

Foodstuffs North Island Limited and Foodstuffs South Island Limited response to statement of unresolved issues

PUBLIC VERSION

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

13 August 2024

CONTENTS

EXECUTIVE SUMMARY	4
SECTION 1: UNILATERAL EFFECTS IN ACQUISITION MARKETS: FRAMEWORK	8
Summary	8
The change associated with the Proposed Transaction	9
Market definition	10
Framework for assessing competitive effects	11
Ability to effect a lessening of competition – could relevant conduct occur?	13
What is the relevant conduct? Or, what would a substantial lessening of competition look like?	13
The evidence shows the merged entity would not have the ability to cause a substantial lessening of competition in acquisition markets	20
Incentive to effect a lessening of competition – would relevant conduct be likely to occur?	21
Framework – the Parties’ likely conduct and incentives distinguish a real chance from a possibility	21
The SOUI does not canvas the merged entity’s incentives, or “likely” conduct post-merger, and instead treats theoretical possibilities as sufficient	22
The Parties’ current retail conduct and incentives are evidence of the merged entity’s likely conduct in acquisition markets	24
Conclusion on unilateral effects in acquisition markets	27
Other points raised in the SOUI regarding bargaining power do not alter the conclusion that the Proposed Transaction would not be likely to result in a substantial lessening of competition in any acquisition market	29
Level of constraint provided by other acquirers of grocery products	29
Impact of the previous North Island Foodstuffs merger	31
Countervailing power of suppliers	32
Move to centralisation	33
Private label	34
Impact of the GICA	34
Likelihood of the merged entity’s buyer power impacting entry and/or expansion in retail grocery markets	34
The Proposed Transaction would not be likely to adversely impact innovation for new grocery products	36
Market definition	36
Competitive effects: the Proposed Transaction would not be likely to give rise to a substantial lessening of competition in relation to innovation	36
The Proposed Transaction would result in consumer benefits	41
SECTION 2: UNILATERAL EFFECTS IN ACQUISITION MARKETS: APPLICATION OF THE FRAMEWORK	42
FSNI and FSSI category review programmes	42
Analysing individual products	43
Process followed to identify categories	44
Detail on each category analysed	44
SECTION 3: COORDINATED EFFECTS	50
Framework for considering coordinated effects	50
The national market for the retail supply of groceries is not vulnerable to coordination	50
There is no evidence of existing coordination	51
The Parties and Woolworths engage in activities designed to make their conduct less (not more) predictable to competitors	52
Increased focus on promotions that cannot be detected by rivals	53

Monitoring rivals' pricing is not consistent with facilitating coordination	53
There is no evidence that the Parties are able to predict the future prices or promotions of Woolworths.	54
Price coordination alone would be unstable	54
Price coordination would not be feasible across a wide range of complex products	55
Other factors would complicate any attempt at coordinated pricing	56
Coordination on the average retail grocery prices across a subset or basket of products would not be practicable	57
No ability for deviation from a coordinated outcome to be easily identified and swiftly punished	58
The merger would not increase the likelihood, completeness or sustainability of coordination	59
APPENDIX 1 – RESPONSE TO SPECIFIC THIRD-PARTY CONCERNS RAISED	62

EXECUTIVE SUMMARY

1 Foodstuffs North Island (**FSNI**) and Foodstuffs South Island (**FSSI**, together the **Parties**) are pleased to provide additional evidence and information to ensure the Commerce Commission (**Commission**) can be satisfied that their proposed merger (**Proposed Transaction**) would not be likely to result in a substantial lessening of competition in any market, such that it ought to give clearance pursuant to the Commerce Act, section 66(3).

2 In relation to **unilateral effects in acquisition markets**:

2.1 The analysis set out in the SOUI would, if adopted in the clearance determination, materially depart from the Commission's usual approach, in a way that is inconsistent with the legal test and economic reasoning.¹ In summary:

- (a) the SOUI pays no regard to whether the Proposed Transaction would give rise to any *incentive* for the merged entity to lessen competition in any acquisition market, even though an analysis of, and evidence regarding, incentives is fundamental to:
 - (i) the Commission's usual methodology in horizontal, vertical and conglomerate mergers,
 - (ii) an economic assessment of the likely competition effects of the Proposed Transaction, and
 - (iii) the legal question of whether any theoretical competition concern meets the "real chance" statutory standard of likelihood.

Buyer power conduct that would reduce competition in acquisition markets would not be in the merged entity's short-term (as the SOUI acknowledges) or long-term interests. That is because a reduction in competition in acquisition markets would lessen the merged entity's ability to obtain competitively-priced, innovative and high quality products to sell to its customers. Therefore, the evidence as to whether and why the merged entity would engage in that conduct must be considered, and

- (b) the potential "harms" identified in the SOUI:
 - (i) do not amount to harms to *competition*, but rather adverse outcomes that may be experienced by individual suppliers, where their products are not ranged for what can be entirely benign or pro-competitive reasons e.g. they are too expensive for, or not attractive to, customers (compared to alternatives that are ranged). Such outcomes do not meet the legal standard, which protects *competition* (for the long-term benefit of consumers) not individual *competitors*, and/or

¹ The Commission has signalled a possible departure from chapter 4 of its Guidelines (Commerce Commission, *Mergers and Acquisitions Guidelines* (May 2022)), but the SOUI's departure from the Commission's usual methodology is much broader.

- (ii) are not supported by reasoning or evidence as to why they should be considered to have a *real chance* of arising from the Proposed Transaction e.g. they would require the merged entity to be acting against its own interests,
- 2.2 applying the legal standard and economic reasoning to the available evidence, the Parties demonstrate why the Proposed Transaction would not be likely to have an adverse effect on competition in any acquisition market. Specifically:
- (a) the evidence shows the change brought about by the Proposed Transaction would not be expected to give rise to any *ability* for the merged entity to suppress competition in any acquisition market such that a substantial lessening of competition could result. That is because the product cost savings the Parties aspire to achieve (which the SOUI does not contest), and economic analysis of the Proposed Transaction, indicate the merged entity would not have materially increased buyer power compared with the Parties,
 - (b) the evidence also shows the merged entity would not have any *incentive* to suppress competition in any acquisition market. That is:
 - (i) the Parties' demonstrated incentives are primarily to present a competitive retail offering downstream, while generating a commercial return. Those incentives in turn mean the Parties are incentivised to maintain and improve competition in acquisition markets, to ensure they benefit from products that will enhance their ability to compete in retail markets,² including on price, quality, range and service (**PQRS**), and including with respect to new, innovative products, and
 - (ii) the Proposed Transaction is not capable of altering those incentives because it would not result in any aggregation in retail markets. That is, the merged entity's incentives in acquisition markets would be the same as the Parties' incentives in acquisition markets, currently and in the counterfactual. There is no evidential basis for it being realistic to expect the merged entity to seek to lessen competition in any acquisition market.

This is, obviously, a rare situation. The Commission does not typically consider horizontal mergers where the parties are not in competition with each other in supply markets, and the sole change brought about by the Proposed Transaction is upstream in acquisition markets. A more typical, or expected, situation would be for upstream aggregation to be accompanied by a weakening of competitive incentives downstream, which would therefore be a key driver of the overall change in ability and incentives arising from the merger. The fact that no such downstream aggregation will occur in this case enables the Commission to be satisfied there is no likelihood of a substantial lessening of competition.

- 2.3 To ensure the conclusions drawn above would bear out across acquisition markets, the Parties have carried out a competitive effects analysis, including

² with established and new entrant competitors.

with reference to internal documents and other evidence, to particular product categories (allowing for narrowly-defined markets). This work shows the Commission can be satisfied that the Proposed Transaction would not result in a substantial lessening of competition in any acquisition market. In summary, the analysis shows the Proposed Transaction's effect on the Parties' buying power would not be capable of having a material effect on competition. Further, the documents and other evidence clearly show the primary driver of the Parties' acquisition conduct, and therefore the Merged Entity's, is to present a competitive retail offering. The evidence in no cases indicates the Parties, and therefore the Merged Entity, would have an incentive to suppress competition in acquisition markets. In fact, the evidence demonstrates the Parties have incentives to maintain and promote competition in acquisition markets e.g. by seeking, and bringing in, new suppliers in categories where supply is concentrated (including where that entails de-ranging products that have low sales), and introducing innovative new products.

3 In relation to **coordinated effects in a national market for the retail supply of groceries**, the Commission can be satisfied the Proposed Transaction would not be likely to substantially lessen competition because, in summary:

3.1 retail grocery markets are not vulnerable to coordination. In particular:

- (a) consistent with the conclusions in the grocery market study,³ there is no evidence of existing coordination between the Parties and Woolworths,
- (b) given grocery retailing encompasses competition on the entire "retail offer", with many variations in terms of both quality levels and price points, price coordination alone would be unstable,
- (c) the fact that the Parties and Woolworths have multiple retail banners would require any coordinated agreement to adjust for differences in non-price dimensions, which would not be practicable, particularly given there is no mechanism for arriving at a basket of products on which to coordinate,
- (d) maintaining price coordination would not be feasible across a wide and complex range of products,
- (e) similarly, maintaining coordination on the average retail grocery prices across a subset or basket of products would not be practicable, and
- (f) finally, there are a range of other factors that would complicate any attempt at coordinated pricing, including the ability for individual FSNI/FSSI stores to [REDACTED], the interdependencies of pricing between products and the application of promotions, grocery retailers' wider strategic priorities and the Parties' use of [REDACTED], and

3.2 the Proposed Transaction would not increase the likelihood, completeness and sustainability of coordination on the level of national retail prices between the merged entity and Woolworths, because:

³ Commerce Commission, *Market study into the retail grocery sector: Final report*, 8 March 2022 at p 146.

- (a) there would not be a meaningful increase in Woolworths' ability to monitor price at the Parties' stores – Woolworths already has this ability (noting the limits given [REDACTED]),
- (b) FSNI and FSSI already trade under national brands that have clear brand propositions and associated price positions. The Merged Entity would trade under several banners (with different brand propositions and associated price positions), sell thousands of different items across these stores, and vary prices at the local/store level, which makes it very unlikely that the merged entity and Woolworths would be able to come to a collusive agreement (e.g. a set of prices or price differentials) without communicating explicitly – in both the factual and the counterfactual – and then understand what constitutes deviation from that agreement,
- (c) there would be no change in the incentive to price nationally as a result of the Proposed Transaction. FSNI and FSSI are already capable of setting national [REDACTED],
- (d) the Parties' owner-operator model (which means that individual stores may set different prices) would continue as today with the Proposed Transaction. Individual store pricing decisions militate against increased coordination (or indeed, as above, the likelihood of sustainable coordination even without the Proposed Transaction), and
- (e) there would be no change in the downstream retail demand and competitive conditions as a result of the Proposed Transaction. The Parties would face the same incentives to set retail grocery prices nationally following the Proposed Transaction as they do in the counterfactual. As such, with no coordination present currently and in the counterfactual, there is no basis to conclude coordination is more likely in the factual.

SECTION 1: UNILATERAL EFFECTS IN ACQUISITION MARKETS: FRAMEWORK

Summary

- 4 Any merger clearance analysis requires an assessment of the position before and after the merger, to determine what would change, and an assessment of whether the changes would be likely to substantially lessen competition in a market.⁴
- 5 The key change that would arise from the Proposed Transaction is the Parties would buy as a single entity,⁵ rather than separately as they do in many scenarios today. The Proposed Transaction would not alter downstream competition i.e. there would be no change to retail concentration.⁶
- 6 Therefore in its analysis of unilateral effects in acquisition markets, the Commission is focused on testing the competition effects that could potentially arise from the key change described above, in markets for the acquisition of products.
- 7 The conventional method of testing whether a merger would be likely to substantially lessen competition in a market is to 1) establish what would change as a result of the merger, 2) define markets within which effects might be observed, and 3) assess whether the evidence shows there is a real chance the merger-specific changes would give rise to a substantial lessening of competition in any relevant market. The Commission has signalled a deviation from its usual approach. The Parties understand the Commission is proposing a deviation to the type of effect that would be recognised as a substantial lessening of competition, rather than a change to the overall methodology of its merger clearance analysis.⁷
- 8 In the SOUI:
- 8.1 the change associated with the Proposed Transaction has not been clearly articulated. In this submission the Parties set out the differences between the factual and the counterfactual that are potentially meaningful from a competition perspective. The potential change is small,
- 8.2 some steps have been taken to define potentially-affected acquisition markets, but that task has not been completed and as such no potential competitive harm has been linked to markets, in a way that conforms to the legal test. In this submission the Parties progress the market definition work,
- 8.3 the potential effects that could be regarded as a substantial lessening of competition have not been robustly identified, in a way that conforms to the legal test. This, along with a lack of market definition has led, in many cases, to an identification of concerns on the part of individual suppliers rather than potential harm to competition in a market. In this submission the Parties set out the conditions and observations that would suggest a substantial lessening of competition in a market, characterise the observations in the SOUI, and analyse whether competitive concerns could arise from the

⁴ SOUI at [25]. Commerce Act section 66(1) and section 47; Commerce Commission *Mergers and Acquisitions Guidelines* (May 2022), chapter 2.

⁵ The Parties also expect to make overhead savings as a result of some consolidation of head office functions, and to be simpler for suppliers to deal with – see the Parties’ submission on the Statement of Issues (**SOI**) from paragraph 107.

⁶ SOUI at [63]-[64].

⁷⁷ SOUI at [25], [34] and [40].

Proposed Transaction. The change that could arise from the Proposed Transaction would not have the potential to lessen competition in any market, and

- 8.4 the likelihood of a substantial lessening of competition occurring has not been considered (which is required by the legal test). In this submission the Parties provide evidence there is no realistic prospect of conduct that would lead to a substantial lessening of competition in any acquisition market, based on their, and the Merged Entity's, incentives.
- 9 The Parties use the same framework to demonstrate that the Proposed Transaction would not be likely to result in a substantial lessening of competition in any acquisition market by impacting the pace and development of new product innovation.
- 10 Based on the analysis described above, the Commission can be satisfied the Proposed Transaction would not be likely to result in a substantial lessening of competition in any acquisition market.
- 11 It is also worth noting that the implication of the analysis, supported by the evidence, is that the Proposed Transaction would result in consumer benefits at the retail level, relative to the counterfactual. To be clear, the Parties do not argue that harm upstream is offset by pro-competitive effects downstream, but rather that no substantial lessening of competition would be likely to arise in *any* market as a result of the Proposed Transaction. The consumer benefits at the retail level are consistent with a lack of harm at the upstream level.

The change associated with the Proposed Transaction

- 12 In assessing competitive effects, it is necessary to start by assessing the change arising from the Proposed Transaction.
- 13 The SOUI presents the "factual" scenario as being one where the number of distinct retail suppliers of grocery products and so buyers of grocery products would be reduced.⁸
- 14 Specifically, the key change arising from the Proposed Transaction is that procurement would take place for Foodstuffs in both the North Island and South Island out of a single entity,⁹ acknowledging:
- 14.1 store-level and local acquisition of groceries would be unaffected, because there is no change to the way such buying would take place,
- 14.2 the acquisition of private label inputs, and the acquisition of products in certain other markets (e.g. bananas) would be unaffected, because the Parties already jointly acquire them, and
- 14.3 the Proposed Transaction would not aggregate the Parties' position in any retail markets.¹⁰

⁸ SOUI at [62].

⁹ Although still for three banners.

¹⁰ SOUI at [63]-[64]. The absence of a change in downstream concentration means there would be no change in existing incentives associated with the acquisition of grocery products, to the extent those

- 15 The potential change that is expected to arise from the Proposed Transaction in acquisition markets is circumscribed by the fact the Parties already share brands (and therefore brand positioning and initiatives), coordinate certain retail strategy, have shared national marketing campaigns and content and customer surveys and insights,¹¹ (including the same analytical tools).
- 16 As above noted above, the Proposed Transaction would not give rise to any change in downstream concentration. Therefore, the downstream incentives that drive the current alignment in range would not be altered by the Proposed Transaction. Accordingly, a high degree of alignment in range would be expected in both the factual and counterfactual. It is not likely that the Parties, while sharing brands and brand positioning (as well as tools and insights for analysing their retail positioning) in both the factual and counterfactual, could offer completely different retail propositions.
- 17 The SOUI acknowledges the high degree of alignment in ranging, in particular for products that are sold by the largest suppliers. The SOUI identifies markets in which these suppliers participate as being more likely to be materially affected by the Proposed Transaction.¹² But this view is based on an assumption there is a real chance the Parties would diverge from each other in their ranging of these suppliers' products in the counterfactual. In many cases, this is not realistic, because the banners are responding to similar customer "need states",¹³ meaning a degree of consistency across their national retail proposition is inevitable (even ignoring scenarios where range divergence would be difficult or impossible due to high supplier concentration – see Section 2).
- 18 Regardless, in the competitive effects analysis that follows, the Parties have proceeded on the conservative basis that there is the potential for them to have materially separate retail offerings. The Parties conclude that, even on that conservative basis, there is not a real chance a substantial lessening of competition would arise from the Proposed Transaction.¹⁴ That being the case, no substantial lessening of competition could arise based on the smaller change the Proposed Transaction would be likely to give rise to.

Market definition

- 19 The statutory test requires the Commission to be satisfied that an acquisition would not be likely to result in a substantial lessening of competition in a market.¹⁵

incentives arise from the Parties' competitive position at the retail level. See the brief buyer power discussion in [Asda/Safeway/Wm Morrison Supermarkets](#).

¹¹ Clearance application, [40]-[46].

¹² SOUI at [93].

¹³ See 136.1.

¹⁴ If the Parties' conclusion is wrong, the extent of the potential change would need to be assessed before interrogating whether, on that basis, the Proposed Transaction could adversely affect competition.

¹⁵ The SOUI accepts that a bargaining framework is the most accurate way to characterise the interactions between the Parties and most suppliers [118]. The Parties agree. But the bargaining framework focuses on characterising bilateral relationships, rather than identifying outcomes in a market more generally.

The previous HoustonKemp reports, and the Parties' submissions, showed (with reference to the bargaining framework) that only a small change in bargaining power would arise from the Proposed Transaction and there would be no change in downstream incentives, such that it would not be expected any lessening of competition could arise.

- 20 As indicated in the SOUI, the analysis in the context of acquisition markets can appropriately take the conventional form of defining markets, establishing the changes that would be likely to arise from the Proposed Transaction and testing what effect those changes would have on the markets.¹⁶
- 21 However, the steps taken in the SOUI do not conform to the approach described above, and the consequence is significant gaps in the analysis. That is, the SOUI:
- 21.1 begins a market definition process but does not conclude it, then
 - 21.2 identifies possible outcomes of the Proposed Transaction (with reference to potential outcomes for individual market participants, and without reference to markets),
 - 21.3 treats these outcomes as competitive concerns (without considering whether the evidence shows they can properly be characterised as such) and
 - 21.4 concludes the Commission cannot yet be satisfied the Proposed Transaction would not be likely to result in a substantial lessening of competition (without considering whether, either: the evidence shows there is or is not a real chance they would arise from the Proposed Transaction; or, whether any potential change is more than immaterial).
- 22 In Section 2 of the submission, the Parties ground the discussion of potential competitive harms in an analysis of specific acquisition processes. The Parties note that these analyses allow for a narrow product market lens, closely conforming to the product markets suggested in the SOUI.¹⁷
- Framework for assessing competitive effects**
- 23 In assessing competitive effects in all types of merger, both the ability and the incentive of a merged entity to cause a substantial lessening of competition relative to any realistic counterfactual must be analysed.
- 24 This approach is consistent with the legal framework and the Commission’s usual approach, not only to mergers of buyers (as here), but also horizontal mergers of suppliers, vertical mergers and conglomerate mergers.
- 25 In relation to horizontal mergers between competing suppliers, the Commission states,¹⁸ “*a merger that removes a competitor may mean that the merged firm has the incentive and ability to profitability increase prices*” (emphasis added). From a legal perspective, incentives are critical to distinguishing a “real chance” from a mere possibility – see further below from paragraph 66.

However, to the extent the Commission does not accept this work as conclusive, it is necessary to conduct a fuller competitive effects analysis, in the context of markets (rather than focusing on bilateral relationships as the SOUI appears to have done), to provide more detailed evidence that no substantial lessening of competition in any market would be likely to arise from the Proposed Transaction. That is the task the Parties have undertaken – see Section 2 of this submission. The bargaining framework continues to inform how bilateral transactions or relationships occur within that work.

¹⁶ SOUI at [58], [71].

¹⁷ SOUI at [84].

¹⁸ Commerce Commission *Mergers and Acquisitions Guidelines* (May 2022) e.g. 3.62 and footnote 81.

- 26 In a horizontal merger of suppliers, incentives are critical but tend to be a less separate focus. That is because the ability to raise prices above competitive levels without risking a competitive response (e.g. price competition or entry or expansion) is typically consistent with an entity's incentives. That is, if such conduct is achievable for an entity, the entity can be expected, rationally, to engage in it – it does not involve cutting across short-term incentives and losing revenue in the expectation of future gains (which is a scenario where further testing is needed as to whether the conduct would be in the merged entity's overall interests such that there is a real chance it would engage in it).
- 27 The same approach applies for vertical mergers.¹⁹ Prohibiting a vertical merger requires evidence a party would conduct itself contrary to own interests at one functional level of the market (e.g. upstream) with the expectation of gains in the other (e.g. downstream). The ability and incentive to foreclose are separate factors. That is, for vertical mergers, a firm is generally only *able* to foreclose competitors if it has market power at one or more level(s) of the supply chain. But that alone is not enough – a firm will only *rationally* foreclose competitors (i.e. have the *incentive* to foreclose competitors) if the effects arising in the combination of vertically related markets means it is profitable to do so.
- 28 For completeness, in conglomerate mergers the Commission considers both the merged entity's ability and its incentives to engage in foreclosure.²⁰
- 29 For acquisition markets, any form of conduct that reduces competition upstream is not in a merged entity's either short-term (as the SOUI acknowledges) or long-term interests and therefore its incentives are likely to be to avoid that outcome. A reduction in competition in acquisition markets lessens a merged entity's ability to obtain competitively-priced, innovative and high quality products to sell to its customers – simply put, competitive supply is critical to its ability to earn a return from its business. Therefore, the evidence as to whether and why a merged entity would engage in that conduct must be considered. Reasons a merged entity might have such an incentive include e.g. a degree of downstream horizontal aggregation that was so significant it would weaken the incentive to compete downstream and thereby the incentive to ensure competitive markets upstream (as the merged entity would not have such a strong need to maintain competitive markets upstream to maintain its competitive position downstream).²¹
- 30 Another way to put the test is, *could* the relevant outcome that would represent a substantial lessening of competition occur? Secondly, *is it likely* to occur (i.e. is there a real chance it would occur)?
- 31 In the next sections the Parties:
- 31.1 set out the legal and economic considerations relevant to identifying a substantial lessening of competition,
- 31.2 apply those considerations to show that the Commission can be satisfied the Proposed Transaction would not give rise to an ability to effect a substantial lessening of competition,

¹⁹ Commerce Commission *Mergers and Acquisitions Guidelines* (May 2022), 5.7 and 5.8.

²⁰ Commerce Commission *Mergers and Acquisitions Guidelines* (May 2022), 5.12.

²¹ See also HoustonKemp's first report, at 2.3.2.

- 31.3 set out the legal and economic considerations relevant to identifying an incentive to substantially lessen competition, and
- 31.4 apply those considerations to show that the Commission can be satisfied the Proposed Transaction would not give rise to an incentive to effect a substantial lessening of competition.

**Ability to effect a lessening of competition – could relevant conduct occur?
What is the relevant conduct? Or, what would a substantial lessening of competition look like?**

It is necessary to characterise conduct or outcomes

- 32 The SOUI accepts the bargaining framework as an appropriate economic basis for analysing the Proposed Transaction (although, as set out in HoustonKemp’s report, and below, the Commission has not consistently applied that framework). But regardless of the economic framework used to analyse the Proposed Transaction, the focus of the statutory test is harm to *competition*, or the competitive process.²²
- 33 The SOUI agrees that the focus of the statutory test is harm to competition, and the proposition is worth setting out in a fuller way. As noted by the Court of Appeal, the relevant enquiry is as to a substantial lessening of competition. That is not the same as substantially lessening the effectiveness of a particular competitor. Competition in a market is a much broader concept. It is defined in s 3(1) as meaning “workable and effective competition”. That encompasses a market framework which participants may enter and in which they engage in rivalrous behaviour with the expectation of deriving advantage from greater efficiency.²³
- 34 The first question is how to identify harm to competition. In this case, one of the potential outcomes of the Proposed Transaction, which is a focus of the SOUI, is the potential for cost savings by the merged entity (relative to the counterfactual) associated with acquiring products from suppliers. As such, this section illustrates the method of identifying harm to competition by reference to cost savings arising from a merger. Characterisation of other outcomes identified in the SOUI is carried out in subsequent sections of this submission.
- 35 Self-evidently, cost savings that arise from a merger can on the one hand be benign or pro-competitive, or on the other hand can form part of a lessening of competition in one or more acquisition markets.²⁴
- 36 In a Commerce Act context, it is common to have to characterise changes (including price changes) as pro- or anti-competitive, based on analysis, economic reasoning and evidence. For example:
- 36.1 the Commerce Act treats joint buying by competing buyers (as distinct from buy-side cartels) as benign or pro-competitive unless it substantially lessens competition.²⁵ Benign or pro-competitive joint buying allows competing buyers to purchase goods or services collectively on terms that an individual buyer would be unlikely to be able to negotiate on their own. Those improved terms may reflect cost savings on the part of the supplier arising from

²² Commerce Commission *Mergers and Acquisitions Guidelines* (May 2022), 2.18-2.19; *ANZCO Foods Waitara Ltd v AFFCO NZ Ltd* [2006] 3 NZLR 351 (CA) at [242].

²³ *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554 (CA), 564-565.

²⁴ SOUI at [38].

²⁵ Commerce Act, sections 33 and 27.

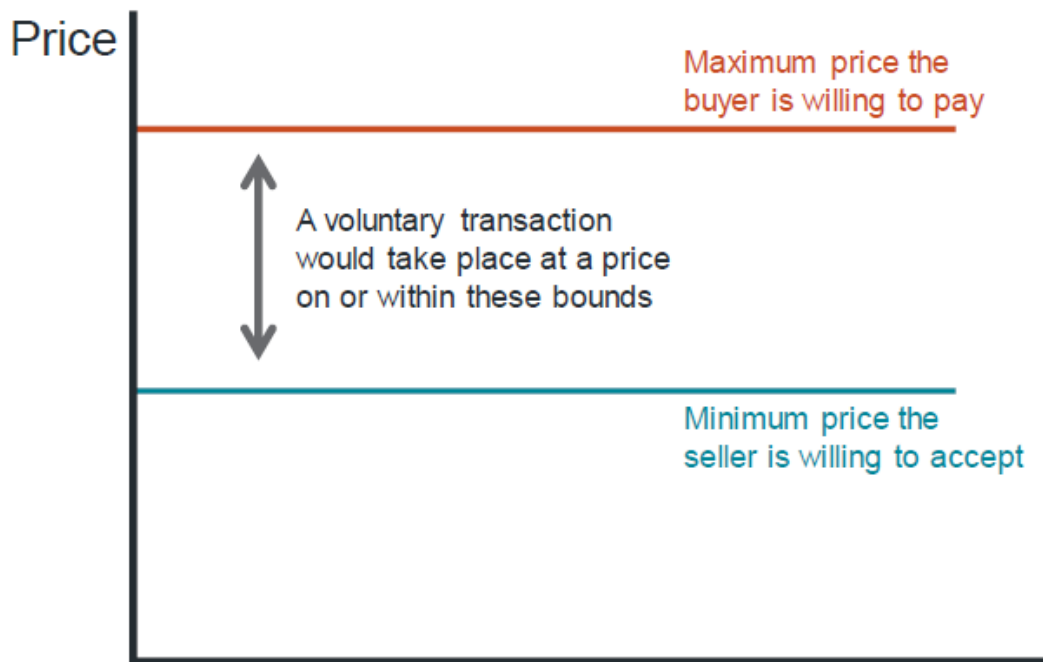
supplying higher volumes, and/or a transfer of surplus from the seller to the buyers – the Commerce Act does not distinguish. The issue that changes pro-competitive joint buying to anti-competitive joint buying is not the presence of cost savings, but an adverse effect on the competitive process i.e. a substantial lessening of competition, and

- 36.2 in a merger context, input cost savings that reduce the marginal cost of supplying an output market are treated positively in many instances. The Commission (rightly) considers that *“if everything else is equal, the lower a firm’s marginal costs – which largely depend on variable cost – the lower the firm’s profit-maximising price. Even a monopoly that experiences a decrease in its marginal costs will have an incentive to lower its price.”*²⁶
- 37 On the other hand, as acknowledged in the limits to the joint buying exception and to buyer power in a merger (or section 36) context, a reduction in competition among buyers can lead to *“artificially suppressed input prices or purchase volume”*,²⁷ which can give rise to a substantial lessening of competition.
- 38 As such, in common with many types of conduct and its effects under the Commerce Act, it is necessary to examine the evidence to distinguish benign or pro-competitive conduct and effects, from those that are anti-competitive.
- 39 Distinguishing between benign and pro-competitive, and anti-competitive effects on acquisition markets is also consistent with the economic reasoning associated with acquisition markets. In particular, under a bargaining framework, prices agreed between the same two parties can vary. There is not a specific pricing outcome that can be expected from any particular interaction, and it cannot be said that one or other of the different pricing outcomes that are likely to be present without the merger is a more (or less) competitive outcome. This point is illustrated by Figure 2.2 in HoustonKemp’s first report, replicated below at Figure 1.

