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Determination

Goodman Fielder New Zealand Limited and Lion – Dairy & Drinks (NZ) Limited [2018] NZCC 12

The Commission:	Dr Mark Berry Dr Jill Walker Elisabeth Welson
Summary of application:	An application from Goodman Fielder New Zealand Limited seeking clearance to acquire, either directly or indirectly, assets related to the manufacture and distribution of "Yoplait" branded yoghurt in New Zealand from Lion – Dairy & Drinks (NZ) Limited.
Determination:	Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance for the proposed acquisition.
Date of determination:	9 August 2018

Confidential material in this report has been removed. Its location in the document is denoted by [ ].

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The proposed acquisition

1. On 22 June 2018, the Commerce Commission (the Commission) registered an application (the Application) under section 66(1) of the Commerce Act 1986 (the Act) from Goodman Fielder New Zealand Limited (Goodman Fielder) seeking clearance to acquire, directly or indirectly, assets related to the manufacture and distribution of "Yoplait" branded yoghurt in New Zealand from Lion – Dairy & Drinks (NZ) Limited (Lion) (the proposed acquisition).

2. Goodman Fielder and Lion both currently manufacture and distribute yoghurt in New Zealand. Goodman Fielder currently manufactures and distributes yoghurt under a range of its own brands; whereas Lion currently manufactures and distributes "Yoplait" branded yoghurt in New Zealand under an exclusive licence from Sodima, a French company that owns and licences the Yoplait brand worldwide.

3. The assets Goodman Fielder intends to acquire and for which clearance is sought are physical assets (manufacturing plant, business premises, etc) as well as intangible assets (goodwill, etc).[1] The purchase price for the acquisition is [ ]. However, Goodman Fielder has not sought clearance to enter into a licence arrangement with Sodima in relation to the manufacture and distribution of "Yoplait" branded yoghurt in New Zealand.[2] Goodman Fielder intends to enter into such a licence separately from the asset transaction for which clearance is sought. We discuss this issue further in the "With and without scenarios" section.

Rationale for the acquisition

4. Goodman Fielder submitted that its rationale for the acquisition is to continue to expand its range and diversify its product offering in the "fast-growing yoghurt market in New Zealand" to better allow it to compete against Fonterra.[3] Specifically, Goodman Fielder is looking to
[ ].[4]

Our decision

5. The Commission gives clearance to the proposed acquisition as it is satisfied that the acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.

Our framework

6. Our approach to analysing the competition effects of the proposed acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.[5]

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1 Application at [4.1]–[4.3]; Sale and Purchase Agreement, Annex 4 to Application.
2 Email from Bell Gully to Commerce Commission (22 June 2018).
3 Application at [1.3].
4 Application at [5.2]; Commerce Commission interview with Goodman Fielder (13 June 2018); Goodman Fielder response to Commerce Commission information request dated 7 June 2018 (26 June 2018), provided by email by Bell Gully to the Commerce Commission.
5 Commerce Commission, *Mergers and Acquisitions Guidelines* (July 2013).

The substantial lessening of competition test

7. As required by the Act, we assess mergers and acquisitions using the substantial lessening of competition test.

8. We determine whether an acquisition is likely to substantially lessen competition in a market by comparing the likely state of competition if the acquisition proceeds (the scenario with the acquisition, often referred to as the factual), with the likely state of competition if the acquisition does not proceed (the scenario without the acquisition, often referred to as the counterfactual).[6]

9. A lessening of competition is generally the same as an increase in market power. Market power is the ability to raise price above the price that would exist in a competitive market (the “competitive price”),[7] or reduce non-price factors such as quality or service below competitive levels.

When a lessening of competition is substantial

10. Only a lessening of competition that is substantial is prohibited. A lessening of competition will be substantial if it is real, of substance, or more than nominal.[8] Some courts have used the word “material” to describe a lessening of competition that is substantial.[9]

11. Consequently, there is no bright line that separates a lessening of competition that is substantial from one that is not. What is substantial is a matter of judgement and depends on the facts of each case. Ultimately, we assess whether competition will be substantially lessened by asking whether consumers in the relevant market(s) are likely to be adversely affected in a material way.

When a substantial lessening of competition is likely

12. A substantial lessening of competition is “likely” if there is a real and substantial risk, or a real chance, that it will occur. This requires that a substantial lessening of competition is more than a possibility, but does not mean that the effect needs to be more likely than not to occur.[10]

The clearance test

13. We must clear an acquisition if we are satisfied that the acquisition would not be likely to substantially lessen competition in any market.[11] If we are not satisfied – including if we are left in doubt – we must decline to clear the acquisition.

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6 *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].
7 Or below competitive levels in a merger between buyers.
8 *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].
9 *Woolworths & Ors v Commerce Commission* (HC) above n8 at [129].
10 *Woolworths & Ors v Commerce Commission* (HC) above n8 at [111].
11 Section 66(3)(a).

Key parties

Goodman Fielder

14. Goodman Fielder is a food company operating across New Zealand, Australia, and the Asia-Pacific region. Goodman Fielder is a subsidiary of Goodman Fielder Pty Limited, an Australian company, and is ultimately owned by Wilmar International and First Pacific through the Singapore-registered FPW Singapore Holdings Pte. Ltd.

15. In New Zealand, Goodman Fielder produces a range of dairy, bread, and grocery items, including yoghurt under the brands Meadow Fresh, Activate probiotic, Naturalea, Kalo, and Puhoi Valley. Under its various brands, Goodman Fielder produces a wide range of different types of yoghurt products in a range of pack sizes. The turnover of Goodman Fielder's New Zealand yoghurt operations is approximately $[ ] per year.[12]

Lion

16. Lion is a food and beverage company in Australia and New Zealand ultimately owned by Kirin Holdings Company Limited, a multinational food and beverage company headquartered in Japan. Lion's New Zealand business includes alcoholic and non-alcoholic beverages including dairy drinks, and the manufacture and distribution of yoghurt under the Yoplait brand. Similar to Goodman Fielder, Lion produces a range of different types of Yoplait-branded yoghurt products in an assortment of different pack sizes. Lion's New Zealand yoghurt business makes up only [ ]% of its New Zealand revenue.[13]

17. As discussed above, Lion manufactures and distributes Yoplait branded yoghurt in New Zealand under an Australasian licence agreement with Sodima, a French company that owns and licences the Yoplait brand worldwide. Lion intends to terminate the New Zealand aspects of this licence at the same time as the acquisition occurs, retaining the Yoplait licence for other territories.

Industry background

Yoghurt production, distribution, and sales

18. At a basic level, yoghurt is produced using raw milk, cultures, and additives (for example, fruit). Much of the raw milk used to produce yoghurt in New Zealand is purchased from Fonterra under the access regime set out in the Dairy Industry Restructuring Act 2001 and the Dairy Industry Restructuring (Raw Milk) Regulations 2012.

19. There are a range of different categories of yoghurt products commonly sold in New Zealand. Common categorisations of yoghurt products include:

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[12] Commerce Commission interview with Goodman Fielder (13 June 2018).
[13] Application at [3.5].

19.1 "Mainstream" yoghurt, which is plain or flavoured yoghurt (for example, strawberry or vanilla) that is sold to consumers in 1kg tubs, or 6-packs or 12-packs of "pottles";

19.2 Greek yoghurt, a thicker, strained yoghurt product;

19.3 "Gourmet" or "premium" yoghurt products, which generally contain more fat and sugar than other products;

19.4 "Health" yoghurt, which commonly has extra protein or probiotics added;

19.5 "Natural" yoghurt – plain unsweetened yoghurt, often used in cooking;

19.6 The "kids" or "pouch" category, named due to the pouch-style packaging in which this yoghurt is sold;

19.7 Dairy food (or dairy dessert) is a similar product to yoghurt produced using the same primary ingredients, but unlike yoghurt, dairy food does not contain cultures;[14] and

19.8 Non-dairy yoghurt products, notably coconut yoghurt and soy yoghurt, are generally produced using non-dairy milks or creams and similar cultures to dairy yoghurt.

