# Foodstuffs North Island Limited and Foodstuffs South Island Limited

# Cross-submission on statement of unresolved issues

**PUBLIC VERSION**
Contains Foodstuffs North Island Limited and Foodstuffs South Island Limited confidential information

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

26 August 2024

## CONFIDENTIALITY

1 Confidentiality is sought in respect of the highlighted information in this document. Release of this information would be likely to unreasonably prejudice the commercial position of Foodstuffs North Island (**FSNI**) and/or Foodstuffs South Island (**FSSI**). FSNI and FSSI (together, **the Parties**) request that they are notified if the Commerce Commission (**Commission**) receives any request under the Official Information Act 1982 for the release of any part of the confidential information. They also request that the Commission seek and consider their views as to whether the confidential information remains confidential and commercially sensitive before it responds to such requests.

## PRELIMINARY COMMENTS

2 The Parties provide this cross submission to address key points raised in other submissions on the statement of unresolved issues (**SOUI**). This cross submission is comprised of seven Appendices, being:

2.1 **Appendix 1**: a response to the key points made in other submissions on the SOUI,

2.2 **Appendix 2**: a report prepared by Prof. Dr. Christian Wey and Dr. Salem Saljanin of Dusseldorf Competition Economics. Further information about this report is provided at paragraphs 3 to 5, and

2.3 **Appendices 3 to 7**: 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 five further categories of products (in addition to the 19 categories of products analysed as part of the Parties' 13 August 2024 submission on the SOUI). Further information about these additional analyses is provided at paragraphs 6 to 8 and at Table 1.

### Additional economic analysis provided alongside this cross submission

3 The Parties acknowledge that the considerations associated with the Proposed Transaction are unusual, specifically, no aggregation in downstream markets, with any potential change limited to acquisition markets. While this does not make the likely outcome of the Proposed Transaction unknown, the Parties have taken the view that it may be useful to provide additional economic analysis focusing on the particular features of the Proposed Transaction.

4 With a view to assisting the Commission to consider the economic principles relevant to the Proposed Transaction, the Parties provide at Appendix 2 a report prepared by Prof. Dr. Christian Wey[1] and Dr. Salem Saljanin[2] of Dusseldorf Competition Economics (**DCE**). Prof. Dr. Christian Wey has written extensively on buyer power over a long period (including in relation to food retailing), and so was considered to be an appropriate expert to involve in this case.

---

[1] https://dus-competition.de/en/team/prof-dr-christian-wey

[2] https://dus-competition.de/en/team/dr-salem-saljanin

5 The Parties consider the key conclusions in the report are, in relation to:[3]

5.1 *downstream or retail markets* – lower input costs can be expected to flow though to lower retail prices, and this will increase the intensity of competition,

5.2 *upstream or acquisition markets* – it is crucial to analyse changes in the outside options of the relevant players. If these outside options remain (largely) unchanged, the resulting bargaining outcomes are also unlikely to shift. In this regard:

(a) in relation to (the vast proportion of) suppliers that presently supply both FSNI and FSSI, the anticipated elimination of supplier price differentiation is unlikely to have negative effects on competition, and

(b) in relation to suppliers that presently deal with either FSNI or FSSI but not both:

(i) there would be no increase in buyer power, because the merged entity would not be comparing different terms (as between the two co-ops) and so not seeking to obtain the better terms across the entire supply (because there is only one set of terms to compare), and

(ii) the most attractive outside option governing bargaining power in the existing supplier relationship (with one Foodstuffs entity) is unlikely to be the prospect of supply to the other Foodstuffs entity since it is likely that the supplier has already optimised its channels to market for retail grocery sales in the geographic area covered by the other co-operative. Redirecting the lost volume to the other geographic market cannot therefore be optimal, and so the most relevant outside option will not be affected by the merger, and

5.3 *supplier incentives to innovate* – the incentives for innovation are governed by the expectation of gains, relative to the innovation investment made. The prospect of some reduction in prices received (for the same product/service) by some suppliers cannot be said to affect the incentives for innovation.

**Detail on five additional categories analysed in Appendices 3 to 7**

6 The Parties have carried out a "deep dive" analysis on five additional categories, being paper goods, dishwashing products, laundry, speciality cheeses and oral care. 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.

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

---

[3] Refer to Appendix 2.

8 As with the 19 categories analysed alongside the Parties' 13 August submission on the SOUI, the categories analysed in appendices 3 to 7 (and [REDACTED]) illustrate that:

8.1 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, and

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

**Table 1: Overview of each category analysed in Appendices 3 to 7**

| Appendix | Category | Relevant products in the category | Commission category in Table 2 of SOUI | Comments | [REDACTED] |
|---|---|---|---|---|---|
| 3 | **Paper goods** | • Toilet paper<br>• Paper towels<br>• Facial tissues | National markets for the acquisition of **dry/ambient** groceries by major grocery retailers. | • Category chosen based on information in SOUI<br>• [REDACTED]<br>• [REDACTED] | [REDACTED] |
| 4 | **Dishwashing products** | • Rinse aids<br>• Dishwash cleaners<br>• Dishwash powders<br>• Dishwash tablets<br>• Dishwash liquids | National markets for the acquisition of **dry/ambient** groceries by major grocery retailers. | • Category chosen as [REDACTED] | [REDACTED] |
| 5 | **Laundry** | • Laundry powders<br>• Laundry liquids<br>• Laundry capsules<br>• Strain removers<br>• Fabric softeners & fragrances<br>• Accessories (e.g., pegs)<br>• Washing machine cleaners | National markets for the acquisition of **dry/ambient** groceries by major grocery retailers. | • Category chosen based on information in SOUI<br>• [REDACTED] | [REDACTED] |
| 6 | **Speciality cheeses** | • Speciality cheeses (e.g., blue, brie, gouda, parmesan, goat, mozzarella, feta, haloumi, camembert etc.). | National markets for the acquisition of **chilled and frozen** groceries by major grocery retailers. | • Category chosen based on third party submission received on the SOUI<br>• [REDACTED]<br>• [REDACTED] | [REDACTED] |
| 7 | **Oral care** | • Toothbrushes and refill heads (e.g., manual, battery, and electric)<br>• Toothpaste<br>• Mouthwash | National markets for the acquisition of **health and beauty** products. | • Category chosen as [REDACTED] | [REDACTED] |

| Appendix | Category | Relevant products in the category | Commission category in Table 2 of SOUI | Comments | [REDACTED] |
|---|---|---|---|---|---|
| | | • Tooth whitening products<br>• Dental floss<br>• Denture products (e.g., adhesive cream, and cleanser) | | | |