²⁶ Commerce Commission *Mergers and Acquisitions Guidelines* (May 2022), 3.122.

²⁷ 2023 Merger Guidelines of the US Department of Justice and Federal Trade Commission, section 2.10.

Figure 1: bargaining solutions within the bounds of willingness to pay and accept²⁸



- 40 The SOUI expressly agrees the bargaining framework is the appropriate lens through which to analyse the effects of the Proposed Transaction for most products.²⁹
- 41 It follows that the mere fact of different pricing outcomes (with corresponding quality and output unchanged) within an existing range cannot, by itself, be regarded as likely to amount to a change that could reduce competition. As noted in the Houston Kemp report,³⁰ the fact that a transfer of surplus does not amount to a lessening of competition is recognised by international competition bodies, such as the FTC, which explains that neither *competition* nor consumers are harmed “when the increased bargaining power of large buyers allows them to obtain lower input prices without decreasing overall input purchases. This bargaining power is pro-competitive when it allows the buyer to reduce its costs and decrease prices to its customers”.³¹
- 42 So, for legal and economic reasons it cannot be the case that *any* reduction in prices paid by buyers is the result of a substantial lessening of competition. The SOUI seems to recognise this when it notes a transfer of surplus could be anti-competitive where it is a result of “prices being forced below the competitive level.”³² But in other places, the SOUI appears to consider “lower grocery prices paid to some

²⁸ HoustonKemp, *Economic effects of proposed merger of FSNI and FSSI* (7 March 2024) Figure 2.2

²⁹ SOUI at [118] and [123]-[127].

³⁰ At 3.2.1.

³¹ FTC, *In the matter of Caremark Rx, Inc./AdvancePCS*, File no. 031 0239, p 2.

³² SOUI at [42.1]. Note that the reference to a particular “competitive level” below which prices have been suppressed contradicts the finding that a bargaining framework is appropriate because the terms will vary from one supplier-buyer relationship to another i.e. there is no single price that reflects “the competitive level”.

suppliers” sufficient to conclude there is a lessening of competition,³³ which in fact could simply be evidence of competition taking place.

- 43 There must be some way of identifying prices “below competitive levels”, including assessing the potential for lower quality or lower volume of products to result. Again, the Parties note they are not advocating for *offsetting* a competitive harm in one market with pro-competitive consequences in another³⁴ (the Parties have not suggested at any time that this is required³⁵), nor that it necessary to identify or quantify the extent of any harm to consumers.³⁶ Rather, it is simply a matter of identifying and *characterising* any potential competitive effects of the Proposed Transaction, which is standard for competition analysis.

How the conduct and outcomes can be characterised in this case

- 44 To characterise potential savings in acquisition markets,³⁷ the Commission’s usual approach would be to look at what it describes as “*the mirror image of market power on the selling side*” (noting that “*on the selling side [the Commission is] concerned with price changes that result in decreases in output*”. “*This entails price increases that cause buyers to buy less of the product*). *In particular, it is the ability to profitably depress prices paid to suppliers to a level below the competitive price for a significant period of time such that the amount of input sold is reduced.*”³⁸
- 45 The Commission’s usual approach is consistent with both the legal test and economic reasoning:
- 45.1 from a legal perspective cost savings need to give rise to a “*substantial lessening of competition in a market*” (section 47, section 66). A reduction in output would provide evidence of such a lessening, whereas mere lower prices (“*lower grocery prices paid to some suppliers*”), with no consequential impact on competition in a market, with at least the theoretical potential to impact consumers in the long term,³⁹ could not meet the legal standard, and
- 45.2 from an economics perspective, “*a necessary criterion for buyer power to be ‘damaging’ to the economy [or, competition] is that the amount of input being procured and then on-sold is reduced. Unless the amount of input sold is reduced, the economic presumption is that any change in the circumstances applying in buyers markets arising from a merger amounts only to a transfer between the supplier and the buyer*”.⁴⁰
- 46 The SOUI reiterates the Commission may need to depart from chapter 4 of its guidelines.⁴¹ If the Commission does depart from chapter 4, it of course still needs

³³ SOUI at [147].

³⁴ SOUI at [54]-[57].

³⁵ Refer to the Parties’ submissions on the Statement of Preliminary Issues and the Statement of Issues.

³⁶ SOUI at [47].

³⁷ The Parties agree that the Commerce Act protects acquisition markets as well as supply markets [37.1].

³⁸ Commerce Commission *Mergers and Acquisitions Guidelines* (May 2022), 4.2 and footnote 107.

³⁹ Commerce Act 1986, section 1A, “*The purpose of this Act is to promote competition in markets for the long-term benefit of consumers within New Zealand.*”

⁴⁰ HoustonKemp, *Economic effects of proposed merger of FSNI and FSSI* (7 March 2024), [9].

⁴¹ SOUI at [34.1]. See also the Statement of Issues at [34].

to apply the correct legal standard in characterising what can amount to a substantial lessening of competition. As illustrated above, chapter 4 has the potential to meet that standard, and is also consistent with economic reasoning. We further note, based on the reasoning in this submission, that the SOUI represents a much more significant far-reaching departure from the Guidelines, legal test and economic reasoning than merely a departure from chapter 4.

The focus of the test is a substantial lessening of competition in a market, not an adverse effect on individual market participants

- 47 As above, the SOUI acknowledges the focus of the test is competition, not individual competitors, which is consistent with the statutory test. But much of the attention and evidence set out in the SOUI focuses on the potential for harm to individual suppliers, and competitors, rather than harm to the competitive process. Indeed, in places the SOUI seems to suggest that some individual suppliers do not want to compete hard to sell their products. This leads to the SOUI mistaking evidence of competition occurring, for competitive harm.
- 48 For example, de-listing of a product (i.e. the merged entity deciding to no longer range the product) appears to be cited as a potential harm.⁴² There is theoretical potential for de-listing to operate in a way that reduces competition in acquisition markets. On the other hand, de-listings may be pro-competitive, or at least occur in a way that represents competition occurring, rather than diminishing competition. If de-listings are a way to push suppliers out of the market, leaving inadequate competition such that, over the longer term, grocery retailers have access to lower quality and volume of products, then that could be evidence of a substantial lessening of competition. If de-listings occur following a competitive process to supply a particular product to a grocery retailer, where an incumbent product is replaced by a new product that is more innovative (i.e. to “make way” for quality innovation, or new product development (**NPD**)⁴³), cheaper (including lower-cost to manage) or otherwise more attractive or relevant to retail customers, then the de-listing, and its associated ranging of alternative grocery products, is pro-competitive.
- 49 In fact, an absence of category reviews and the associated de-listings and new listings could be evidence of uncompetitive supplier markets or a lack of incentive on the part of grocery retailers to respond to evolving customer demand and compete dynamically with new, more innovative and/or better-priced products. For example, if the Parties did not seek to refresh their product offerings, it could suggest they were not competing in retail markets. It could also stifle competition and innovation over time, if suppliers observed a lack of opportunity for their products to be listed, and a lack of appetite for new, innovative products.
- 50 As such, evidence about the reasons for de-listings, rather than the fact of them, is critical to characterising an observation of markets in competition terms. The SOUI suggests the evidence before the Commission is that de-listings are currently benign or pro-competitive. That is, the SOUI indicates that “*products may be delisted to make way for new or more profitable products*”.⁴⁴ As such, the SOUI acknowledges that products may be delisted to foster innovation, or to replace them with products that are more highly demanded by customers (as is clear from the analysis of

⁴² SOUI at [130], [187], [188], [207.4], Table 4.

⁴³ SOUI at [125].

⁴⁴ SOUI at [125].

specific markets set out in Appendices 2 to 20, the profitability of products is (unsurprisingly) linked to customer demand for them).

- 51 Despite acknowledging that the statutory test is focused on competition, not individual competitors, in a number of places the SOUI makes statements and cites evidence that it suggests demonstrate harm, or adverse outcomes, to individual suppliers, which by themselves do not indicate a lessening of competition. For example, it notes that:

51.1 *"a single negotiation with the merged entity would raise the stakes and the cost of disagreement for suppliers, compared with separate negotiations" because "disagreement with the merged entity could mean a supplier would lose the margins associated with all sales to the Parties" [the factual], whereas "disagreement with either FSNI or FSSI separately, could mean a supplier would lose the margins associated with sales to one of the Parties" [the counterfactual].⁴⁵ This reasoning analyses competitive harm by reference to "a supplier", focusing on a supplier that is an incumbent, or in other words currently supplies one or both co-operatives. As a result, the SOUI overlooks the upside, or increased opportunity, available to the supplier/s that would replace that supplier (e.g. an innovative new entrant supplier). For the alternative supplier/s, the prospect of a combined negotiation means increased opportunity (not increased risk), in terms of greater potential for increased sales (and margin), which may not arise to the same extent under the counterfactual. This, again, is why it is essential to look at effects on competition, not effects on individual suppliers,*

51.2 *suppliers who currently supply FSSI or FSNI but not both, may be forced from the market if the merged entity elects not to stock their products.⁴⁶ This concern focuses on the theoretical effect on individual suppliers that lose a competitive opportunity to supply nationally, or regionally. It ignores that such supply would be replaced with an equivalent opportunity. Therefore it does not home in on any impact of the Proposed Transaction on competition, it merely describes a theoretical scenario where a product is currently supplied by different suppliers in each island and following the Proposed Transaction is supplied by the same supplier in both islands. If two island-wide products are replaced by a single product supplied nationally that is more competitive, then it is unlikely to represent a lessening of competition. Rather, it would be the upshot of a competitive process. Furthermore:*

- (a) *this outcome could also occur in the counterfactual, where the Parties previously ranged two separate suppliers' products and then switched to ranging the same supplier's product across both islands, and*
- (b) *to the extent the merged entity would be driven by downstream incentives that are unchanged compared with the counterfactual (see the next section), if the product that presents the most competitive downstream outcome in one island (e.g. is particularly in-demand by consumers in one island, or there is only supplier capacity for one island) then it can be expected to be ranged. This is consistent with*

⁴⁵ SOUI at [169].

⁴⁶ SOUI at [69.5].

the Parties' stated intention that the merged entity would not be unwilling to supply at a smaller-than-national level,

- 51.3 *the risk to grocery suppliers of losing product nationally and the outcome of ranging decisions would be greater with the Proposed Merger.*⁴⁷ This raises the same point as 51.2, and
- 51.4 *could enable the merged entity to negotiate lower grocery prices paid to some suppliers.*⁴⁸ As described, this concern is merely that there would be a slightly less favourable margin earned by specific suppliers. It does not indicate that those specific suppliers operate in markets where *any* change to the distribution of surplus between the supplier/s and their buyers would damage the competitive process with respect to the supply of the product (and its substitutes). As such, as presented, the concern suggests a less favourable outcome for individual suppliers and suggests nothing about harm to competition in a market. See Appendices 2 to 20 for more information about the impact on particular acquisition markets that can be expected to arise from the Proposed Transaction.
- 52 The SOUI contains information obtained from interviews with suppliers, some of which refers to "margin" as a reason for being de-listed (or otherwise being adversely affected by a ranging decision). The SOUI implicitly suggests that such scenarios are evidence of the Parties having the ability and/or incentive to suppress competition when they make their ranging decisions (albeit the SOUI does not explain how such a concern would bear out). But "margin" is not the starting point for category review processes. The starting point is customer "need states" (which is, essentially, customer demand – see paragraph 136.1 for more detail). Customer need states are weighed with other customer insights, as well as commercial factors, category dynamics and category health – see Section 2 for more detail.
- 53 Secondly, "margin", compared with other bases for de-listings, is not a relevant distinction for competition purposes, or substitute for carrying out a competitive effects analysis.
- 54 As shown in the category review materials provided in Appendices 2 to 20, and as described by the Parties, a concept of "trading margin" does form part of negotiations between each of the Parties and suppliers. This may be a concept that suppliers are identifying in their interviews with the Commission.
- 55 Trading margin refers to the difference between the cost price received from suppliers (less any scale terms, distribution terms and trade spend) and the retail price charged (or believed possible and appropriate to be charged) to consumers.
- 56 Accordingly, a discussion about trading margin effectively encompasses the key commercial terms of any deal, from FSNI or FSSI's perspective. It does not, in and of itself, indicate anything about the purpose or effect of the deal in competition terms.
- 57 For example, a decision to de-list a product in favour of another (or reduce its shelf space etc) on the basis of trading margin will typically mean an alternative product (or alternative ranging mix) was being offered on commercial terms that allowed for

⁴⁷ SOUI at [145.2].

⁴⁸ SOUI at [147].

a lower retail price (or a PQRS mix that was considered to be more attractive to retail customers). In other words, there is a benign or pro-competitive basis for decision. This decision reflects consumer preferences.

- 58 Further, the term trading margin refers only to the cost and retail price differential applicable for the Parties (which any party to a commercial arrangement would be expected to take account of) and does not provide any insight into the separate cost and wholesale price differential being earned by the supplier and/or the effect on competition between suppliers. In other words, a supplier might be making the most competitive offering to the retailer of any of its competitors, while still earning a very high margin itself (or, the opposite) e.g. where it has a low cost base, or its product is a “must-have” such that the Parties need to agree to terms that result in them earning a comparatively low margin in order to secure the product. The margin the retailer earns will be a function of the popularity of the product with consumers, the retailer’s own costs and the sum of terms it has been able to strike with the supplier in the particular negotiation.
- 59 Any impact of the relative strength of the negotiating parties *on competition in an acquisition market* needs to focus on the actual ability and incentive of the retailer to lessen competition, and the impact the Proposed Transaction would have on that ability and incentive. The identification of “margin” as a reason for ranging decisions merely acknowledges commercial and price factors form part of the decision but does not provide any material insight from a competition perspective.⁴⁹

The evidence shows the merged entity would not have the ability to cause a substantial lessening of competition in acquisition markets

- 60 Applying the Commission’s conventional approach to merger clearance analysis, the change associated with acquisition markets that would result from the Proposed Transaction is very limited.
- 61 First, the buying benefits the Parties expect to gain are, in terms of any potential impact on competition in individual acquisition markets, not material. The SOUI does not dispute [REDACTED]. Further, the SOUI’s description of the buying benefits appears [REDACTED] i.e. the SOUI suggests the merged entity may be able to extract lower prices from suppliers, which it articulates further as “cherry pick” the most favourable terms, which the Parties understand to mean achieve the better of two sets of terms the co-operatives currently achieve.⁵⁰
- 62 Pursuant to the business case, the cumulative saving the Parties expect to make over 6 financial years is \$[REDACTED], a maximum of less than [REDACTED] in a single year, which is [REDACTED]% of the merged entity’s projected total spend on products, and [REDACTED]% of the projected total value of retail sales. More detail is set out at Figure 2, below. Regardless of whether the savings could be characterised as pro- or anti-competitive, the change is likely to be so small as to be

⁴⁹ As set out in Appendices 2 to 20, and discussed in further detail in Section 2, the Parties have carried out the exercise of examining the impact of the Proposed Transaction on acquisition markets in categories that have been identified as being of most concern to the Commission. In short, the merged entity’s ability to exercise buyer power would not be materially altered relative to the counterfactual. The merged entity’s incentives would be unchanged by the Proposed Transaction, and would remain primarily focused on the downstream competitive position – therefore, as implied by the economic reasoning and demonstrated in the documents, the merged entity can be expected to be incentivised to maintain the strongest possible degree of competition between suppliers in acquisition markets.

⁵⁰ SOUI at [122.1], [153].

immaterial to competition in any market, and certainly incapable of giving rise to a lessening of competition that is real, or of substance.⁵¹

Figure 2: expected buying benefits associated with the Proposed Transaction

MERGED FSNI/FSSI (\$m) [REDACTED]	FY26	FY27	FY28	FY29	FY30	FY31
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

- 63 Secondly, the nature of the expected change [REDACTED] suggests it is likely to be within the range of prices that could be expected within the bargaining framework (illustrated at Figure 1 above). That is consistent with the expectation set out in HoustonKemp’s first report, which notes an expectation that the merged entity’s bargaining position would improve “slightly”, relative to national suppliers,⁵² and would be unchanged for regional suppliers.⁵³ It noted in that context that it expected the merged entity would seek to bargain for the better of the terms that each of the Parties currently receives. HoustonKemp notes in its report accompanying this submission, that even the largest possible effect of the proposed merger could not reasonably be described as “substantial”.⁵⁴
- 64 As a result, the size and nature of the cost savings the Parties hope to gain as a result of the Proposed Transaction suggest no substantial lessening of competition could arise.
- 65 Most relevantly, the analysis set out in Appendices 2 to 20 applies the Commission’s conventional merger clearance methodology to show that, in markets in product categories the Commission has indicated it is most concerned about, a substantial lessening of competition could not be caused by the Proposed Transaction.

Incentive to effect a lessening of competition – would relevant conduct be likely to occur?

Framework – the Parties’ likely conduct and incentives distinguish a real chance from a possibility

- 66 The statutory test requires the Commission to be satisfied there is not a “real chance” of a substantial lessening of competition in a market. The effect does not

⁵¹ *Woolworths & Ors v Commerce Commission* (HC) at [127].

⁵² HoustonKemp first report, 59; 66.

⁵³ HoustonKemp first report, 69.

⁵⁴ HoustonKemp report, 3.2.1.

need to be more likely than not to occur. However, it must be more than a possibility.⁵⁵

67 A mere possibility might include conduct that is technically possible, but which is not likely to occur e.g. because the conduct would run directly counter to a party's incentives as driven by its structure or the dynamics of markets in which it operates. If conduct would be possible if parties acted irrationally, or contrary to their incentives, then it would be very difficult to reach the threshold of a real chance (absent compelling evidence that parties would behave that way). For example:

67.1 in its determination in horizontal merger of suppliers Z/Chevron, the Commission considered the likelihood of a substantial lessening of competition arising from coordinated effects. The evidence showed Chevron was "*not a party that is preventing or limiting coordinated outcomes. Chevron has been a passive competitor. Therefore, we do not consider that the removal of Chevron from the market would make a material difference to outcomes*". The Commission went on to acknowledge, "*we accept the possibility that absent acquisition by Z, Chevron may be acquired by a third party that would take a materially more aggressive competitive approach than Chevron has to date. While that is a possibility, there is no evidence before us to suggest that it is likely that a new owner would operate the business differently.*"⁵⁶ Put another way, unless the existing owner were acting irrationally, or in a way that was not in its commercial interests or the incentives driven by its structure, there could be no reason to conclude there was a real chance of a completely different approach being adopted by a new owner, and

67.2 in its determination in horizontal merger of suppliers Vero/Tower, the Commission took the view that the intensity of the competition Tower presented would be enhanced under third party ownership. This view was not based on the theoretical potential for Tower to behave differently in the counterfactual than it did under the pre-merger status quo. Rather, it was based on specific evidence about Tower's steps to improve its performance, and evidence that identified interested buyers of Tower were large, well-resourced global businesses, with a signalled intention to grow the Tower business and position it to effectively compete, consistent with the actions that Tower was already seeking to take in the market.⁵⁷

68 The commentary above is uncontroversial within the Commission's framework. It is applied in the following sections.

The SOUI does not canvas the merged entity's incentives, or "likely" conduct post-merger, and instead treats theoretical possibilities as sufficient

69 In this case the key concern set out in the SOUI is that, in facilitating the merged entity buying as one, in more instances than the Parties carry out joint procurement today, the Parties' conduct would be likely to cause a substantial lessening of competition to acquire products.

70 In describing that concern, the SOUI does not canvas evidence associated with the Parties' incentives or likely conduct. Yet, it would be the merged entity's buying

⁵⁵ *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102, 128 (HC) at [111].

⁵⁶ And [240].

⁵⁷ [99]-[111].

conduct that would cause any substantial lessening of competition in one or more markets, so its incentives, and projections about its likely conduct, are key to assessing the statutory question. And, as above, a consideration of relevant parties' incentives is part of any merger clearance analysis, particularly where (as here) conduct of concern would appear not to be in those parties' interests. Incentives are critical to meeting the "real chance" standard.

71 The SOUI comes close to acknowledging this point, where it notes that substituting products for other products is "*constrained by the need of major grocery retailers to procure a sufficiently comprehensive range of groceries in order to compete in downstream retail grocery markets*".⁵⁸

72 However, the SOUI does not go on to canvas what drives the Parties' conduct, and whether the Proposed Transaction would give rise to a change in their conduct that would result in the relevant concerns.⁵⁹ The Commission barely mentions the drivers of the Parties' conduct, or the merged entity's anticipated conduct. The exceptions are:

72.1 at [125]: *the major grocery retailers assess supplier performance regularly as part of category review processes. In a category review, a major grocery retailer will consider the mix of products it stocks in a product category. Changes may be made to shelf-space allocation based on the performance of existing products. Some products may be delisted to make way for new or more profitable products.* While the SOUI does not set out what is meant by "performance",⁶⁰ this passage suggests the grocery retailers are concerned to ensure products they offer sell well i.e. their primary driver in buying products is to compete as effectively as possible downstream. The paragraph notes that de-listings occur "to make way for new or more profitable products" which suggests de-listings are likely to be pro-competitive. An incentive to compete effectively downstream suggests the Parties would not wish to see a substantial lessening of competition in supplier markets – the opposite,

72.2 at [130]: *while we acknowledge that the merged entity would like competitive supply, because more supply options reduce the bargaining power of suppliers, we note that in the event of disagreement with a supplier, the merged entity would have far more options to turn to than the supplier.* This extract agrees with the Parties that the merged entity's incentive would be to have competitive supply. It goes on to note this incentive would be offset by the merged entity having the ability to turn to an alternative supplier.⁶¹ This is erroneous reasoning. If a grocery retailer has alternatives available, that fact says nothing, in and of itself, about its incentives to support or suppress competition. It only speaks to the retailer's ability to replace a product with another product. Secondly, the passage indicates that by choosing one supplier over another the merged entity would be lessening competition. In fact, choosing among alternatives for ranging purposes is simply a description of competition in relevant markets, and

⁵⁸ SOUI at [86].

⁵⁹ See evidence in the Parties' submission on the SOI paragraphs 9-15, 95-96

⁶⁰ The meaning of "product performance" in a category review is set out at 140.1.

⁶¹ From a factual perspective, the analysis in Section 2 also shows that in many cases the Parties are limited in their ability to switch suppliers.

72.3 at [308]: *we accept that it would theoretically not be in the merged entity's interests for suppliers to be squeezed so far that they exit. However, we are not satisfied that this could not happen in practice given the short-term gains that the merged entity may achieve from squeezing suppliers, or that squeezing may inadvertently go too far.* Here, the SOUI again accepts the Parties' incentives will be to sustain competition in acquisition markets. It notes there is a theoretical possibility of different conduct if the merged entity acted irrationally or mistakenly. Without evidence, this theoretical but economically irrational possibility would clearly not amount to a real chance. It is also worth noting this paragraph appears inconsistent with the SOUI's consideration of a risk of increases to consumer prices over the long term.⁶²

73 The SOUI jumps from a perceived theoretical ability to suppress competition in acquisition markets (which in any event the evidence shows would not be present) to carrying out such conduct, while at the same time acknowledging the conduct would be against the merged entity's interests. The only justification the SOUI suggests to support the likelihood of the conduct is the Parties would engage in conduct that is not rational in order to secure competitive harm. The SOUI does this without evidence, or reference to economic reasoning. Without such evidence or reasoning, it cannot be correct to conclude there is a real chance parties would act irrationally or mistakenly, such that a substantial lessening of competition in a market is likely.

74 Given this gap in the SOUI, in the next sections the Parties explain what the evidence shows as to the merged entity's incentives when it acquires products.

The Parties' current retail conduct and incentives are evidence of the merged entity's likely conduct in acquisition markets

75 The Parties and the Commission agree the Proposed Transaction would not alter competition in retail markets.⁶³ As a result, there is no basis to conclude that incentives or conduct in retail markets would alter as a result of the Proposed Transaction. In other words, the Parties' current downstream incentives would be unchanged by the Proposed Transaction.

76 Currently, maintaining competitiveness in retail markets is a primary driver of acquisition conduct for the Parties. That is, when making choices about which groceries to acquire, the Parties are primarily focused on how those choices will make them more competitive in retail markets (which is how they make a return). As the SOUI acknowledges,⁶⁴ and the evidence demonstrates, that being the case the Parties' incentives are to maintain competition in supplier markets.

77 The merged entity's incentives would be the same as the Parties' current incentives. This is, obviously, a very rare situation. The Commission does not typically consider mergers where the parties that are not in competition with each other downstream and the sole change brought about by the Proposed Transaction is upstream in acquisition markets. A more typical, or expected, situation would be for upstream aggregation to be accompanied by a weakening of competitive incentives downstream, which would therefore be a key driver of the overall change in ability and incentives arising from the merger.

⁶² See for example SOUI at [277.2].

⁶³ SOUI at [63]- [64].

⁶⁴ SOUI at [130].

- 78 The Parties have presented with this submission extensive evidence of the drivers of their acquisition conduct – see Section 2. This evidence shows that the Parties’ acquisition conduct is driven by competing in retail markets. The starting point for the category review processes and the Parties’ engagement with suppliers more generally is to promote each Party’s competitiveness at the retail level i.e. by reference to meeting customer “need states”. Furthermore, the category review materials show:⁶⁵
- 78.1 the key driver for category review decisions is selecting products anticipated to result in the best overall consumer offering. As above, to use the language of category reviews, the starting point is “need states”,
- 78.2 where a product is de-listed, the purpose is to substitute another, more preferred product (which is expected to be more competitive based on PQRS factors), a larger amount of a very popular product at a lower price, or in some other way to improve the relevant Party’s retail offering, rather than to reduce overall supply of groceries, or to reduce competition in any acquisition market. As expressed in the HoustonKemp report, in that context supplier exit can be presumed to represent the process of competition between suppliers to be the most efficient and to offer the best product for ultimately meeting consumer demand,⁶⁶
- 78.3 the Parties demonstrate their incentives for acquisition markets to be competitive e.g. attempts to foster newer suppliers e.g. [REDACTED],
- 78.4 the Parties are receptive to new product development when this will be met by consumer demand for such innovation (see further below from paragraph 112, and [REDACTED]).
- 79 Category reviews are effectively a form of competitive tender process, and there is nothing in the Parties’ materials that suggests their conduct does anything but the opposite of reducing competition in acquisition markets. Given the structure of the downstream markets would not change as a result of the Proposed Transaction, this same acquisition conduct can be expected from the merged entity.
- 80 There is no evidence that would suggest the Parties seek, or have an incentive to seek, a reduction in competition among suppliers. Clearly, where the Parties’ conduct is driven by selling products that are attractive to customers, their incentive is to have competitive supplier markets, not the opposite. The suggestion in the SOUI that the Parties would be likely to engage in conduct that is not rational in order to secure competitive harm cannot be supported by the evidence.
- 81 Further, even assuming competition in grocery retail markets is weak (which the Parties do not agree is the case), the fact is that the Parties do face competition. If they do not compete downstream on price and non-price terms they will lose sales to Woolworths, The Warehouse, Costco and several others. This provides further support for the merged entity’s incentive to ensure competitive supply – its ability to obtain competitively-priced, and new and innovative, grocery products for retail sale, and maintain and improve its competitive positioning, depends on it.

⁶⁵ See also the HoustonKemp report 3.4.

⁶⁶ See the HoustonKemp report at 3.4., including the examples of de-listings, as well as Section 2.

- 82 Because there would be no change in downstream competition as a result of the Proposed Transaction, like the Parties' the merged entity's incentives and conduct would focus on seeking to ensure acquisition markets remain competitive. The Parties do not agree that it would be possible for the merged entity to extract short-term gains by "squeezing" suppliers' terms below competitive levels, or to inadvertently do so (e.g. the Parties consider [REDACTED]). But, even if it were possible, such conduct would be a mere "possibility" and far from the threshold required for a "real chance". As is evident from Section 2, the Parties are sophisticated acquirers of grocery products, and while mis-judgements are always theoretically possible in individual instances, there is not a real chance they would systematically play into the merged entity's conduct in a way that could give rise to a real chance it would seek to (or would successfully) reduce competition in acquisition markets.
- 83 The evidence described above is also consistent with an economics-based approach to the question of the likely competitive effects of the Proposed Transaction on acquisition markets. As HoustonKemp notes,⁶⁷ the economic effect of a change in buyer power in an acquisition market must take into account the associated effect in the corresponding downstream market. That is, the oligopsony problem of suppressed volumes and prices cannot be sustained if competitive conditions in the retail market imply that some portion of the input cost reduction will be passed through to retail consumers, thereby mitigating:
- 83.1 the volume reduction caused by the acquisition market price suppression – if retail prices also fall, the acquisition market quantity effect will be mitigated/eliminated, and
 - 83.2 the incentive to drive acquisition market prices and output below the competitive level, because to do so involves sacrificing profitable sales in the retail market (without an expectation of future offsetting gain).
- 84 As a result of the above, the aggregation of the two buyers in question would not result in any negative impact on competition (if anything, it would improve competition).⁶⁸ Another way to express this outcome is that, despite the reduction in the *number* of buyers, there is no change to the *opportunity* for suppliers – it is of the same magnitude (or greater) – only a change by which that opportunity is accessed. As explained by HoustonKemp,⁶⁹ despite the merged entity consolidating two, formerly separate, buyers in some grocery acquisition markets, it would purchase the same or a greater quantity than FSNI and FSSI (in combination) pre-merger. The reduction in the number of "opportunities to pitch" does not have the potential to reduce competition where it represents no reduction in the size of suppliers' opportunity (including, further, no change in the ability or incentive to buy regionally and locally).⁷⁰
- 85 The above analysis is similar to that which would apply in any horizontal merger of suppliers. In other words, a reduced number of buyers, or suppliers, may be relevant to an assessment of competition but does not itself represent a harm to

⁶⁷ Section 3.3.