20. Goodman Fielder submitted that the vast majority (over [ ]%) of the yoghurt sold in New Zealand is sold through the supermarket channel and, of the yoghurt sold in supermarkets, a large proportion [ ]% is sold on promotion.[15] The remainder of the yoghurt sold in New Zealand is sold through the food service channel to restaurants/cafes, hotels, service stations and dairies. Lion sells less than [ ]% of its yoghurt through this channel and accordingly we do not examine it further.[16]

Market trends

21. Over the past decade the yoghurt industry has been characterised by innovation, particularly in the higher-end (and higher-price) categories as well as Greek yoghurt.

22. Industry participants noted that the growth (in volume and value) of some of the categories listed above has been at the same time as the "mainstream" and dairy food categories see either stable or declining demand.[17] A common term used by industry participants to describe industry trends to the Commission was

14 Annual sales figures supplied by [ ] show that Dairy Food comprised only [ ]% of the yoghurt category at [ ].

15 Application at [9.5].

16 For completeness, only approximately [ ]% of Goodman Fielder's yoghurt is sold through this channel. Goodman Fielder submitted that whilst market share information was not available for this section of the market, their analysis of the market was that [ ].

17 Commerce Commission interviews with [ ]; [ ]; [ ]. See also [ ], provided by email by Bell Gully to the Commerce Commission (26 June 2018) at 5, 7.

"premiumisation" – that is, the shift of consumer demand towards higher-end products and away from cheaper, mass-produced yoghurt.[18]

Imports and exports

23. Relatively little yoghurt is imported into New Zealand. This is likely because of its short shelf life,[19] relatively high volumes, low margins, and New Zealand's geographic isolation, all of which appear to make importing yoghurt by air freight uneconomic.[20] Nonetheless, there are examples of small scale imports of yoghurt into New Zealand, for example [ ].[21]

24. Some yoghurt is exported from New Zealand (and the volume and value of yoghurt exported from New Zealand appears to be growing)[22] but exports do not appear to be a material part of either Goodman Fielder's or Lion's yoghurt businesses.

Industry participants: yoghurt manufacturers and distributors

25. Goodman Fielder and Lion are two of the three largest manufacturers and distributors of yoghurt in New Zealand by both value and volume, with Fonterra being the largest.

26. Other industry participants include Epicurean Dairy, Gopala, The Dairy Culture Co, and a range of other manufacturers of dairy and non-dairy yoghurts.

Fonterra

27. Fonterra Co-operative Group Limited (Fonterra) is a multinational dairy co-operative headquartered in New Zealand. Fonterra's New Zealand operations include collecting and processing raw milk, and producing a wide range of dairy products for sale in both New Zealand and overseas.

28. Fonterra is the largest single producer of yoghurt in New Zealand, and Fonterra markets its New Zealand yoghurt products under various brands including Fresh 'n Fruity, Anchor, De Winkel, Piako, and Symbio.

Epicurean Dairy

29. Epicurean Dairy (Epicurean) is an Auckland-headquartered company that manufactures and distributes yoghurt under The Collective and Moogurt brands. Epicurean also distributes its yoghurt products in the United Kingdom and Ireland

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18 Commerce Commission interviews with [ ]; [ ]; [ ].

19 [ ] told the Commission that yoghurt has a shelf life of approximately [ ] days from production, and that supermarkets generally require yoghurt to have at least [ ] days' remaining shelf life on arrival: Commerce Commission interview with [ ].

20 Commerce Commission interview with [ ][ ]; [ ];

21 [ ].

22 Application at [16.24].

[ ].[23] Epicurean is partly owned by Pencarrow Private Equity.

Other suppliers of yoghurt

30. Other New Zealand-based manufacturers and suppliers of yoghurt include:

    30.1 Gopala, an Auckland-headquartered company that manufactures natural yoghurt, lassi (an Indian yoghurt drink) and other dairy products;

    30.2 The Dairy Culture Co (which operates under the Cyclops brand), a company that produces primarily natural and Greek yoghurt, based in the South Island; and

    30.3 A range of smaller suppliers of both dairy and non-dairy yoghurt products.

31. There are also a range of large international yoghurt suppliers who do not currently operate in New Zealand but do operate in Australia, including Danone, Chobani, and Parmalat.

Summary of yoghurt manufacturers and brands

32. Table 1 provides an overview of the key market participants in the each of the categories set out above at paragraph 19.[24]

Table 1: Market participants (brands) and market categories

Market category	Goodman Fielder	Lion	Fonterra	Epicurean	Others[25]
Mainstream	Meadow Fresh	Yoplait	Fresh 'n Fruity	-	-
Greek	Meadow Fresh, Kalo	Yoplait	Fresh 'n Fruity	The Collective	Various including Cyclops
Gourmet	Puhoi Valley	-	Piako	The Collective	Various
Health	Activate probiotic	-[26]	Anchor, Symbio	The Collective	Various
Natural	Naturalea	Yoplait	De Winkel	The Collective	Various including

23 Commerce Commission interview with Epicurean Dairy (10 July 2018).

24 Market participant views differ on where to categorise products and categorisation can be sensitive to how categories are defined. For example, some yoghurt products might be Greek or Natural and also appeal to health conscious consumers. As such, the information in the table is an overview only and is not intended to be a complete picture of brand positioning in the New Zealand yoghurt market.

25 The "others" column does not contain an exhaustive list of other competitors in the relevant yoghurt category in New Zealand.

26 However, Lion does produce a "Yoplait" Greek style yoghurt with "2x protein", similar to other brands' protein-boosted "health" yoghurts.

Market category	Goodman Fielder	Lion	Fonterra	Epicurean	Others[25]
					Gopala
Kids (including pouches)	Meadow Fresh	Yoplait, Petit Miam	Fresh 'n Fruity	The Collective, Moogurt	-
Dairy food	Calci Strong	Vigeur, Yogo	Calci Yum	-	-
Non-dairy	-	-	-	-	Various

Industry participants: supermarkets

33. Foodstuffs is a New Zealand-owned co-operative organisation that operates supermarkets and grocery stores under the New World, PAK'n SAVE and 4 Square brands.[27] Foodstuffs' grocery operations are divided between Foodstuffs North Island Limited (Foodstuffs NI) and Foodstuffs South Island Limited (Foodstuffs SI), each of which is owned by the relevant retail members. Foodstuffs NI and Foodstuffs SI jointly own Foodstuffs (NZ) Limited, a non-trading entity. Foodstuffs co-operative members operate approximately 140 New World, 60 PAK'n SAVE and 240 Four Square stores across New Zealand.[28]

34. Woolworths New Zealand (Woolworths NZ) is a national supermarket and grocery company operating nationally across New Zealand under the Countdown brand, as well as in some parts of the country under the SuperValue and FreshChoice franchises.[29] Woolworths NZ operates 184 Countdown supermarkets across New Zealand,[30] as well as 40 SuperValue[31] and 30 FreshChoice stores.[32] Woolworths NZ is a subsidiary of Woolworths Limited, an ASX-listed company based in Australia.

Market definition

35. Market definition is a tool that helps identify and assess the close competitive constraints the merged entity would face. Determining the relevant market requires us to judge whether, for example, two products are sufficiently close substitutes as a matter of fact and commercial common sense to fall within the same market.

27 https://www.foodstuffs.co.nz/our-brands. Although the relevant supermarkets are part of the Foodstuffs co-operative, all are owned by individual members. Foodstuffs also owns other entities in the liquor, convenience store, and food service industries, for example Liquorland and Gilmours.