# APPENDIX 1: RESPONSES TO SUBMISSIONS

<table>
<tr><th>Ref</th><th>Topic</th><th>Key points from submission</th><th>Comments</th></tr>
<tr><td colspan="4">Pernod Ricard New Zealand</td></tr>
<tr><td>Page 1</td><td>General comments</td><td><ul><li>The merger should be approved, as locally owned and operated business such as Foodstuffs should be permitted to operate nationally (like the Warehouse and Woolworths).</li><li>Size and scale can unlock efficiencies which will benefit customers, including through only having to engage with one head office instead of two.</li><li>Supplier success for innovations and commercial negotiations is not impacted by whether there are three or two grocers, but rather on the individual merits and strength of supplier proposals.</li></ul></td><td>The Parties agree. In particular:<ul><li>The Parties anticipate that the Proposed Transaction will lead to efficiencies for suppliers. Refer to the Parties' submission on the SOI from paragraph 107.</li><li>The Commission also acknowledges that suppliers across a range of categories have indicated that the Proposed Transaction could create efficiencies or simplifications for suppliers, including through only having to deal with a single merged entity. Refer to the SOUI at paragraph 151.</li><li>The Parties agree that supplier success is based on the merits and strength of supplier proposals (in addition to sales to other channels outside of grocery retailers). The starting point for the Parties' engagement with suppliers is to promote each co-operative's competitiveness at the retail level, including by reference to meeting customer "need states". For further information, refer to paragraphs 78 onwards of the Parties' 13 August submission.</li></ul></td></tr>
<tr><td>Page 1</td><td>2013 merger</td><td><ul><li>The 2013 merger resulted in greater efficiencies and more effective operations.</li></ul></td><td>The Parties agree. The Parties note that the concerns suppliers have raised about the inefficiencies associated with FSNI and FSSI's existing separate buying structures (see paragraph 108 of the Parties' submission on the SOI) were previously also raised with respect to the Auckland and Wellington co-operatives and</td></tr>
</table>

| Ref | Topic | Key points from submission | Comments |
|---|---|---|---|
| | | | subsequently alleviated by the completion of that merger. For further information, refer to the Parties' submission on the SOI from paragraph 141. |
| **NZ Specialist Cheesemakers Association** | | | |
| Pages 2 - 3 | Lessening competition | • The merger will substantially lessen competition in the New Zealand grocery market, as Foodstuffs currently enjoys 60% market share in each island. If a single entity were to be granted 60% market share of a national market it would create a highly unequal market both on the supply and retail side.<br>• Foodstuffs retail brands dominate in both low-price high-volume retail and in lower volume higher price offers. | The Proposed Transaction would result in no material change to retail competition. The market position of the Parties would not be enhanced by the Proposed Transaction. |
| Page 3 | | • NZSCA members face supply-side pressure as Foodstuffs demand favourable terms and increased margins for market access. The merger would create an uncompetitive market, enabling monopolistic control with little benefit to consumers. | The Parties do not determine "market access". The starting point for ranging of products by the Parties is whether the products meet customer "need states".<br>A transfer of surplus, without more, is not evidence of a lessening of competition (which is supported by an application of the bargaining framework). See paragraphs 44, 87.1 and 120 of the Parties' submission on the SOUI.<br>Further, it can be expected that the merged entity would have an incentive to share with customers an improvement in its variable costs (such as product costs).<br>See the discussion on the relevance of "trading margin" from paragraph 52 of the Parties' submission on the SOUI. |
| Page 3 | Coordination implications | • NZSCA believes Foodstuffs and Woolworths effectively coordinate their pricing, in the same way petrol companies do. The Commission, in its first report on the grocery market recognised the lazy level of competition between the retailers.<br>• FSNI's centralised buying model is a direct reflection of their awareness of Woolworths national terms and pricing. | For the reasons set out at Part 3 of the Parties' submission on the SOUI, the Proposed Transaction would not increase the likelihood, completeness and sustainability of coordination between the merged entity and Woolworths. |

| Ref | Topic | Key points from submission | Comments |
|---|---|---|---|
| | | Woolworths retail pricing is included in the FSNI ranging documents. | |
| Pages 3 - 4 | Woolworths' adoption of localised pricing | • Woolworths' adoption of postcode pricing will increase South Island pricing, given the fact that Foodstuffs already prices higher in the South Island.<br>• This kind of margin enhancing pricing reflects poor competition for market share, and if not a tacit agreement, it is an acceptance by each retailer of the others' market position. | The Parties cannot comment on Woolworths' potential move to localised pricing except to say that to the extent that this is correct, coordination between the Parties and Woolworths on a national basis would be even more challenging than it is currently – see paragraph 180 of the Parties' response to the SOUI.<br>The Proposed Transaction will put downward pressure on the Parties' retail prices, including in the South Island. |
| Page 4 | Intra-Foodstuffs pricing coordination | • NZSCA proposes examining intra-Foodstuffs pricing coordination, as New World and PAK'nSAVE have set price points and margins that maintain their retail positions. In some local geographies, this would be tantamount to cartel-like behaviour.<br>• Consideration should be given to splitting up the New World and PAK'nSAVE brands, and although not as consequential, breaking up Four Square into its own retail chain would also be beneficial.<br>• Existing pricing and margin demands cannot be sustained should PAK'nSAVE and New World stores have to compete against one another equally. | It is correct that the Parties trade under several banners (with different brand propositions and PQRS offerings). Operating under several banners is not prohibited under the Commerce Act. As set out below, there are no arrangements between the Parties to not compete, or that prevent them from competing, in any retail grocery markets (see paragraph 64 of the SOUI).<br><br>The Parties' position is that no substantial lessening of competition can arise from the Proposed Transaction and therefore no divestment remedy needs to be offered. |
| Pages 4 - 5 | Central coordination of pricing | • NZSCA members report that along with centralisation of buying and ranging, pricing is also centrally controlled.<br>• Individual stores have limited flexibility to adjust pricing in the SAP system, if prices are centrally maintained.<br>• Centralised promotion, online shopping, and national marketing prevent stores from deviating from the Co-ops pricing structures. | No merger effect is identified. In any event, this submission is incorrect. Individual FSNI/FSSI stores are able to [REDACTED]. |
| Page 5 | | • FSSI has recently manipulated prices within categories, raising retail prices on some products to increase profits, | It is correct that the retailer, not the supplier, is responsible for setting/adjusting retail pricing. The Proposed Transaction will not impact this. |