⁶⁸ See [69.1], [148], [170], [187], [197], [325].

⁶⁹ Section 3.2.4.

⁷⁰ And improvement in the efficiency to access that opportunity. The discussion in the SOUI regarding direct competition between the Parties is addressed in the table at Appendix 1.

competition.⁷¹ The latter is assessed by reference to the evidence associated with the effect of the reduction in the number of buyers or suppliers.

86 In accepting the reasoning and evidence above, the Commission does not need to re-consider:

86.1 its conclusion in the market study (that competition in retail grocery markets is “*not working well*”), in this process (“*weak*”⁷²), or elsewhere. The Parties disagree with that conclusion, but it is not necessary to disrupt it for present purposes. The Commission need only accept that legal and economic reasoning, and comprehensive factual evidence, show that it can be satisfied there is not a real chance the Proposed Transaction can give rise to a substantial lessening of competition. In doing so, the Commission need only accept the Parties’ acquisition conduct and incentives are as shown in the documents and other evidence, and that that would not be altered by the Proposed Transaction, not that the conduct and incentives represent an ideal, or even satisfactory, level of downstream competition, or

86.2 the value of its work to create a level playing field for all suppliers and monitor and enforce the Grocery Supply Code. This clearance process does not require the Commission to arbitrate or take the side of the Parties in any commercial disagreements with suppliers. Again, the Commission need only accept the Parties’ acquisition conduct and incentives are as shown in the documents and other evidence, and that they would not be altered by the Proposed Transaction, not that the conduct and incentives exhibit an ideal relationship between suppliers and the Parties.

Conclusion on unilateral effects in acquisition markets

87 This analysis has consequences for whether and how the “harms” identified in the SOUI can be characterised as evidence of a lessening of competition.⁷³ That is:

87.1 *a transfer of surplus from grocery suppliers to the merged entity as a result of prices being forced below the competitive level* – as above, a transfer of surplus, both in legal terms and economic terms, cannot by itself be evidence of a lessening of competition. Evidence of the *outcome* of any change in pricing for the competitive process is required in order to characterise that change as pro-competitive or benign, or anti-competitive e.g. reduced output. The SOUI uses the terminology of “*being forced below the competitive level*” but does not proceed to analyse whether potential cost savings can properly be characterised in this way. As HoustonKemp notes, a transfer of surplus from suppliers to the merged entity is not itself harmful to competition i.e. a change in surplus does not inform the potential for rivalry, output or quality effects in relevant markets (indeed the view in the SOUI presupposes that the market is currently sharing surplus in the “correct” proportions).⁷⁴ Whether or not it occurs in accordance with chapter 4 of the Guidelines, the evidence must be analysed as to whether a relevant effect could arise. In this case, as

⁷¹ See also the HoustonKemp report at 3.2.

⁷² SOUI at [270].

⁷³ The SOUI seems to recognise this point at [57.2], noting “a complete analysis of the effect of the proposed merger on the long-term interests of retail consumers would need to take account of the effects on choice and quality of groceries resulting from the impact on suppliers in relevant acquisition markets” (although, as above, in other parts of the SOUI that downstream impacts are presented as irrelevant).

⁷⁴ 3.2.1.

set out above and in Section 2, the evidence shows that any reductions in the prices paid by the merged entity in particular markets (would be small and) would not affect competitive conditions, and the merged entity would have no incentive to suppress competition even if it could,

- 87.2 *a reduction in choice or quality of groceries* – the Parties agree that this outcome could be the consequence of a loss of competition, as a loss of competition would reduce output. However, characterisation still needs to occur in full, based on the evidence. A reduction in choice or quality of groceries cannot be assessed as evidencing a reduction in competition in isolation from price. For example, a reduction in “choice” might be pro-competitive where consumers consider lower prices more attractive than multiple brands of products they perceive to be substitutable. Accordingly, the evidence must be interrogated to assess the competitive significance of a reduction in choice or quality – the SOUI does not carry out this task. As demonstrated above and in Section 2, the evidence indicates that the merged entity would have no ability to reduce choice or quality, and any change in the number or type of products ranged in the merged entity’s retail stores would occur for reasons that are benign from a competition perspective e.g. changes in customer preferences (based on the Parties’ incentives as demonstrated by their conduct). As noted by HoustonKemp and demonstrated by the evidence, the imperative to meet customer preferences at the retail level is the driver of range and/or quality sought in acquisition markets. That being the case, there cannot be a real chance the merged entity would seek to suppress competition in any acquisition market, or would successfully do so,
- 87.3 *exit by suppliers from any acquisition market* – this outcome could form part of a loss of competition in acquisition markets, but not necessarily so. Suppliers’ exit can occur for reasons other than a loss of competition (e.g. its products are no longer popular with customers and buyers therefore do not want them). As such, it is important to examine the evidence as to the reasons for supplier exit to determine whether they are evidence of a loss of competition or have occurred for another reason. The SOUI does not do this, but instead identifies concern that suppliers might exit and jumps to this indicating a potential lessening of competition. An unchanged incentive to ensure the PQRS dimensions of the retail grocery offering best meet customer need states implies that exit by one supplier will correspond with entry by a different (either new or expanded) supplier that will improve the merged entity's PQRS offering.⁷⁵ This reasoning is borne out in Section 2, where the evidence from the co-operatives’ actual conduct indicates that supplier exit would only occur for reasons that are benign from a competition perspective e.g. lack of customer demand for a supplier’s product,
- 87.4 *a reduction in the number of channels for suppliers, or a reduction in the number of opportunities suppliers have to pitch new ideas or products* – a reduction in the number of channels or opportunities cannot be *evidence* of a lessening of competition. Rather, it is a change in the market that could *give rise to* a lessening of competition, *depending on the evidence*.⁷⁶ The evidence

⁷⁵ HoustonKemp at 3.2.3.

⁷⁶ The distinction between a reduction in the number of market participants and the implications of that reduction for competition, is encapsulated in the Commission’s press release on its determination in *Connexa/2degrees*, where it stated:

With the acquisition, there will only be two large national suppliers of passive infrastructure services to mobile network operators (MNOs): Connexa – serving Spark and 2degrees – and

is that, although the merged entity would consolidate two, formerly separate buyers in some grocery acquisition markets, the merged entity would purchase the same (or a greater) quantity than FSNI and FSSI (in combination) pre-merger, and would do so driven by the same incentives in the same retail markets. Put another way, the Parties are channels to different markets. There would be no reduction in the number of channels or opportunities as a result of the Proposed Transaction – the same channels and opportunities would be available as before the Proposed Transaction. This is supported by the evidence as to the incentives driving conduct in acquisition markets, for which the starting point is customer need states, which would be unchanged by the Proposed Transaction. Thus in this case the evidence, along with economic reasoning, indicates that a reduction in the number of buyers does not indicate a reduction in competition because the opportunity for suppliers is unchanged, and

87.5 *a reduction in grocery suppliers' ability and incentives to invest or innovate* – a reduction in the ability and incentive to invest or innovate could be evidence of a lessening of competition. However, the concerns identified in the SOUI focus on a reduction in margin for suppliers, and a consolidation of channels. In both cases, the SOUI does not examine the evidence associated with these concerns. As shown below and in Section 2, the evidence shows no reason to consider the Proposed Transaction would give rise to a reduction in suppliers' ability and incentives to invest or innovate.

88 The preceding sections, together with analysis of specific acquisition markets described at Section 2, show that, applying a conventional methodology, which is consistent with the relevant legal test and economic reasoning, the Commission can be satisfied the Proposed Transaction would not be likely to result in a substantial lessening of competition by reason of unilateral effects in any acquisition market. For completeness, the following sections address points raised in the SOUI that are not directly referred to above.

Other points raised in the SOUI regarding bargaining power do not alter the conclusion that the Proposed Transaction would not be likely to result in a substantial lessening of competition in any acquisition market
Level of constraint provided by other acquirers of grocery products

89 The SOUI expresses a concern that constraint from other grocery retailers, in particular Woolworths, would not be sufficient to constrain an exercise of buyer power by the merged entity in the acquisition of grocery products.⁷⁷

90 First, for the reasons given above it is not necessary to conclude on the level of constraint provided by other acquirers of grocery products. The focus is the change that would arise from the Proposed Transaction, and the consequences of that change. The change is in upstream markets, but the key driver of the merged

FortySouth, serving Vodafone. This compares with three providers if 2degrees' assets were sold to an independent third party."

Given this, and Spark's ownership interest in Connexa, we had initial concerns about the impact of the acquisition on competition for the supply of these services, and in downstream wholesale and retail telecommunications markets. We therefore published a Statement of Issues to test these concerns."

After considering submissions in response to the Statement of Issues and other evidence gathered, the Commission is now satisfied that the acquisition is unlikely to substantially lessen competition.

⁷⁷ SOUI at [173].

entity's conduct in those markets is its downstream competitive position. The downstream market structure, and therefore competitive incentives, would not change as a result of the Proposed Transaction. As such, the conclusion that the Proposed Transaction would not be likely to result in any adverse effect on competition does not depend on this question.

91 Secondly, the concern that Woolworths would not present a sufficient constraint on the merged entity's acquisition conduct is implausible. That is because:

91.1 Woolworths is a national (or, the New Zealand division of a trans-Tasman) business. While the merged entity may be a very slightly larger acquirer than Woolworths in New Zealand following the Proposed Transaction, Woolworths is a materially larger acquirer than the Parties currently (even excluding the possibility Woolworths buys as a trans-Tasman entity). If a large national (or trans-Tasman) grocery retailer could achieve significantly better terms than an island-wide grocery retailer, then Woolworths would be currently achieving significantly better terms than FSNI and FSSI (noting the amount by which the merged entity would be larger than Woolworths is dwarfed by the amount by which Woolworths is larger than each of the Parties). The Parties are not in a position to know if that is the case but, as set out in their response to the SOI, they are price competitive with Woolworths in retail markets, suggesting it is not the case (or, is not material). The Parties have not seen evidence to support the concern set out in the SOUI, but encourage the Commission to seek validation from Woolworths about the current, and potential future, product prices it would pay,

91.2 the change in product prices the Parties aim to achieve are not sufficiently significant to support any material change in their ability to compete with Woolworths (only a small improvement in price competitiveness) – see further above at 63 and Figure 2, and

91.3 it may be that the concern in the SOUI is based on the product prices and terms offered to Woolworths by suppliers *worsening* as a result of the Proposed Transaction (i.e. that the Parties and Woolworths currently achieve similar terms, but the Parties' terms would improve slightly and Woolworths' would worsen slightly as a result of the Proposed Transaction). For that expectation to be plausible, it would need to be the case that (some) suppliers could, currently, be charging Woolworths higher prices or offering worse terms, but are not doing so. That is because suppliers' bargaining position relative to Woolworths will not be changed by the Proposed Transaction in a way that would allow them to worsen the terms they offer Woolworths. The Parties do not know of any evidence for this scenario, and consider it not to be plausible. Instead, the Parties assume Woolworths is achieving the best product prices and terms it can from suppliers, in each individual bargain it strikes. That being the case, Woolworths' prices and terms cannot be said to be likely to worsen as a result of the Proposed Transaction.

92 Thirdly, the concern set out in the SOUI proceeds on the assumption that other full-service grocery retailers are the only genuine alternative for "most suppliers" (other than some suppliers of fresh produce).⁷⁸ That is incorrect. As shown in Section 2, many suppliers have significant channels to market outside of the grocery retailers, such as export markets, specialty retailers, foodservice buyers, wholesalers and food

⁷⁸ SOUI at [186].

manufacturers. Further, any substantial lessening of competition would occur in markets – as such, the analysis of specific acquisition conduct set out at Section 2 is more relevant than generalised concerns, or concerns about particular suppliers. The fact that “many suppliers” supply meaningfully only to Foodstuffs and Woolworths is not, in and of itself, relevant. Rather, the competitive position in relation to the market/s in which those suppliers operate is critical to the statutory question.

Impact of the previous North Island Foodstuffs merger

- 93 As discussed with the Commission, there is limited information available to the Parties as to the effect of the 2013 merger. However, the evidence the Parties have provided suggests the merger was pro-competitive. Most significantly, the evidence is consistent with:
- 93.1 the merger resulting in lower prices to retail customers (see the Parties’ cross submission on the SoPI at 63.3 and submission on the SOI at 144-145),
 - 93.2 the merger not resulting in any material uplift in FSNI’s margin (see the Parties’ submission on the SOI at 146, which is based on the Commission’s work in the grocery market study), and
 - 93.3 given the merger did not result in any aggregation in retail markets, suppliers’ total opportunity did not change.
- 94 The SOUI does not refer to the evidence the Parties have provided on the margin impact of the merger, but the Parties assume the Commission has taken it into account as it has not disagreed with it. The evidence referred to above is directly relevant to the questions the SOUI seeks further submissions on at [198].
- 95 In addition, the concerns raised in the SOUI do not appear to be merger-specific, nor do they appear to reflect a lessening of competition. That is:
- 95.1 the Commission raises that *the merger reduced customers from four to three*.⁷⁹ As for all horizontal mergers, the mere fact of a change in the number of market participants is not determinative, in and of itself, from a competition perspective.⁸⁰ Rather, the *effects* of the change on competition are relevant. The Parties consider there was no material impact of the change, and that that is likely to be because the total opportunity for suppliers did not change, and the merged entity’s downstream competitive position did not change relative to the pre-merger position (and the then-status quo). Further, as noted above, the idea that there was a reduction from four to three is incorrect for the reasons given above at 92), and
 - 95.2 *the centralised buying model led to a rationalisation in product range and supplier base as well as reduced opportunities to negotiate and form relationships at the store level, which has had an impact on smaller suppliers and the extent to which they are able to innovate and range in individual FSNI grocery stores*.⁸¹

⁷⁹ SOUI at [196.1].

⁸⁰ See also HoustonKemp report at 3.2.

⁸¹ SOUI at [196.2].

- (a) the relevance of this concern to the Proposed Transaction is unclear, given for the Proposed Transaction there is not a material difference between the factual and counterfactual in terms of centralisation (acknowledged at [221]),
- (b) in any event, the Parties disagree with this characterisation of centralisation. The current strategy for acquiring groceries, which has been adopted by both Parties (albeit FSSI is less progressed in implementation), is to focus on meeting customer demand, or “need states”, with a more customer-insight-driven streamlined range. This is a process and model that is used by many retailers around the world. The Commission is familiar with it through its market study into the retail grocery sector, and it is one of many possible ways for competition to supply products to grocery retailers to occur. To the extent the centralised buying model is considered to continue to best meet customer demand, the merged entity proposes to adopt a similar strategy (noting that buying strategies, including the degree of centralisation, change over time as consumer preferences and competitive strategies change). Regardless, as above there will be no change to the Parties’ incentives arising from the Proposed Transaction,⁸²
- (c) centralised buying does not eliminate the ability of suppliers to supply a single island (or banner within an island), or a single store.⁸³ Local stores retain the ability to carry out local ranging, and are encouraged to do so. Given downstream incentives would not be altered, that can be expected to continue following the Proposed Transaction, and
- (d) to the best of the Parties’ knowledge, the 2013 merger did not result in any adverse impact on competition in any acquisition markets, and no evidence has been presented during the merger clearance process that cuts across that view.

Countervailing power of suppliers

- 96 The first concern in the SOUI about this topic is that “*the majority of suppliers are not able to exert countervailing power to the extent that they could prevent an exercise of buyer power by the merged entity... the Parties generally have multiple sources of supply, have the ability to dictate terms to suppliers, and appear to prioritise margin expectations over strength of brand and ranging – all of which would be further exacerbated with the Proposed Merger*”.⁸⁴
- 97 Many suppliers have countervailing power e.g. through having popular or must-have products (meaning the Parties consider their downstream competitive position would be materially affected by not stocking these products), or multiple alternative options such as for exporters and goods imported by multinational suppliers. The significance of suppliers’ countervailing power to the potential competition effects of the Proposed Transaction depends on the market/s in which the suppliers operate – see Section 2.

⁸² Parties’ submission on the SOI, [14].

⁸³ As set out in further detail at paragraphs 22 to 28 of the Parties’ cross-submission on the Statement of Preliminary Issues, and paragraph 61.3 of the Parties’ SOI submission.

⁸⁴ SOUI at [208].

- 98 In any event, for the reasons given above and demonstrated in Section 2 the Parties consider the Proposed Transaction would not be likely to give rise to any substantial lessening of competition because it would not create the ability or effect to suppress competition in any acquisition market.
- 99 The second concern in the SOUI is that suppliers may not be able to leverage the popularity of a “must-have”, or strong, product into the supply of other products in its portfolio.⁸⁵ In fact, both Parties experience suppliers leveraging the popularity of their must-have products into the supply of other products in their portfolio. Examples are given in the table at Appendix 1.
- 100 The third concern is that suppliers may be impacted by a bargaining power imbalance *due to having one less major grocery retailer customer with which to negotiate and as a channel to reach the domestic grocery market.*⁸⁶ As noted above, this concern is unfounded in a scenario where the same downstream opportunity, subject to the same downstream incentives, would be available to suppliers in the factual and counterfactual.
- 101 As a more general point, the significant countervailing power of the large multinational suppliers in concentrated acquisition products is not diminished based on choices those suppliers make about structuring their business in New Zealand or outsourcing aspects of their negotiation or distribution. For example:⁸⁷
- 101.1 where a supplier appoints an agency or distributor to carry out negotiations with the Parties, this does not alter the underlying bargaining strength associated with the products in question, which are still based on the same factors e.g. downstream demand for the products and the underlying supplier’s alternatives for those products, and
- 101.2 where an international supplier chooses to operate manufacturing plant in New Zealand, and supplies domestic customers through that plant (as compared with importing the products from another location), the supplier’s outside options would also include that supplier having the ability to deploy its resources (and capital) in other markets. In other words, the effect of the Proposed Transaction on the supplier is unlikely to be different from the effect on the remaining major international suppliers (which is not expected to be material).

Move to centralisation

- 102 The Parties agree with the view expressed in the SOUI that, in summary, “*we do not consider that there is a material difference between the factual and counterfactual in terms of centralisation of procurement by the Parties. The Proposed Merger may not make a substantial difference to the extent of centralisation of procurement by the Parties.*”⁸⁸
- 103 In addition, it is worth reiterating that “centralisation”, or any buying model, is not inherently better or worse for competition in acquisition markets. Regardless of the degree of centralisation, the Parties (and their stores) would be driven by the same incentives. The more centralised procurement models the Parties have been in the

⁸⁵ SOUI at [209].

⁸⁶ SOUI at [210].

⁸⁷ See also HoustonKemp report at 3.2.5.

⁸⁸ SOUI at [221].

process of adopting are intended to make the Parties' offerings more competitive, by being more responsive to customer preferences (using data to support judgements) and to achieve more competitive results in terms of prices and other dimensions.

Private label

- 104 The Parties agree with the view expressed in the SOUI that, in summary, *we do not consider that there is likely to be a material difference between the factual and counterfactual in terms of penetration of private label, or the ability for either FSNI or FSSI to use private label as a bargaining tool in their negotiations with suppliers. However, we consider that the prevalence of private label is relevant to the assessment of any current disparities in the bargaining power between the Parties and some grocery suppliers.*⁸⁹
- 105 The SOUI does note that *"while the ability and incentive of the Parties in terms of private label may be the same both with and without the Proposed Merger, the impact of private label on negotiations with suppliers may be greater with the Proposed Merger. This could be the case if the greater buyer power of the merged entity, combined with private label being used as a tool by the merged entity in negotiations, meant that suppliers felt more pressure to accept unfavourable terms with the Proposed Merger"*. Contrary to the position described in the first sentence, this paragraph does not appear to describe a scenario where private label has a greater impact on negotiations with suppliers. Rather, it appears to describe a scenario where the strength of private label as a tool in negotiations has the same significance as pre-merger.

Impact of the GICA

- 106 As the Parties have previously explained,⁹⁰ they consider an overall climate of political, public and regulatory pressure on grocery retailers would continue with and without the Proposed Transaction. In the factual, that climate would assist to ensure the Parties focus on sharing buying benefits with customers but, regardless of the Proposed Transaction, would continue (along with competitive conditions including customer mobility and cross-shopping)⁹¹ to ensure downward pressure on retail prices.
- 107 The Parties have not argued that the GICA is intended to, or would, mitigate any loss of competition arising from the Proposed Transaction.⁹² Rather, the Parties' position is that the Proposed Transaction would not be likely to result in a substantial lessening of competition in any market. The GICA would form part of the broader regulatory landscape that, along with the other features described above, would place ongoing pressure on the merged entity.

Likelihood of the merged entity's buyer power impacting entry and/or expansion in retail grocery markets

- 108 The SOUI raises a concern that the merged entity would achieve better terms and that would raise the minimum required scale of grocery retailers.⁹³

⁸⁹ SOUI at [241].

⁹⁰ For example, clearance application at 7, 66.2, 120, Parties' statement of issues submission from 93.

⁹¹ [REDACTED].

⁹² SOUI at [252]-[255].

⁹³ SOUI at [261.1].

- 109 First, the better terms the merged entity would achieve are very small overall, so cannot be expected to make a difference to the likelihood of entry (noting, as above, the Commission has not contested the size of the improvement in buying terms the Parties hope to achieve). If the change expected to arise from the Proposed Transaction were significant, it would suggest the Parties would be currently at a very significant competitive disadvantage to Woolworths, as far as product costs are concerned. The Parties do not know the terms Woolworths achieves, but perceive their own pricing to be competitive with Woolworths', suggesting they are not at a material disadvantage.⁹⁴ If the Commission is correct that the most likely form of entry and/or expansion to occur in a timely fashion in the counterfactual is expansion by existing rival grocery retailers,⁹⁵ the Proposed Transaction can have no material effect.
- 110 The SOUI also presents a specific concern that the merged entity lowers retail prices for a period, and then raises them again (presumably, once entry is deterred). This concern does not seem plausible. It suggests the merged entity would perceive a heightened risk of entry and lower prices (presumably, below profit-maximising levels, but not below cost i.e. predation) thus improving conditions for consumers. Prices that are lower, but not predatory, would not raise barriers to entry. At most, they might reduce profit levels that present a particular commercial opportunity to enter, which is conduct that is consistent with a pro-competitive response to threat of entry, rather than an anti-competitive raising of entry barriers. The implication is that after a period of deterring entry with its low prices, the merged entity would need to raise prices again (which would be essential for the conduct to have any anti-competitive effect). It is not clear when and how the merged entity would judge that its low prices had caused the heightened threat of entry to reduce such that it could return its prices to higher levels (presumably, back to profit-maximising levels). But, if price levels had resulted in a heightened threat of entry in the initial phase of the conduct, then restoring those levels would presumably entail the same heightened risk. As well as this concern lacking any sound foundation, it would seem an odd conclusion for the Commission to prefer prices to remain at higher levels than risk them being reduced, just in case that deterred entry. For the same reasons, "strategic price cuts" appear unlikely to have the potential to have any adverse impact on competition.
- 111 The SOUI raises a concern that other grocery retailers would be less likely to achieve competitive terms following the Proposed Transaction. Paragraph [279] describes a scenario where input prices decrease and consequently so do downstream prices (which is pro-competitive). The "waterbed" effect assumes that suppliers are charging lower prices to some customers than it could extract from those customers, such that there is headroom to raise prices to those customers following the Proposed Transaction (because the Proposed Transaction would not itself alter the relative bargaining position as between suppliers and other retailers). The basis for this scenario is unclear. Without reliable evidence to the contrary suppliers must be assessed currently to be operating rationally, meaning the "waterbed" effect cannot reach the "real chance" threshold.⁹⁶

⁹⁴ See HoustonKemp report at 3.2.6.

⁹⁵ SOUI at [271].

⁹⁶ See also [Tesco/Brooker](#), at 8.62; [Sainsbury/Asda](#), 103ff.

The Proposed Transaction would not be likely to adversely impact innovation for new grocery products

- 112 In this section, the Parties assess the theory of harm set out in the SOUI that each of FSNI and FSSI provide separate opportunities for new grocery products to be listed in New Zealand, and their consolidation with the Proposed Transaction could impact the pace and development of new product innovation, resulting in reduced consumer choice and quality of grocery products.⁹⁷ The concern is that the Proposed Transaction may lessen the ability and incentive for local suppliers to develop new grocery products, or for multinational suppliers to bring new products into New Zealand.⁹⁸
- 113 The SOUI states that the concern could arise in two ways:⁹⁹
- 113.1 the transfer of surplus away from suppliers, as a result of increased bargaining power, and/or
- 113.2 the structural loss of the Parties as two separate channels for new products to gain a foothold in the New Zealand market i.e. the loss of one independent channel for new suppliers and/or products to come to market.
- 114 In the following sections, the Parties set out the appropriate framework and key points in relation to testing this theory of harm. These sections, in conjunction with the analysis of specific acquisition conduct described in Section 2, show the Commission can be satisfied the Proposed Transaction would not be likely to result in a substantial lessening of competition in any market.

Market definition

- 115 The markets potentially affected by the theory of harm described above are markets for the acquisition of products grocery retailers sell in retail markets. So, the preceding sections and the analysis of specific acquisition dynamics set out in Section 2 (which allow for a product market lens as narrow as identified in the SOUI¹⁰⁰), can be adopted to analyse this theory of harm.

Competitive effects: the Proposed Transaction would not be likely to give rise to a substantial lessening of competition in relation to innovation

The Proposed Transaction would not give rise to an ability to suppress innovation such that competition could be lessened

- 116 The Proposed Transaction would not give rise to any ability to suppress the pace and impact of product innovation, resulting in reduced choice and quality because:
- 116.1 the change in acquisition markets is likely to be too small to have any material impact on competition – see 61 and Figure 2 above. A slight change in the allocation of surplus for some suppliers could not alter their ability and incentive to engage in new product innovation compared with the counterfactual, and

⁹⁷ SOUI at [10.5].

⁹⁸ SOUI at [285].

⁹⁹ SOUI at [286].

¹⁰⁰ SOUI at [84].

116.2 the opportunity presented to suppliers for innovation would not alter, as the downstream markets, and their competitive conditions, would be unchanged by the Proposed Transaction.

The Proposed Transaction would not give rise to any incentive to suppress innovation such that competition could be lessened

117 The Proposed Transaction would not give rise to any incentive for the merged entity to suppress the pace and impact of product innovation. As discussed in preceding sections, the merged entity's incentives in acquiring products would be unchanged compared with their current incentives and those in the counterfactual. The Parties' current incentives when acquiring products are to compete downstream by presenting the PQRS mix (including as to new products) that best meets customer demand. The merged entity's incentives would be the same. As such, the merged entity would retain the incentive to ensure optimal supplier investment.¹⁰¹ See also the HoustonKemp report at 3.2.4.

118 The above conclusions are demonstrated by the analysis in Section 2 e.g. in the cases of [REDACTED].

119 Addressing the two issues the SOUI focuses on as having the potential to give rise to an adverse effect on innovation.

The first issue: a transfer of surplus

120 First, a transfer of surplus from suppliers to the merged entity is not itself harmful to competition, including innovation. That is, and as explained by HoustonKemp, a change in surplus does not inform the potential for rivalry, output or quality effects in the relevant markets – indeed, the Commission's view presupposes that the market is currently sharing surplus in the "correct" proportions.¹⁰²

121 In terms of the specific concerns the SOUI identifies:¹⁰³

121.1 *suppliers' incentives to invest (or stay in the market) may be reduced if they are unable to capture a sufficient share of the benefits of their sunk investments when negotiating with buyers. Suppliers' ability to invest may be reduced by the worsening of their terms of trade if it is harder for them to finance investments that they would otherwise make.* For the reasons set out above, a change in the allocation of surplus does not say anything, in and of itself, about any impact on competition (including a supplier's ability and incentive to innovate). The analysis in Section 2 tethers the SOUI's concerns to particular acquisition dynamics, where the impact of any shift in surplus can be tested as to its effect on competition, and

121.2 *innovation would be lessened if suppliers become unprofitable, resulting in their exit.* The SOUI accepts that forcing suppliers' exit would not be in the merged entity's interests, and therefore this concern is limited to scenarios

¹⁰¹ HoustonKemp at paragraph 18, citing, for example, Inderst, R and Wey, C, *Buyer power and supplier incentives*, WZB discussion paper, No. SP II 2003-05, 2003, p 3, explains that 'consider a supplier's incentives to choose between different non-contractible strategies of production or process innovation...in both instances of process and product innovation we argue that the formation of larger buyers should induce the supplier to chose strategies that increase total output and, by raising consumer surplus, possibly increase social welfare.'