28 https://www.foodstuffs.co.nz/about-foodstuffs/company-information/

29 Until 25 June 2018, Woolworths New Zealand operated as Progressive Enterprises. Any references to "Progressive" in these reasons are to be taken to be references to Woolworths New Zealand. http://www.woolworthsnz.co.nz/

30 https://www.countdown.co.nz/about-us/our-company

31 https://supervalue.co.nz/supermarkets

32 https://freshchoice.co.nz/supermarkets

36. We define markets in the way that best isolates the key competition issues that arise from an acquisition.[33] In many cases this may not require us to precisely define the boundaries of a market. What matters is that we consider all relevant competitive constraints, and the extent of those constraints. For that reason, we also consider products and services which fall outside the market but which would still impose some degree of competitive constraint on the merged entity.

37. Goodman Fielder and Lion both supply yoghurt products in New Zealand across a number of categories, with the main overlapping areas being the Meadow Fresh and Yoplait brands in the mainstream and Greek yoghurt categories. Based on data for one supermarket chain in New Zealand, mainstream yoghurt comprises approximately [ ]% of yoghurt sales, whilst Greek yoghurt accounts for around [ ]%.[34]

Applicant's view of the relevant markets

38. Goodman Fielder submitted that the relevant market is the national market for the manufacture and wholesale supply of yoghurt and dairy food.[35] Goodman Fielder identified that this is the same market that the Commission previously defined in Decision 459 (*National Foods/NZ Dairy Foods*, 2002) and Decision 542 (*Fonterra/National Foods*, 2004) and submitted that this definition remains appropriate.[36]

39. Goodman Fielder submitted that there is no basis on which to draw separate product markets for gourmet or other yoghurt products, saying that:[37]

 39.1 on the demand side, "consumers can and do switch between products and will do so in response to price changes, marketing and preferences". Although there are different yoghurt product categories with clear price differences, these segments are simply to meet consumer preferences and there is no clear dividing line between product markets on the consumer side;[38]

 39.2 on the supply side, it is straightforward for manufacturers to switch between different types of products, even on the same manufacturing line, "by simply tweaking certain production methods".[39] Goodman Fielder [ ]. Accordingly, other manufacturers (including Epicurean and Gopala) that do not currently manufacture specific types of yoghurt could easily do so if market opportunities were to arise.

33 *Mergers and Acquisitions Guidelines* above n5 at [3.10-3.12].
34 Based on data supplied to the Commission by [ ].
35 Application at [13.1]–[13.8].
36 Application at [13.3].
37 Application at [16.8]–[16.14].
38 Application at [16.8(a)]; Commerce Commission interview with Goodman Fielder (13 June 2018).
39 Application at [16.8(b)]; Commerce Commission interview with Goodman Fielder (13 June 2018).

Previous decisions

40. As mentioned above, the Commission has previously considered the yoghurt market in Decisions 459 and 542.[40] In those decisions, the Commission found that the relevant market was the national market for the manufacture and wholesale supply of yoghurt and dairy food because:

    40.1 supermarkets and other market participants indicated that there was demand-side substitution between yoghurt and dairy food/dairy dessert products, but not between these products and other dairy-based products such as sour cream and cottage cheese;

    40.2 in Decision 459, we concluded that "although products are differentiated to some extent, the differentiation is not sufficient to prevent the different brands from being substitutable for each other. Accordingly, the various brands and products are not so differentiated as to affect the market definition."[41] We reaffirmed our conclusion on this point in Decision 542;[42] and

    40.3 participants operated on a national basis from centralised plants.

Our view of the relevant markets

41. In forming our view on the relevant yoghurt market(s), we have considered whether market conditions have changed in the 14 years since Decisions 459 and 542 (in 2002 and 2004, respectively) such that one single national market for the manufacture and wholesale supply of yoghurt and dairy food is no longer appropriate.

42. As market participants continue to operate on a national basis from centralised plants, and we have seen no evidence of regional differences in the supply of yoghurt, we consider the relevant market for yoghurt to be national.

43. However, for the reasons set out below, we consider that the primary relevant markets for assessing the proposed acquisition are the national markets for the manufacture and wholesale supply of mainstream yoghurt (the mainstream yoghurt market) and the manufacture and supply of Greek and Greek style yoghurt products (the Greek yoghurt market).[43]

Mainstream yoghurt

44. As described above, yoghurt is a product that is commonly segmented into a number of categories that are broadly identifiable, although exactly how they were characterised differed between some suppliers and customers. The main area of

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40 National Foods Limited and New Zealand Dairy Foods Limited (Commerce Commission Decision 459, 22 March 2002); Fonterra Co-operative Group Limited and National Foods Limited (Commerce Commission Decision 542, 9 December 2004).

41 Decision 459, above n40, at [99]-[100].

42 Decision 542, above n40, at [47].

43 When we refer to "mainstream yoghurt products", we include both the products mentioned at paragraph 25.1 above – 1kg tubs, and 6 and 12 packs of "pottles" of plain or flavoured yoghurt.

overlap between the Parties is in mainstream and Greek yoghurt. We therefore considered the level of substitutability across mainstream, Greek and other categories of yoghurt product, starting with the mainstream category.

45. In terms of shelf placement, yoghurt products are commonly organised by category rather than by brand, with the distinction between some categories being clearer than others.[44] For example, there appears to be more overlap between "premium" and "health" yoghurt than with mainstream and other types of yoghurt.

46. We found that although there is a degree of substitution between different types of yoghurt products, we received consistent evidence from retailers that consumers were generally unlikely to view other types of yoghurt products such as premium/gourmet or natural yoghurt as substitutes for mainstream yoghurt products.

47. In addition, while the price of yoghurt varies significantly depending on promotional activity, we note that the price of mainstream yoghurt can be significantly lower per ml than that of gourmet and health yoghurts. Greek yoghurt tends to be sold at a price between that of mainstream and gourmet yoghurt.

48. We received consistent evidence from industry participants about the scope of the "mainstream" category. For example:

    48.1 industry participants emphasised the price-conscious nature of many consumers in the mainstream category, who are primarily looking for a cheap product (unlike other categories).[45] [ ] told the Commission that competitive per-serve pricing in the mainstream category (as opposed to others) meant that prices would have to rise a substantial amount before consumers would consider switching to other products;[46] and

    48.2 [ ] also noted that it observes consumer switching behaviour between different "mainstream" products – that is, 1kg tubs, 6-packs and 12-packs – based on price, but not often into or out of the category.[47]

49. Accordingly, whilst there may be some consumer substitution between mainstream and other yoghurt products, we do not consider that there is sufficient switching between mainstream and other types of yoghurt products for those products to be considered demand-side substitutes.

50. Goodman Fielder also submitted that yoghurt producers could switch between producing different categories of yoghurt with ease.

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44 See for example "[ ]", provided by email by Bell Gully to the Commerce Commission (25 July 2018); and the Application at 15.

45 Commerce Commission interview with [ ]; [ ]; [ ].

46 Commerce Commission interview with [ ].

47 Commerce Commission interview with [ ].

51. In our view, while smaller yoghurt manufacturers could produce mainstream yoghurt, they are unlikely to do so because:

    51.1 industry participants referred to the mainstream category as a segment characterised by scale and large volumes, with low margins and accordingly a great deal of risk in entering, even from an established position in other categories. For example, a number of producers noted that they would need to increase their volumes substantially in order to be able to produce at a low enough cost per unit to compete to supply mainstream yoghurt;[48]

    51.2 industry participants also identified that existing suppliers of other types of yoghurt might not be incentivised to expand into supplying mainstream yoghurt due to the effects doing so might have on those suppliers' brand positioning, especially if they produced higher end premium or gourmet yoghurts;[49] and

    51.3 we have not been provided with any evidence of any yoghurt provider switching capacity across from other types of products into the mainstream category.[50]

52. Accordingly, we do not consider that there is sufficient supply-side substitutability to include other categories of yoghurt products in the same market as mainstream yoghurt products.