| Ref | Topic | Key points from submission | Comments |
|---|---|---|---|
| | | which can reduce sales volumes for suppliers without prior consultation or warning. | For further information on the potential effect of the Proposed Transaction on specialty cheese, refer to the category analysis on speciality cheese at Appendix 6. |
| Pages 5 - 6 | Unilateral effects in upstream markets | • The specialty cheese category is going through its second round of the new commercial negotiations model with FSNI. FSNI was pushing for compounding price decreases in the speciality cheese category through margin and term demands and retail price expectations.<br>• FSNI is therefore increasing margins despite rising manufacturing and supply chain costs. Suppliers would not willingly provide these margins if there were effective other routes to market. | Refer to the category analysis on speciality cheese at Appendix 6. |
| Page 6 | Alternative channels | • Export is not viable for most SMEs due to high costs and strict compliance requirements (i.e., food safety compliance standards required by MPI).<br>• Specialty cheese makers have no alternative retail channels with comparable reach to the RGRs, making them reliant on these retailers.<br>• A merged entity would dominate the market, limiting consumer access to specialty cheeses based solely on whether the entity deemed it commercially attractive to provide. | The Parties understand that some domestic suppliers of speciality cheeses export products overseas (e.g. [REDACTED]). However, in any event, there are many other buyers of speciality cheese beyond the grocery retailers, including speciality retailers, independent grocers, hospitality and wholesalers. The Parties understand that these other channels are typically a significant contributor to suppliers' overall sales in this category.<br>As described in Section 2 of the Parties' submission on the SOUI, the Parties' acquisition conduct is strongly influenced by downstream customer demand and the Parties' desire to present an attractive offering to customers.<br>Further information is set out in the category analysis on speciality cheese at Appendix 6. |
| Pages 6 - 7 | Efficiencies | • The NZSCA view is that efficiencies arising from the merger is double sided: efficiency of upstream supply and administration and retailer efficiency. The merged entity would provide limited upstream supply efficiencies for members. | The Parties anticipate that the Proposed Transaction will lead to efficiencies for suppliers. Refer to the Parties' submission on the SOI from paragraph 107.<br>While no merger effect is identified in relation to distribution costs, the Parties note that such costs reflect the cost to serve. |

| Ref | Topic | Key points from submission | Comments |
|---|---|---|---|
| | | • Suppliers will continue to bear supply costs. Distribution centre costs have risen, and the merged entity is unlikely to reduce them.<br>• The merger would exacerbate existing issues rather than improve market access or reduce costs for suppliers. | |
| Page 8 | Previous merger experience | • Despite slight efficiencies, the 2013 merger didn't benefit consumers or suppliers through pricing or margin improvements.<br>• The merger has enabled FSN's new commercial terms strategy, with impacts still unfolding. | FSNI has seen no evidence that the 2013 merger resulted in a lessening of competition in any market involving the acquisition of groceries (and this submission does not appear to provide such evidence). FSNI considers prices decreased as a result of the 2013 merger and presented evidence to that effect in the 26 April submission – see from paragraph 141. |
| Page 8 | Countervailing power of suppliers | • NZSCA members are made up of mostly small provincial businesses, who lack the resources to defend themselves from the market power of the proposed merger. | The "market power", or market position, of the Parties is not expected to be enhanced by the Proposed Transaction.<br>In any event, as set out at Appendix 6, there is substantial competition in relation to speciality cheeses, including from imported products.<br>Further, small suppliers that at present only supply to a small number of stores will be unaffected by the Proposed Transaction. |
| Pages 8 – 10, 14 - 15 | Centralised buying | • A centralised national buying office for the merged entity would raise the stakes for any business engaging with it.<br>• This would create a severe negotiating imbalance and increase the risk of unfavourable ranging decisions.<br>• The centralised buying model adopted by FSNI shows what is to come:<br>  ○ FSNI's range review stated that there has been a significant reduction in SKUs. This requires suppliers to compete for fewer product slots and provide favourable commercial outcomes to gain access.<br>  ○ Suppliers must focus on high-margin products, which limits the ability to diversity and weakens business resilience. | The Parties disagree that the Proposed Transaction would "create a severe negotiating imbalance and increase the risk of unfavourable ranging decisions".<br><br>It is clear from [REDACTED] [(REDACTED]), [REDACTED] that the Parties' acquisition conduct in relation to the products in the speciality cheese category is strongly influenced by customer demand, [REDACTED], and the Parties' desire to present an attractive offering to customers that meets all need states i.e. retail market considerations. As the Proposed Transaction would not give rise to any change in retail market competitive dynamics, the evidence is that the same factors would drive the merged |

| Ref | Topic | Key points from submission | Comments |
|---|---|---|---|
| | | ○ FSNI's SKU limit the number of SKUs it keeps in each cheese type, thus suppliers cannot compete equally, and this reduces consumer choice.<br>○ FSNI's model is essentially a 'pay to play'. The current FSNI range review prioritises financial criteria over product quality, leading suppliers to cut quality to meet margin and price requirements, which reduces consumer choice.<br>• NZSCA see margin transfer from suppliers to retailers already in play. The proposed merger would worsen this imbalance, benefiting large suppliers and giving the merged entity excessive control and a monopoly like fee for access to consumers, with no advantage for smaller suppliers. | entity's conduct. That is, the merged entity would have no incentive to suppress competition in any acquisition market associated with this product category and would continue to be incentivised to [REDACTED].<br><br>Information regarding FSNI's category review is provided at Appendix 6. In particular, FSNI notes that [REDACTED].<br><br>This submission also assumes that centralisation would reduce competition. The degree of centralisation merely reflects the co-operatives' view of how to best optimise their competitiveness at a given time, and is subject to change (in the factual and the counterfactual). |
| Pages 9 - 10 | Counterfactual and centralised national buying | • FSSI's buying approach allows more direct market access for suppliers compared to FSNI's centralised and restrictive model.<br>• While FSSI lets suppliers approach stores directly or seek central support, FSNI has increasingly centralised buying decisions, limiting store-by-store sales and creating high-stakes ranging windows.<br>• FSNI's CEO insisted to media that suppliers will be able to sell in store by store. However, it is the members view that this is being discouraged. Suppliers are funnelled in to a ranging process and head office vetting prior to being able to sell.<br>• For new market entrants, FSNI's Emerging Products Category Manager has discouraged new products, claiming existing products meet consumer needs.<br>• NZSCA fears the merged entity will exacerbate these issues, further limiting competition and market access. | The Parties note that both co-operatives are developing centralised buying practices [REDACTED].<br><br>There would be no merger impact on direct dealings with stores. FSNI does not consider it discourages suppliers from dealing directly with stores – refer to FSNI 139.00001.<br><br>For further information about the speciality cheese category and FSNI category review, refer to Appendix 6. |
| Pages 10 – 11 | Private label products | • Private label products control entry-level pricing, which has the effect of limiting supplier pricing power. This is | No merger impact is identified. Further:<br>• As acknowledged in the SOUI, there is no basis to conclude the Proposed |