¹⁰² For example, it is entirely possible that an increase in buyer power works to counteract market power currently held by suppliers in some acquisition markets, noting the margins or profitability of suppliers is not known by the Parties with any certainty.

¹⁰³ SOUI at [305]-[309].

where the merged entity acts contrary to its interests, or mistakenly [308]. For the reasons set out above, there would need to be a strong basis in evidence for the Commission to conclude that the merged entity would act contrary to its own interests (or mistakenly) to an extent that would give rise to a substantial lessening of competition. The Parties have seen no such basis, including in the category review materials provided with this submission (which provide evidence of the Parties' acquisition incentives and, given the Proposed Transaction would not result in any downstream consolidation, the incentives of the merged entity). Further, an unchanged incentive to ensure the PQRS dimensions of retail grocery offering best meet consumer needs implies that exit by one supplier will correspond with entry by a different (either new or expanded) supplier that will improve the merged entity's PQRS offering – accordingly, concern about exit focuses on harm to individual suppliers and not harm to competition.

The second issue: reduction in the number of channels

122 The SOUI notes, “each of the three major grocery retailers present separate opportunities for new suppliers, or suppliers with new products, to gain a foothold in the market. Each of FSNI, FSSI and Woolworths brings different new products and suppliers to the market, ultimately contributing to the range, and quality of product development in the country”.¹⁰⁴

123 As discussed in the preceding sections, focusing on a reduction in the number of channels for innovative products does not take account of the potential competition effects of the change brought about by the Proposed Transaction. In particular, given the lack of change downstream, it is important to recognise that the existing opportunities for innovation will be unaffected i.e. the nature of the opportunity is unchanged. The Parties serve separate geographic markets, so there will be no change to the downstream opportunity, or incentives associated with servicing them, arising from the Proposed Transaction.

FSSI as a channel for innovation

124 The SOUI indicates, “FSSI may be more receptive to supporting suppliers' innovation than FSNI, with industry participants that we have spoken with (including suppliers across a range of categories) telling us that it is easier to get new products ranged in FSSI than in FSNI”.¹⁰⁵

125 The interview evidence cited in the SOUI suggests the issue is more one of perception, or at least does not suggest a competition problem, and the Parties have been unable to find a sound basis for this perception. For example, FSSI is perceived to be “more open to innovation and supportive of local manufacturers”, or “doing things a bit their own way”, willing to “take a punt”, being easier to form an initial relationship with. Some of this perception is simply incorrect, as noted in Appendix 1 in relation to the concerns expressed. Further, in some cases the perception goes the other way,¹⁰⁶ and further the FSSI process is becoming more like the FSNI process as part of its Better Buying programme.

126 Furthermore, and even if it were correct that FSSI were easier to get a new product range in, there is no suggestion that this is a more pro-competitive outcome than FSNI produces, nor that innovation is being suppressed by FSNI (as opposed to, new

¹⁰⁴ SOUI at [313].

¹⁰⁵ SOUI at [327].

¹⁰⁶ For example, [REDACTED]

products being listed only where there is a sound competitive offering – not all new products are necessarily wanted by customers, or capable of having a pro-competitive impact).

- 127 Actual NPD numbers do not suggest a material difference.¹⁰⁷ Figure 3 below shows new products registered on each of FSNI and FSSI’s system during FY24. The Parties acknowledge the extent of true innovation will vary by product, but nevertheless it provides a picture that there is not a material difference between the Parties.

Figure 3 – new products registered on FSNI and FSSI system in FY24¹⁰⁸

Product	FSNI	FSSI
Liquor	[REDACTED]	[REDACTED]
General merchandise	[REDACTED]	[REDACTED]
Frozen foods	[REDACTED]	[REDACTED]
Bakery	[REDACTED]	[REDACTED]
Tobacco	[REDACTED]	[REDACTED]
Bulk	[REDACTED]	[REDACTED]
Florist	[REDACTED]	[REDACTED]
Cafe	[REDACTED]	[REDACTED]
Services	[REDACTED]	[REDACTED]
Grocery	[REDACTED]	[REDACTED]
Chilled foods / dairy ¹⁰⁹	[REDACTED]	[REDACTED]
Total	[REDACTED]	[REDACTED]

- 128 Accordingly, there does not appear to be any real evidence to suggest a meaningful difference between the Parties. To the extent FSSI has a more effective approach to innovation, FSNI takes that seriously as it does not want to miss out on innovative offerings. If it were the case that FSSI’s manner and approach to innovation were more competitive than FSNI’s, including in a way that would work well in the North Island, it can be expected it would feature in the merged entity’s conduct. That is because the Parties are hoping to adopt the better of the Parties’ practices in every aspect. And, as is clear from the category review materials, the primary driver for the Parties’ acquisition conduct is downstream positioning.

Impact on smaller and larger suppliers

- 129 Focusing on the types of suppliers about which the SOUI expresses most concern [291.1]:

129.1 *small and local suppliers reducing investment in innovation.* The Parties assume the SOUI is referring to suppliers that currently supply to only a small number of stores, or regionally, rather than nationally. It is not clear how this concern would arise, as the acquisition market conditions faced by these suppliers would not alter as a result of the Proposed Transaction. As the

¹⁰⁷ See also paragraph 65 and 119-123 of the Parties’ response to the SOI.

¹⁰⁸ [REDACTED]

¹⁰⁹ [REDACTED]

SOUI acknowledges, the Proposed Transaction would not result in any change to local store ownership,¹¹⁰ nor could it affect bargaining outcomes at a local level.¹¹¹ The SOUI also states, “we do not consider that there is a material difference between the factual and counterfactual in terms of centralisation of procurement by the Parties”.¹¹² Local and regional ranging continues, and would be unaffected by the Proposed Transaction,¹¹³

129.2 *prevent or delay multinational suppliers from launching new products in New Zealand.* Even if a small transfer of surplus occurred from large multinational suppliers to the merged entity, relative to the particular bargains that have currently been struck between those suppliers and the merged entity, it is implausible that such a change could affect whether and at what time the suppliers roll out new products in New Zealand (noting also that this argument did not hold up in the United Kingdom).¹¹⁴ There is no basis in evidence the Parties have seen that would support this concern.¹¹⁵

130 For completeness, more detail regarding the Parties’ commitment to innovation is provided below. That commitment is driven by the Parties’ downstream incentives and competitive positioning, which would not be altered by the Proposed Transaction.

The Parties have a strong commitment to innovation, which would be unchanged by the Proposed Transaction

131 Both co-operatives regard NPD and supplier innovation as a key part of their business.¹¹⁶ As acknowledged in the SOUI, Emerging Supplier and Foodies Connect Forums are held throughout the year and are seen to provide additional support to smaller suppliers.¹¹⁷ FSSI holds Foodies Forums on an 8-12-week cycle for all suppliers. Foodstuffs Emerge competitions are run as a national initiative¹¹⁸ to help new suppliers on-board and scale up.

132 The co-operatives also consider that their ability to foster small supplier innovation is an important competitive advantage over their (corporate) competitors, as the co-operative model enables the Parties to assist a supplier to work initially with one or two stores (driven by suppliers’ cashflow and production capabilities), with the ability to expand the supplier’s reach to more stores in the co-operative network as its capabilities grow. They also already conduct certain activities together (see case study 7 from the Parties’ submission on the statement of issues), which limits the potential change that could arise from the Proposed Transaction. The co-operatives have no incentive to cease a practice they perceive as a key competitive advantage,

¹¹⁰ SOUI at [62].

¹¹¹ SOUI at [112.2].

¹¹² SOUI at [221].

¹¹³ See the Parties’ SOI submission at 19 and 58.

¹¹⁴ See also [Sainsbury/Asda](#), 104.

¹¹⁵ See for example the [REDACTED].

¹¹⁶ For example, [REDACTED]. See also the Parties’ SOI submission 119ff.

¹¹⁷ FSNI has a “Small Supplier Guide” which sets out a detailed seven step process for small suppliers to get “the best possible chance of landing on shelves and becoming a hit with customers”. Small Supplier Guide Version 2 (August 2023) at 4. A version of the Small Supplier Guide is also available online here <https://www.foodstuffs-exchange.co.nz/assets/documents/FSNI-docs/small-Supplier-guide/Foodies-Small-Supplier-Guide.pdf>.

¹¹⁸ The SOUI indicates these are a FSSI-only initiative which is not correct, see the Parties’ submission on the SOI at 65.3.

and where their downstream incentives would not change as a result of the Proposed Transaction.

The Proposed Transaction would result in consumer benefits

- 133 The Parties acknowledge the statutory test is focused on the likelihood that a merger would reduce competition in relevant markets. As such, it is not necessary or strictly relevant to focus on pro-competitive features. Nevertheless, in terms of the judgement the Commission must make whether to clear the Proposed Transaction, it may be worth bearing in mind that the strong implication of the analysis and evidence set out in this submission is that the Proposed Transaction would result in benefits to New Zealand retail grocery customers. At the very least, the Commission should expect to see some cost savings passed through to consumers (for the reasons given above¹¹⁹). See the HoustonKemp report for more information.

¹¹⁹ For example, see paragraphs 29, 36.2, 78.4.

SECTION 2: UNILATERAL EFFECTS IN ACQUISITION MARKETS: APPLICATION OF THE FRAMEWORK

134 To illustrate how no substantial lessening of competition would be likely to arise in any market as a result of the Proposed Transaction, the Parties have carried out a “deep dive” analysis on 19 categories of products. This analysis is provided at Appendices 2 to 20.

FSNI and FSSI category review programmes

135 Both FSNI and FSSI are in the process of carrying out category review programmes. Importantly, the purpose of both programmes is to ensure the Parties continue to offer a range that meets their customers’ needs.

136 To that end, the category review programmes [REDACTED]. While each Party operates its programme independently, the factors can be summarised as:

136.1 the extent to which the category currently addresses key customer “need states”. As noted above and as is clear from the documents, this is the starting point for category reviews. A “need state” refers to core customer needs, or demand, [REDACTED],

136.2 the factors that are important to customers in relation to the particular category (e.g., low prices, variety/breadth of assortment, role of brands etc),

136.3 whether there are any “must-have” products/brands in the category (being products/brands where there is very low propensity for customers to substitute away from the particular product/brand),

136.4 whether customers’ tastes in relation to the relevant products are stable or evolving, and whether the specific products are in growth or decline,

136.5 the role of private label products in the category e.g., to provide an additional option where supply is concentrated to a small number of market participants (to maintain competitive supply), or to provide innovation in a market where consumer demand is for innovation and suppliers have not met the demand, or to provide a low-priced quality product for price-sensitive customers,

136.6 challenges faced by suppliers in the category (e.g., increasing cost prices for key ingredients/inputs, which FSNI and FSSI need to accommodate to preserve suppliers’ viability),

136.7 challenges faced by FSNI/FSSI in the category (e.g., reliance on a particular supplier, issues regarding security of supply, or where there is too much duplication in the range, leading to poor customer experience¹²⁰),

136.8 the level of substitutability between different suppliers of the same product and different products within the category, and

¹²⁰ By way of example, if a customer wanted to buy maple syrup and found 100 different options on the shelf this could result in confusion / a poor customer experience (i.e. it would be hard to choose and take too long to purchase one item).

136.9 the role of innovation in the category – for example, whether there is customer demand for new products or flavours/varieties of the product. The Parties refer to three different types of innovation, being:

- (a) “true” innovation: a new product or format that is not currently available,
- (b) “renovation”: a variation on an existing product (e.g., a new flavour), and
- (c) “pack-novation”: redesigning the packaging of an existing product for a limited period (e.g. Mondelez Olympics products or All Blacks activations on Cadbury Dairy Milk chocolate).

137 The category insights above heavily influence the category strategy, which considers factors such as whether there are opportunities to:

137.1 increase share of shelf for certain high performing (in terms of customer demand)/growth products (or conversely, whether there are opportunities to decrease share of shelf for products that are selling poorly),

137.2 rationalise/reduce the product range or simplify the shop for customers (e.g., where there is a long tail of products with high substitutability and/or low sales). Any ranging decisions are considered at the segment level (e.g., “mainstream” products would be compared against other similar products, whilst “natural” products would be considered as part of a separate review), to ensure that the co-operative continues to range products that cover the relevant customer need states in the category, and

137.3 introduce new suppliers/SKUs, to reduce the co-operative’s reliance on a particular supplier i.e., ensure competitive supply over the longer term.

138 “Category health” is another factor that is considered in category reviews, which takes account of the number and quality of suppliers and ensuring surety of supply i.e., ensuring competitive supply, and security of supply.

139 FSNI is further advanced in its category review programme, with FSNI having completed [REDACTED] category reviews to date and FSSI having completed [REDACTED] category reviews to date. FSNI notes that:

139.1 [REDACTED],

139.2 [REDACTED],

139.3 [REDACTED].

Analysing individual products

140 A key part of the category review processes is also assessing individual product performance across a set of criteria. At its simplest:

140.1 [REDACTED],

140.2 [REDACTED],

140.3 [REDACTED],

140.4 [REDACTED], and

140.5 [REDACTED]

Process followed to identify categories

141 A list of the 19 categories analysed is set out in the table on the following page. These categories were selected by identifying:

141.1 a random selection of categories that FSNI has completed a category review process for. These categories were selected by listing all [REDACTED] category reviews completed by FSNI in chronological order and selecting every 20th category review. The six categories that were chosen based on this criterion were: (i) salad dressings, vinegar, pickles & relishes, (ii) cooking sauces and marinades, (iii) Mexican products, (iv) frozen berries, (v) personal wash, (vi) confectionery,

141.2 categories/products that were raised in the SOUI (either in Table 2 of the SOUI or elsewhere in the document) and had not otherwise been identified based on the criteria noted above. The eleven categories that were chosen based on this criterion were (i) breakfast, (ii) cleaners, (iii) ice cream, (iv) frozen poultry, (v) beverages, (vi) nuts and snacking food, (vii) meat and seafood, (viii) beer and cider, (ix) wine, and (x) fresh produce, and

141.3 categories/products that were raised by the Commerce Commission on a call with Chapman Tripp on 31 July 2024, being categories that the Commission would be interested in the Parties carrying out specific analysis on. The three additional categories raised on that call were (i) spreads (ambient), (ii) frozen fish, and (iii) chilled fresh sauces.

Detail on each category analysed

142 The table on the following page sets out further detail on each category analysed, including how the categories fit into the categories identified by the Commission at Table 2 of the SOUI.

143 Where FSNI and/or FSSI have carried out a category review process in relation to the particular category, [REDACTED]:

143.1 [REDACTED],

143.2 [REDACTED],

143.3 [REDACTED],

143.4 [REDACTED],

143.5 [REDACTED], and

143.6 [REDACTED].

144 The categories analysed, and [REDACTED] illustrate that:

144.1 the Parties' acquisition conduct is strongly influenced by customer demand and the Parties' desire to present an attractive offering to customers. In particular, the [REDACTED] drives ranging decisions,

144.2 there is no evidence of the Parties' suppressing competition, or having the ability or incentive to do so,

144.3 in many cases, product markets are dominated by multi-national suppliers that supply "must have" products and face limited competition in acquisition markets. It follows that these suppliers have strong countervailing power and that the Parties are [REDACTED], and

144.4 smaller national suppliers that do not necessarily offer "must have products" are also [REDACTED]. These smaller suppliers already face significant competition from large suppliers and should not be expected to be materially affected by the Proposed Transaction. Further, [REDACTED].

Table 1: Overview of each category analysed in Appendices 2 to 20

	Category	Relevant products in the category	Commission category in Table 2 of SOUI	Comments	[REDACTED]
1	Salad dressings, vinegar, pickles and relishes	<ul style="list-style-type: none"> Shelf stable salad dressings including mayonnaise, flavoured mayonnaise, aioli, plant-based dressings, pourable salad dressings Vinegars Pickles and relishes, including gherkins, pickled vegetables, olives, relishes and chutneys 	National markets for the acquisition of dry/ambient groceries by major grocery retailers.	<ul style="list-style-type: none"> Randomly selected category [REDACTED] [REDACTED] 	[REDACTED]
2	Cooking sauces and marinades	<ul style="list-style-type: none"> Pasta sauce Simmer sauce Purees/paste Marinades Recipe bases Stocks and gravies 	National markets for the acquisition of dry/ambient groceries by major grocery retailers.	<ul style="list-style-type: none"> Randomly selected category [REDACTED] [REDACTED] 	[REDACTED]
3	Mexican	<ul style="list-style-type: none"> Carriers Kits Ingredients 	National markets for the acquisition of dry/ambient groceries by major grocery retailers.	<ul style="list-style-type: none"> Randomly selected category [REDACTED] [REDACTED] 	[REDACTED]
4	Breakfast	<ul style="list-style-type: none"> Muesli / granola Adult health Staples / children's breakfast cereals Convenience (e.g. Up&Go) Hot (rolled oats) Biscuits (e.g. Weetbix) Note: this category excludes bread, yoghurts etc. 	National markets for the acquisition of dry/ambient groceries by major grocery retailers.	<ul style="list-style-type: none"> Category chosen based on information in SOUI [REDACTED] [REDACTED] 	[REDACTED]

	Category	Relevant products in the category	Commission category in Table 2 of SOUI	Comments	[REDACTED]
5	Cleaners	<ul style="list-style-type: none"> Toilet cleaner (liquid and in bowl and in cistern) Household cleaner (i.e. all purpose, wipes, disinfectants, glass cleaner) Bleach 	National markets for the acquisition of dry/ambient groceries by major grocery retailers.	<ul style="list-style-type: none"> Category chosen based on information in SOUI [REDACTED] [REDACTED] 	[REDACTED]
6	Spreads	<ul style="list-style-type: none"> Ambient spreads (e.g. honey, jam, peanut butter) 	National markets for the acquisition of dry/ambient groceries by major grocery retailers.	<ul style="list-style-type: none"> Category identified by the Commission on a call with Chapman Tripp on 31 August 2024 [REDACTED] [REDACTED] 	[REDACTED]
7	Frozen fish	<ul style="list-style-type: none"> Frozen fish fillets, fingers and cakes 	National markets for the acquisition of chilled and frozen groceries by major grocery retailers.	<ul style="list-style-type: none"> Category identified by the Commission on a call with Chapman Tripp on 31 August 2024 [REDACTED] [REDACTED] 	[REDACTED]
8	Chilled fresh Sauces	<ul style="list-style-type: none"> Chilled fresh sauces e.g. chilled pasta and pizza sauces (rather than ambient sauces) 	National markets for the acquisition of chilled and frozen groceries by major grocery retailers.	<ul style="list-style-type: none"> Category identified by the Commission on a call with Chapman Tripp on 31 August 2024 [REDACTED] [REDACTED] 	[REDACTED]
9	Frozen berries	<ul style="list-style-type: none"> Packaged frozen berries 	National markets for the acquisition of chilled and frozen groceries by major grocery retailers.	<ul style="list-style-type: none"> Randomly selected category [REDACTED] [REDACTED] 	[REDACTED]
10	Ice cream	<ul style="list-style-type: none"> Tubs Multipacks Ice blocks Plant based 	National markets for the acquisition of chilled and frozen groceries by major grocery retailers.	<ul style="list-style-type: none"> Category chosen based on information in SOUI [REDACTED] 	[REDACTED]

	Category	Relevant products in the category	Commission category in Table 2 of SOUI	Comments	[REDACTED]
11	Frozen poultry	<ul style="list-style-type: none"> Whole chickens Chicken portions Value added items (e.g. nuggets, tenders) 	National markets for the acquisition of chilled and frozen groceries by major grocery retailers.	<ul style="list-style-type: none"> Category chosen based on information in SOUI [REDACTED] [REDACTED] 	[REDACTED]
12	Personal wash	<ul style="list-style-type: none"> Body wash / shower gel Solid soap Liquid handwash Bath products / salts 	National markets for the acquisition of health and beauty products.	<ul style="list-style-type: none"> Randomly selected category [REDACTED] [REDACTED] 	[REDACTED]
13	Beverages	<ul style="list-style-type: none"> Soft drinks Juices Energy drinks Water Note: excludes hot beverages 	National markets for the acquisition of beverages by retailers and other customers.	<ul style="list-style-type: none"> Category chosen based on information in SOUI [REDACTED] 	[REDACTED]
14	Confectionery	<ul style="list-style-type: none"> Chocolate (blocks and bars) Sugar / confections Gum & mints Seasonal 	National markets for the acquisition of snacks by retailers and other customers.	<ul style="list-style-type: none"> Randomly selected category [REDACTED] [REDACTED] 	[REDACTED]
15	Nuts and snacking food	<p>Salty and sweet snacks including:</p> <ul style="list-style-type: none"> chips (potato chips, corn chips, multipack chips, extruded chips, "better for you" chips and tube chips) popcorn packaged nuts jerky/pork crackle/biltog seaweed "better for you" salty snacks (e.g. Calbee Harvest Snacks) 	National markets for the acquisition of snacks by retailers and other customers.	<ul style="list-style-type: none"> Category chosen based on information in SOUI [REDACTED] [REDACTED] 	[REDACTED]

	Category	Relevant products in the category	Commission category in Table 2 of SOUI	Comments	[REDACTED]
16	Meat and seafood	<ul style="list-style-type: none"> All fresh meat products All fresh seafood products 	National and regional markets for the acquisition of meat and seafood products by retailers and other customers.	<ul style="list-style-type: none"> Category chosen based on information in SOUI [REDACTED] 	[REDACTED]
17	Beer & cider	<ul style="list-style-type: none"> Beer Craft beers Ciders 	National markets for the acquisition of beer and wine.	<ul style="list-style-type: none"> Category chosen based on information in SOUI [REDACTED] [REDACTED] 	[REDACTED]
18	Wine	<ul style="list-style-type: none"> Bottles Casks 	National markets for the acquisition of beer and wine.	<ul style="list-style-type: none"> Category chosen based on information in SOUI [REDACTED] [REDACTED] 	[REDACTED]
19	Fresh produce	<ul style="list-style-type: none"> All fresh produce 	Regional and local markets for the wholesale supply of fresh produce.	<ul style="list-style-type: none"> Category chosen based on information in SOUI [REDACTED] 	[REDACTED]

SECTION 3: COORDINATED EFFECTS

145 The SOUI states that the Commission is currently not satisfied that the Proposed Transaction would not be likely to substantially lessen competition due to coordinated effects in a national market for the retail supply of groceries.¹²¹ In particular, the Commission has noted that coordinated effects could arise in a national market for the retail supply of groceries through the potential for the Merged Entity and Woolworths reaching a tacit agreement on the level of some national retail prices.¹²²

Framework for considering coordinated effects

146 The Commission is assessing whether:¹²³

146.1 the national market for the retail supply of groceries is vulnerable to coordination, and

146.2 the Proposed Transaction would change the conditions in the market so that coordination is more likely, more complete or more sustainable.

147 The Guidelines state that successful coordination “*requires firms to reach at least an implicit agreement, and then to maintain that agreement by detecting and punishing any firm that deviates from the agreement*”.¹²⁴ Accordingly:

147.1 for coordination between the Merged Entity and Woolworths to *emerge*, the retailers would need to be able to reach a common view on the *scope* of such coordination. This would need to be sufficiently clear to enable their behaviour to be aligned, and

147.2 to *sustain* coordination, the Merged Entity and Woolworths would also need to be able to observe each other’s behaviour sufficiently to ensure that deviation from the coordinated outcome would be *detected*. If deviation from the coordinated outcome goes undetected then there would be no incentive to sustain a non-competitive outcome.

The national market for the retail supply of groceries is not vulnerable to coordination

148 The Commission states that retail grocery markets may be vulnerable to coordination on national retail prices, including because:¹²⁵

148.1 the Merged Entity and Woolworths may be able to reach a tacit agreement to raise the level of national retail prices for some products. The Commission notes that there are some characteristics of a national market for the retail supply of groceries that may enable coordination on that basis, including high concentration levels and transparency of prices, and

¹²¹ SOUI at [335].

¹²² SOUI at [337].

¹²³ SOUI at [334].

¹²⁴ At [91].

¹²⁵ SOUI at [352].

148.2 the high degree of transparency may allow the Merged Entity and Woolworths to monitor, detect and punish deviations from a tacit agreement, without the threat of disruptions by rival grocery retailers.

149 However, in the Parties' view, retail grocery markets are not vulnerable to coordination. In particular:

149.1 consistent with the conclusions in the grocery market study,¹²⁶ there is no evidence of existing coordination between the Parties and Woolworths,

149.2 given grocery retailing encompasses competition on the entire "retail offer", with many variations in terms of both quality levels and price points, price coordination alone would be unstable,

149.3 the fact that the Parties and Woolworths have multiple retail banners would require any coordinated agreement to adjust for differences in non-price dimensions, which would not be practicable, particularly given there is no mechanism for arriving at such a basket,

149.4 maintaining price coordination would not be feasible across a wide range of complex products,

149.5 similarly, coordination on the average retail grocery prices across a subset or basket of products would not be practicable, and

149.6 finally, there is a range of other factors that would complicate any attempt at coordinated pricing, including:

- (a) the ability for individual FSNI/FSSI stores to [REDACTED],
- (b) the interdependencies of pricing between products and the application of promotions,
- (c) grocery retailers' wider strategic priorities, and
- (d) the Parties' use of [REDACTED] [REDACTED].

There is no evidence of existing coordination

150 The Commission has stated that "*at this point, we consider the evidence whether coordination in retail grocery markets is already occurring is unclear*".¹²⁷ However, the Commission does not put forward any actual evidence that coordination in retail grocery markets is already occurring, other than general observations that it says may indicate (or be consistent with) existing coordination, noting that such behaviours may also be consistent with unilateral behaviour.¹²⁸

151 To the contrary, it is clear that the Parties do not currently coordinate with Woolworths. In particular:

¹²⁶ Commerce Commission, *Market study into the retail grocery sector: Final report*, 8 March 2022 at p 146.

¹²⁷ SOUI at [388].

¹²⁸ SOUI at [389] to [391].

- 151.1 the Parties and Woolworths engage in activities designed to make their conduct less (rather than more) predictable to each other,
- 151.2 in recent months there has been an increased focus by grocery retailers on developing “personalised promotions” which cannot be detected by other retailers,
- 151.3 while the Parties monitor Woolworths’ pricing, the evidence shows that conduct is consistent with competition rather than coordination, and
- 151.4 there is no evidence that the Parties are able to predict the future prices or promotions of Woolworths.

152 The Parties elaborate below.

The Parties and Woolworths engage in activities designed to make their conduct less (not more) predictable to competitors

153 [REDACTED].

Example 1: [REDACTED]

154 [REDACTED].¹²⁹ [REDACTED].

Figure 3: [REDACTED]¹³⁰ [REDACTED]

[REDACTED]

155 [REDACTED]. If there was pre-existing coordination, we would expect the Parties to be able to predict to some extent how their competitors would respond to their initiatives. As such, this evidence is clearly more consistent with competition than pre-existing coordination.

Example 2: [REDACTED]

156 In addition, as the Commission is aware, the Parties each [REDACTED]. As set out below, the Commission has acknowledged that the use of these categories would increase the difficulty to reach and sustain a tacit understanding with Woolworths since it requires reaching an understanding on multiple retail prices (or price differentials).¹³¹ Relevantly, [REDACTED] is consistent with the Parties engaging in activities designed to make their conduct even more unpredictable to competitors.

Example 3: FSNI PAK’nSAVE Iconic programme

157 In May 2023 FSNI launched the Iconic programme in PAK’nSAVE stores. This programme identifies high performing KVIs within the PAK’nSAVE banner and [REDACTED].

Example 4: FSSI [REDACTED]

158 [REDACTED]

159 [REDACTED].

¹²⁹ [REDACTED].

¹³⁰ [REDACTED].

¹³¹ SOUI at [369].

160 The examples described above are inconsistent with coordination, where competitors would instead attempt to make their conduct *more* predictable.

Increased focus on promotions that cannot be detected by rivals

161 In addition, in recent months there has been an increased focus by grocery retailers on developing “personalised promotions”. A recent Deloitte study suggests that in the next five to ten years the marketing of groceries will become “hyper-personalised”.¹³² Personalised promotions are promotions that are tailored to individual shoppers through the use of algorithms. These promotions are designed to create customer loyalty and are communicated directly to individual shoppers (via email, text, app etc) and are not visible at the shelf edge (and therefore cannot be detected by other retailers). [REDACTED].

162 For example:

162.1 the Parties have observed that Woolworths’ Everyday Rewards programme includes personalised “Boost offers” which are offers specifically tailored to each member, based on what that shopper typically buys when they swipe their Everyday Rewards card at the checkout.¹³³ The specific “Boost offers” presented to each customer are not visible to anyone other than the specific customer, and

162.2 [REDACTED], and

[REDACTED]

162.3 [REDACTED].