53. We note that dairy food is produced by the same suppliers as mainstream yoghurt and that the conditions of supply are similar. As such, given that it does not affect our analysis whether it is included within the same market or a separate market, we consider that dairy food can be included in the same market as mainstream yoghurt.

Greek yoghurt

54. Other than mainstream yoghurt, the other major area of overlap between the parties is in Greek yoghurt. We received mixed evidence regarding whether Greek yoghurt formed its own separate market or is part of a wider non-mainstream yoghurt market.

55. There are several factors supporting the view that Greek yoghurt is part of a single non-mainstream yoghurt market that includes natural, health and/or gourmet categories. These include:

    55.1 [ ] identify that Greek yoghurt is perceived by consumers as a healthy yoghurt product,[51] and we have identified similarities between Greek

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48 Commerce Commission interview with [ ]; [ ].

49 Commerce Commission interview with [ ]; [ ].

50 Although we note this may be due to prices and volumes in this category remaining relatively static ([ ]), Commerce Commission interview with [ ].

51 [ ].

and other non-mainstream yoghurt categories such as health and natural, that are marketed to more health-conscious consumers;

55.2 Greek yoghurt, like other types of yoghurt, may not be viewed by consumers,[52] and is generally not viewed by suppliers,[53] as in the same low cost bracket as the mainstream market; and

55.3 on the supply side, the barriers appear to be lower for switching into Greek yoghurt. [ ].[54] There are a number of small and niche yoghurt manufacturers which compete in the supply of Greek yoghurt. We consider it likely that the [ ] in Greek yoghurt allow its production to be profitable on a smaller scale. Several small suppliers that do not compete in mainstream yoghurt have a portfolio of non-mainstream yoghurt products including Greek.

56. Conversely, factors supporting the view that Greek yoghurt constitutes its own product market separate from other non-mainstream yoghurt categories include:

56.1 industry participants generally referred to Greek yoghurt as its own product category, outside of both mainstream products as well as other categories. There was not perceived to be a significant volume of consumer switching between different categories (although some switching is seen between Greek and the gourmet/premium and health categories);[55] and

56.2 whilst there are more suppliers supplying Greek yoghurt than mainstream yoghurt, including niche suppliers and recent entrants, it is not a product supplied by all yoghurt manufacturers.

57. There is also some evidence which may support the view that Greek yoghurt could be considered as part of the mainstream market, or an asymmetric constraint. This includes that:

57.1 [ ] told the Commission that although some Greek yoghurts might be seen by consumers as premium products, from a supplier's perspective they are "just another mainstream offering";[56] and

57.2 Goodman Fielder, Lion and Fonterra supply Greek yoghurt under the same brands that they supply mainstream yoghurt (Meadow Fresh, Yoplait and Fresh 'n Fruity). This is in comparison to other non-mainstream categories in which they utilise different premium brands (however, Goodman Fielder also supplies Greek yoghurt under the "Kalo" brand and Fonterra has supplied

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52 Commerce Commission interview with [ ].

53 Commerce Commission interview with [ ].

54 [ ].

55 Commerce Commission interview with [ ]; [ ].

56 Commerce Commission interview with [ ].

Greek yoghurt under its premium "Anchor" branch in the past [ ]).

58. Given the mixed evidence, we have assessed whether the proposed acquisition would be likely to substantially lessen competition in a Greek yoghurt market. This approach is conservative in this case because widening the market would increase the number of competitors to the merging parties and reduce their market share. Therefore, if there is no substantial lessening of competition in narrower Greek or mainstream markets, there is not likely to be a substantial lessening of competition if Greek yoghurt were part of a wider mainstream or non-mainstream market.

Conclusion on market definition

59. Accordingly, we consider that the relevant markets to assess the impact of the proposed acquisition are:

    59.1 the national market for the manufacture and wholesale supply of mainstream yoghurt products (the mainstream yoghurt market); and

    59.2 the national market for the manufacture and wholesale supply of Greek yoghurt (the Greek yoghurt market).

60. We do not draw any conclusions on market definition for any other yoghurt products, because doing so is unnecessary in order to assess the competitive effects of the proposed acquisition.[57]

With and without scenarios

61. To assess whether an acquisition is likely to substantially lessen competition in a market, we compare the likely state of competition if the acquisition proceeds (the scenario with the acquisition, often referred to as the factual), with the likely state of competition if the acquisition does not proceed (the scenario without the acquisition, often referred to as the counterfactual).[58]

With the acquisition

62. As discussed above, Lion currently manufactures Yoplait branded yoghurt in New Zealand under an exclusive licence from Sodima, the French company that owns and licences the Yoplait brand worldwide.

63. Lion is not assigning the Sodima licence for New Zealand to Goodman Fielder as a part of the proposed acquisition. Instead, Goodman Fielder is negotiating directly with Sodima, separately from this acquisition, to enter into a new exclusive licence to manufacture and distribute Yoplait yoghurt in New Zealand. Lion is negotiating separately with Sodima to remove New Zealand from its existing Australasian licence.

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[57] Since no potential competition concerns arise in any other area of overlap between Goodman Fielder and Lion, the rest of this document focusses on the mainstream and Greek yoghurt markets.

[58] *Mergers and Acquisitions Guidelines* above n5 at [2.29].

64. Nonetheless, [ ],[59] and [ ].[60] Goodman Fielder also told the Commission that the intention behind the asset transaction is to allow Goodman Fielder to acquire the Sodima licence.[61]

65. The acquisition of the Sodima licence by Goodman Fielder appears to be an indivisible part of the acquisition for which clearance has been sought. Accordingly, as we do when considering the effects of any potential merger, the Commission has had regard to the acquisition of the Sodima licence as part of the facts and circumstances of the acquisition.

66. With the acquisition, Goodman Fielder would acquire the assets set out in the Application and would also enter into an exclusive licence with Sodima to manufacture and supply Yoplait branded product in New Zealand. As such, Goodman Fielder would become the exclusive manufacturer and wholesale supplier of Yoplait products in New Zealand, and we have assessed the proposed acquisition on that basis.

Without the acquisition

Goodman Fielder without the acquisition

67. Goodman Fielder submitted that the most likely counterfactual for its yoghurt operations in New Zealand is, effectively, the status quo.[62]

Lion without the acquisition

<u>Lion's submission</u>

68. Lion submitted that due to the low profitability of its New Zealand yoghurt business and the aged machinery at its Palmerston North manufacturing site which requires capital investment, it had conducted a comprehensive strategic review of its New Zealand yoghurt business and decided that the current operation is economically untenable as a going concern.

69. Lion submitted that if it were to not sell its yoghurt business to Goodman Fielder, it would seriously reconsider its participation in the New Zealand yoghurt market, and that the next option would be to [ ] exit its New Zealand yoghurt business and close its Palmerston North site.

70. If Lion were not [ ] to exit New Zealand, Lion submitted that of the remaining alternatives previously considered, it would be most likely to continue supplying yoghurt in New Zealand through a combination of third party

59 [ ] of Application.
60 [ ]of Application.
61 Commerce Commission interview with Goodman Fielder (13 June 2018).
62 Application at [15.1].

manufacturing and importation of Australian made Yoplait products from Lion Australia.[63]

71. Accordingly, Lion submitted that the most likely counterfactual for its yoghurt business is either its complete exit from New Zealand or a combination of third party manufacturing and imports.

<u>The Commission's assessment of the evidence</u>

72. In considering the likely state of competition absent the acquisition, we assessed the likely competitive position of Lion's New Zealand yoghurt business absent it being acquired by Goodman Fielder.