| Ref | Topic | Key points from submission | Comments |
|---|---|---|---|
| | | done in tandem with margin demands and retail price expectations from a retailer.<br>• This makes suppliers more dependent on retailers who compete with them, and this restricts their ability to achieve scale and grow. | Transaction would affect the merged entity's incentives or ability in relation to ranging private label, relative to the counterfactual. See the SOUI at paragraph 226ff, and the Parties' submission on the SOUI at paragraph 104ff.<br>• Further, the new Grocery Supply Code requires non-discrimination of private label products in range reviews, product ranging decisions and shelf space allocation decisions.[4] |
| Page 11 | Role of the GICA | • NZSCA members have observed that RGRs have used the GICA to protect their interests, particularly by negotiating opt-out clauses with suppliers.<br>• Speciality cheese suppliers face pressure from retailers to cover costs and provide credits for unsaleable stock. This power imbalance and market access control of the RGRs allows them to manipulate the Code of Conduct to their advantage.<br>• Members of the NZSCA are afraid of retribution, and that has prompted members to submit the concerns collectively, in this submission. | No merger impact is identified. In any event, the Parties strongly disagree with the sentiment in this submission. The Parties are compliant with the Code and ensure that all negotiations with suppliers are carried out in good faith. The Parties never pressure suppliers to cover costs or provide credits for unsaleable stock. |
| Pages 12 -13 | Threat of denial of access to consumer markets | • NZSCA highlights how FSNI undermined GICA protections by introducing merchandising fees for suppliers just as the code was implemented. FSNI now charges specialty cheese makers these fees, despite not doing so previously.<br>• FSNI claims that applying merchandising fees across the category offsets service and supplier costs. However, store merchandising is typically a retailer's responsibility, and no additional staff have been hired to justify these fees. Insisting on an opt out of the code with implied | No merger effect is identified. In any event, FSNI disagrees that FSNI has undermined GICA protections and notes that merchandising is only by agreement in good faith as per the Code (and further that it has been discussing and mutually agreeing merchandising arrangements with suppliers well before the introduction of the GICA). FSNI has been very transparent with suppliers on this point. |

[4] Clauses 24, 26 and 27 of the Grocery Supply Code 2023.

| Ref | Topic | Key points from submission | Comments |
|---|---|---|---|
| | | threats of reduced ranging, FSNI effectively extracts more margin from suppliers. | |
| Page 16 | Consumer harm | • The proposed merger would reduce consumer choice. It is in the interests of the merged entity to limit choices and push higher stock returns through fewer SKUs.<br>• This would push suppliers to cut quality and would discourage new suppliers to emerge and challenge incumbents.<br>• In an already concentrated market, further consolidation would harm competition and contradict New Zealand's open market principles. | The Parties disagree. In particular:<br>• The Parties would continue to have the same incentives to meet customer demand that they have currently, including choice, variety, quality and fair/competitive pricing.<br>• Given there would be no change to retail competition arising from the Proposed Transaction, the merged entity will have the same incentives and therefore priorities. For further detail, refer to paragraphs 95 to 106 of the Parties' submission on the SOI. |
| Page 16 | | • The Commission should decline the merger and work towards breaking up the existing duopoly to establish a healthier grocery retail market. | This submission presents a law reform proposal. As such, it falls outside the scope of the existing process. |
| **Murray Edridge** | | | |
| Page 1 - 2 | General comments and merger impact | • The merger should be approved. It would be good for the South Island to also have social supermarkets.<br>• FSNI has been generous and provided ongoing support to the Wellington City Mission and the Social Supermarkets. FSNI has provided an immense amount of financial support.<br>• The merger will create critical mass and creative momentum to extend the generosity of the North Island to those working in and with communities in the South Island. This can only serve to benefit New Zealand's commitment to fairness, wellbeing, and equity for all its citizens. | The Parties agree that the merger should be approved, and appreciate the support of Murray Edridge.<br>FSNI is committed to opening more social supermarkets, enabling individuals and families to access nutritious food with dignity.[5]<br>FSSI also has a number of longstanding partnerships with organisations such as the Christchurch City Mission and the NZ Food Network, and has supported the Christchurch City Mission to introduce the South Island's first self-serve foodbank where people who need food |

[5] For further information, see: https://www.foodstuffs.co.nz/our-brands/social-supermarkets

<table>
<tr><th>Ref</th><th>Topic</th><th>Key points from submission</th><th>Comments</th></tr>
<tr><td></td><td></td><td></td><td>support can shop with dignity in a supermarket environment.[6]<br><br>The Parties look forward to continuing this work following the Proposed Transaction (and consider the merged entity may be able to do more).</td></tr>
<tr><td colspan="4">Monopoly Watch NZ</td></tr>
<tr><td>Page 1</td><td>General comments</td><td>• The merger should be approved, and it is in the public interest.<br>• However, two conditions should be imposed on merged entity:<br>  ○ Foodstuffs must have separate accounting systems for its distribution centres, and<br>  ○ Four Square franchisees can buy from other distribution centres (such as Woolworths where it has better pricing) i.e., they cannot be in a "collusive cartel agreement to only buy from one wholesaler who restricts competition".</td><td>An applicant for clearance may offer a divestment undertaking to sell certain assets or shares where that would remedy an identified competition concern.[7] The Parties' position is that no substantial lessening of competition can arise from the Proposed Transaction and therefore no divestment remedy needs to be offered. In any event, as the Commission can only accept undertakings to divest assets or shares, the conditions proposed by this submitter would not fall within the scope of the undertakings that the Commission can accept under the Commerce Act.</td></tr>
<tr><td>Page 1</td><td>Real reason for the merger</td><td>• The submitter wants the Commission to understand the real reason for the merger, being PAK'nSAVE franchisees who want to exit and sell their business. The merger will enable them to change their organisation structure.<br>• The market study has meant that no large PAK'nSAVE owners have been able to sell at full value (as the current level of probability is now projected to fall).</td><td>This assertion is incorrect. Each co-operative has constitutional provisions and a protection trust structure which ensures that they remain owned by independent grocers. This structure is fundamental to the co-operatives, cannot be changed by the current members or trustees, and will be preserved throughout the merger. The protection trust structure prevents the outcome the submitter speculates about.</td></tr>
<tr><td colspan="4">Food and Grocery Council</td></tr>
</table>

[6] As part of their on-going community support, each FSSI New World and PAK'nSAVE store partners with at least one local foodbank or community organisation to help get food and groceries to those who need it most. For further information, see: https://www.foodstuffs-si.co.nz/news-room/2023/Foodstuffs-South-Island-cooperative-gives-a-200k-boost-to-local-foodbanks-and-community-partners

[7] Commerce Act 1986, s 69A.