Monitoring rivals’ pricing is not consistent with facilitating coordination

163 In addition, while the Parties monitor Woolworths’ pricing, this is consistent with competition rather than coordination. Firms continually monitoring prices of rivals and responding to changes in those prices is a feature of highly competitive markets.¹³⁴ Monitoring the retail prices of products sold by Woolworths is aimed at *increasing* the Parties’ competitiveness against Woolworths and reflects the fact that Woolworths’ strategies are not well known to the Parties.

164 As explained in the Parties’ submission on the Statement of Issues (see paragraph 179), [REDACTED].¹³⁵ If there was pre-existing coordination between the Parties and Woolworths, [REDACTED].

165 Rather, there is strong evidence that the Parties and Woolworths are competing. For example:

165.1 FSNI and FSSI are highly focused on investing in price, particularly in relation to products that matter the most to customers, with a clear intent to drive

¹³² See for example: <https://www2.deloitte.com/us/en/insights/industry/retail-distribution/future-of-grocery-retail.html>

¹³³ See: <https://www.everydayrewards.co.nz/how-boosts-work>

¹³⁴ For example, in the Commission’s written reasons for providing clearance in respect of the Z / Chevron merger, the Commission stated that “we would expect any firm in a competitive market to closely consider and monitor the reactions of its rivals to any initiative it undertakes (whether that be pricing or otherwise).” See: *Z Energy Limited and Chevron New Zealand* [2016] NZCC10 at [225].

¹³⁵ SOUI at [390.3].

customers to FSNI/FSSI stores i.e. compete. For example, as demonstrated in the excerpt below, [REDACTED],

[REDACTED]

165.2 the Commission acknowledges that it has seen evidence of the Parties [REDACTED],¹³⁶

165.3 [REDACTED]:

- (a) [REDACTED],
- (b) [REDACTED],
- (c) [REDACTED], and
- (d) [REDACTED], and

165.4 [REDACTED].

There is no evidence that the Parties are able to predict the future prices or promotions of Woolworths.

166 Further, the Commission has acknowledged that it has not seen any evidence suggesting that the Parties are able to predict the future prices or promotions of Woolworths.¹³⁷

167 For example:

167.1 [REDACTED], and

167.2 as noted above, [REDACTED].

Price coordination alone would be unstable

168 The Commission has stated that the most likely metric that the Merged Entity and Woolworths would coordinate on is national retail grocery prices.¹³⁸

169 However, grocery retailers compete on a variety of other parameters of competition in addition to price, such as:

169.1 convenience of store locations locally,

169.2 value for money, taking into account product quality as well as price, and

169.3 other aspects of the in-store shopping experience, including range and quality of service (e.g. number of employees available to offer assistance).

170 These factors make one-dimensional coordination on price unstable, because it is far from the only factor influencing customer choice, and accordingly competition between suppliers.

¹³⁶ SOUI at [391] and [REDACTED].

¹³⁷ SOUI at [391].

¹³⁸ SOUI at [354].

171 The Parties and Woolworths have different price/quality positioning and the respective banners of the Parties (PAK'nSAVE, New World and Four Square) and Woolworths (Woolworths, SuperValue and Fresh Choice) all compete on different aspects of price and non-price dimensions of competition.¹³⁹ The differentiation between banners complicates the likelihood of the firms of both reaching a coordinated agreement and maintaining coordination because it:

171.1 means that the retailers would need to agree on a set of collusive price differentials in relation to each banner, rather than a single price for any given product, and

171.2 affects the incentives for cheating and the ability of the firms to retaliate. In particular, differentiation between the banners means that firms could cheat in many ways that would not easily be detected, such as by improving the quality of products or adjusting the project range.

172 The Commission has acknowledged that to account for these non-price aspects of competition, the Parties and Woolworths would need to reach an understanding on relative prices and adjust for differences in non-price dimensions (such as range, quality of service etc).¹⁴⁰ This would simply not be practicable.

Price coordination would not be feasible across a wide range of complex products

173 The number and differentiation of products offered in retail grocery markets acts as a material hindrance to coordination. The Commission has accepted that the fact that grocery retailers sell many thousands of products adds complexity and would make reaching and monitoring a coordinated agreement covering all products more difficult.¹⁴¹

174 For example, FSSI offers [REDACTED] individual product SKUs, [REDACTED], with Woolworths likely offering a similarly large number of products. FSNI and FSSI do not have consistent product ranges across stores, and neither does Woolworths.¹⁴² Further, fresh products, which make up approximately [REDACTED]% of the Parties' sales [REDACTED]. Price is only one dimension of competition, with quality also being a very significant factor for fresh products.

175 Coordination on price across such a large range of products would be time-consuming and costly to implement. In particular:

¹³⁹ For example:

- New World is a full-service supermarket banner offering a comprehensive range, large employee numbers and additional service offerings,
- PAK'nSAVE is committed to offering New Zealand's lowest food prices and offers a no-frills warehouse format that works hard to reduce costs in every corner of the business,
- Four Square is primarily focused on convenience, with smaller community-focused stores often in smaller or rural locations, and
- similarly, Woolworths has different value propositions through its Woolworths, Super Value and FreshChoice supermarket banners.

¹⁴⁰ SOUI at [368].

¹⁴¹ SOUI at [364].

¹⁴² [REDACTED].

175.1 given prices change frequently, particularly for fresh products, coordination would need to be constantly updated, and

175.2 any coordination on price would need to factor in supplier trade spend.

176 Overseas competition authorities have acknowledged the complexity of pricing across a wide range of different products is a significant barrier to reaching and sustaining a coordinated outcome. For example:

176.1 in its consideration of the proposed merger between Sainsburys and Asda the Competition Markets Authority stated that “*We consider the main barrier to reaching and monitoring a common understanding to be the complexity of pricing across such a wide range of different products*”,¹⁴³ and

176.2 the fact that there are thousands of different product SKUs was one of the key reasons provided by the Competition Commission in 2008 for why coordination is unlikely in grocery. The Competition Commission stated that “*sustaining coordinated conduct over thousands of differentiated products or choosing a smaller group of products on which to coordinate would be sufficiently complex to prevent the emergence of tacit coordination.*”¹⁴⁴

Other factors would complicate any attempt at coordinated pricing

177 Further, there are a number of other elements of grocery retailers’ pricing that would complicate any coordinated agreement with Woolworths. For example:

177.1 **the ability for individual FSNI/FSSI stores to [REDACTED]:** Individual FSNI and FSSI stores are able to [REDACTED]. This ability means that even if the Parties and Woolworths were able to coordinate on retail national prices (which, for the reasons above and below would not be feasible), [REDACTED]. This would make it difficult for Woolworths to react to deviations on any coordinated agreement by [REDACTED], and accordingly significantly complicate any attempt by the Parties and Woolworths to reach a tacit understanding,¹⁴⁵

177.2 **corporate versus co-operative model:** Relatedly, the Parties’ owner-operator model involves material debt and risk for individual owners, creating a highly incentivised model for owners to compete locally. This model also [REDACTED],

177.3 **the application of promotions:** The Parties may have many products on promotion on any given week. For example, FSSI [REDACTED]. Similarly, FSNI [REDACTED] Promotions play a key role in both the Parties and Woolworths’ pricing strategies, such that it would not be sufficient to coordinate on price alone. However, it would not be feasible to coordinate through promotions, including because [REDACTED]. Further, promotions are increasingly complex and accordingly it would also be challenging to reach an understanding on price that adjusted for (or took into account) promotions.

¹⁴³ Competition & Markets Authority, *Anticipated merger between J Sainsbury PLC and Asda Group Ltd: Summary of Final Report*, at [54]. Available at: https://assets.publishing.service.gov.uk/media/5cc1434ee5274a467a8dd482/Executive_summary.pdf

¹⁴⁴ Competition Commission, *The supply of groceries in the UK market investigation*, 30 April 2008.

¹⁴⁵ Add cross-reference to section below regarding Commission’s proposal re coordinating on a subset of products

In addition to personalised promotions discussed above at paragraph 161, the Parties and Woolworths also offer complex promotions with conditional pricing such as where the price for a particular product is dependent on the total number of units purchased, or where the relevant shopper is eligible for a further promotion (e.g. a Seniors discount on the relevant Seniors day),

177.4 **the Parties' use of [REDACTED]:** As set out above, the Parties [REDACTED]. As the Commission acknowledges, the use of these categories would increase the difficulty to reach and sustain a tacit understanding with Woolworths since it requires reaching an understanding on multiple retail prices (or price differentials),¹⁴⁶

177.5 **grocery retailers' wider strategic priorities for their pricing:** For example, Four Square offers a number of products at an "Everyday Great Price". The terms and conditions for Everyday Great Price Items state that these prices are generally set of a minimum of at least 12 weeks.¹⁴⁷ Similarly, New World offers a number of products at an "Everyday Low Price". Foodstuffs' website states that "*Everyday Low Price isn't a special or one-off promotion price. Everyday Low Price products remain at a consistently low price. Our shoppers can easily find the blue ticket and can have more certainty on the price of their groceries when they shop at New World*".¹⁴⁸ Priorities such as ensuring consistency/certainty of pricing and reducing the number of price changes (which can also lead to customer confusion) would be likely to conflict with following Woolworths' pricing changes,

177.6 **interdependencies of pricing between products:** for example, pricing differentials within and across categories and between substitute and complementary products, large vs small pack sizes, and branded vs private label products, and

177.7 **Woolworths' potential move to local pricing:** the Parties understand based on media reporting¹⁴⁹ that Woolworths may be moving from national pricing to give more emphasis to local pricing. To the extent that this is correct, coordination between the Parties and the Woolworths on a national basis would be even more challenging, as coordination would require the retailers each to set prices on a national basis.

Coordination on the average retail grocery prices across a subset or basket of products would not be practicable

178 The Commission has suggested that to overcome the complexities associated with coordinating across all products, including the ability of [REDACTED], the Merged Entity and Woolworths could instead:

¹⁴⁶ SOUI at [369].

¹⁴⁷ Refer to: <https://www.foursquare.co.nz/discover-specials-and-promotions/Everyday-Great-Price-Terms-and-Conditions>

¹⁴⁸ Refer to: <https://www.newworld.co.nz/promotions/everyday-low-price>

¹⁴⁹ See: Newsroom, Milne, J, *Big supermarket revamp lays groundwork for postcode price wars*, 7 August 2024, available at <https://newsroom.co.nz/2024/08/07/big-supermarket-revamp-lays-groundwork-for-postcode-price-wars/>

178.1 coordinate on average retail grocery prices across a smaller, targeted, basket of goods, rather than individual shelf prices,¹⁵⁰ or

178.2 alternatively, coordinate on a subset of products where [REDACTED].¹⁵¹

179 However, it would clearly not be feasible to coordinate on a subset of products:

179.1 first, in relation to the concept of coordinating across a basket of goods specifically:

- (a) there is no accepted definition of an "average basket". What is average to one retailer may be different for others. For example, [REDACTED], and [REDACTED]. This would make it difficult to agree which products are "in scope" and to reach a coordinated outcome on those products, and
- (b) even if the Merged Entity and Woolworths could agree on the products within the basket (e.g. milk, bread, apples), to the extent that those products were not branded or barcoded this would require each member of the coordinating group to monitor the range of the other and judge whether their own products were sufficiently close substitutes. Further, even with barcoded products pack sizes can complicate price comparisons,

179.2 second, coordination over a subset of products would face many of the same issues described above, including the volatility of pricing/promotions, and other interdependencies such as the type and size of each product,

179.3 a firm could easily undermine any collusive agreement by lowering prices on the products that fall outside the agreed subset, making it difficult to detect and address any deviations, and

179.4 finally, this coordination theory would require the Parties and Woolworths to reach a shared understanding on the level of an "average" retail price of a targeted basket or subset of goods. This would make it even harder for the Parties and Woolworths to monitor adherence to an understanding as it would be unclear if price differences were due to "cheating" on the understanding or simply a differing understanding in relation to how the "average" price was calculated.

No ability for deviation from a coordinated outcome to be easily identified and swiftly punished

180 The factors discussed above suggest that any attempt at coordinated pricing on national retail prices would be extremely challenging to implement in practice, and could become even more challenging over time given factors such as (i) an increased industry-wide focus on "personalised promotions" which cannot be detected by other retailers, (ii) Woolworths' potential move to localised pricing, and (iii) [REDACTED].

¹⁵⁰ SOUI at [366].

¹⁵¹ SOUI at [370].

181 It would not only be difficult for the Parties and Woolworths to reach a common view on the *scope* of any coordination, but it would also be challenging to *detect* any deviation from the coordinated outcome.

182 The SOUI suggests that price transparency in grocery markets enables the parties and Woolworths to monitor prices and “quickly detect large scale deviations from a coordinated agreement”.¹⁵² However, the SOUI also acknowledges that “it may be difficult to know whether a retail price change for an individual product is consistent with a coordinated agreement”.¹⁵³

183 In particular, given grocery retailing encompasses competition on the entire “retail offer”, with many variations in terms of both quality levels and price points across a range of complex products across multiple retail banners, the Parties and Woolworths would need:

183.1 first, to agree whether changes to non-price dimensions (e.g. customer service levels or breadth of range) would constitute deviating from a collusive agreement over prices, and

183.2 second, the ability to detect deviation from any coordinated agreement across these additional non-price dimensions in addition to price.

184 Consequently, there would be many ways to cheat or deviate from a coordinated agreement on price without detection. For example, as noted above:

184.1 a retailer could “cheat” by amending non-price dimensions such as by improving the quality of products or adjusting its product range, loyalty scheme benefits, store design, convenience features, e-commerce options etc, or

184.2 if the Merged Entity and Woolworths were only to coordinate on a sub-set of products then a retailer could undermine the coordinated agreement by lowering prices on products outside that defined sub-set.

185 If deviation from the coordinated outcome goes undetected then there would be no incentive to sustain a non-competitive outcome. Rather, as set out in HoustonKemp’s report provided alongside this submission, the Parties’ co-operative structure means that individual store owners have an incentive to set prices to maximise their own profits, given the competitive conditions specific to their local market. In contrast, Woolworths’ corporate structure means it has an incentive to set prices to maximise profits over all of its stores across New Zealand, collectively.

The merger would not increase the likelihood, completeness or sustainability of coordination

186 The SOUI states that the Proposed Transaction may increase the likelihood, completeness and sustainability of coordination on the level of national retail prices between the Merged Entity and Woolworths, including because it may make it easier for the Parties to set prices on a national basis, which in turn would make it easier for Woolworths to align its prices with those of the Merged Entity, or make it easier

¹⁵² SOUI at [381].

¹⁵³ SOUI at [381].

for the Merged Entity to align its prices more closely with those of Woolworths (than each of the Parties could individually do without the Proposed Transaction).¹⁵⁴

187 The only relevant change that would arise from the Proposed Transaction would be to combine the Parties' support centres. The Proposed Transaction would not impact the conditions for coordination, discussed above. In particular:

187.1 there would not be any change to the number of products offered or the differentiation of the respective banners of the Merged Entity and Woolworths,

187.2 the Parties' owner-operator model would continue with the Proposed Transaction. This means that the Merged Entity would continue to be a co-operative of individual store owners [REDACTED],¹⁵⁵ [REDACTED]. As a result, [REDACTED],

187.3 the level of *transparency* of pricing would not change. There would be no meaningful increase in Woolworths' ability to monitor the pricing at the Merged Entity's stores. Nor would there be any increased ability for the Merged Entity and Woolworths to detect deviation from a collusive agreement and punish such deviations,

187.4 there would be no change to downstream retail demand and the competitive conditions between the Merged Entity, Woolworths and other competitor stores as a result of the Proposed Transaction,

187.5 the dynamics in retail grocery markets that drive national and regional pricing would be the same in the factual and counterfactual (noting that the Parties are likely to have greater organisational or practical ability to implement national pricing in the factual and [REDACTED]. In other words, the Parties would face the same incentives to set retail grocery prices nationally following the Proposed Transaction as in the counterfactual. In any event, if the Proposed Transaction did cause an increase in the amount of national pricing, it would be a pro-competitive feature of the Proposed Transaction, as the Parties consider the outcome would be that customers all over the country would benefit from an increase in competition in a particular local area, as pricing would be set at the most competitive level,¹⁵⁶ and

187.6 finally, the Merged Entity and Woolworths would remain fundamentally asymmetric due to differences between:¹⁵⁷

- (a) the co-operative versus corporate model [REDACTED],
- (b) the number of banners and size of each business' network of physical stores, and

¹⁵⁴ SOUI at [337.2].

¹⁵⁵ For example, the Commission's quantitative analysis shows that [REDACTED] [REDACTED] and [REDACTED] [REDACTED]. SOUI at [360] and [361].

¹⁵⁶ For further information see paragraph 185 of the Parties' submission on the Statement of Issues.

¹⁵⁷ HoustonKemp notes there is also a potential change in cost asymmetries between Foodstuffs and Woolworths due to the potential for a small reduction in grocery acquisition costs for the merged entity. However, whether costs become more or less symmetric with the Proposed Transaction depends on the difference in costs between FSSI and FSNI and Woolworths without the Proposed Transaction (matters that neither party knows about the other).

- (c) the costs and strategies associated with being a Trans-Tasman versus New Zealand only competitor.

188 For the reasons above, the Commission can be satisfied that there is not a real chance of the Proposed Transaction substantially lessening competition due to coordinated effects.

APPENDIX 1 – RESPONSE TO SPECIFIC THIRD-PARTY CONCERNS RAISED

- 1 The SOUI records concerns regarding the potential impact of the Proposed Transaction expressed by a number of suppliers.¹⁵⁸ A significant portion of this material is redacted from the version of the SOUI that has been provided to the Parties and some details are also redacted from the version made available to the Parties' external advisers.
- 2 It is well-established that, in reaching a determination under the Act, the Commission is required to observe the rules of natural justice. These rules relevantly include:
 - 2.1 the requirement to base the decision upon relevant evidence of probative value i.e. material that in fact "tends logically to show the existence of facts consistent with the finding", and
 - 2.2 the requirement to give an applicant notice of and a reasonable opportunity to respond to material evidence against them.¹⁵⁹
- 3 For the reasons below, these rules indicate the need for the Commission to carefully assess the weight (if any) that can be placed on this material.
- 4 Firstly, the apparent concerns of some suppliers about what they consider the impact of the merger may be are not evidence of past or existing facts but expressions of subjective opinion as to what may occur in the future. Under the Evidence Act, such opinions would only be admissible as evidence if they were from suitably qualified and independent experts.¹⁶⁰
- 5 While the Parties acknowledge the Evidence Act is not directly applicable to the Commission's decision-making process, the Commission is nevertheless required to base its decision on relevant evidence of probative value. The general principle reflected in the Evidence Act, that non-expert opinion evidence from interested parties has little or no probative value, is therefore relevant.
- 6 That is not to deny that suppliers have relevant experience and expertise in how the particular markets in which they participate operate. However, some of the comments included in the SOUI go well beyond this. For example, views on the effect of the merger on the likelihood of

¹⁵⁸ For example, SOUI Table 2 and footnotes, paragraphs 145-146, 150-153, paragraph 274, Table 3.

¹⁵⁹ *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon* [1983] NZLR 662 (PC) at 671.

¹⁶⁰ See Evidence Act 2006 ss 23, 25, 26.

new entry or expansion by grocery retailers;¹⁶¹ or about potential impacts on parties other than themselves (e.g. smaller suppliers).¹⁶² Such comments are merely speculation and are not probative of any issue.

7 Secondly, to the extent the Commission were minded to place weight on this material, this would give rise to a procedural fairness issue, having regard to the extent to which it has been extracted from longer statements or interviews with suppliers that have not been provided, then redacted from the versions of the SoUI provided to the parties and, to lesser extent, their advisers. In these circumstances, the Parties have been limited in their ability to understand and respond to this material, and have not had the opportunity to test these opinions or the assumptions on which they are based. As the Commission will see from the analyses in Section 2, the Parties’ advisers have been able to partly respond to some of the specific concerns provided on an external adviser-only basis, based on information they had to hand, but have been limited in their ability to do so.

8 For these reasons, the Parties say this material should not be given weight in the Commission’s determination.

Para	Content	Comment
69.4	We have some evidence of direct competition between FSSI and FSNI to acquire groceries from some suppliers where there is a shortage of supply (ie, fresh produce) and/or where a supplier’s capacity is restricted to supplying either FSSI or FSNI but not both; ¹⁶³	<p>The Parties cannot see any evidence in the SOUI regarding them directly competing – no such evidence appears in the footnote, and the Parties have not seen any such evidence elsewhere in the SOUI.</p> <p>The SOUI cites the HoustonKemp report, but the citation is not evidence of direct competition, it is a conceptual framework for considering product shortages where both Parties are buyers. The Commission has not appeared to acknowledge or consider the point HoustonKemp is making.</p> <p>The point is that the prospect of periodic shortages of a particular fresh grocery product – a situation that will alter the near-term shape of the supply curve – should not affect either the concepts or the application of the bargaining framework.</p>

¹⁶¹ See para 274 and Table 3.

¹⁶² See for example footnotes 98, 99, 103.

¹⁶³ For example, [] only services FSSI and does not consider that it would be big enough to sell into FSNI, in addition to the logistics of freighting into the other island. Commerce Commission interview with []. See also HoustonKemp Report on SoPI (7 March 2024) at [93], and Commerce Commission interviews with [] and [].

Para	Content	Comment
		See also the HoustonKemp report at 3.4.1.
Table 2 footnotes	For example, [] considers itself a medium sized business and expressed concern with the Proposed Merger that it would make it riskier with less major grocery retailers given that it is not a multi-national sized business, but thought that smaller local and regional suppliers would be covered because planograms allow for local/regional suppliers.	This concern appears to be focused on the effect on an individual supplier rather than competition. There is no explanation for the basis of the concern and what outcome the supplier is concerned about. So it is difficult to respond in more detail. Further, it is contradicted by the evidence in Section 2.
	[] considers itself a medium sized business and expressed concern with the Proposed Merger that it would be difficult for manufacturers and that it would be especially difficult for smaller businesses.	This complainant appears to be speculating on potential issues arising for other suppliers (manufacturers and smaller businesses), rather than giving an account of its own likely experience. Further, the basis for the perceived difficulty (or outcome of concern) is not explained. See Section 2 for evidence regarding acquisition conduct.
	[] noted their pipeline for importing products is [] and it expressed a concern that with the Proposed Merger, there would be no option to divert supply to one of the Parties and the volumes that it would supply to the merged entity could not be sold to other channels (eg, smaller grocery retailers or restaurants).	The idea that a supplier can simply divert supply ignores the role of customer demand in ranging decisions. In reality, customer demand is a primary driver of ranging decisions. The fact that ranging decisions are driven by downstream competitive conditions explains why the Parties are not simply separate "options" for suppliers, with the Proposed Transaction reducing choice. Rather, the overall opportunity, and the drivers of decisions in relation to it, would not be altered by the Proposed Transaction. This is an effect on a supplier (i.e. it would need to stop importing a product if it were de-listed) not an effect on competition.
	[] expressed concern with the Proposed Merger that there would be increased pressure on it as a supplier and that there is a low probability that other channels like export, foodservice or hotels could replace volume to the merged entity.	This concern appears to relate to a particular supplier rather than competition in a market. For analysis of the effects of the Proposed Transaction on conduct in acquisition markets see section 2.
	See Commerce Commission interviews with [], [], [] and [].	Evidence redacted.
	For example, [] expressed concern with the Proposed Merger that smaller suppliers, particularly South Island based manufacturers would struggle. While [] considers itself in a unique position to other suppliers in terms of already supplying across the geographies and better placed to navigate the Proposed Merger, it does express concern in relation to the potential impact on smaller suppliers who may only be able to range to a smaller supply base without the scale or operation to supply at a national level. It also considers that for a lot of suppliers, if they lost	This supplier appears to be speculating on issues that could arise for other suppliers, while acknowledging the Proposed Transaction would be unlikely to affect it. Further, the merged entity would not have an incentive to drop local suppliers <u>unless</u> alternatives offered a more competitive proposition, meaning there would be no adverse effect on competition.

Para	Content	Comment
	<p>volume to the merged entity, they could not redirect volume into the domestic market.</p>	<p>As above, the ability to direct volumes through any particular retail channel depends on retail market conditions. Retail market conditions would not be altered by the Proposed Transaction.</p>
	<p>[] considers that smaller suppliers are more restricted to the North Island or South Island and so the risk to them is higher in relation to the outcome of the Proposed Merger with respect to terms and ranging. See Commerce Commission interviews with [], [] and [].</p>	<p>The merged entity would not have an incentive to drop local suppliers <u>unless</u> alternatives offered a more competitive proposition, meaning there would be no adverse effect on competition.</p>
	<p>For example, [] considers itself a big company. It noted its timeframe for importing products is [] and expressed concern with the Proposed Merger that it would be cautious about bringing product to market in New Zealand if not ranged with the merged entity.</p>	<p>This does not appear to be a competition concern, rather an explanation of the consequences for a particular supplier if a decision is made not to range its products.</p>
	<p>[] considers itself a medium-large supplier in a fortunate position but expressed concern with the Proposed Merger that suppliers who cannot supply nationwide would be removed or have their margin squeezed leading to fewer small suppliers, loss of innovation and large suppliers increasing. See Commerce Commission interviews with [] and [].</p>	<p>This supplier appears to be speculating on issues that could arise for other suppliers, while acknowledging the Proposed Transaction would be unlikely to affect it.</p> <p>The merged entity would not have an incentive to drop local suppliers <u>unless</u> alternatives offered a more competitive proposition, meaning there would be no adverse effect on competition.</p> <p>The Parties, and the evidence in Section 2, do not give rise to any concern that the Proposed Transaction would create a higher likelihood that larger suppliers would be ranged in preference to smaller suppliers (even if such an outcome could be a lessening of competition, which does not appear to be the case).</p>
	<p>For example, [] expressed concern with the Proposed Merger that the opportunity to have three separate negotiations would be removed and this would be challenging for both small and large suppliers. [] expressed concern that the Proposed Merger would increase risk by removing the ability to shift volume from one of the Parties to the other. It also considers that in terms of innovation, it would make it more difficult for a small brand to enter the market and build into a market leader. It considers that national ranging poses a high risk to suppliers that require volume to operate. See Commerce Commission interviews with [] and [].</p>	<p>The removal of a buyer would not cause a competition concern, in the unusual case of the Proposed Transaction which does not give rise to any downstream aggregation. This is explained at 87.4, and evidence associated with acquisition conduct is set out at Section 2.</p> <p>Innovation is specifically addressed from paragraph 124.</p>

Para	Content	Comment
	<p>For example, [] expressed concern with the Proposed Merger that its market is already small and only being able to sell into one customer would constrain its ability to innovate locally. See Commerce Commission interview with [].</p>	<p>For suppliers whose markets are small i.e. one or a small number of stores, the Proposed Transaction is not capable of giving rise to any change in competitive conditions. There would be no change to competition in any local market (which presumably drives stores' acquisition conduct), and no change to the ownership of any local store.</p>
	<p>For example, [] considers itself a large supplier with a unique product but expressed concern with the Proposed Merger that smaller suppliers would be impacted.</p>	<p>This supplier appears to be speculating on issues that could arise for other suppliers, while acknowledging the Proposed Transaction would be unlikely to affect it.</p>
	<p>[] expressed concern with the Proposed Merger that the merged entity might rationalise which could remove smaller suppliers in the market, particularly in the South Island. See Commerce Commission interview with [] and [].</p>	<p>A set out in the submission, and demonstrated in Section 2, the Parties' acquisition conduct is driven by its competitive position in retail markets, which would not change as a result of the Proposed Transaction.</p> <p>To the extent this concern focuses on smaller suppliers, for suppliers whose markets are small i.e. one or a small number of stores, the Proposed Transaction is not capable of giving rise to any change in competitive conditions. There would be no change to competition in any local market (which presumably drives stores' acquisition conduct), and no change to the ownership of any local store.</p>
	<p>For example, [] expressed concern with the Proposed Merger that the Parties are present in [] and so a loss in volume to the merged entity would affect its minimum threshold volume to actually produce a product. It also considers that harmonising national suppliers could potentially affect local suppliers.</p>	<p>This is a concern about the impact on a particular supplier of the merged entity's decision not to range its products, but does not provide any information on any effect on competition in an acquisition market.</p> <p>Further, the merged entity would not have an incentive to drop local suppliers <u>unless</u> alternatives offered a more competitive proposition, meaning there would be no adverse effect on competition.</p>
	<p>[] expressed concern with the Proposed Merger that for at least one of its products, it would be exposed if it lost volume to the merged entity because it is not a product that it can export easily. See Commerce Commission interviews with [] and [].</p>	<p>This is a concern about the impact on a particular supplier of the merged entity's decision not to range its products, but does not provide any information on any effect on competition in any acquisition market.</p>
<p>137. 138.</p>	<p>We have had suppliers (of all sizes, including large multinationals and smaller local suppliers) decline to participate in our investigation of the Proposed Merger. Suppliers who have made submissions and/or been interviewed (and suppliers that have declined to speak with us) have expressed concerns around whether the information</p>	<p>The Parties note the acknowledgement in the SOUI that supplier reluctance to talk about the Proposed Transaction was not based on actual evidence or any threats of retribution. The Parties wish to reiterate that there are no such threats. The Parties' commercial</p>

Para	Content	Comment
	<p>they provide us would be disclosed to the Parties, potentially due to a fear of retribution from the Parties for participating in this process. This is consistent with the Commission's experience in the market study in relation to suppliers of all three major grocery retailers, and in 2014 when it investigated under Part 2 of the Act conduct of what was then Progressive Enterprises (now Woolworths). We note some suppliers appear to have spoken with the media and cited concerns with speaking about the Proposed Merger because "...using their identity is something of a professional death-wish, fearing they could be deleted from supermarket distribution".¹⁶⁴</p> <p>Suppliers that have raised concerns with us about information being disclosed to the Parties generally did so due to the importance of continued supply to the Parties to maintain the viability of their business, rather than being based on actual evidence or any threats of retribution. In our experience, such concerns are not unusual where goods are supplied or acquired in highly concentrated markets. We consider that the processes we have in place to safeguard confidential and commercially sensitive information, including against disclosure to the Parties themselves, should enable suppliers to speak with us without fear of retribution by the Parties.</p>	<p>incentives are to treat suppliers as commercial counterparties that are critical to their success in their business of grocery retailing. They have no incentive to act irrationally, and consider they do not do so – this is consistent with the evidence the Parties have provided to the Commission throughout the process, and evidence regarding their conduct in category reviews included in Section 2. As such the concerns are unfounded.</p>
140.	<p>The Food and Grocery Council broadly agrees with our view in the SoI and submits that in response to its survey, suppliers consider that:¹⁶⁵</p>	<p>The response rate for the survey is not given, nor does the total number of members of NZFGC appear on its website, so it is not clear how representative this survey is. Further, no methodological information regarding the survey is given with the submission.</p>
140.1	<p>the Parties would have increased market power in procurement and negotiations with suppliers. With suppliers having fewer options, suppliers' ability to negotiate would diminish with the merged entity having more control over pricing and terms of trade leading to a transfer of surplus from suppliers to the merged entity; and</p>	<p>As to transfer of surplus, see 44, 87.1, 120.</p>
140.2	<p>the combined entity's consolidated power would enable the combined entity to negotiate more assertively, resulting in winners and losers among suppliers.</p>	<p>As expressed, this view does not appear to be a competition concern, because it focuses on assertive negotiations. The result – winners and losers – is consistent with any competitive process to sell products to a grocery retailer.</p>

¹⁶⁴ <https://www.newshub.co.nz/home/new-zealand/2024/06/suppliers-sh-t-scared-about-proposed-foodstuffs-mega-merger-of-north-and-south-island-businesses.html>.