73. Since February 2017, internal documents produced for the Lion board indicate that Lion has been [ ].[64]

74. Lion's internal documents confirm that the assets of the plant are in a poor state and require significant investment. [ ]. Issues with the plant include [ ].[65] [ ].[66]

75. Consistent with Lion's submission, Lion's board documents demonstrate that throughout 2017, Lion considered a number of different options for the future of its yoghurt business in New Zealand. Of the options considered, [ ][67] [ ].[68]

76. In contrast, the internal documents indicate that it is unlikely that Lion would have been able to find an alternative buyer or third party manufacturer other than Goodman Fielder. [ ].

    76.1 We are aware that in [ ], there was potential interest in acquiring the Lion business by [ ].

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[63] [ ].

[64] Internal Lion document *[ ]*.

[65] Internal Lion document [ ].

[66] [ ].

[67] [ ]; [ ].

[68] [ ].

76.2 The [ ] proposal did not progress further as it ultimately did not consider the business would be viable. [ ] independently confirmed this to the Commission, noting that the aged state of Lion's plant (and the capex required to bring it up to standard) was a disincentive to purchase it, as were [ ].[69]

76.1 The internal documents also indicate that Lion was unlikely to invest in its plant to address the issues there, as significant capital investment was required [ ].[70]

77. We consider that Lion's yoghurt business in New Zealand is unlikely to continue in its current form and, [ ], it would be unlikely to continue operating out of Palmerston North absent the proposed acquisition. We also note that there does not appear to be a real chance of the Lion plant or assets being acquired by another party.

78. Nevertheless, we do not consider that it is inevitable that Lion would have exited the yoghurt business in New Zealand absent the proposed acquisition. Lion's [ ]. Lion's internal documents indicate that it has seriously considered importing yoghurt products from its plant in Australia, [ ].

79. However, Lion's calculations are based on the assumption that there may be a [ ] drop in Yoplait sales due to importing. It is noted that if sales dropped by [ ], importing would result in significant losses to Lion.[71]

80. A number of industry participants questioned the feasibility of importing yoghurt into New Zealand in general.[72] [ ][73] As noted in Lion's internal documents, importing would not be without risk.

81. Nonetheless, we consider that there is a real chance that absent the proposed acquisition, Lion would continue to supply Yoplait in New Zealand as an independent competitor of Goodman Fielder. However, as this is likely to take the form of

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69 [ ].

70 Internal Lion Document [ ].

71 Internal Lion Document [ ].

72 Commerce Commission interview with [ ].

73 Commerce Commission interview with [ ].

importation, it is likely to provide a diminished constraint from that currently exercised.

82. Despite this likely diminished constraint, we consider that this would be a more competitive scenario than Yoplait exiting the market or entering into a third-party manufacturing relationship with Goodman Fielder. Such an arrangement would have seen the competitive constraint posed by Lion on Goodman Fielder diminish due to the ability of Goodman Fielder to control Lion's costs and production.[74]

<u>Conclusion on the relevant counterfactual for Lion's operations</u>

83. We conclude that the level of constraint currently provided by Lion is not likely to continue in the scenario without the acquisition. However, we cannot exclude the real chance that without the acquisition Lion would continue to operate yoghurt operations in New Zealand, through imports from Australia.

84. We therefore assess the acquisition against a counterfactual of Lion continuing to supply Yoplait in New Zealand, albeit with a likely diminished competitive constraint absent the acquisition.

How the acquisition could substantially lessen competition

85. We have considered two possible ways in which the proposed acquisition would be likely to have the effect of substantially lessening competition in the mainstream and Greek yoghurt markets:

  85.1 first, the acquisition could give rise to unilateral effects by enabling the merged entity to profitably raise prices; and

  85.2 second, the acquisition could increase the potential for the merged entity and Fonterra to coordinate their behaviour and collectively exercise market power such that prices increase (coordinated effects).

Competition analysis – unilateral effects

86. An acquisition can substantially lessen competition if it increases the potential for the merged entity to be able to unilaterally raise prices.[75] Where two suppliers compete in the same market and the constraint from other competitors is limited, an acquisition could remove a competitor that would otherwise provide a competitive constraint, allowing the merged entity to profitably raise prices.

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74 A similar argument would hold if Lion entered into a relationship with Fonterra, which as the other mainstream yoghurt manufacturer would likely be the only other firm potentially capable of manufacturing Yoplait yoghurt on behalf of Lion.

75 For simplicity, when we refer to concerns that the acquisition may result in an increase in price, this also includes the possibility that the impact of the acquisition is a reduction in quality or some combination of a price and quality effect – that is, an increase in quality-adjusted prices.

87. Goodman Fielder submitted that the proposed acquisition would not give rise to a substantial lessening of competition in the national market for the manufacture and wholesale supply of yoghurt and dairy food because:[76]

    87.1 there is strong existing competition in the market from Fonterra (which Goodman Fielder refers to as "the largest brand by some margin") and Epicurean Dairy, amongst others;

    87.2 barriers to entry and expansion are low, and there are several existing competitors in the market with the ability to expand their production and compete more closely with Goodman Fielder and Fonterra. Supermarkets have encouraged such growth and will continue to do so post-acquisition; and

    87.3 due to the importance of promotional sales, the two major supermarkets wield a high degree of countervailing buyer power, which they would use to thwart any attempt by the merged entity to raise prices.

88. For the reasons below, we are satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the national market for the manufacturing and wholesale supply of mainstream yoghurt products or the national market for the manufacturing and wholesale supply of Greek yoghurt due to unilateral effects.

Mainstream yoghurt

Market shares in the mainstream yoghurt market

89. With the acquisition, the number of suppliers in the mainstream yoghurt market would reduce from three to two. The merged entity would have a market share of approximately [ ]% in this market, compared to Fonterra's market share of [ ]%.[77]

90. The proposed acquisition will have a "three-to-two" effect in the mainstream yoghurt market, and such acquisitions have a significant risk of anticompetitive effects due to the high level of concentration in the relevant market post-acquisition. However, we are required to make our assessment based on all the evidence before us. As we discuss below, in the fact-specific context of this proposed acquisition, we do not consider the acquisition would be likely to have the effect of substantially lessening competition.

Closeness of competition

<u>Parties' submissions</u>

91. Goodman Fielder submitted that, post-acquisition, Fonterra would continue to provide a "strong and vigorous" competitive constraint on the merged entity, and that any attempt by the merged entity to increase prices would lead to consumers

[76] Application at [1.5]–[1.9].
[77] Based on Commerce Commision analysis of Aztec scanner data for 2017/2018 (ending June). The estimates are consistent with other figures provided to the Commerce Commission.

"readily" switching to Fonterra's products and supermarkets reassigning both promotional slots and shelf space to Fonterra.[78]

92. Goodman Fielder emphasised that Fonterra is the largest manufacturer of yoghurt in New Zealand (by both size and volume) and that both Goodman Fielder's and Lion's brands currently compete closely against Fonterra, with supermarkets leveraging that competition and the limited number of promotional slots to achieve the lowest possible price for consumers.[79]

Assessment of the evidence

93. We have considered the closeness of competition between the parties as well as the extent to which rival suppliers would continue to place a constraint on the merged entity after the acquisition. We have also noted that absent the proposed acquisition, it is likely that the competitive constraint from Lion would be less than it is currently due to the likely shift to importing from Australia.

94. We have received consistent evidence from industry participants that the only competitors in the mainstream yoghurt market at present are Goodman Fielder, Lion, and Fonterra. Industry participants generally saw Goodman Fielder and Fonterra as the two closest competitors, with Lion present but less active for a number of reasons. For example, [ ] pointed to Fonterra as the strongest competitor in the entire yoghurt industry.[80] It said that Lion is engaged in a "struggle … against the big guys", but without the scale of either Fonterra or Goodman Fielder to support its low-margin mainstream yoghurt operations. [ ] also stated that Fresh n' Fruity is the "strongest brand" in mainstream yoghurt.[81]

95. To help assess the closeness of competition between the key brands, the Commission obtained scanner data regarding yoghurt sales. Analysis of this data by the Commission regarding the degree of substitution between the three brands of 1kg tubs of Vanilla yoghurt appears to indicate that changes in the price of Fonterra's product alters volumes in Goodman Fielder's, and Lion's, equivalent product by more than changes in price of Yoplait, or Meadow Fresh, respectively.[82] This suggests that for this product at least, Goodman Fielder's products compete more closely with Fonterra's than Lion's.