| Ref | Topic | Key points from submission | Comments |
|---|---|---|---|
| Page 1 | General comments | • The merger should be declined, given the findings of the 2022 Market Study and that subsequent regulation was required to address the anti-competitive effects in the market and to provide protection for suppliers.<br>• The 2022 Market Study identified concerns about the concentration in the grocery sector, so it would seem surprising to allow a proposal that would result in further concentration and exacerbate well-known issues. | No merger effect is identified. For completeness, the Parties note that there would be no change in downstream competition as a result of the Proposed Transaction. Accordingly, like the Parties', the merged entity's incentives and conduct would focus on seeking to ensure that acquisition markets remain competitive. |
| Page 2 | Grocery Supply Code | • NZFGC is concerned about FSNI and FSSI's approach to contract out of the key protection of the GSC in their separate and, prior to intervention by the grocery Commissioner, substantially different template agreements remain in breach of the code and their obligations to act in good faith. | No merger effect is identified in relation to the Grocery Supply Code. In addition, for completeness the Parties note that:<br>• It is incorrect to say that the Parties' template agreements are in breach of the code and their obligations to act in good faith.<br>• The Parties are committed to complying with the Grocery Supply Code. This is demonstrated by the fact that both willingly incorporated Commission feedback on their contracts when received (noting it is not surprising that there would be Commission feedback on the Parties' first-ever attempt to comply with the Code – the existence of such feedback cannot be taken as an unwillingness by the Parties to comply). For example [REDACTED]. |
| Page 5 - 6 | Responses from members (to SOI questions from FGC survey data) | • That there is a reluctance for suppliers to provide comments, given the potential ramifications. The Commission must not take this to suggest those concerns are not real and abundant.<br>• Strongly encourage a thorough consideration of the merger's impacts on suppliers.<br>• Many supplier members foresee the merger as a significant factor that could disrupt current supply dynamics and competitive balance in the market. | The Parties strongly disagree with any suggestion that they would retaliate against suppliers that chose to speak to the Commission about the Proposed Transaction. The Parties note the acknowledgement at paragraph 137-138 of the SOUI that supplier reluctance to talk about the Proposed Transaction was not based on actual evidence of any threats of retribution. The Parties wish to reiterate that there are no such threats. The Parties' commercial incentives are to treat suppliers as commercial counterparties that are critical to their success in |

| Ref | Topic | Key points from submission | Comments |
|---|---|---|---|
| | | | 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. As such the concerns are unfounded.<br>See Section 2 and Appendices 2 to 20 of the Parties' submission on the SOUI for an analysis of the likely impact of the Proposed Transaction on particular acquisition markets. |
| **Beverley Moore** | | | |
| Page 1 | Merger impacts | • The merger should be approved as Foodstuffs should be treated the same as Woolworths (who operate nationally). Particularly because Foodstuffs profits stay in New Zealand, while Woolworths go to Australia.<br>• Foodstuffs should be allowed equal benefits of competitive purchasing power, which will in turn be passed on to customers. | The Parties agree and note that:<br>• most major New Zealand companies operate across both Islands, including the Parties' Australian and globally owned competitors, and<br>• any product price savings the Parties are able to achieve through the Proposed Transaction would be shared with consumers. |
| **Anonymous L** | | | |
| Page 1 | General comments | • While there are issues within the grocery sector (including transparency and the cost of data), the merger is not the core of the issue and so the merger should be approved. | The submitter's view is that there is no adverse merger effect for the issues the submitter suggests, and that the Proposed Transaction should be cleared. |
| Page 1 - 2 | Impact on the industry of delay | • The prolonged process to determine whether the merger should go ahead is causing material damage to people in the industry (including suppliers, retailers and others).<br>• It is time for the Commission to make a decision - this prolonged process is creating uncertainty for the industry's future and affecting the mental and physical wellbeing of those in the industry. | The Parties agree that the Commission's prolonged process is creating uncertainty and negatively impacting the wellbeing of those in the industry. |
| **Anonymous K** | | | |
| Page 1 | Merger impact | • The merger should be approved as it would mean less time dealing with two companies, increased speed to | The Parties agree that the Proposed Transaction will lead to efficiencies for suppliers. For further |

| Ref | Topic | Key points from submission | Comments |
|---|---|---|---|
| | | market to bring out new products, consistent messaging through only dealing with one business, less time spent on category reviews, and consistent ranging possibilities.<br>• The submitter (a supplier) has always been treated fairly by FSNI and FSSI and does not see this changing following the Proposed Transaction. | information, refer to the Parties' submission on the SOI from paragraph 107.<br>The Parties are pleased to hear this feedback, and are working hard to ensure this perception is shared as broadly as possible. |
| **Anonymous J** | | | |
| Page 1 | Merger impact | • The merger should be approved as it will benefit people living in the South Island, where groceries (particularly meat) are more expensive. | Product price decreases that the Parties are able to achieve through the Proposed Transaction would be shared with consumers.<br>If the Proposed Transaction increased the prevalence of national pricing, customers all over the country would benefit from an increase in competition in a particular local level, as pricing would be set at the most competitive level. [REDACTED]. As set out from paragraph 141 of the Parties' submission on the SOI, following the 2013 Auckland/Wellington merger, [REDACTED]. |
| **Ernie Newman** | | | |
| Page 4 | General comments | • The merger brings into focus the ongoing role of the Grocery Commissioner. There is a need to strengthen this role, by:<br>○ implementing full accounting separation between wholesale and retail,<br>○ investigating how loyalty cards and AI are used, and<br>○ implementing policies to support and protect new market entrants. | The Parties disagree with these suggestions. However, as no merger effect is identified the Parties do not discuss the issue further. |
| Page 2 | Lessening competition | [*in response to paras 10.1 and 10.3 of the SOUI*]<br>• The parties and Woolworths are the only route to market in viable volumes. This is a reduction of buyers from 3 to 2.<br>• This would result in the removal of an important option and the potential closure of a number of suppliers. | The change in the opportunity associated with the Proposed Transaction, and its effects on the ability is incentives to lessen competition in supplier markets are set out in Section 1 of the Parties' submission on the SOUI, with evidence provided at Section 2, as well as paragraph 87.4. |

| Ref | Topic | Key points from submission | Comments |
| --- | --- | --- | --- |
| Page 4 | | [*in response to para 46 of the SOUI, which discusses the s 67 merger authorisation process*]<br>• The merger cannot be seen as having a net public benefit. The history of consolidation in the sector proves this point. | While the Parties disagree that the merger will not result in public benefits, this assessment is not relevant. The Parties' position is that no substantial lessening of competition can arise from the Proposed Transaction and accordingly have sought clearance, rather than authorisation.<br><br>Further, as set out from paragraph 141 of the Parties' submission on the SOI, following the 2013 Auckland/Wellington merger, [REDACTED]. |
| Page 2 | Buyer power | [*in response to para 10.4 of the SOUI*]<br>• The merged entity will pick the better price for products. A supplier will have no choice but to accept the lower price, which will remove any cross-subsidisation. | The merged entity achieving the terms one of the co-operatives achieves today (and in the counterfactual) would not be expected to amount to a lessening of competition. See paragraphs 62 to 63 and Figure 2 of the Parties' submission on the SOUI.<br><br>A transfer of surplus, without more, is not evidence of a lessening of competition (which is supported by an application of the bargaining framework). See paragraphs 44, 87.1, and 120 of the Parties' submission on the SOUI.<br><br>Further, it can be expected that the merged entity would have an incentive to share with customers an improvement in its variable costs (such as product costs). |
| Page 2 | End of innovation | [*in response to para 10.5 of the SOUI*]<br>• The remaining purpose of stocking manufacturers' brands would be to make the Pams prices look good. | As acknowledged in the SOUI, there is no basis to conclude the Proposed Transaction would affect the merged entity's incentives or ability in relation to ranging private label, relative to the counterfactual. See the SOUI at paragraph 226ff, and the Parties' submission on the SOUI at paragraph 104ff. |