¹⁶⁵ SoI submission from the Food and Grocery Council (26 April 2024) at [4.19] and [11.3].

Para	Content	Comment
141.	The Food and Grocery Council also submits that there was no analysis in the SoI on whether individual stores may have less countervailing power against a larger head office. ¹⁶⁶	The Parties assume the Commission is not considering this issue, as it has not raised it with the Parties (which the Parties consider is appropriate as the concern is unfounded). In any event, the Parties would not expect FGC to have experience or knowledge of the relationship between members and the centres.
142.	The Warehouse Group submits that the Parties' own economic report concludes that the Proposed Merger would improve the bargaining position of the merged entity relative to large and small national suppliers to the Parties and that the transfer of a mere surplus as characterised in HoustonKemp's report ignores the real-world implication of that effect. ¹⁶⁷	Information about the cost savings the Parties hope to achieve is at 61-63 and Figure 2. Information and evidence about a transfer of surplus is at 44, 87.1 and 120.
143.	The Warehouse Group also submits that there would be a material reduction in the bargaining power of suppliers with the Proposed Merger and a move to a single national supply contract compared to supply arrangements with FSNI and FSSI separately. ¹⁶⁸	Information about the cost savings the Parties hope to achieve is at 61-63 and Figure 2. Evidence about the implications of the Proposed Transaction for dynamics in acquisition markets is in Section 2. Moving to a single national supply contract would not, in and of itself, represent a lessening of competition – see for example 51.1.
144.	Anonymous G highlights a concern around the merged entity becoming a de facto 'decider' of what grocery products are listed in New Zealand and submits that it would be difficult for a grocery supplier to continue to sell or launch a product unless it is listed with the merged entity. ¹⁶⁹	The Parties do not consider it accurate, based on the market analyses set out at Section 2, that the merged entity would have the ability to decide (without reference to consumer demand), which products to range, given products are available at other retailers and suppliers have other channels. The Parties' competitors would remain materially the same, with the same retail presence as absent the Proposed Transaction, so the significance of new products being ranged by those competitors would be unchanged compared with currently and in the counterfactual.

¹⁶⁶ SoI submission from the Food and Grocery Council (26 April 2024) at [2.3(c)].

¹⁶⁷ SoI cross submission from The Warehouse Group (10 May 2024) at [6] and [9]. We note the Parties' response to this submission that any change in bargaining outcome, or price, is not in and of itself a competitive harm. The Parties further note that no evidence is provided by The Warehouse Group about the real-world implication of the effect of a "mere" transfer. SoI cross submission from the Parties (31 May 2024) at 2.

¹⁶⁸ SoI cross submission from The Warehouse Group (10 May 2023) at [18(a)]. We note the Parties' response to this submission that there is no evidence presented by The Warehouse Group on this point. SoI cross submission from the Parties (31 May 2024) at 7.

¹⁶⁹ SoI submission from Anonymous G (18 April 2024) at [6].

Para	Content	Comment
154.	Freighting across the Cook Strait is recognised as a significant expense for suppliers. ¹⁹¹ We have been told that it is more costly moving product from the North Island to the South Island compared to the reverse, ¹⁹² and there are also some suppliers who do not move or move very little product between the North Island and South Island because of the costs involved. ¹⁹³ If the merged entity – by potential “cherry picking” of terms – implemented the better of the terms in a supplier’s existing contract with FSNI and FSSI, this could have implications for suppliers in terms of margin and ranging. For example, one industry participant indicated to us that it expects FSNI and FSSI to merge terms, taking the terms that are more favourable to the commercial interests of the merged entity, rather than a fair balance and expressed concerned about this, given there are more costs involved in getting product to the South Island. ¹⁹⁴	Details of the evidence are redacted. The Parties do not know which product market/s this concern relates to. But the idea that the Parties would be able to cherry-pick terms irrespective of the costs associated with bringing products to market is not consistent with the evidence associated with particular product markets, provided at Section 2. It would also be directly contrary to the Parties’ incentives, which are to maintain competitive supply – see 76-87.
161.1	for suppliers in many markets, options of at least the scope and scale of the Parties are available (eg, export) and other grocery retailers of sufficient scope and scale provide alternatives (eg, Chemist Warehouse);	
163.	Anonymous G’s submission agrees with our characterisation of the Proposed Merger as a three to two reduction in the number of major grocery retailers acquiring groceries from suppliers, and also that FSNI and FSSI currently present alternative channels to market and separate opportunities for suppliers to have products listed. ¹⁹⁵	The change in the opportunity associated with the Proposed Transaction, and its effects on the ability and incentives to lessen competition in supplier markets are set out in Section 1, with evidence provided at Section 2, as well as 87.4.
164.	Lisa Asher submits that there are currently three supermarket buyers in New Zealand and three options for suppliers to sell their product into. ¹⁹⁶	As above.

¹⁹¹ Commerce Commission interview with [redacted].

¹⁹² Commerce Commission interview with [redacted].

¹⁹³ Commerce Commission interviews with [redacted] and [redacted]. In addition, [redacted] currently only supplies FSNI. However, it does currently supply some [redacted] for the right price but notes the high freight costs. Commerce Commission interview with [redacted].

¹⁹⁴ Commerce Commission interview with [redacted].

¹⁹⁵ SoI submission from Anonymous G (18 April 2024) at [5]-[8].

¹⁹⁶ SoI submission from Lisa Asher (25 April 2024) at 5. We note that the Parties response to this submission is that the three to two concern in relation to buying is not supported by the evidence. SoI cross submission from the Parties (6 May 2024) at 26.

Para	Content	Comment
165.	The Food and Grocery Council submits that in response to its survey, suppliers consider that maintaining three separate major grocery retailers reduces the risk by offering more options and spreading the risk. ¹⁹⁷	As above.
166.	Industry participants consider that:	
166.1	the Parties do not generally compete for volume from grocery products (including due to the geographical separation and/or different territories in which each of FSNI and FSSI operate); ¹⁹⁸ but	Details of the evidence are redacted, so it is not possible to tell which markets these comments relate to. Evidence on the effect of the Proposed Transaction in particular markets is provided at Section 2.
166.2	there are currently three major grocery retailer customers with which suppliers can have separate trading negotiations, and with the Proposed Merger, this would reduce to two. ¹⁹⁹	Details of the evidence are redacted, so it is not possible to tell which markets these comments relate to. The change in the opportunity associated with the Proposed Transaction, and its effects on the ability and incentives to lessen competition in supplier markets are set out at Section 1, with additional evidence provided at Section 2. See also 87.4.
167.	The Parties compete directly for volume from suppliers in limited circumstances (for example, in periods of short supply, which may happen in relation to fresh produce, but there are also potentially other times when products are in short supply – eg, imported products facing shipping problems) and this competition would be lost as a result of the Proposed Merger. ²⁰⁰	No evidence is cited for this concern. The principles associated with this concern are set out in the second HoustonKemp report, and the HoustonKemp report provided with this submission.
168.	There appears to be a few instances where one of the Parties has ranged a product and a supplier might use that as leverage to obtain ranging in the other of the	Unable to see this evidence, so cannot comment on its validity. In general, suppliers do not provide the Parties with information on their supply to other customers.

¹⁹⁷ SoI submission from the Food and Grocery Council (26 April 2024) at [13.3].

¹⁹⁸ Commerce Commission interviews with [], [], [], [] and [].

¹⁹⁹ Commerce Commission interviews with [], [], [], [], [], [], [], [], [] and [].

²⁰⁰ FSSI acknowledges that fresh produce is difficult and that it is most prone to shortages in the market for a number of reasons, including climate situations, biosecurity or market access (import) issues. Commerce Commission interview with FSSI (20 February 2024).

Para	Content	Comment
	Parties. ²⁰¹ However, suppliers that we have spoken with (across different categories and of varying sizes) consider that in practice:	
168.1	there is no mechanism with which they can directly play the Parties off against each other; ²⁰²	Unable to see this evidence, so cannot comment on its validity. In general, suppliers do not provide the Parties with information on their supply to other customers. That is, this comment is consistent with the Parties' experience. The evidence in the footnote relating to fresh produce appears to refer to wholesaler purchasing rather than retailer (presumably, fresh produce wholesalers?)
168.2	they do not leverage their position or terms with one in order to obtain better trading terms with the other; ²⁰³ or	The evidence is redacted so the Parties do not know what market/s it relates to. In general, the comment is consistent with the Parties' experience.
168.3	they do not share terms between the Parties. ²⁰⁴	The evidence is redacted so the Parties do not know what market/s it relates to. But the comment is consistent with the Parties' experience.
169.	Even when FSNI and FSSI are not explicitly competing for volume from a supplier, the Proposed Merger would lessen competition and increase buyer power. This is because a single negotiation with the merged entity would raise the stakes and the cost of disagreement for suppliers, compared to separate negotiations with each of FSNI and FSSI. Disagreement with either FSNI or FSSI, separately, could mean a supplier would lose the margins associated with sales to one of the Parties, whereas disagreement with the merged entity could mean a supplier would lose the margins associated with all sales to the Parties.	The evidence is redacted so the Parties do not know what market/s it relates to. Information on potential effects on acquisition markets is provided at Section 2.

²⁰¹ Commerce Commission interviews with [REDACTED], [REDACTED] and [REDACTED].

²⁰² Commerce Commission interview with [REDACTED]. However, one industry participant indicated there are instances where suppliers of fresh produce might play off the Parties against each other albeit this is more in respect of the wholesale space than retail. Commerce Commission interview with [REDACTED].

²⁰³ Commerce Commission interviews with [REDACTED], [REDACTED] and [REDACTED].

²⁰⁴ Commerce Commission interview with [REDACTED] and [REDACTED]. FSNI also told us that suppliers [REDACTED]. Commerce Commission interview with FSNI (22 February 2024).

Para	Content	Comment
	We have been told that the Proposed Merger would reduce suppliers' ability to negotiate and that this would be challenging for small suppliers. ²⁰⁵	
170.	While the Parties serve different islands and operate quite differently (including the potential for FSNI and FSSI to reach different terms), ²⁰⁶ we remain of the view that the Proposed Merger would reduce the number of major grocery retailer customers with which suppliers can negotiate from three to two and this would increase the merged entity's buyer power.	The Parties serve different islands and have some differences in their operations. Further, some differences in individual bargains would be expected within a bargaining framework – within the upper and lower bounds shown at Figure 1, bargains are not inherently preferable or otherwise from a competition perspective. Impact of the Proposed Transaction in terms of buyer power is set out at 61-63, applied at Section 2. See also 87.4.
177.	The Warehouse Group submits that retailers outside the major grocery retailers are of a different scope and scale and do not provide a true alternative for suppliers. ²⁰⁷	This concern assumes only other grocery retailers can provide an alternative channel to the Parties, which is incorrect. The validity of this point also depends on the market in question. Alternative channels, and their significance to competition in acquisition markets, are demonstrated in the analyses at Section 2.
178.	The Grocery Action Group submits that The Warehouse is the only other realistic competitor to the Parties and Woolworths. ²⁰⁸	This concern assumes only other grocery retailers can provide an alternative channel to the Parties, which is incorrect. The validity of this point also depends on the market in question. Alternative channels, and their significance to competition in acquirer markets, are set out in the analysis at Section 2.

²⁰⁵ Commerce Commission interview with [REDACTED].

²⁰⁶ Our review of a sample of 50 supplier contracts common to both Parties indicated that [REDACTED]. See responses to requests for information from FSNI (15 May 2024) and FSSI (10 May 2024).

²⁰⁷ SoI cross submission from The Warehouse Group (10 May 2024) at [18(b)]. We note the Parties' response to this submission that it is incorrect, simplistic, and inaccurate to characterise the Proposed Merger as a reduction from three to two buyers. The Parties further note that as an example, for suppliers in many markets, options of at least the scope and scale of the Parties are available (eg, exports), for suppliers in many markets other local grocery retailers are easily of sufficient scope and scale to provide an alternative (eg, Chemist Warehouse). For suppliers in lower-volume markets, grocery retailers do not need to be of a comparable scope and scale to provide an alternative. SoI cross submission from the Parties (31 May 2024) at 7.
[REDACTED]. Commerce Commission interview with The Warehouse Group (8 February 2024).

²⁰⁸ SoI submission from the Grocery Action Group (24 April 2024) at [3.10].

Para	Content	Comment
179.	The Food and Grocery Council submits that in response to its survey, suppliers generally perceive other grocery retailers like The Warehouse and Costco as too small to have an impact or provide a viable alternative to the major grocery retailers, and that these other grocery retailers lack the scale to compete effectively with the major grocery retailers. ²⁰⁹	This concern assumes only other grocery retailers can provide an alternative channel to the Parties, which is incorrect. The validity of this point also depends on the market in question. Alternative channels, and their significance to competition in acquirer markets, are set out in the analysis at Appendices 2 to 20.
180.	Rival grocery retailers that we have spoken with consider that they already acquire groceries on different terms to the Parties or may not be able to source brands sold through the Parties, or with the Proposed Merger would pay higher prices than the merged entity. However, one of these rival grocery retailers does not see themselves competing that closely with the Parties or consider that the Proposed Merger would materially impact on it. Specific feedback from rival grocery retailers includes:	
180.1	one smaller grocery retailer having told us that the Proposed Merger would have a limited effect on it albeit it does consider the major grocery retailers to be its close competitors. It also considers that it already does not acquire groceries on the same supply terms as some of the major grocery retailers; ²¹⁰	Information redacted from footnote. No merger effect is identified.
180.2	[], ²¹¹	Evidence redacted.
180.3	[it would consider itself a smaller player relative to the merged entity; ²¹² and],	Evidence redacted.

²⁰⁹ SoI submission from the Food and Grocery Council (26 April 2024) at [13.4].

²¹⁰ Commerce Commission interview with [redacted]. While [redacted], we do not consider it a direct competitor to the Parties given the differentiated offering and customer base.

²¹¹ Commerce Commission interview with [redacted].

²¹² Commerce Commission interview with [redacted] and [redacted].

Para	Content	Comment
		The focus on the ability to divert supply appears to be based on an assumption suppliers can (or should be able to) be ranged irrespective of retail demand for their products.
184.2	<p>anecdotal evidence from suppliers supports this data and other grocery retailers account for a very small proportion of grocery retailing, although we acknowledge that this may vary by category or supplier. For example, two suppliers (of non-food products) told us that over []% and []% of their revenue/business sits with the major grocery retailers.²¹⁹ A third supplier (of a range of grocery products) told us that []% of its products go through the major grocery retailers.²²⁰ A fourth supplier (of beverages) told us that the Parties are the primary source of its business,²²¹ with a fifth supplier (of dry food products) highlighting the dominant role of the Parties in its category.²²²</p> <p>A sixth supplier (of non-food products) said that the major grocery retailers make up a majority of its business and that its supply to other grocery retailers (ie, The Warehouse and Chemist Warehouse) are negligible compared to volumes being acquired by the major grocery retailers.²²³ A seventh supplier (of imported food) advised that while, it sells into The Warehouse and Costco, this is relatively small business compared to the major grocery retailers.²²⁴ Lastly, another supplier (of dry food products) noted that no other grocery retailers can buy at the volume of the Parties, especially for premium goods.²²⁵</p>	<p>Evidence redacted.</p> <p>Impact of the Proposed Transaction in particular markets is at Appendices 2 to 20.</p>
185.	Suppliers that we have spoken with (across a range of categories) consider that channel diversity and having multi-channels to sell into, is important for suppliers, ²²⁶ and we consider it is important to the competitive process in acquisition markets. One	The Proposed Transaction would not reduce the opportunity for suppliers, as set out at 51.1 and 89.

²¹⁹ Commerce Commission interviews with [] and [] be to other grocery retailers, as suppliers could also make sales to foodservice wholesalers.

²²⁰ Commerce Commission interview with [].

²²¹ Commerce Commission interview with [].

²²² Commerce Commission interview with [].

²²³ Commerce Commission interview with [].

²²⁴ Commerce Commission interview with [].

²²⁵ Commerce Commission interview with [].

²²⁶ Commerce Commission interviews with [], [], [] and [].

[]. We note that the remaining sales of these suppliers may not solely

Para	Content	Comment
	of these suppliers told us that, from a trading environment perspective, the fact that it has the ability to trade with three different major grocery retailers and also other smaller grocery retailers around the edges, balances things out currently. ²²⁷ However, other suppliers and industry participants indicated to us that they saw risks in supplying other grocery retailers or in offering them better prices than the Parties, currently or post-merger:	The availability of alternatives to supplying the Parties, and the merged entity, varies by acquisition market (and the effect of the Proposed Transaction must be considered at a market level, not an individual supplier level). As such, this issue is best addressed in the analyses at Appendices 2 to 20.
185.1	one supplier (of a range of grocery products) told us that it would struggle to supply The Warehouse because of that retailer’s price demands; ²²⁸	This suggests The Warehouse is bargaining hard and has options if it is prepared to let suppliers walk away if they do not meet price expectations. The Warehouse has indicated it achieves supply on competitive terms (see further below).
185.2	a second supplier (of a range of ambient products) said that it is not comfortable supplying The Warehouse and taking the risk of cheaper products on shelves being seen by the Parties; ²²⁹	Evidence redacted. The reason for the discomfort is unclear. As set out elsewhere, the Parties do not seek to disrupt supply to their competitors. The Parties do seek to ensure they receive supply on competitive terms. The Parties consider the evidence supports this.
185.3	a rival grocery retailer expressed the view that []; ²³⁰ and	Evidence not identified.
185.4	an industry participant described the practice of price indexing and noted in supply negotiations (on behalf of suppliers), they are asked what the opposition price is and how they index against it. For example, it considers that if Costco (even though it is a small grocery retailer) or The Warehouse are given the same price as the major grocery retailers and emerge with a sharp price (at the retail level), suppliers are called in by the major grocery retailers who seek a lower supply price from suppliers so they can match other grocery retailers, while maintaining existing margins. ²³¹	The Parties do not know the source of this comment. In the ordinary course, the Parties do not seek information on prices being offered to their competitors (and suppliers do not volunteer this information). The Parties would engage with suppliers with a view to ensuring the prices they receive allow them to remain competitive in retail markets, as would be expected. The Parties consider the evidence is consistent with the above.

²²⁷ Commerce Commission interview with [].

²²⁸ Commerce Commission interview with [].

²²⁹ Commerce Commission interview with [].

²³⁰ Commerce Commission interview with [].

²³¹ Commerce Commission interview with [].

Para	Content	Comment
186.	There are other alternative channels (including through food service, or direct selling online) for some suppliers. However, these do not appear to be a meaningful option for most suppliers (other than some suppliers of fresh produce).	No evidence cited.
186.1	Woolworths considers that producers and growers of fresh fruit and vegetables have significant options/alternative channels (eg, central markets, direct to customers, export, food service, food processors and meal kits), noting that export is the biggest market for many farmers/growers, while local consumer markets constitute a small proportion of their supply. ²³²	This is consistent with the Parties’ experience – see the market analysis on fresh produce, at Appendix 20.
186.2	One supplier (of fresh products) told us that its whole business is catered towards the major grocery retailers, and it would be very difficult to move to foodservice. ²³³	The impact of the Proposed Transaction on fresh produce is at Appendix 20.
186.3	A large supplier (of chilled products) told us that if it lost volume with the merged entity, it could not redirect that volume elsewhere in the domestic market – there would be nowhere for that volume to go, and that this scenario would be true for most suppliers that supply FSNI. ²³⁴	The impact of the Proposed Transaction on chilled products is analysed at Appendices 2 to 20. This scenario is not true for most suppliers – see the further market analyses at Appendices 2 to 20.
187.	We consider that there are likely to be a subset of suppliers that have no substantial alternative options of supply outside of the major grocery retailers, and these are particularly likely to be suppliers of products that are dry/ambient, frozen or chilled (as outlined earlier in Table 2). This is consistent with the concern that a reduction in major grocery retailer customers from three to two and a single point of negotiation with the merged entity would raise the stakes for such suppliers (ie, the cost of disagreement or risk to the supplier in being delisted and/or losing volume, would be significantly higher than without the Proposed Merger). In terms of evidence on this point from industry participants and suppliers (across a range of categories) that we have spoken with, we note that:	No evidence cited.

²³² E-mail from Woolworths to the Commerce Commission (17 April 2024). We note this is consistent with the view shared by some growers of fresh produce that we have spoken with, that they tend to go about seeking the best return for their product in the market. Commerce Commission interviews with [] and [].

²³³ Commerce Commission interview with [].

²³⁴ Commerce Commission interview with [].

Para	Content	Comment
187.1	some indicated that they view each of the Parties as a separate option to sell product into and consider that the Proposed Merger would remove suppliers' ability to shift volume from one of FSNI/FSSI to the other; ²³⁵	Evidence redacted, so product markets unknown. The idea that suppliers can (or should be able to) simply shift volume among customers, without reference to downstream demand, is incorrect. The starting point for category reviews is customer need states. The reduction in the number of buyers is addressed at 84-85.
187.2	one supplier (of non-food products) said that it can generally offset the impact of a delisting in FSNI with product to FSSI and Woolworths but is concerned that its offering would reduce over time with the Proposed Merger; ²³⁶ and	This is an impact on an individual supplier, not competition. The basis for the concern is not clear, so difficult to respond to. Not clear what market/s "non-food products" would fall into, but certain non-food ambient products are covered by the Parties' analyses at Section 2.
187.3	another supplier (of non-food products) considers that currently, it can balance a delisting in one of the Parties with volume to the other, but that this would no longer be an option post-merger. ²³⁷	Evidence redacted, so product markets unknown. The idea that suppliers can (or should be able to) simply shift volume among customers, without reference to downstream demand, is incorrect. The starting point for category reviews is customer need states. The reduction in the number of buyers is addressed at 84-85.
188.	Finally, even for suppliers that could divert some or all of their product to other channels such as export or food service, it may be difficult for those suppliers to do so quickly and easily. For example, one supplier told us that if the merged entity's buyer power led to the merged entity wanting better terms, the supplier could look to alternative channels out of survival. However, it noted that food service would be unlikely to replace the volume lost from the merged entity, and neither would export, especially in the time it takes to arrange it (given once delisted, a supplier would have a very short time to survive). ²³⁸ Another industry participant also noted that when a	There is no basis for the assumed significant change in ranging or pricing expectations. See analyses at Appendices 2 to 20. Final sentence not evidence of a competitive harm, just descriptive of what happens when a product is de-ranged in any circumstances.

²³⁵ Commerce Commission interviews with [] and [].

²³⁶ Commerce Commission interview with [].

²³⁷ Commerce Commission interview with [].

²³⁸ Commerce Commission interview with [].

Para	Content	Comment
	product is delisted, a supplier has to create new customers to make up the volume, which is difficult to do in the short term. ²³⁹	
193.	The Food and Grocery Council submits that in response to its survey, suppliers consider that: ²⁴⁰	
193.1	they experienced a shift towards centralised decision-making, with the new entity exerting dominance in negotiating better terms and that negotiations often favoured the terms where there was the lowest cost, resulting in reduced profitability for some suppliers;	This point does not suggest any competition problem. As to a transfer of surplus, see 44, 87.1, 120. As to centralised decision-making, see 102.
193.2	despite the promise of increased efficiencies and cost savings, the previous North Island Foodstuffs merger failed to deliver tangible benefits to consumers with prices sometimes increasing and ranging opportunities decreasing; and	No evidence is given for this concern. The Parties have provided evidence that this concern is not correct – see paragraph 93.
193.3	since the previous North Island Foodstuffs merger, they have experienced resource limitations, negotiation challenges, range consolidation and product deletions, decreased profit and increased reliance on the merged entity as well as alignment of terms and voidance of historical agreements.	No evidence is given, so FSNI cannot respond to the specific points but consider this effect is not correct. In any event, for the reasons given in the submission, the concerns do not, in and of themselves, amount to competition concerns. FSNI is not sure is what is meant by the reference to “voidance of historical agreements” and are not aware of any complaints that have been raised in relation to historical agreements.
194.	The Warehouse Group submits, in respect of the previous North Island Foodstuffs merger, that there is a real question about whether the benefits promised by that merger (which it submits were customers benefitting from operations running under one IT system, integration, launch of online grocery delivery, improved efficiencies and savings resulting in better services and lower prices over time) ever or mostly eventuated, and that similar statements made by the Parties about the Proposed Merger should be treated with caution. ²⁴¹	No evidence is given for these concerns (and many of them would not be known by a third party as they deal with FSNI’s internal information. Further, the Parties addressed these concerns in their cross submission on the SoPI – see paragraph 63.

²³⁹ Commerce Commission interview with [].

²⁴⁰ SoI submission from the Food and Grocery Council (26 April 2024) at [15.2], [15.5] and [15.8]. We note the Parties’ response to this submission that FSNI disagrees it exerted “dominance” following the previous North Island Foodstuffs merger. The Parties further note that FSNI considers retail grocery prices decreased as a result of the previous North Island Foodstuffs merger and disagrees that retail consumer choice has decreased – rather that FSNI has continued to seek to optimise its offer to consumer demand. SoI cross submission from the Parties (6 May 2024) at 18-19.

²⁴¹ SoPI submission from The Warehouse Group (9 February 2024) at [6]-[7], [31]-[36]

Para	Content	Comment
195.	Industry participants that we have spoken with (including suppliers across a range of categories and of all sizes, both large multinationals and smaller local suppliers) have expressed mixed views on the impacts of the previous North Island Foodstuffs merger and on the insights of this for our assessment of the Proposed Merger.	No evidence is given.
195.1	Four suppliers (in different categories) told us that the previous North Island Foodstuffs merger had very little impact or no significant change/difference, with one noting that with one point of contact, dealings with FSNI became easier, rationalised, centralised and/or smooth. ²⁴² Three suppliers (across differing categories) said that there was a crossover already between Foodstuffs Auckland and Foodstuffs Wellington prior to that merger or that they worked closely, and operated similarly in terms of their models, culture and policies. ²⁴³ However, one supplier (of health and beauty products) expressed the view that Foodstuffs Wellington behaved very differently to Foodstuffs Auckland. ²⁴⁴ One supplier (of fresh products) explicitly told us that there were “no instances of increased pressure from Foodstuffs” with the previous North Island Foodstuffs merger. ²⁴⁵ One other supplier (of dry food products) had no insight on how the North Island Foodstuffs merger impacted commercial terms, but considered that as a whole, the North Island Foodstuffs merger brought efficiencies. ²⁴⁶	These comments summarise suppliers’ experience of the 2013 merger, none of which indicates competition concerns.
195.2	However, five suppliers indicated that there was a change in buyer power as a result of, or that suppliers or competition were impacted by, the previous North Island Foodstuffs merger. One supplier (of dry food products) told us that the result of that merger was that there was more of a pressure to keep products listed, and that the power balance had shifted. ²⁴⁷	This concern does not indicate a competition issue – see above at paragraph 51.