96. In addition, Fonterra appears to have been competing aggressively on price recently,[83] and [ ].[84]

78 Application at [14.1](a)], [16.6].
79 Application at [16.5]–[16.6].
80 Commerce Commission interview with [ ].
81 Commerce Commission interview with [ ].
82 Based on weekly price and volumes data for Vanilla 1kg tubs for [ ] in 2017. We selected this product as it had similar sizes and flavours across all three suppliers.
83 For example, [ ], and our analysis of pricing data indicates that Fonterra has reduced the price of some of its mainstream products over the past few years.

97. We therefore considered the nature of competition in the market with a view to considering how likely price increases would be after the acquisition. Evidence we have received from a range of industry participants (and also discussed above under market definition) indicates that, to a greater extent than non-mainstream categories, effective competition in the mainstream market requires scale. For instance:

97.1 industry participants characterised New Zealand consumers as incredibly price-conscious in their mainstream yoghurt purchasing decisions;[85]

97.2 other participants went further, telling us that price increases were unlikely given the nature of the industry and the remaining competition from Fonterra. For example, [ ] told the Commission that any price changes would have an immediate downward effect on volume, so price increases post-acquisition would be irrational given the importance of the large mainstream yoghurt volumes for plant efficiency (and the low margins on these products). [ ] also noted that Fonterra would quickly take volume if the merged entity attempted to increase price, which would have immediate negative effects on the merged entity – it would have "price[d] itself out of the market";[86] and

97.3 some industry participants noted that the proposed acquisition would likely provide the merged entity with a more competitive cost base, allowing it to run more efficiently and in fact reduce wholesale prices.[87] [ ].[88]

98. We consider that the importance of scale in mainstream yoghurt reduces the likely profitability of unilateral price increases in the face of a remaining strong competitor due the effect of falling volumes on average costs. This is particularly true given the potential for supermarkets to exercise buyer power in this industry, as discussed in more detail below.

99. Overall, we consider the merged entity would likely continue to face strong competition from Fonterra. Evidence of Fonterra's recent behaviour suggests that it has been competing vigorously prior to the acquisition and we have received no evidence to suggest this would change after the acquisition. Furthermore, we consider that any difference in competition through the loss of Lion would be reduced in circumstances where the constraint Lion places on Goodman Fielder would be likely to diminish absent the acquisition.

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84 Commerce Commission interview with [ ].
[ ].

85 See for example Commerce Commission interview with [ ].

86 Commerce Commission interview with [ ].

87 See for example Commerce Commission interview with [ ].

88 [ ].

100. As discussed at paragraphs [114]-[130] of these reasons, this view is further supported by the ability of supermarkets to resist price increases in this market.

Greek yoghurt

101. The proposed acquisition would also result in consolidation in the supply of Greek yoghurt.

102. The merging parties' combined share of Greek yoghurt supply would be approximately [ ]% ([ ]% Yoplait, [ ]% Goodman Fielder) compared to Fonterra's share of [ ]% and Epicurean's share of [ ]%.[89] This is a high share of Greek yoghurt supply.

103. However, in contrast to the mainstream yoghurt market, a number of alternative Greek yoghurt suppliers would remain aside from Fonterra. These include Epicurean (The Collective) and Dairy Culture Co (Cyclops). There are also current Greek yoghurt manufacturers without a Greek yoghurt product in supermarkets, but which supply other non-mainstream yoghurt products to supermarkets.

104. Moreover, while Greek yoghurt was one of the few areas that Yoplait had performed well in over recent years, it is likely that this would have deteriorated absent the acquisition as Lion shifted to importing from Australia. As discussed further below, we consider that the alternatives available, along with the supermarkets' countervailing power and the likelihood of entry, would constrain the actions of the merged entity in the supply of Greek yoghurt.

Potential entry and expansion

105. In assessing whether the proposed acquisition would be likely to have the effect of substantially lessening competition, we assess whether, if prices increase and/or quality decreases, existing competitors would expand their sales, and/or new competitors would enter and effectively compete with the merged entity.

106. Goodman Fielder submitted that barriers to entry and expansion in the yoghurt industry in New Zealand are relatively low and that there are a range of potential local and international entrants.[90] It submitted that recent examples of such entry and expansion demonstrate this, including the growth of Epicurean and a number of other smaller yoghurt producers, such as Piako and Gopala.[91]

107. Further, as mentioned above, Goodman Fielder and Lion submitted that private label products are a near entrant into the yoghurt industry in New Zealand. The parties noted the presence of private label brands in yoghurt in Australia, as well as in a range of other dairy products in New Zealand.[92] We discuss further the ability of supermarkets to launch private label products in the countervailing buyer power section below at paragraphs [114]-[130].

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89 Based on Commerce Commision analysis of Aztec scanner data for period 11 June 2017 - 10 June 2018.
90 Application at [14.1(c)]. [16.16], [16.20]–[16.21].
91 Application at [16.16].
92 Application at [16.22]–[16.23].

Entry/expansion in mainstream yoghurt

108. We received consistent feedback from market participants that entry into the mainstream yoghurt market is difficult and unlikely. [ ].

109. Market participants noted the significant scale required to produce mainstream yoghurt profitably, while also noting that entry would require building brand awareness and significant shelf-space to sell the volumes required to be profitable.[93]

110. In order to produce mainstream yoghurt profitably, a new supplier would need to produce enough so that average cost is below price. However, to reach such a scale would require substantial investment and require raising brand awareness, most of which would be sunk costs and therefore unrecoverable. In addition, the effect of the extra volumes on the market could further lower price and reduce profitability, making such a large investment particularly risky.

Entry/expansion in Greek yoghurt

111. In contrast to entry into the manufacture and supply of mainstream yoghurt, entry into the Greek yoghurt market appears to be relatively more straightforward. Factors informing this conclusion include:

    111.1 in contrast to mainstream yoghurt, Greek yoghurt is experiencing strong volume growth year on year, with new entrants able to compete for new customers rather than primarily competing for customers of established brands;

    111.2 market participants have identified Greek yoghurt as a category where there has been a lot of innovation and there are examples of new entrants which have been able to establish new brands;[94]

    111.3 [ ].[95] It appears that manufacturing Greek yoghurt does not require the same scale of operation as manufacturing mainstream yoghurt to be profitable;

    111.4 the more recent entrants, [ ], have launched Greek yoghurt products;

    111.5 market share data for the past three years shows that new products have been able to enter and establish a position in the market fairly quickly, such

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93 Commerce Commission interview with [ ]; [ ] and [ ].

94 Commerce Commission interviews with [ ]; [ ]and [ ].

95 [ ].

as Meadow Fresh's Kalo brand which had a market share of [ ]% in 2016/2017 but [ ]% in 2017/2018;[96] and

111.6 [

].

Conclusion on entry/expansion

112. In our view, conditions of entry and expansion in the mainstream yoghurt market make new entry difficult. Entrants require considerable scale, and given the highly competitive market and low margins, we consider it unlikely that existing yoghurt producers (either in New Zealand or overseas) will expand into the market.

113. Conversely, we consider that the conditions of entry into the supply of Greek yoghurt mean that entry is more straightforward, and the threat of new entry would act as a constraint on the actions of the merged entity in the supply of Greek yoghurt.