| Ref | Topic | Key points from submission | Comments |
|---|---|---|---|
| | | | Further, the new Grocery Supply Code requires non-discrimination of private label products in range reviews, product ranging decisions and shelf space allocation decisions.[8] |
| Page 2 | Entry and expansion | [*in response to para 10.8 of the SOUI*]<br>• The likelihood of new or expanding retailers are low, due to a history of land covenants, anticompetitive land banking and the Commission's failure to prevent the Foodtown/Woolworths merger. | Retail barriers would not be altered by the Proposed Transaction as the Proposed Transaction would result in no material change to retail competition. |
| Page 3 | Tacit coordination | [*in response to para 11 of the SOUI*]<br>• If the merger was approved, it would enhance tacit coordination with Woolworths, making pricing practices more similar.<br>• This is evidenced by the RNZ Checkpoint price survey, which shows that while the price of some items like cheese and produce have decreased due to consumer awareness, others like detergent and nappies have risen.<br>• Both retailers use confusing pricing tactics to obscure 'normal' prices, a strategy that would be easier to implement if the merger is approved. | For the reasons set out at Part 3 of the Parties' submission on the SOUI, retail markets are not vulnerable to coordination and the Proposed Transaction would not increase the likelihood, completeness and sustainability of coordination between the merged entity and Woolworths. In particular:<br>• consistent with the conclusions in the grocery market study,[9] there is no evidence of existing coordination between the Parties and Woolworths,<br>• there are a range of factors that would complicate any attempt at coordination, including the wide range of complex products offered by grocery retailers,<br>• 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 |

8 Clauses 24, 26 and 27 of the Grocery Supply Code 2023.

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

| Ref | Topic | Key points from submission | Comments |
|---|---|---|---|
| | | | sustainable coordination even without the Proposed Transaction), and<br>• 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]).<br><br>To the extent that prices for certain products have increased over the relevant two-year period, this reflects supplier cost increases (refer for example to 2022-2024 data on Stats NZ food price inflation and Foodstuffs supplier costs during this period)[10] and not coordination between the Parties and Woolworths.<br><br>Finally, the concern regarding "confusing pricing tactics", if true, does not appear likely to support coordination, as it would make monitoring a competitor's pricing more difficult. The Parties consider they do not engage in confusing pricing but in any event, there is no reason to expect any particular change in pricing tactics will be incentivised by the Proposed Transaction. The Parties have no plans to adopt different pricing strategies as a result of the Proposed Transaction. |
| Page 3 | Supermarkets use of information | [*in response to para 32 of the SOUI*]<br>• Supermarkets now use their market power and technology to manipulate pricing, creating inconsistencies unrelated to costs. This gives new entrants an information disadvantage compared to established players. | The Parties consider this submission mis-characterises their practices in terms of use of data insights, retail price and margin decisions – see the Parties' response to the SOUI. Further, no merger effect is identified. |

[10] See: https://www.foodstuffs.co.nz/news-room/2024/Foodstuffs-co-ops-see-third-month-of-sub-1-percent-annual-food-price-inflation

| Ref | Topic | Key points from submission | Comments |
|---|---|---|---|
| Page 3 | Pass through of benefits to consumers | [*in response to para 35.3 of the SOUI*]<br>• In the current duopoly, the incentive to pass on surplus is minimal. All incentives encourage directing it into the distributor's account. | The Parties disagree. The Parties are committed to prioritising low prices for customers, particularly in an environment of increased inflationary pressures and new competitors. There are many examples where the Parties have reduced retail prices to consumers to consumers at the expense of FSNI/FSSI margin, in order to ensure that they are meeting their commitment to offer low prices to consumers. Given there would be no change to retail competition arising from the Proposed Transaction, the merged entity will have the same incentives and therefore priorities. For further detail, refer to paragraphs 95 to 106 of the Parties' submission on the SOI.<br><br>Foodstuffs NZ publishes a comparison of Foodstuffs prices as against supplier cost prices and the Stats NZ Food Price Index. As illustrated in Figure 9 of the Parties' submission on the SOI, over the last 27 months FSNI and FSSI have been making a concerted effort not to pass on the full amount of increased supplier costs onto consumers, to ensure that the Parties remain price competitive at the checkout. |
| Page 3 | Competitive tension | [*in response to para 44 of the SOUI*]<br>• Weak competition in one market (e.g., distribution), can reduce competition in an adjacent market by driving out smaller business. | No merger effect is identified. In particular, the Proposed Transaction will not result in any change to the physical distribution infrastructure given the Parties' respective retail footprints are geographically separate. |
| Page 4 | Downstream effects on retail consumers | [*in response to para 50 of the SOUI*]<br>• Retail consolidation has reduced consumer choice, with shelves now dominated by unhealthy products like Coca Cola and chips, with health options scarce. The Commission's decision will impact obesity rates and the health system in the future. | The Parties disagree that the Proposed Transaction could have the effects described. The Parties' acquisition conduct is driven by their competitive position in retail markets, which would not change as a result of the Proposed Transaction. As described in Section 2 of the Parties' submission on the SOUI, the Parties' acquisition conduct is strongly influenced by |

