate and determine cartel conduct and be given powers to remedy such conduct. This then removes the reliance on further government resources, taxpayers' money and time to determine something itself as the Commission of Commerce could do in a more efficient manner. The European Commission do this through Antitrust rules in the Article 101 of the Treaty[102], as well as the FTC[103] in the US, currently blocking Albertsons and Kroger[104] [105]. It is strongly recommended the Commerce Commission request from the courts the power to improve efficiencies in its ability to keep markets competitive, and not waste resource deferring something which it could easily determine itself.

H. The Commerce Commission should request powers from the courts to reverse mergers or force divestiture, should it be found that entities are engaging in anti-competitive behaviour. To share information between two legally separate entities to increase profitability, suggests the Nash Equilibrium is already at post-merger status.

I. The Commerce Commission should request powers from the courts to be able to make entities have a name change or "remedial action" to enable competition, within its request for divestiture powers. To have these powers is a deterrent for bad conduct but should be efficient if it is found they are required to fix competition issues in the market.

J. AI and Machine Learning Risks:
    a. The Commerce Commission should do three major things with regards to AI and New Zealand's access to food. First, they should stop the allowed use of machine learning and AI, until it can deemed as safe, based on the following conditions. The Commerce Commission or Grocery Commission should first request detailed information on the "computer teaching" for machine learning and algorithms being used to determine these assortments, the original learnings, values, and assumptions, and what controls are in place to ensure fairness free of bias.
    b. The Commerce Commission should request, what controls and changes have been made over time to ensure fairness and removal of bias in the use of machine learning to determine assortments for stores and most importantly customers, and how this has changed decisions.
    c. The Commerce Commission should have knowledge and oversight of what is being done to protect customers, consumer welfare, and the New Zealand public with regards to data, and determine it is compliant and not discriminatory or unethical.
    d. The Commerce Commission should request the information as detailed above from Foodstuffs North Island, and we suspect Foodstuffs South Island in their collaboration of sharing information. If the Commerce Commission does not have the power to stop such practice in use, it should therefore URGENTLY request these powers from the court, to understand and then ensure it is safe for New Zealanders, consumer welfare, and society, before it is introduced into the system and determining our food availability. This is no different to a novel food introduction under FSANZ[106].

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102 https://competition-policy.ec.europa.eu/antitrust-and-cartels_en
103 https://www.just-food.com/news/kroger-albertsons-court-battle-with-ftc-set-for-august/
104 https://www.seafoodsource.com/news/foodservice-retail/us-legislators-urge-court-to-block-kroger-albertsons-merger
105 https://www.reuters.com/markets/deals/kroger-albertsons-amend-asset-sale-agreement-with-cs-wholesale-2024-04-22/
106 https://www.foodstandards.gov.au/business/novel

K. The Commerce Commission again should request divestiture powers, to spur competition with existing entities, and the name change of both cooperatives, and demerger of the large low-priced banner PaknSave from each centralized buying network to form its own.

Mā te aroha me te pono

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