Countervailing buyer power

114. A merged entity's ability to increase prices profitably may be constrained by the ability of certain customers to exert substantial influence on negotiations – that is, the countervailing power of buyers.[97] Countervailing power is more than a customer's ability to switch from buying products from the merged entity to buying products from a competitor; and a customer's size and importance is not sufficient in itself to amount to countervailing power. Countervailing power exists when a customer possesses a special ability to substantially influence the price the merged entity charges (for example, an ability to switch to self-supply or sponsor new entry).[98]

Parties' submissions

115. Goodman Fielder submitted that the two major supermarket chains hold significant countervailing power and that this in itself would be sufficient to constrain any exercise of market power by the merged entity.[99]

116. Goodman Fielder noted that the Commission has previously accepted (in *Decision 542*) that supermarkets have strong bargaining power in relation to their suppliers in the yoghurt category, and that if a supplier increased pricing, the supermarket would act to counter that increase by refusing to accept it, refusing to promote the supplier's products, refusing to accept new product lines, and/or approaching other suppliers.[100]

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96 Commerce Commission analysis of Aztec sales data.

97 *Mergers and Acquisitions Guidelines* above n5 at [3.113].

98 For examples of the types of characteristics that may give rise to countervailing power see *Mergers and Acquisitions Guidelines* above n5 at [3.115].

99 Application at [14.1(d)], [16.25]–[16.38].

100 Application at [16.27].

Evidence of countervailing buyer power

117. Supermarkets would account for the vast majority of the merged entity's yoghurt sales. However, the acquisition would lead to the aggregation of sales and brands of two of the three largest yoghurt suppliers, which could potentially shift the bargaining power towards the merged entity. We have therefore considered whether supermarkets have the means to impose sufficient countervailing power to offset that shift in bargaining power.

118. Feedback from supermarkets generally suggested that they did not consider the acquisition would lead to price increases. Specifically:

118.1 [ ] told us that even [ ];[101]

118.2 [ ] told us that if the merged entity attempted to raise prices without a clearly evidenced increase in their costs, this would be "unreasonable" and so [ ]. For example, [ ];[102] and

118.3 [ ] noted the continued ability for supermarkets to use the existence of Fonterra to maintain a competitive outcome.[103]

119. We consider that there are a number of factors particularly relevant to the yoghurt sector that provide supermarkets with the ability to resist price increases. For example:

119.1 [ ] told the Commission that the supermarkets "keep [the mainstream yoghurt producers] honest on price", because due to the large scale and volume requirements, mainstream providers need to be stocked by both supermarket chains to be viable;[104]

119.2 [ ] stated that due to the nature of scale effects in the industry, any lost volume to a competitor through being taken off promotion would result in the supplier quickly wanting to get back on promotion and Fonterra would remain as a strong competitor post acquisition.[105]

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[101] Commerce Commission interview with [ ]].
[102] Commerce Commission interview with [ ].
[103] Commerce Commission interview with [ ]].
[104] Commerce Commission interview with [ ].
[105] Commerce Commission interview with [ ]].

120. We also received evidence that a large proportion of yoghurt sales occur when the products are on promotion. The importance of scale and the prevalence of sales on promotion suggest that suppliers rely on the supermarkets to achieve the volumes required.

121. We consider that supermarkets are likely to have the ability to undertake actions to resist price increases, such as reducing the merged entity's shelf space or promotional slots in retaliation to any threatened exercise of market power. We consider below whether supermarkets would be likely to take such actions in the face of price increases.

122. The same mechanisms described above for the mainstream market also apply to the supply of Greek yoghurt, albeit in Greek yoghurt, supermarket bargaining power is enhanced. For example, there are more alternative suppliers and potential entrants to which supermarkets could switch or sponsor to enter or expand.

123. There is also some evidence of the ability of supermarkets to [ ].[106]

Would supermarkets be likely to exercise countervailing buyer power?

124. Given the existence of a strong competitor post-acquisition in Fonterra and the likely ability of the supermarkets to ensure sufficient competition remains, we considered the extent to which the supermarkets would have an incentive to prevent prices increasing for mainstream yoghurt. We consider that the characteristics of the yoghurt category are such that it is likely to make commercial sense for supermarkets to resist attempts by the merged entity to increase prices and pass through the increases to consumers.

125. Market participants indicated the importance of the yoghurt category to promotional activity and to grocery sales generally, with a relatively large amount of dedicated shelf-space and an important category for promotional activity. As an important category, it is less likely that supermarkets would pass through price increases without resistance.

126. We were also provided with examples of supermarkets resisting changes to pricing in the past, and of this being successful.[107]

127. We consider that reallocating promotional slots (or shelf space) is likely to impose relatively low costs on supermarkets, both in terms of direct cost (eg, the actual cost of supermarket time) and opportunity cost. This is primarily because of the presence of at least one other prominent brand (Fonterra) with an established customer base

[106] Commerce Commission interview with [ ] and [ ].

[107] Application at [16.34] – [16.37]. We note that in itself this does not mean customers will have the ability to resist price increases after the acquisition.

in the mainstream market, as well as a range of other well-established and popular brands in the non-mainstream categories. Given this low cost and the importance of the product for supermarkets, we consider that supermarkets are likely to act on their ability to resist if the merged entity were to attempt to raise prices.

128. Similarly, in relation to Greek yoghurt, in addition to the reasoning above, given its increasing popularity we consider that supermarkets are likely to exercise countervailing power in response to any threat of price increases post-acquisition. Furthermore, as mentioned above, [ ].

Conclusion on countervailing buyer power

129. We consider that supermarkets would be likely to exercise countervailing power in response to any threat of price increases post-acquisition (thereby constraining the actions of the merged entity).

130. Evidence from supermarkets indicates that they are likely to undertake one or more actions to impose a competitive disadvantage on the supplier, such as shifting the merged entity's shelf placings, shelf facings, or promotional slots. These actions are likely to be particularly effective in the mainstream yoghurt market due to the particular importance of scale and the existence of a strong competitor.

Conclusion on unilateral effects

131. Accordingly, we are satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the national market for mainstream yoghurt due to unilateral effects compared to the scenario without the acquisition, because:

131.1 there will be strong remaining competition from Fonterra;

131.2 the competitive constraint Goodman Fielder currently faces from Lion is weaker than it faces from Fonterra, and would be likely to diminish further absent the acquisition; and

131.3 the nature of the industry (in particular, the strong scale efficiencies) and supermarkets' countervailing power, would be likely to prevent a price increase by the merged entity.

132. We are also satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the manufacturing and wholesale supply of Greek yoghurt, due to the existence of several remaining competitors, the threat of entry from new suppliers and the role of the supermarkets in exercising countervailing power.

Competition analysis – coordinated effects

133. An acquisition can substantially lessen competition if it increases the potential for the merged entity and all or some of its remaining competitors to coordinate their behaviour and collectively exercise market power such that quality reduces and/or prices increase across the market.

134. Unlike a substantial lessening of competition arising from a merged entity acting on its own, coordinated effects require some or all of the firms in the market to be acting in a coordinated way. Such behaviour need not be unlawful, and includes tacit collusion such as accommodating price responses or parallel conduct.

135. Goodman Fielder submitted that the proposed acquisition would not increase any risk of coordinated effects in the national market for the manufacture and wholesale supply of yoghurt and dairy food because:[108]

 135.1 wholesale prices are not transparent;

 135.2 all suppliers have highly differentiated products;

 135.3 the category is growing in both value and number/types of products, which makes coordination difficult;

 135.4 Fonterra, the largest industry participant, is vertically integrated and will always have a different cost base to the merged entity;

 135.5 the supermarkets' countervailing power would undermine any attempts at coordination; and

 135.6 there are low barriers to entry and expansion, and such entry or expansion could disrupt attempts to coordinate.