²⁴² Commerce Commission interviews with [redacted], [redacted], [redacted], [redacted], and [redacted].

²⁴³ Commerce Commission interviews with [redacted], [redacted] and [redacted].

²⁴⁴ Commerce Commission interview with [redacted]. This supplier also considered that as a result of previous North Island merger, there became less options for supply, it had less negotiating power and one less fall-back option.

²⁴⁵ Commerce Commission interview with [redacted]. [redacted].

²⁴⁶ Commerce Commission interview with [redacted].

²⁴⁷ Commerce Commission interview with [redacted].

Para	Content	Comment
	A second supplier (of a range of grocery products) said that the centralised head office with that merger meant FSNI could leverage power over suppliers, impacting small suppliers. ²⁴⁸	FSNI does not consider the merger impacted smaller suppliers. But in any event, this concern does not give evidence of any competition issue.
	A third supplier (of chilled products) noted that it lost a competitive customer with the previous North Island Foodstuffs merger. ²⁴⁹	No impact is mentioned, so it is difficult to respond to this concern. The overall opportunity for suppliers did not change, and in any event FSNI considers there was not a material impact on smaller suppliers.
	A fourth supplier (of beverages) noted that while some suppliers benefitted from that merger, others lost out. ²⁵⁰	This concern appears to describe a competitive process, rather than a competition concern.
	A fifth supplier (of dry food products) noted that following the Proposed Merger, the merged entity would seek to implement the better of the Parties' terms, as was the case with the previous North Island Foodstuffs merger. ²⁵¹	For the reasons given in the submission, this outcome would not represent a competition issue. See, for example, paragraphs 61-63 and Figure 2.
195.3	In terms of the insights we might draw from the previous North Island Foodstuffs merger, two suppliers (from different categories) told us that there were more similarities between Foodstuffs Auckland and Foodstuffs Wellington than between FSNI and FSSI, ²⁵² implying that the effects of the Proposed Merger would be likely to be greater than the previous North Island Foodstuffs merger. A third supplier (of fresh products) told us that during the time of the North Island Foodstuffs merger, the market was quite different, and the power of the major grocery retailers was not as strong, ²⁵³ with another industry participant considering that head office had less control over individual members at the time of the previous North Island Foodstuffs merger, ²⁵⁴ both suggesting that the effects of the Proposed Merger could be different.	It is not clear who provided this information, and therefore the validity of it. It is not clear what similarities are being referred to. The concerns do not appear to contain evidence.

²⁴⁸ Commerce Commission interview with [redacted].

²⁴⁹ Commerce Commission interview with [redacted].

²⁵⁰ Commerce Commission interview with [redacted].

²⁵¹ Commerce Commission interview with [redacted].

²⁵² Commerce Commission interviews with [redacted] and [redacted].

²⁵³ Commerce Commission interview with [redacted].

²⁵⁴ Commerce Commission interview with [redacted].

Para	Content	Comment
206.	The Food and Grocery Council submits that responses to its survey indicate a shared view among suppliers who perceive themselves as having less negotiating power relative to the major grocery retailers. ²⁵⁵	This survey result is not meaningful. The relative bargaining position of suppliers will depend on a range of factors that vary by product market, such as supplier concentration, the presence of must-have products (and, short of “must-have” status, many products enjoy popularity with customers that provides their supplier with material bargaining leverage) and alternative channels available. As is clear from the specific product market analyses provided at Section 2, there are many instances where suppliers have demonstrated a strong bargaining position e.g. [REDACTED].
207.	Industry participants that we have spoken with (including suppliers across a range of categories and of all sizes, both large multinationals and smaller local suppliers) have expressed mixed views on whether there is any countervailing power on the part of any suppliers.	No evidence given.
207.1	Evidence indicates that larger suppliers, suppliers of ‘must have’ products and suppliers with alternative options to the Parties may be more likely to have, or be perceived to have, countervailing power. For example, a large multinational supplier considers that it has strong bargaining power with the major grocery retailers because it is a big supplier and the major grocery retailers need it (ie, the major grocery retailers’ need for its product creates some leverage). ²⁵⁶	The Parties are unable to see the identity of this supplier so are unable to comment on the validity of its evidence. However, they note that many multi-national suppliers would be in this position i.e. big suppliers that are needed by the Parties.
	A second supplier (of a range of ambient products) expressed the view that a supplier the size of Coca Cola (for example) would never be delisted (even if it was underperforming) because it is a massive contributor to the margin of FSNI. ²⁵⁷ Two other suppliers (in different categories) indicated that smaller local and regional suppliers may have better leverage than other suppliers (with one noting that smaller suppliers potentially get a “leg up”, and the other noting that planograms allow for local/regional suppliers). ²⁵⁸ A fifth supplier (of dry food products) told us that its	The Parties are unable to see the identity of this supplier, but it is not clear why a supplier would have evidence about the contribution to FSNI’s margin of another supplier. [REDACTED]. This is not a competition concern with respect to the Proposed Transaction.

²⁵⁵ SoI submission from the Food and Grocery Council (26 April 2024) at [10.2].

²⁵⁶ Commerce Commission interview with [REDACTED].

²⁵⁷ Commerce Commission interview with [REDACTED]. Although we note that overseas Coca Cola has had products delisted or not ranged by major grocery retailers overseas at times. See <https://www.smh.com.au/goodfood/eating-out/woolworths-refusing-to-stock-coca-cola-no-sugar-20170706-gx5kti.html> and <https://supermarketnews.co.nz/news/shifts-in-supermarket-strategy/>.

²⁵⁸ Commerce Commission interviews with [REDACTED] and [REDACTED].

Para	Content	Comment
	strength of brand and propositions are its strength in negotiations, but also noted that "[the Parties] are more important to us than we are to them." ²⁵⁹	
207.2	Two suppliers indicated that they would not supply the Parties on terms that were unacceptable, with one suggesting a supplier might have a degree of power in negotiations where it has a 'must have' product. In particular, one supplier (of a range of products) said that if it cannot get a price that is acceptable, it would not supply product to the Parties, and noted that while it is necessary to "put up with what you can get," if a supplier has a product that the Parties really want, then there is no argument/questions on price. ²⁶⁰ A second supplier into FSSI told us that if the merged entity sought a better deal on one of its products, that it would not supply it and pull the product. ²⁶¹	The Parties are unable to see the identity of these suppliers, or the product markets they participate in, but their evidence is consistent with the Parties' experience.
207.3	In terms of evidence from grocery retailers, Woolworths told us that many dry grocery products are considered 'must haves' and these suppliers (of 'must have' dry grocery products) have significant countervailing power. ²⁶² Woolworths considers that a large proportion of suppliers have alternative options to supplying it and therefore exert countervailing power and constraint on it in negotiations. ²⁶³	The Parties are unable to see the identity of these suppliers, or the product markets they participate in, and further do not know Woolworths' position so it is difficult to comment on the specifics. However, as a general reaction, the evidence is consistent with the Parties' experience, and consistent with the market analyses in relation to dry grocery products provided at Appendices 2 to 20.
207.4	However, contrary evidence from other industry participants and suppliers (across a range of categories and of all sizes) is that a number of market leading brands or large suppliers have been de-ranged by the Parties (with some exiting the market or scaling back their business) or have had to reduce their prices/margins to be ranged by the Parties, suggesting that suppliers of such brands may not have countervailing power. For example:	
207.4.1	An industry participant told us that [], a supplier of [] products was completely de-ranged in FSNI and [] (a supplier of [] products) was	The Parties are unable to see the identity of this industry participant, or the product markets it participates in, so are unable to comment on the particular instance.

²⁵⁹ Commerce Commission interview with [].

²⁶⁰ In this instance, the supplier referred to its []. See Commerce Commission interview with [].

²⁶¹ Commerce Commission interview with [].

²⁶² E-mail from Woolworths to the Commerce Commission (17 April 2024).

²⁶³ E-mail from Woolworths to the Commerce Commission (17 April 2024).

Para	Content	Comment
	<p>forced to exit the market due to an inability to meet the Parties' margin expectations;²⁶⁴</p>	<p>But as a general response, this scenario appears not to be directly relevant to the point being made, but rather appears to describe the outcome of a competitive process in which the supplier was unsuccessful which does not in and of itself give rise to competition concerns. Further:</p> <ul style="list-style-type: none"> • there is no evidence that de-ranging occurs for any anti-competitive reason i.e. de-ranging is inevitably accompanied by ranging of products that are considered likely to form part of a more competitive offering. See for example 48-49 and Section 2, • the benign or pro-competitive nature of that process is unaffected by the supplier subsequently exiting the market (noting the Parties, like anyone, are sympathetic to any supplier that goes out of business), and • the point about "margin expectations" is a red herring – as above, the Parties range products taking customer need states as a starting point. The price component of that equation will, unsurprisingly, result in the Parties earning a margin (which will vary by product) but that does not override the overall goal of presenting the most competitive offering in the retail markets in which they participate. <p>Finally, it is not clear the Commission has validated this evidence, which appears to be second-hand evidence provided in an interview. If the Parties could see the scenario, it may be possible to provide evidence relating to it. The Parties consider the Commission should not rely on this evidence without substantiation.</p>
207.4.2	<p>One supplier (of [] products) lost approximately [] of its [] in FSNI and was forced to []. It explained that, while volume is only one of many variables it looks at when making portfolio decisions, losing as much volume as it did when it was delisted from FSNI was a major contributor to [];²⁶⁵</p>	<p>The Parties are unable to see the identity of this supplier, the product markets it participates in or the details of the scenario being described, so are unable to comment on these features.</p> <p>But as a general response, this scenario appears not to be directly relevant to the point being made, but rather appears to describe the</p>

²⁶⁴ Commerce Commission interview with [].

²⁶⁵ The product referred is []. Commerce Commission interview with [].

Para	Content	Comment
		<p>outcome of a competitive process in which the supplier was unsuccessful. Further:</p> <ul style="list-style-type: none"> • there is no evidence that de-ranging occurs for any anti-competitive reason i.e. de-ranging is inevitably accompanied by ranging of products that are considered likely to form part of a more competitive offering. See for example 48-49 and Section 2, • the benign or pro-competitive nature of that process is unaffected by the supplier subsequently exiting the market (noting the Parties, like anyone, are sympathetic to any supplier whose business experiences adverse outcomes), and • the point about “margin expectations” is a red herring – as above, the Parties range products taking customer need states as a starting point. The price component of that equation will, unsurprisingly, result in the Parties earning a margin (which will vary by product) but that does not override the overall goal of presenting the most competitive offering in the retail markets in which they participate. <p>Finally, it is not clear the Commission has validated this evidence, which appears to have been provided in an interview. If the Parties could see the scenario, it may be possible to provide documentary evidence relating to it. The Parties consider the Commission should not rely on this evidence without substantiation.</p>
207.4.3	<p>A second supplier (of [] products) told us about an instance where it was not able to meet FSNI’s margin expectations and so many products were delisted and []. While it was able to divert some of that supply to Woolworths, it was required to reduce its production;²⁶⁶</p>	<p>The Parties are unable to see the identity of this supplier, the product markets it participates in or the details of the scenario being described, so are unable to comment on these features.</p> <p>But as a general response, this scenario appears not to be directly relevant to the point being made, but rather appears to describe the outcome of a competitive process in which the supplier was unsuccessful. Further:</p> <ul style="list-style-type: none"> • There is no evidence that de-ranging, or reduction in the products ranged from a particular supplier, occurs for any anti-competitive reason i.e. de-ranging is inevitably accompanied by ranging of

²⁶⁶ Commerce Commission interview with [].

Para	Content	Comment
		<p>products that are considered likely to form part of a more competitive offering. See for example 48-49 and Section 2.</p> <ul style="list-style-type: none"> The benign or pro-competitive nature of that process is unaffected by adverse outcomes arising for the supplier’s business, such as reducing production (noting the Parties, like anyone, are sympathetic to any supplier whose business experiences adverse outcomes). <p>Finally, it is not clear the Commission has validated this evidence, which appears to have been provided in an interview. If the Parties could see the scenario, it may be possible to provide documentary evidence relating to it. The Parties consider the Commission should not rely on it without substantiation.</p>
207.4.4	<p>A third supplier (of [] products) told us that it has seen some big manufacturers exiting categories over time including [], major suppliers of [] which caused a shortage in the market and itself, having exited [] in the past few years because of the Parties’ margin aspirations;²⁶⁷</p>	<p>The Parties are unable to see the identity of this supplier or the product markets it participates in. It does not appear the “big manufacturers” have been identified, and the Parties are unable to see the products affected.</p> <p>The Parties are unable to identify the scenario or the timeline it relates to and do not believe it is accurate. In any event, they consider any shortage that may have arisen after de-ranging would have been unforeseen and inadvertent, and would have been resolved quickly.</p> <p>It is not clear what steps have been taken to validate the scenario described above, particularly as it appears to be second-hand information rather than relating to the supplier’s own experience. If the Parties could see the scenario, it may be possible to provide evidence in relation to it.</p>
207.4.5	<p>A fourth supplier was listed over its competitor’s product because it cut its margin in order to keep business;²⁶⁸</p>	<p>The Parties are unable to see the identity of this supplier or the product markets it participates in so cannot comment on the scenario raised.</p> <p>But as a general response, this scenario appears not to be directly relevant to the point being made, but rather appears to describe the outcome of a competitive process in which a supplier was successful</p>

²⁶⁷ Commerce Commission interview with [].

²⁶⁸ Commerce Commission interview with [].

Para	Content	Comment
		<p>over another supplier. There is nothing to suggest the reduced margin was not a positive margin, and the Parties would expect the tough competition against another supplier as described has resulted in a pro-competitive outcome and no competitive detriment in any acquisition market.</p> <p>It is not clear the Commission has validated this evidence, which appears to have been provided in an interview. If the Parties could see the scenario, it may be possible to provide documentary evidence relating to it.</p>
207.4.6	A fifth supplier told us that it had recently had to reduce its production because it could not afford to sell at FSNI's desired price; ²⁶⁹ and	<p>The Parties are unable to see the identity of this supplier or the product markets it participates in so cannot comment on the scenario raised.</p> <p>But as a general response, this scenario appears not to be directly relevant to the point being made, but rather appears to describe the outcome of a competitive process in which the supplier was unsuccessful. Further:</p> <ul style="list-style-type: none"> • There is no evidence that de-ranging, or reduction in the products ranged from a particular supplier, occurs for any anti-competitive reason i.e. de-ranging is inevitably accompanied by ranging of products that are considered likely to form part of a more competitive offering. See for example 48-49 and Section 2. • The benign or pro-competitive nature of that process is unaffected by adverse outcomes arising for the supplier's business, such as reducing production (noting the Parties, like anyone, are sympathetic to any supplier whose business experiences adverse outcomes). • FSNI's "desired price" is presumably a price at which a competitor of the supplier was able to supply, suggesting the process described was pro-competitive. <p>Finally, it is not clear the Commission has validated this evidence, which appears to have been provided in an interview. If the Parties could see the scenario, it may be possible to provide documentary</p>

²⁶⁹ Commerce Commission interview with [].

Para	Content	Comment
		evidence relating to it. The Parties consider the Commission should not rely on it without substantiation.
207.4.7	A sixth supplier had its [] delisted in FSNI and noted these scenarios are usually in connection with FSNI seeking margin. ²⁷⁰	<p>The Parties are unable to see the supplier, or the product markets it participates in, so are unable to comment on the particular instance.</p> <p>But as a general response, this scenario appears not to be directly relevant to the point being made, but rather appears to describe the outcome of a competitive process in which the supplier was unsuccessful. Further:</p> <ul style="list-style-type: none"> • There is no evidence that de-ranging occurs for any anti-competitive reason i.e. de-ranging is inevitably accompanied by ranging of products that are considered likely to form part of a more competitive offering. See for example [x]. • The benign or pro-competitive nature of that process is unaffected by the supplier subsequently exiting the market (noting the Parties, like anyone, are sympathetic to any supplier that goes out of business). • The point about “seeking margin” is a red herring – see the discussion of “trading margin” at paragraph 54 and evidenced in Section 2. <p>Finally, it is not clear the Commission has validated this evidence, which appears to have been provided in an interview. If the Parties could see the scenario, it may be possible to provide documentary evidence relating to it. The Parties consider the Commission should not rely on this evidence without substantiation.</p>
209.	We have received mixed evidence to support the proposition that, where a supplier might have a ‘must have’ product, or particular strength in one category, that the supplier would be able to leverage this power into the supply of other products in its portfolio. One supplier (of beverages) we spoke with considers that it could leverage the strong brand power of one of its products into negotiations for its other products that are more readily substitutable but noted that it tends to focus more on how to make that other product/brand non-substitutable instead. It also noted that while	<p>FSSI experiences suppliers leveraging a popular or must-have product to improve their negotiating position. [REDACTED]</p> <p>In FSNI’s experience, leveraging a popular or “must-have” product to gain ground with another product is a key negotiation tool that suppliers use, particularly the larger multi-nationals. Examples include:</p> <ul style="list-style-type: none"> • [REDACTED].

²⁷⁰ Commerce Commission interview with [].

Para	Content	Comment				
	Table 3: Evidence from suppliers on barriers to entry/expansion					
	<table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th data-bbox="331 316 797 427" style="width: 50%; text-align: center;">Evidence that the Proposed Merger would make entry/expansion harder</th> <th data-bbox="797 316 1263 427" style="width: 50%; text-align: center;">Evidence that the Proposed Merger may not make a material difference</th> </tr> </thead> <tbody> <tr> <td data-bbox="331 427 797 960"> <p>There would be a “large war chest” available to the merged entity to make new entry unprofitable.²⁷⁶</p> <p>Proposed Merger would increase barriers to entry because there would be “two behemoths” for entrants to compete against.²⁷⁷</p> <p>The merged entity may be able to exert its power if it feels threatened by an outside party, and would have more buying power, and more money to invest in infrastructure than any entrant.²⁷⁸</p> </td> <td data-bbox="797 427 1263 960"> <p>It would be a risky and bold move to try and set up a rival grocery retailer now.²⁸⁰</p> <p>The retail grocery market may not be big enough for new entry.²⁸¹</p> <p>Costco and any other new entrant grocery retailers seem open to suppliers.²⁸²</p> <p>Any entrant already looks at the Parties as one entity.²⁸³</p> <p>The way the Parties operate is already a barrier to entry for rival grocery retailers, and the Proposed Merger just</p> </td> </tr> </tbody> </table>	Evidence that the Proposed Merger would make entry/expansion harder	Evidence that the Proposed Merger may not make a material difference	<p>There would be a “large war chest” available to the merged entity to make new entry unprofitable.²⁷⁶</p> <p>Proposed Merger would increase barriers to entry because there would be “two behemoths” for entrants to compete against.²⁷⁷</p> <p>The merged entity may be able to exert its power if it feels threatened by an outside party, and would have more buying power, and more money to invest in infrastructure than any entrant.²⁷⁸</p>	<p>It would be a risky and bold move to try and set up a rival grocery retailer now.²⁸⁰</p> <p>The retail grocery market may not be big enough for new entry.²⁸¹</p> <p>Costco and any other new entrant grocery retailers seem open to suppliers.²⁸²</p> <p>Any entrant already looks at the Parties as one entity.²⁸³</p> <p>The way the Parties operate is already a barrier to entry for rival grocery retailers, and the Proposed Merger just</p>	<p>A general comment on this table is that the weight that can be placed on the various comments depends on the identity of the submitter. That is because these are generally concerns and not evidence, and whether the concerns can have a sound basis will depend on the experience of the submitter.</p> <p>There are two key themes:</p> <ul style="list-style-type: none"> • the “large war chest” and change in the merged entity’s position compared with the counterfactual are countered by evidence at 61-63 and Figure 2, and • the predation- or retaliation-type concerns are addressed at 108-111.
Evidence that the Proposed Merger would make entry/expansion harder	Evidence that the Proposed Merger may not make a material difference					
<p>There would be a “large war chest” available to the merged entity to make new entry unprofitable.²⁷⁶</p> <p>Proposed Merger would increase barriers to entry because there would be “two behemoths” for entrants to compete against.²⁷⁷</p> <p>The merged entity may be able to exert its power if it feels threatened by an outside party, and would have more buying power, and more money to invest in infrastructure than any entrant.²⁷⁸</p>	<p>It would be a risky and bold move to try and set up a rival grocery retailer now.²⁸⁰</p> <p>The retail grocery market may not be big enough for new entry.²⁸¹</p> <p>Costco and any other new entrant grocery retailers seem open to suppliers.²⁸²</p> <p>Any entrant already looks at the Parties as one entity.²⁸³</p> <p>The way the Parties operate is already a barrier to entry for rival grocery retailers, and the Proposed Merger just</p>					

²⁷⁶ Commerce Commission interview with [].

²⁷⁷ Commerce Commission interview with [].

²⁷⁸ Commerce Commission interview with [].

²⁸⁰ Commerce Commission interview with [].

²⁸¹ Commerce Commission interview with [].

²⁸² Commerce Commission interview with [].

²⁸³ Commerce Commission interview with [].

Para	Content	Comment
	<p>While Costco and The Warehouse have opportunity to expand, they would “get beaten up” by the merged entity.²⁷⁹</p>	<p>amalgamates the two Boards of the Parties.²⁸⁴</p>
275.1	<p>Anonymous A submits that the merged entity would become considerably more powerful to resist rival grocery retailers entering and establishing themselves. It also noted that the Proposed Merger would reduce the attractiveness and ability of rival grocery retailers to enter the marketplace and improve competition, pricing and choice for retail consumers.²⁸⁵</p>	<p>The basis of these concerns is not given. See paragraphs 108-111. As to the second sentence, the idea that the Proposed Transaction would reduce the attractiveness to enter would conventionally be interpreted as the Proposed Transaction improving competition, and therefore reducing the commercial opportunity to enter i.e. pro-competitive, and beneficial for consumers.</p>
275.2	<p>Habilis submits the Proposed Merger would consolidate the grocery sector further with a high likelihood of adverse outcomes for retail consumers and increase the barriers to</p>	<p>No evidence is given.</p>

²⁷⁹ Commerce Commission interview with [redacted].

²⁸⁴ Commerce Commission interview with [redacted].

²⁸⁵ SoPI submission from Anonymous A (22 January 2024) at 1-2.

Para	Content	Comment
	entry for new rival grocery retailers. In its view, the sole beneficiary of the Proposed Merger would be the merged entity. ²⁸⁶	
275.3	Ernie Newman submits that it would be highly unwise to allow further consolidation in the grocery sector, and that the signal to the market and especially potential entrants would be that the Commission is incapable of protecting them. In his view, it would strengthen the barrier to potentially new entrant rival grocery retailers, and would result in potential local and global competitors in this and other industries walking away to invest in markets where there is protection of an effective regulator focused on the best interests of the consumer. ²⁸⁷	No evidence is given.
275.4	The Food and Grocery Council submits that (among other things), 74% of its members who responded to its survey consider that the Proposed Merger would make new entry by rival grocery retailers (or expansion by small/niche rival grocery retailers) harder, ²⁸⁸ and consolidation/greater concentration structurally upstream would increase barriers to entry in retail grocery markets. ²⁸⁹	Specific concerns are redacted, no evidence is given. The Parties' position is at 108-111.
275.5	Monopoly Watch and Northelia submit that the Proposed Merger would increase the cost of capital for a third major grocery retailer. ²⁹⁰	No evidence is given.
275.6	The Warehouse Group submits that the Proposed Merger is likely to increase barriers to entry and/or expansion in retail grocery markets at scale, noting that the concentration of the major grocery retailers makes it much harder for potential rival grocery retailers to achieve the scale and scope required to compete and further limits the incentive for suppliers to supply new rival grocery retailers when doing so may risk their current arrangements with the major grocery retailers, exacerbating the	The impact of the Proposed Transaction on other grocery retailers is set out at 108-111.

²⁸⁶ SoPI submission from Habilis (1 February 2024) at 2.

²⁸⁷ SoPI submission from Ernie Newman (5 February 2024) at 1 and 5.

²⁸⁸ We note the Parties' response to this submission that the source of this concern is unclear, but that the Parties consider the Proposed Merger would not be likely to result in a substantial lessening of competition, which would therefore preclude impact on barriers to entry and expansion. SoPI cross-submission from the Parties (7 March 2024) at [135].

²⁸⁹ SoPI submission from the Food and Grocery Council (19 February 2024) at 8, 30, 32 and 37 and SoI submission from the Food and Grocery Council (26 April 2024) at 26 and 48.

²⁹⁰ SoPI submissions from Monopoly Watch (27 February 2024) at [3] and Northelia (27 February 2024). We note the Parties response to the Monopoly Watch submission that the submitter does not identify the source of the increase in barriers to entry for a "third party challenger". But, in the Parties view, if the Proposed Merger would have no adverse effect on competition, it follows it would not adversely impact barriers to entry and it is not necessary to offer divestments. SoPI cross-submission from the Parties (7 March 2024) at [141].

Para	Content	Comment			
]. ³⁰⁰	Product	Warehouse	New World	Countdown
		Whittaker's block -250g	\$7.00	\$6.29	\$6.20 (on special, usually \$6.99)
		Watties spaghetti in tomato sauce - 3 pack	\$6.00	\$5.99	\$6.00
		Flemings choc chip chewy muesli bar - 6 pack	\$3.00	\$3.00	\$3.29
		Sealord tuna - 95g	\$2.40	\$2.69 (or 3 for \$5.00 super saver)	\$2.69
		Campbells real stock beef - 1L	\$5.00	\$4.69	\$4.70 (or member price of \$4.50)
		Arnott's cruskits crispbread low fat - 250g	\$5.80	\$5.79	\$6.00
		Boring oat milk barista bottle - 1L	\$4.60	\$4.89	\$4.99
		Delmaine premium black beans - 390g	\$2.40	\$2.49 (or 3 for \$4.00 super saver)	\$2.49

³⁰⁰ Commerce Commission interviews with The Warehouse Group (8 February 2024) and (22 May 2024).

[

].

Para	Content	Comment			
		Snacka changi chips – 150g	\$4.80	\$4.79	\$4.00 (on special, usually \$4.79)
282.1.2	[] . ³⁰¹	Evidence redacted.			
282.1.3	One large supplier told us that [] when Costco came in, the Parties did not want anyone to supply Costco. It did not indicate that the major grocery retailers threatened to take away business, but simply questioned (where they faced supply issues) why a supplier cannot supply a major grocery retailer but can supply a new entrant rival grocery retailer. ³⁰²	<p>It is not clear whether this interview evidence has been substantiated but the Parties cannot see it in full so cannot respond to the specific scenario raised about their conduct.</p> <p>Neither FSSI nor FSNI seeks to constrain a supplier’s ability to supply Costco (or other grocery retailers).</p> <p>[REDACTED]</p> <p>[REDACTED]</p>			
282.1.4	A second supplier (of ambient products) said that it looked at supplying The Warehouse in 2005/2006 and was told by “both supermarket chains” (ie, Foodstuffs and Woolworths) that, if it supplied The Warehouse, it would not be able to supply them. ³⁰³	<p>Given its age, FSSI and FSNI would need more information to validate this complaint. If the Commission has evidence the Parties can see, they can test it further.</p> <p>In any event, one-off instances more than 10 years ago are not helpful evidence of the current and future position. As a matter of current (and future) conduct, to the best of the Parties’ knowledge they do not threaten to stop dealing with suppliers due to relationships with other retailers. The Parties do not believe there is any recent evidence of this sort of conduct.</p>			
282.1.5	An industry participant told us that the Parties have more power to encourage suppliers to deal with them exclusively and on better terms, and are constantly trying	This concern is unclear – is the supplier talking about its own preferred retail pricing (which it is common for suppliers to have)?			

³⁰¹ Commerce Commission interview with [] .

³⁰² Commerce Commission interview with [] .

³⁰³ Commerce Commission interview with [] .