| Ref | Topic | Key points from submission | Comments |
|---|---|---|---|
| | | | downstream customer demand and the Parties' desire to present an attractive offering to customers. In particular, the starting point of customer "need states" drives ranging decisions. Further, the Parties engage directly with local growers in store catchments to supply the freshest produce to customers. |
| **Rob Beard** | | | |
| Page 1 | General comments / merger impacts | • This submitter is a proud supplier of Foodstuffs and understands the importance of locally owned and operated ownership.<br>• The merger should be approved as there will be efficiencies which can only benefit kiwi shoppers and suppliers alike.<br>• The banners can only be strengthened by bringing the systems together, and the sharing and collaboration of knowledge.<br>• The merger will allow for significant cost savings to the supplier's business and will mean everything is more streamlined through one entity. Currently everything needs to be presented twice (e.g. the same product needs to be loaded separately into two separate systems which can be messy. | The Parties agree that the Proposed Transaction will lead to efficiencies for suppliers. For further information, refer to the Parties' submission on the SOI from paragraph 107.<br><br>In addition, FSNI has an Emerging Supplier team that is solely focused on making the path to selling in store in the North Island easier for small and emerging suppliers, and operates an Emerging Supplier Programme with a number of forums throughout the country. The Parties anticipate that this programme would be rolled out nationally following the Proposed Transaction, which would also benefit small suppliers. |
| **Lisa Asher** | | | |
| Page 1 | General comments | • The merger should be declined - New Zealand is currently at market failure pre-merger, and if the merger goes ahead, it will be very hard to reverse due to the concentration of power. | The Parties disagree and consider that the market has become increasingly competitive in recent years. Along with the continued competitive pressure from the Parties' closest competitor, Woolworths, there are a number of market developments such as the entry of Costco and the development of The Warehouse Group's grocery offering. For further information, refer to paragraph 93 of the Parties' submission on the SOI and paragraphs 58 to 60 of the clearance application. |

| Ref | Topic | Key points from submission | Comments |
|---|---|---|---|
| [1] | Retaining profits within the merged entity | • Research indicates that market concentration boosts profit and raises entry barriers. The parties would likely retain profits within the merged entity, reducing competition and failing to lower prices for consumers. | Strictly speaking, it is not necessary for the Commission to conclude that cost savings would be passed on to consumers given the Parties consider the Proposed Transaction would not give rise to a substantial lessening of competition. Further, general optimisation principles indicate that when *any* company (even a monopolist) secures more favourable procurement terms it will pass on a portion of the savings in lower prices to customers. But in any event, the Parties consider there is good reason to conclude the merged entity would face competitive and regulatory pressure to pass on cost savings. For further information, refer to paragraph 93ff of the Parties' submission on the SOI. The Parties also note HoustonKemp's explanation that at least some part of the anticipated reduction in the merged entity's marginal cost of production will always be passed on by a profit maximising firm under any form of downstream competition – refer to paragraph 11 of the HoustonKemp report on the SOUI. See also the Commission's merger guidelines at 3.122. |
| [2] | High market concentration and fewer stores per capita | • New Zealand's market concentration is notably high compared to global standards, raising concerns about potential market failure and shareholder profits over consumer benefits. High market concentration results from deliberate actions by cooperatives to reduce competition, e.g. land covenants.<br>• New Zealand has fewer stores per capita than other countries. This high ratio, combined with market concentration and restrictive land covenants, indicates limited store choice in New Zealand. | No merger effect is identified. However, the Parties note that:<br>• The New Zealand market is small and geographically dispersed, which impacts the number of stores per capita relative to other countries. In the Market Study Final Report the Commission noted that:[11] |

[11] Commerce Commission, *Market study into the retail grocery sector: Final report,* 8 March 2022 at p 189 and p 198.

| Ref | Topic | Key points from submission | Comments |
|---|---|---|---|
| | | • High revenue per store and market concentration highlight a need for regulatory intervention. | ○ New Zealand's supermarket density does not appear out of line with other OECD countries,<br>○ New Zealand's size and population profile may restrict the number of places a supermarket can profitably operate, and<br>○ there is a lack of suitable sites for development of retail grocery stores.<br>• In any event, if it were true that New Zealand has fewer stores per capita, this could provide an opportunity for entry and expansion. The Commission has noted that it is likely to be more difficult to enter a saturated market where the maximum number of competitors that an area can support has already been reached.[12] |
| [2], [4.4], [16] | Divestment | • The Commission should seek divestiture powers to separate PAK'nSAVE from the rest of the banners into two distinct entities. This change could increase the number of entities from three to five and foster competition without relying on foreign investment.<br>• The Commission needs the powers to reverse mergers or force divestitures. | This submission presents a law reform proposal. As such, it falls outside the scope of the existing process. |
| [3] | Economic theory | • HoustonKemp has not adequately applied 'game theory' to analyse the merger's strategic implications, focusing instead of monopsony power which may not address competition concerns. | The Parties disagree and note that:<br>• The SOUI expressly accepts that a bargaining framework is the most accurate way to characterise the interactions between the Parties and |

[12] Commerce Commission, *Market study into the retail grocery sector: Final report,* 8 March 2022 at [6.36].

| Ref | Topic | Key points from submission | Comments |
|---|---|---|---|
| | | • HoustonKemp lacks specific expertise in the New Zealand market, raising questions about why local economists were not consulted.<br>• The Commission should request detailed documentation and rationale for choosing HoustonKemp. | most suppliers (refer to paragraph 118). The Parties agree.<br>• HoustonKemp's 7 March 2024 report considers game theory in its consideration of the bargaining framework (refer to section 2.1.2).<br>• HoustonKemp has extensive knowledge of the New Zealand grocery industry, including having provided economic input on the Commission's market study into the retail grocery sector.<br>• The HoustonKemp reports contain expert economic evidence based on the evidence as to the New Zealand market, and are supplemented by the Parties' own submissions.<br>• For additional economic analysis, refer to the DCE report. |
| [4] | Game theory applied to mergers and acquisitions | • FSNI and FSSI are sharing marketing, product range, brand alignment and initiatives across entities. This is very concerning and a dangerous precedent. | No merger effect is identified. In any event the Parties note that the Commission has stated at paragraph 64 of the SOUI that it is satisfied based on the evidence before it that there is not a real chance of a counterfactual scenario where the Parties enter each other's island and compete in any retail grocery markets and that it does not consider that there are any arrangements between the Parties to not compete, or that prevent them from competing, in any retail grocery markets. Further:<br>• The fact the Parties are separate entities is a consequence of their history, and they now consider that aspect of their structure to be outdated.<br>• The Parties each focus on maximising the competitiveness of the retail banners in the island where they operate. That there are separate co-operatives is a result of the |

| Ref | Topic | Key points from submission | Comments |
|---|---|---|---|
| | | | historical development of the Foodstuffs business.<br>• Under the existing business model, inevitably some assets (principally the brands) are shared between the Parties, with each using those assets in the island it focuses on. The Parties are undoubtedly in a collaborative activity as that term is used in the Commerce Act.<br>• The Commission has considered the Parties' business a number of times, including during the extensive market study. If there were unlawful aspects of the business model they would have been identified. |
| [4.1] | Store brands / private label | • The merger could enhance the parties market power, leading to a focus on private labels at the expense of national brands, which may reduce consumer choice and supplier opportunities. | As acknowledged in the SOUI, there is no basis to conclude the Proposed Transaction would affect the merged entity's incentives or ability in relation to ranging private label, relative to the counterfactual. See the SOUI at paragraph 226ff, and the Parties' submission on the SOUI at paragraph 104ff. |
| [4.2] | Food production being shut down | • The food sector continues to face issues, with businesses liquidating, wanting to sell etc. Sanitarium have announced they will be shutting down factory lines due to "changing consumer demands". The data does not support this.<br>• The Commission should review communications between Foodstuffs and these businesses (Sanitarium, Fonterra, and Synlait) to investigate why lines are being shut down. Something does not stack up when three major food companies must make these challenging decisions. | It is not clear what is being alleged here, although the submitter appears to suggest that the Parties have had some role in forcing certain suppliers to exit certain product markets. The Parties do not agree with this suggestion, which is also inconsistent with the supplier's stated reason for closing down factory lines.<br>In any event, the Parties note that even if a supplier was unsuccessful in ranging a product with FSNI/FSSI and as a result exited the market / closed certain product lines, this does not in and of itself give rise to competition concerns. Further:<br>• There is no evidence that de-ranging occurs for any anti-competitive reason i.e. de-ranging is inevitably accompanied by ranging of products |