136. For the reasons set out below, we are satisfied that the acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the mainstream yoghurt market due to coordinated effects.

137. In carrying out our assessment, we have applied the two stage framework set out in our Mergers and Acquisitions Guidelines.[109]

 137.1 We first considered the features of the mainstream yoghurt market that affect the extent to which it is vulnerable to coordination.

 137.2 We then asked whether the acquisition is likely to change conditions in the mainstream yoghurt market so that coordination is more likely, more complete, or more sustainable.

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108 Application at [1.10], [14.1(d)], [16.39]–[16.41].

109 *Mergers and Acquisitions Guidelines* above n5 at [3.86].

138. We also considered the potential for the proposed acquisition to result in coordinated effects in the Greek yoghurt market, but given the range of suppliers of Greek yoghurt, the asymmetric market shares post acquisition and the relative ease of entry, we consider the proposed acquisition would be unlikely to increase coordination. We do not address the issue further in these reasons.

To what extent is the mainstream yoghurt market vulnerable to coordination?

139. A range of market features are commonly accepted as making a market more vulnerable to coordination. That is, these are market features that make it more likely that firms would be able to successfully coordinate their behaviour to increase their profits. Not all need to be present for a market to be vulnerable to coordination. Nor does the existence of some or all of these features inevitably mean that firms would engage in coordinated behaviour.[110]

140. We considered coordination both in terms of coordination over prices and coordination via allocation of customers or coordination over market shares.

141. We consider that the mainstream yoghurt market has some features that make it vulnerable to coordination, although it also has other features that make coordination more difficult. Features that make the mainstream yoghurt market vulnerable to coordination are:

141.1 products that are not highly differentiated - whilst the different yoghurt brands within the mainstream market will all differ slightly in terms of taste, texture, and flavour, we received feedback from interviews conducted with suppliers and customers that the mainstream end of the market is focused on volume and tends to be sold at low prices;[111]

141.2 market concentration - the mainstream yoghurt market is currently relatively concentrated, with only three competitors. With the acquisition, this would reduce from three to two;

141.3 conditions of entry - as discussed above, there are significant obstacles to entry and expansion into the mainstream yoghurt market, particularly the scale required to produce yoghurt at a sufficiently low cost to price competitively;[112]

141.4 firms being active in other markets - when firms interact more regularly, this can increase the likelihood of coordination; and

141.5 retail price and volume transparency - while suppliers may not have information on each other's wholesale prices, data regarding retail prices for yoghurt and the volumes sold is readily available through services such as Aztec scanner data. The transparency of retail prices could provide some

[110] Ibid at [3.89-3.90].
[111] Commerce Commission interviews with [ ], [ ], [ ] and [ ].
[112] Commerce Commission interview with [ ].

indication of the wholesale prices charged by rivals. However, this would be dependent on supermarkets treating suppliers in predictable ways.

142. Features that make coordination in the mainstream yoghurt market more difficult are:

142.1 customers are sophisticated buyers who purchase large volumes - as noted above, the main customers of mainstream yoghurt are the two supermarkets. The evidence suggests that the ability of supermarkets to play Goodman Fielder and Fonterra off against each other provides them with a strong bargaining position which likely makes coordination more challenging to achieve. We also note that [ ];[113]

142.2 there is some complexity in mainstream yoghurt - within the mainstream yoghurt category there are a large number of SKUs, with all three major brands offering a range of pack sizes and flavours. In addition, as discussed, a large proportion of mainstream yoghurt is sold through promotion. This complexity may make it more difficult for mainstream yoghurt producers to coordinate their behaviour;

142.3 there appears to be some innovation in the market - we received feedback that whilst mainstream yoghurt is not as innovative as other yoghurt products, there is still a need to produce new flavours frequently;[114] and

142.4 we did not find any evidence of existing coordination in the mainstream yoghurt market. Rather, the evidence (including interviews and internal documents) suggested that there has been recent strong competition on price between Fonterra and Goodman Fielder.[115]

Would the acquisition make coordination more likely, complete, or sustainable?

143. Where an acquisition materially enhances the prospects for any form of coordination between businesses, the result is likely to be a substantial lessening of competition. This could happen if the proposed acquisition is likely to change conditions in the mainstream yoghurt market so that coordination is more likely, more complete, or more sustainable.[116]

144. For the reasons below, we consider that compared to the likely conditions absent the acquisition, the acquisition is not likely to materially change conditions in the mainstream yoghurt market so that coordination is more likely, more complete or more sustainable.

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113 Commerce Commission interviews with [ ]; [ ] and [ ]

114 Commerce Commission interview with [ ].

115 For example, [ ], and our analysis of pricing data indicates that Fonterra has reduced the price of some of its mainstream products over the past few years.

116 *Mergers and Acquisitions Guidelines* above n5 at [3.86.2].

145. The acquisition will reduce the number of suppliers in the mainstream yoghurt market to two. In addition, [ ]. However, a number of features in the mainstream yoghurt market that currently make coordination more difficult would remain post-acquisition, despite concentration in the market changing with the acquisition.

146. Most importantly, given the ability of supermarkets to affect the prominence of products on shelves and suppliers' access to promotional activity, supermarkets are likely to be able to play off the two suppliers to disrupt any attempt to coordinate.[117] This is further reinforced by the importance of scale efficiencies in the production of mainstream yoghurt, where (even small) reductions in volume sold could reduce the economic feasibility of manufacturing plants.

147. While the proposed acquisition would result in the loss of Lion as an alternative supplier, we consider that it is unlikely to materially reduce the existing bargaining position of supermarkets. The evidence we found shows that customers typically consider Goodman Fielder and Fonterra as the main parties in mainstream yoghurt, while Lion is not generally considered to the same extent by customers in the bargaining process.

148. We expect that supermarkets would likely continue to be able to effectively bargain between the merged entity and Fonterra and design their procurement strategies to reduce the risk of coordination, including by maximising rivals' incentives to cheat on any coordination arrangement when negotiating to supply customers, such as through access to shelf space or promotional activity. We note that none of the supermarkets raised concerns about the proposed acquisition raising prices or increasing the risk of coordination. We also received feedback that [ ].[118]

149. As such, the acquisition would be unlikely to change the ability of the supermarkets to effectively play the key suppliers off against each other and to disrupt any attempts to coordinate.

150. We note that [ ].[119]

151. Further, we have undertaken this assessment in the context that Lion would likely have a lower competitive impact on the market absent the acquisition, thereby

[117] We note that such customers may not have such a strong bargaining position in the non-supermarket sector. However, as noted above, due to Lion's limited presence in this sector and that absent the acquisition their competitive constraint would likely diminish, we do not consider the acquisition to alter the likelihood of coordination in this sector.

[118] Commerce Commission interview with [ ].

[119] [ ].

reducing the constraint that Lion would be able to provide on any coordination in the market in any event.

Conclusion on coordinated effects

152. Although we consider that there are some factors which may make the mainstream yoghurt market vulnerable to coordination, we are nonetheless satisfied that the acquisition is unlikely to result in a material increase in the risk of coordination. In particular, the removal of Lion from the mainstream yoghurt market is not likely to substantially alter the market conditions and make coordination materially more likely.

153. Accordingly, we are satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the mainstream yoghurt market due to coordinated effects.

Overall conclusion

154. We are therefore satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the national markets for the manufacture and wholesale supply of mainstream yoghurt or the manufacture and wholesale supply of Greek yoghurt.

Determination on notice of clearance

155. We are satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.

156. Pursuant to section 66(3)(a) of the Act, the Commerce Commission determines to give clearance to Goodman Fielder New Zealand Limited to acquire, either directly or indirectly, assets related to the manufacture of "Yoplait" branded yoghurt in New Zealand from Lion – Dairy & Drinks Limited.

Dated this 9th day of August 2018

Dr Mark Berry
Chairman