Para	Content	Comment
	<p>to leverage suppliers. It indicated that it was common for other grocery retailers (beyond the Parties and Woolworths) to face higher prices or for the major grocery retailers to get better buying prices. It noted that supplying other grocery retailers diversified risk, but a supplier has to weigh the ramifications of that retailer setting its retail price at a lower level than the major grocery retailers.³⁰⁴</p>	<p>Regardless, this complaint does not seem like a competition concern i.e. seems to describe a supplier conducting a commercial weighing exercise regarding supply to various channels.</p> <p>The basis for the exclusivity concern is unclear, as the Parties rarely have exclusive arrangements, and do so only where it would be pro-competitive e.g. they are seeking to support the emergence of competition in a category (see clearance application at 128.2(b)), or meet a customer/PQRS need. The Parties do not see a reason they would alter this position as a result of the Proposed Transaction.</p> <p>Both Parties always seek to negotiate robustly. For the reasons set out in this submission, they do not consider the Proposed Transaction would alter the position in a way that could result in a substantial lessening of competition in any acquisition market.</p>
282.1.6	<p>A third supplier (of a range of products) indicated that it is not comfortable taking the risk of being seen by the Parties as cheaper on the shelves of The Warehouse. It commented that if a banner of a major grocery retailer wants to do a promotion, it gets calls from other banners/major grocery retailers asking why product is cheaper in that banner and why promotion is not with them instead.³⁰⁵</p>	<p>It is not clear there is a competition concern here.</p> <p>As noted elsewhere the Parties always seek the best terms they can. However, they are well aware that suppliers cannot prevent The Warehouse from discounting their products, as that would be unlawful under the Commerce Act. The Parties' advocacy to receive better terms in the scenario described in this complaint is limited to checking in a general way (as in any normal commercial negotiation) that they are being treated "fairly" relative to other customers. The Parties also observe their own retail competitiveness relative to other retailers.</p> <p>The Parties do not seek to know the terms on which suppliers supply other retailers, and do not ask suppliers to engage in resale price maintenance.</p>
282.1.7	<p>An industry participant noted that a lot of grocery suppliers are looking for opportunities to grow, but do not want to risk annoying the major grocery retailers (who drive []% of revenue) by supplying other grocery retailers like Costco and The Warehouse, particularly given they are currently minuscule grocery retailers. For example, suppliers may have signed or given a brand promise to PAK'nSAVE that it</p>	<p>The Commission holds information on clauses in the Parties' supply contracts so is in a position to substantiate (or otherwise) this issue, which appears to have been raised in an interview. Please let the Parties know urgently if you do not have the information you require to test this concern.</p>

³⁰⁴ Commerce Commission interview with [].

³⁰⁵ Commerce Commission interview with [].

Para	Content	Comment
	will be 15% less than any rival grocery retailer, so cannot afford to offer lower prices to other grocery retailers. ³⁰⁶	
282.1.8	However, [] ³⁰⁷ [] said it did not notice any reaction from the Parties when it [] ³⁰⁸ The Warehouse. ³⁰⁸ [] said it is always open to new customers. ³⁰⁹ [] said it is always open to new grocery retailers but currently the opportunity to supply them was not as big as with the major grocery retailers. ³¹⁰ Another industry participant thought there would be no more downward pressure on suppliers to not supply a new entrant rival grocery retailer so long as the new entrant “has enough skill and expertise to get going”. ³¹¹	The Parties cannot see this point so are unable to validate the specifics. But it appears to validate the Parties’ position that they do not react adversely to suppliers supplying other retailers, and have not seen any evidence that they do so.
282.2.2	This may increase the likelihood that suppliers might be either disincentivised from supplying rival grocery retailers at risk of damaging their relationship with the merged entity, or might be more likely to agree to exclusivity arrangements with the merged entity. Two industry participants told us that they considered the merged entity might/would have more power to ask suppliers for exclusivity, ³¹² and Woolworths noted that while it is generally not in the interests of suppliers to have exclusive arrangements, that does not mean a supplier would not enter an arrangement with the merged entity. [] ³¹³	Based on the evidence and reasons given above, there is no basis for these concerns. The Parties do not seek exclusivity agreements except in limited circumstances . There is no plan, and no basis to expect this would change as a result of the Proposed Transaction, and the Parties would be facing the same downstream incentives as they are currently. In any event, the Parties would not expect suppliers to agree to exclusivity without a sound basis.
300.	The Food and Grocery Council submits it conducted a member survey which raised concerns about potential adverse effects of the Proposed Merger on supply, ranging, quality, and innovation due to tighter margins and reduced pricing flexibility.	It is understandable that suppliers would prefer to avoid any reduction in their profitability (even if that reduction ultimately benefits consumers). The evidence shows any change would be likely to be

³⁰⁶ Commerce Commission interview with [].

³⁰⁷ Commerce Commission interview with [].

³⁰⁸ Commerce Commission interview with [].

³⁰⁹ Commerce Commission interview with [].

³¹⁰ Commerce Commission interview with [].

³¹¹ Commerce Commission interview with [].

³¹² Commerce Commission interviews with [] and [].

³¹³ Commerce Commission interviews with Woolworths (14 June 2024) and (15 February 2024).

Para	Content	Comment
	Additionally, the Food and Grocery Council submits that increased costs of doing business could impact the attractiveness of the market for investment, potentially jeopardizing the long-term viability of the industry. We understand that Food and Grocery Council members were asked whether the Proposed Merger could impact innovation by suppliers, such as reducing the incentives and/or pace of development, and 68% of suppliers answered yes. ³¹⁴	too small to impact competition, including innovation (see 61-63), and further an adverse effect on innovation that lessens competition in acquisition markets would be contrary to the merged entity's incentives and thus would not be likely even if it were possible. Impacts on innovation are also specifically addressed from 112.
301.	The Food and Grocery Council also submits that statements from its members suggest that a reduction in prices resulting from the Proposed Merger would have a negative impact on investment in innovation. In this regard, it submits that tightened margins, squeezed pricing, and increased pressure on profitability with the Proposed Merger may limit resources available for innovation initiatives and hinder the innovation process. ³¹⁵	See row above.
302.	The Food and Grocery Council further submits that many of its members have indicated the Proposed Merger may impact innovation, with 68% ³¹⁶ of its members who responded to its survey indicating it would (and the remainder split between those who were unsure and those believe that the Proposed Merger may lead to greater investment and efficiency in the innovation process). Its members explained that the Proposed Merger would impact innovation in the following ways: ³¹⁷	See row above, noting the comments here are mixed.
302.1	reduced prices or margins: suppliers express concerns about working on tight margins and the erosion of cost pricing, and that increased pressure on margins or a reduction/squeeze in prices with the Proposed Merger could leave little room for investment in innovation. It could reduce suppliers' ability to take risks in new product development, limit resources available for innovation efforts and/or restrict marketing support for new products;	See row above.
302.2	chilling effect: there are concerns that the Proposed Merger could have a chilling effect on innovation, particularly if ranging decisions are solely based on retailer margin and lowest cost;	Comprehensive evidence regarding the bases for ranging decisions is provided at Section 2. The evidence shows the starting point for category reviews is customer need states. Where lowest-cost is

³¹⁴ SoI submission from the Food and Grocery Council (26 April 2024) at [14.2].

³¹⁵ SoI submission from the Food and Grocery Council (26 April 2024) at [14.3].

³¹⁶ SoI submission from the Food and Grocery Council (26 April 2024) at [14.3].

³¹⁷ SoI submission from the Food and Grocery Council (26 April 2024) at [14.4a]-[14.4j].

Para	Content	Comment
303.1	<p>one supplier (of a range of grocery products) told us that ultimately any consolidation in the grocery sector which shifts a suppliers’ ability to negotiate and moves margin from it to the major grocery retailers without any benefit to retail consumers would inhibit its ability to innovate. It further noted that if a supplier does not get volume from the major grocery retailers (who account for 60% of business), a supplier could not range a product;³²¹</p>	<p>First, a benefit to retail consumers can be expected.</p> <p>Secondly, and regardless of the above, the statement that any shift in margin would inhibit innovation is baseless (noting further that the acquisition market/s in question have not been disclosed). The reasons this point is incorrect are set out above e.g. 44, 87.1, 120. The evidence associated with impacts on acquisition markets is set out at Section 2.</p> <p>It further noted that if a supplier does not get volume from the major grocery retailers (which account for 60% of business), a supplier could not range a product: this comment focuses on protecting individual competitor/suppliers, rather than competition. In the healthiest possible acquisition and retail markets, suppliers would be de-ranged (and, depending on the structure and focus of suppliers’ business, de-ranging could be damaging). Such an outcome is not indicative of any impact on competition of the Proposed Transaction.</p>
303.2	<p>a second supplier (of non-food products) said that if the Proposed Merger resulted in it giving more margin to the merged entity, this would potentially cause the quality of its products to lessen as it would have less money in its “pot”;³²²</p>	<p>As above, this concern does not indicate any competition impact of the Proposed Transaction, noting also that the market/s being referred to are not indicated (but non-food products are dealt with in Appendices – see section 2).</p> <p>A transfer of surplus is dealt with above at 44, 87.1, 120.</p> <p>Evidence about the impact on competition (including quality) is dealt with in Section 2. The key conclusions are that the Proposed Transaction would not have a material impact on buyer power and, regardless, the merged entity would have the incentive to maintain competition in acquisition markets (including its PQRS mix, not only price).</p>
303.3	<p>a third supplier (of dry food products) noted that NPD is costly and is higher risk than investing in core range. It considers it is possible that the Proposed Merger would</p>	<p>This concern is appropriated caveated to the supplier’s knowledge.</p> <p>Evidence about the impact on competition (including innovation) is dealt with in Section 2, with dry food products dealt with in Appendices.</p>

³²¹ Commerce Commission interview with [].

³²² Commerce Commission interview with [].

Para	Content	Comment
	impact its investment in NPD, depending on how the Proposed Merger impacts its leverage and terms; ³²³	
303.4	an industry participant told us that there is significant investment in innovation in the [] space, with that investment generally coming from [] who have the means to do this through the testing and purchasing of []. It explained that the nature of the supply chain means that if [] returns are diminished, they would be “putting less in []”, so while there might be no initial impact on innovation as a result of the Proposed Merger, there might be long term impact if there is enough downward pressure on []; ³²⁴	The market/s being referred to are not clear. See row above.
303.5	a fourth supplier (of frozen products) said it would have to consider the resources it puts towards innovation if profitability came down; ³²⁵ and	See row above, noting frozen products are dealt with in Appendices – see Section 2.
303.6	a second industry participant told us that ultimately the Proposed Merger would force suppliers to innovate less as they would feel they cannot make a mistake with only two paths to market (to major grocery retailers), as there would be more pressure on the negotiation. ³²⁶	The effect of the reduction in the number of buyers is explained above e.g. at 84.
304.	In addition, two suppliers have specifically told us the Proposed Merger would impact the ability for suppliers to innovate on environmentally friendly packaging. One supplier (of a range of grocery products) said they mainly innovate by launching different product categories and flavours but also by investing in BPA free [], but also noted that in the future it would not do this innovation unless it has the ability to invest. ³²⁷ Another supplier (of dry food products, which currently offers a []) told us that if the Proposed Merger reduces competition then retail consumers would not see alternatives to plastic like this. ³²⁸	These concerns focus on a transfer of surplus and effects on individual suppliers, as to which see 44, 87.1, 120, 47 onwards and Section 2. They do not indicate how the Proposed Transaction would impact their ability to invest. The supplier of a range of grocery products identifies it needs to invest in order to innovate, but does not indicate whether or on what basis the Proposed Transaction would affect its ability to do so. The dry food product supplier provides an example of a potential consequence of a loss of competition, but does not indicate whether or

³²³ Commerce Commission interview with [].

³²⁴ Commerce Commission interview with [].

³²⁵ Commerce Commission interview with [].

³²⁶ Commerce Commission interview with [].

³²⁷ Commerce Commission interview with [].

³²⁸ Commerce Commission interview with [].

Para	Content	Comment
		on what basis the Proposed Transaction would be expected to result in a detriment to competition.
309.	We recognise that there are arguments that suppliers faced with buyers with increased bargaining power may have stronger incentives to invest. One supplier noted that it would “probably have to invest more to keep up with the supermarket chain” ³²⁹ as a result of the Proposed Merger. However, we have not seen evidence to support that this theoretical effect is likely to eventuate in response to the Proposed Merger. Nor do we have evidence that suppliers would have the ability to fund these innovations even if they had a greater incentive to do so. We consider it likely that the Proposed Merger would result in reduced investment in innovation from grocery suppliers, as well as reduced introduction of innovative products into the New Zealand market.	In response to this supplier’s comment, the SOUI notes that there is no evidence suppliers would have a stronger incentive to invest. The Parties note that the SOUI also does not contain evidence that the Proposed Transaction would detrimentally impact incentives to invest either. Evidence relating to actual acquisition conduct is supplied at Section 2. See also the section on innovation above from 112.
320.	Anonymous G submits it would become very difficult to continue to sell a product or to launch a product unless the merged entity was to list it, meaning that the merged entity would likely become de facto the “decider” of what products are listed in New Zealand. [], ³³⁰ Anonymous G also submits that to support a successful introduction of a new product, it would be necessary []. It submits that while FSNI and FSSI are in the process of centralising their procurement model, in the counterfactual (where FSNI and FSSI remain separate), []. ³³¹	The first part of this concern focuses on the outcome for an individual supplier of not being listed, but does not deal with any impact of the Proposed Transaction on competition in a market. This is similar to the concern about the Proposed Transaction “raising the stakes” for suppliers – see 51.1 and 87.4. It is difficult to glean the remainder of the comment, but see the Parties’ submissions on centralisation above at 95.2 and 102-103.
321.	Anonymous G further submits that [], a failure to secure listing with the merged entity would make it extremely difficult to justify media spend to promote the product. ³³²	Some of this is redacted but the concern appears to be similar to the concern about the Proposed Transaction “raising the stakes” for suppliers – see 51.1 and 87.4.
322.	Evidence from industry participants we have spoken with is mixed on whether the Proposed Merger would have a negative impact on innovation by reducing the	The specific concerns are redacted. But as explained in the submission, and demonstrated in the analysis in Section 2, the

³²⁹ Commerce Commission interview with [].

³³⁰ SoI submission from Anonymous G (18 April 2024) at [6].

³³¹ SoI submission from Anonymous G (18 April 2024) at [17].

³³² SoI submission from Anonymous G (18 April 2024) at [19].

Para	Content		Comment
	<p>then a supplier only has a couple of other choices of where it could launch the new product.³⁴⁰</p>	<p>happen regardless because of the export market.³⁴⁴</p> <ul style="list-style-type: none"> • A supplier (of bakery items) said it innovates a lot now and hopes that the Proposed Merger would make it easier to bring NPD to market.³⁴⁵ • Proposed Merger would be from a marketing launch perspective much better.³⁴⁶ 	
	<ul style="list-style-type: none"> • If a multinational supplier was not ranged in the merged entity, it might not bring some of its innovation to New Zealand (which might result in more homogenous, less curated product ranges).³⁴⁷ • The Proposed Merger could mean a supplier is able to have nationwide supply with the merged entity, but could also mean its products get delisted, with which the hurt would be more significant.³⁴⁸ 	<ul style="list-style-type: none"> • One supplier (of beverages) told us the Proposed Merger would not impact its innovation because it needs to innovate for the long-term growth of its business.³⁵⁰ • One supplier (of beverages) said it innovates with Woolworths as there is no proper process for innovation with FSNI, but also noted that it thinks about innovation from an international market.³⁵¹ • If the Proposed Merger allowed for a national ranging approach then it 	

³⁴⁰ Commerce Commission interview with [redacted].

³⁴⁴ Commerce Commission interview with [redacted].

³⁴⁵ Commerce Commission interview with [redacted].

³⁴⁶ Commerce Commission interview with [redacted].

³⁴⁷ Commerce Commission interview with [redacted].

³⁴⁸ Commerce Commission interview with [redacted].

³⁵⁰ Commerce Commission interview with [redacted].

³⁵¹ Commerce Commission interview with [redacted].

Para	Content	Comment
	<ul style="list-style-type: none"> One supplier told us that retail media is expensive and required for innovation. It considered the Proposed Merger could require more investment into retail marketing (ie, if a supplier could no longer execute retail marketing differently in each island), which would make it more expensive/challenging to launch new products.³⁴⁹ 	<ul style="list-style-type: none"> would be easier to bring new products to market (rather than needing to secure supply with both FSNI and FSSI, or one of FSNI/FSSI and Woolworths).³⁵² The Proposed Merger could help a supplier to know whether a piece of innovation is worth producing.³⁵³ The Proposed Merger would probably be beneficial for its innovation due to how it uses the Parties' insights on sales data, and because the merged entity would have more insights to share.³⁵⁴
327.	<p>While FSNI holds Emerging Supplier and Foodies Connect Forums at various intervals throughout the year and is seen to provide additional support to smaller suppliers,³⁵⁵ information currently before us (summarised below) indicates that FSSI may be more receptive to supporting suppliers' innovation, with industry participants that we have spoken with (including suppliers across a range of categories) telling us that it is easier to get new products ranged in FSSI than in FSNI.³⁵⁶ However, one supplier we</p>	<p>The details of these concerns are redacted, and it is unclear to the Parties what is driving this (mixed) perception and no evidence appears to have been provided, but the issue is dealt with above at paragraph 124.</p> <p>This point, and list, appear in a section that sets out the Commission's current view, so the Parties assume significant weight is being placed</p>

³⁴⁹ Commerce Commission interview with [redacted].

³⁵² Commerce Commission interview with [redacted].

³⁵³ Commerce Commission interview with [redacted].

³⁵⁴ Commerce Commission interview with [redacted].

³⁵⁵ Response to our request for information from FSNI (23 February 2024) and Commerce Commission interview with FSNI (22 February 2024). FSNI has a "Small Supplier Guide" which sets out a detailed seven step process for small suppliers to get "the best possible chance of landing on shelves and becoming a hit with customers". Small Supplier Guide Version 2 (August 2023) at 4. A version of the Small Supplier Guide is also available online here <https://www.foodstuffs-exchange.co.nz/assets/documents/FSNI-docs/small-Supplier-guide/Foodies-Small-Supplier-Guide.pdf>. Of note, FSSI also holds Foodies Forums on an 8-12-week cycle for all suppliers, Foodstuffs Emerge competitions to help new suppliers onboard and scale up, and is separately recruiting for a small supplier support manager. See response to our request for information from FSSI (27 February 2024) at [3] and [6] and Commerce Commission interview with FSSI (20 February 2024).

³⁵⁶ Commerce Commission interviews with [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted] and [redacted].

Para	Content	Comment
	have spoken with had a different view. ³⁵⁷ While we are continuing to explore this point, we note that:	on it. While some of the information cannot be seen by the Parties, it is worth noting that a judgement is required as to how much weight to place on interview evidence, particularly where it is not accompanied by evidence or based on specific experiences of the submitter.
327.1	The Food and Grocery Council submits that its members' views vary on the ease of entering the market or launching new products with FSSI, with some finding it more open to innovation and supportive of local manufacturers. It further submits that other suppliers express challenges in entering the market or getting products accepted by FSNI. ³⁵⁸	No evidence appears to have been presented to support this perception (nor is any merger effect identified). The concern is dealt with above from paragraph 124.
327.2	a large supplier told us that the Proposed Merger would take away an element of innovation because currently FSSI "does things a little bit their own way and are trying things" such that, in this supplier's view, if the Proposed Merger goes ahead, there might be a reduction in innovation because that current tension between FSNI/FSSI would be gone; ³⁵⁹	This appears to be a perception only, and no evidence is provided as to this "tension". See paragraph 124 onwards.
327.3	a second supplier (of dry food products) told us that FSSI will "take a punt on a product" more easily than FSNI will. It considers that the threshold for launching new products with FSNI is much higher than FSSI (who will load the product so long as there is one FSSI store that wishes to buy the product), and added that it took a few years of being in FSSI before it was ranged in FSNI; ³⁶⁰	This appears to be a perception. See paragraph 124 onwards. The fact that it took longer for this supplier to be ranged in one of the Parties than the other is not, in and of itself, evidence of any difference between them, and particularly any difference that is meaningful from a competition perspective. Based on the evidence at Section 2, a reason for the difference could be differences in downstream demand.
327.4	an industry participant told us that it is a common pathway for a supplier to form a relationship with one of the Parties first before slowly building up distribution. It considers that while suppliers can form relationships with FSNI, its view is that is	As above, this perception is addressed from paragraph 124.

³⁵⁷ Commerce Commission interview with [].

³⁵⁸ SoI submission from the Food and Grocery Council (26 April 2024) at 38.

³⁵⁹ Commerce Commission interview with [].

³⁶⁰ Commerce Commission interview with [].

Para	Content	Comment
	generally easier to form this initial relationship with FSSI because it is a smaller entity that is more engaged with its community; ³⁶¹	
327.5	a third industry participant told us that FSSI is more supportive of taking on new products and that their review cycles are more consistent. However, it also noted that while FSSI are more willing to take on new products, there is an added complexity of having to engage directly with stores. The industry participant also considers that FSSI has a scalability issue in that it will not meet minimum order requirements and suppliers need to supply either both of FSNI/FSSI, or one of FSNI/FSSI and Woolworths; ³⁶²	FSNI notes that it has a NPD calendar that is shared with suppliers so it is not clear the basis on which FSSI is regarded as more consistent. The perception underlying this concern is addressed from paragraph 124. The final part of the concern is misguided given the Proposed Transaction is not capable of changing the total scale of the opportunity, nor the incentives that drive decisions within it.
327.6	a fourth supplier (of dry food products) told us that FSSI is approachable and has more disciplined windows of opportunity to present new products. On the other hand, it considers that it has to wait for a category review to present NPD to FSNI; ³⁶³	See row above. The difference in “discipline” does not appear to be borne out by the comment, given the supplier notes that FSNI has defined times for NPD discussions? Regardless, this difference does not seem capable of having competition implications.
327.7	a fifth supplier (of a range of products) told us there have been many occasions where FSSI has launched a product that FSNI did not want to launch, and that it is able to introduce more innovation through FSSI. On the other hand, it considers that FSNI is more about “less product, less range, less brands”, with a focus on margin. However, it noted that often when a product has been successful with FSSI, it gives the supplier an opportunity to re-request and obtain ranging from FSNI by referring to its record with FSSI; ³⁶⁴	FSNI notes that its focus with respect to innovation is to drive incremental sales within a category and identify new opportunities for customers rather than just replication of existing products on shelf unless there is a significant customer advantage in lower pricing. FSSI’s developing approach to category reviews is along similar lines.
327.8	a sixth supplier (of beverages, []) told us that, with FSSI, a supplier can approach any store to discuss ranging, whereas in FSNI a supplier needs approval from the category manager first. The supplier went on to explain that right now there are three opportunities to gain national relevance in industry, but if the Proposed Merger goes ahead there would only be two opportunities. This suppliers’ view was that if the FSNI approach was adopted by the	FSNI notes that it operates in the same way, in that suppliers are welcome to present concepts to stores who will then reach out to head office if they are interested in stocking the product. This is traditionally how some of FSNI’s locally ranged products have made it e.g. Blue Frog Cereal which has now made it all the way to compulsory range.

³⁶¹ Commerce Commission interview with [].

³⁶² Commerce Commission interview with [].

³⁶³ Commerce Commission interview with [].

³⁶⁴ Commerce Commission interview with [].

Para	Content	Comment
	merged entity, the opportunity to present to individual stores in the South Island would be lost; ³⁶⁵	
327.9	a seventh supplier (of chilled products) told us that if FSNI does not want to range a product, a supplier can have it ranged in FSSI and go back to FSNI once it has gained some traction. This opportunity would be lost with the Proposed Merger; ³⁶⁶ and	There would be change in the demand driving these decisions, and no change in the size of the opportunity.
327.10	lastly, an eighth supplier (of dry food products) told us if it wants to do something more innovative, it is harder to do so in the South Island because FSSI, while more partnership orientated, is more conservative. On the other hand, it told us that FSNI are “pushing more” on how many brands of product are in-store, and are more likely to “push the envelope” (either positively or negatively). ³⁶⁷	This concern demonstrates that the preference for FSSI is likely to be based on individual suppliers’ experience and perception rather than a systematic or significant difference. FSNI notes it seeks to ensure customer needs are well met and that room is left on shelf for innovation rather than a significant amount of replication. This approach is borne out by the evidence in Section 2.
329.	We received feedback from industry participants that we have spoken with (including suppliers across a range of categories) that the impact of the reduction in an independent option for ranging new products would be felt differently by different sized suppliers. In particular:	
329.1	one supplier (of dry food products) considers that established brands that have been supplying the major grocery retailers for a long time would likely not be negatively impacted from the Proposed Merger. However, it considers that the Proposed Merger would affect new brands/small businesses that have not yet formed relationships with the major grocery retailers, especially if the merged entity operates more similarly to Woolworths and suppliers cannot engage directly with local stores; ³⁶⁸	Local ranging is available, as well as the emerging supplier forum. There would be no change to these features, based on the Parties’ intentions as well as the merged entity’s incentives (noting the Proposed Transaction would not affect store ownership or incentives, nor any downstream incentives).
329.2	a second supplier (of dry food products) told us that NPD has a huge upfront cost, and the risk factor of dealing with only the merged entity means that suppliers might have	It is not clear whether this supplier is relating its own experience, or speculating about the potential experience of other suppliers. This concern is similar to “raising the stakes” for individual suppliers, as to which see paragraph 51.1 and 87.4.

³⁶⁵ Commerce Commission interview with [].

³⁶⁶ Commerce Commission interview with [].

³⁶⁷ Commerce Commission interview with [].

³⁶⁸ Commerce Commission interview with [].

Para	Content	Comment
	to make decisions about whether the NPD is worthwhile. It thought this might inhibit NPD for smaller and medium businesses; ³⁶⁹	
329.3	a third supplier (of non-food products) considers that small suppliers are often the most innovative, and are the ones that may be impacted the most by the Proposed Merger (given they generally have a higher cost of doing business and may not have scale to supply nationally); ³⁷⁰	<p>Small suppliers' pathway would be unaffected, given the lack of change at the local level arising from the Proposed Transaction. There is no basis for a concern that the Proposed Transaction would alter the ability or incentives for local store owners to support NPD.</p> <p>The emerging supplier program provides support for small brands and is designed to enable them to grow viably. There are examples of suppliers which have been part of the programme and are now recommended range in stores or are about to be. This would not be affected by the Proposed Transaction.</p>
329.4	a fourth supplier (of a range of products) told us that for a small brand the Proposed Merger would make it much harder to build that brand into a market leader or even bring the brand to market; ³⁷¹	<p>No evidence is given.</p> <p>Small suppliers' pathway would be unaffected, given the lack of change at the local level arising from the Proposed Transaction. There is no basis for a concern that the Proposed Transaction would alter the ability or incentives for local store owners to support NPD.</p> <p>–Furthermore, the Proposed Transaction could provide an easier pathway to national supply than the status quo (although would not be expected to affect the factors considered in deciding whether to support any particular supplier).</p>
329.5	a fifth supplier (of fresh products) told us that its innovation is unlikely to be affected by the Proposed Merger because of its activity in the export market; ³⁷²	The Parties cannot see which supplier this is, but agree it is likely fresh produce suppliers with access to export markets could not be affected by the Proposed Transaction.
329.6	an industry participant told us that New Zealand is a small market, and that a lot of large businesses have the benefit of also selling in Australia which enables them to meet minimum factory run requirements for new products they develop. On the other	It is not clear whether this concern is based on the industry participant's own experience or speculation about others'. But the

³⁶⁹ Commerce Commission interview with [].

³⁷⁰ Commerce Commission interview with [].

³⁷¹ Commerce Commission interview with [].

³⁷² Commerce Commission interview with [].

Para	Content	Comment
	hand, smaller businesses without that luxury have to take on a lot more risk to meet minimum factory run requirements, and would be disincentivized to do so following the Proposed Merger (and may end up deleting new lines entirely if they can only supply half of the market); ³⁷³ and	concern appears to focus on a change in opportunity, or higher stakes, arising from the Proposed Transaction, which are unfounded concerns.
329.7	a second industry participant told us that the Proposed Merger does create concern for smaller suppliers because there is a lot more at stake. ³⁷⁴	Small suppliers’ pathway would be unaffected, given the lack of change at the local level arising from the Proposed Transaction. As such there is no basis for a concern that the Proposed Transaction would alter the ability or incentives for local store owners to support NPD. “Raising the stakes” for individual suppliers, rather than an impact on competition in a market, is dealt with above at 51.1 and 87.4.
332.1	One supplier (of a range of products) told us that the Proposed Merger (and having one less customer to introduce new products through) might change branded players’ ability to bring innovation to market, ultimately resulting in less choice for consumers and a lack of offering/variety in brands. ³⁷⁵	The impact on innovation is dealt with in rows above and from paragraph 124.
332.2	A second supplier (of a range of grocery products) told us that a reduction in innovation would mean the consumer loses outright because private label would be bigger and there would be less innovation on the shelf. ³⁷⁶	The impact on innovation is dealt with in rows above and from paragraph 124.
332.3	A third supplier (of a range of products) considers that while there might be some benefits to retail consumers in the short term (ie, rationalisation and potentially some price savings), it considers that in the longer-term, we would ultimately see some grocery suppliers (such as small suppliers that cannot supply nationwide) dropping out of the market. Further, it considers that in the long-term, it would be higher risk for companies to introduce innovative (ie, sustainable, environmentally friendly, more nutritional) products given there would be less channels to “try” those products	This concern seems to be a general one, rather than one based on the supplier’s own experience or evidence. The concern about suppliers dropping out due to a reduction in competition over time is unfounded – see above and Section 2. More generally, supplier exit is dealt with above (e.g. 78.2, 87.3) and higher stakes are dealt with at 51.1 and 87.4.

³⁷³ Commerce Commission interview with [redacted].

³⁷⁴ Commerce Commission interview with [redacted].

³⁷⁵ Commerce Commission interview with [redacted].

³⁷⁶ Commerce Commission interview with [redacted].