| Ref | Topic | Key points from submission | Comments |
|---|---|---|---|
| | | | that are considered likely to form part of a more competitive offering.<br>• The benign or pro-competitive nature of that process is unaffected by the supplier subsequently exiting the market or having to close certain product lines (noting the Parties, like anyone, are sympathetic to any supplier in this situation).<br>• The Parties have presented extensive evidence of the drivers of their acquisition conduct – refer to Section 2 and Appendices 2 to 20 of the Parties' response to the SOUI. This evidence shows that the Parties' acquisition conduct is driven by competing in retail markets, by reference to meeting customer "need states". |
| [4.3], [4.4] | Sharing information between separate entities | • These legally separate supermarket entities are collaborating on joint corporate social responsibility reports, which raises concerns about potential cartel behaviour.<br>• Such coordination is unusual and would likely be scrutinised in other markets.<br>• The parties' joint activities blur the lines between separate legal entities, suggesting creeping coordination. | See comments above in response to [4] of this submission. It is also important to emphasise that the Parties do not compete in downstream markets (with each co-operative focusing on competing in the island in which it is based). |
| [4.4], [8] | Censorship of experts | • Tim Hazledine published concerns about potential cartel behaviour in New Zealand's supermarket sector, drawing on decades of economic research.<br>• After using the term 'cartel conduct', his article was removed following legal threat from FSNI. His credentials make him a respected voice on this topic, raising questions about the censorship of such discussions.<br>• Dissenting voices, including those critical of their practices using terms like 'cartel', have been swiftly censored under claims of defamation. This raises questions about freedom | The letter sent to Stuff and the University of Auckland focused on a narrow issue, being purported statements of fact by this submitter regarding the Parties engaging in unlawful (and potentially, criminal) conduct. The letter simply stated that these imputations were false and not based on facts and requested that the relevant articles be amended to remove the defamatory statements. For the avoidance of doubt, market allocation is unlawful (and, depending on intention, criminal), and that is the case regardless of its effect on competition. |

| Ref | Topic | Key points from submission | Comments |
|---|---|---|---|
| | | of speech and whether public messaging is being manipulated to justify corporate interests. | The Parties have not sought to censor critical discussion of the Proposed Transaction or manipulate public messaging in relation to the Proposed Transaction. |
| [6] | New technologies | • The Commission must take urgent actions, including:<br>○ Investigate AI usages: the Commission should review the algorithms and learning processes to ensure they are free from bias and maintain fairness,<br>○ Oversight and control: the Commission should ensure any AI systems are transparent and properly controlled to avoid discrimination, shifting the burden of proof to companies like Foodstuffs, and<br>○ Prevent harmful practices: the Commission should request legal powers to halt harmful technologies and require proof that new tools are safe for consumers before implementation. | No merger effect is identified. In any event, this submission presents a law reform proposal. As such, it falls outside the scope of the existing process. |
| [7] | Barriers to entry | • Expanding into isolated markets like New Zealand is risky for foreign supermarket chains due to high infrastructure costs and failure rates.<br>• Chains such as PAK'nSAVE and New World are undifferentiated models, therefore have minimal opportunities to expand beyond its home country, as there is a risk of failure. | No merger effect is identified. The source of these concerns is unclear, but the Parties note that:<br>• The Parties consider the Proposed Transaction would not be likely to result in a substantial lessening of competition, which would therefore preclude impact on barriers to entry.<br>• It is incorrect to say that PAK'nSAVE and New World are undifferentiated models. Both are full service banners, but present different offerings in terms of PQRS. |
| [8] | The new information age | • The narrative of efficiency and cost savings from the merger, promoted by Foodstuffs, echoes unfulfilled promises from 2013, with rising prices and growing administrative costs contradicting these claims. | FSNI has seen no evidence that the 2013 merger resulted in a lessening of competition in any market involving the acquisition of groceries. FSNI considers prices decreased as a result of the 2013 merger and presented evidence to that |

| Ref | Topic | Key points from submission | Comments |
| --- | --- | --- | --- |
| | | | effect in the 26 April submission – see from paragraph 141. |
| [12] | When did language change from 'owner operators' to 'franchisees'? | • The gradual shift in press language from 'owner operators' to 'franchisees' in reference to Foodstuffs store owners appears deliberate and suggests possible untransparent alterations in the business model, with significant implications for both the model and their owners.<br>• The Commission should review contracts and communications from FSNI and FSSI with stores owners from 2010, 2013 and 2024 to understand the shift from 'owner operators' to 'franchisees'. | There has been no change in the Parties' business model of the kind suggested. |
| [15] | 100% New Zealand owned and operated | • Foodstuffs claims to be 100% NZ owned, but only a select few can own stores.<br>• Woolworths is listed on the ASX and allows broader ownership through Kiwisaver and retail investors, making it accessible to all New Zealanders, and not just for a select few to own. | No merger impact has been identified. In any event, it is incorrect to say that only a "select few" can own stores; there are 532 owner-operated stores throughout the country. |
| **Tim Hazledine** | | | |
| [5] – [7], [13] | The merger would prevent the co-operatives from entering each other's markets | • The merger would generate a lessening of competition in the retail market as it would foreclose future competition generated by the two parties entering each other's markets to compete independently.<br>• There is no technical or economic reason for the parties not to compete against each other in both islands. This is a strategy chosen by the co-ops themselves.<br>• The strategy of the co-ops is 'the cosiest of cosy agreements to not poach retail customers from each other'. | The Parties do not consider their current business model to entail any breach of the Commerce Act, for the reasons provided at paragraph 42ff of the Parties' cross-submission on the SOPI. In addition, at paragraph 64 of the SOUI the Commission has concluded that "there is not a real chance of a counterfactual scenario where the Parties enter each other's island and compete in any retail grocery market" and "based on the evidence before us, we do not consider that there are any arrangements between the Parties to not compete, or that prevent them from competing, in any retail grocery markets". |

| Ref | Topic | Key points from submission | Comments |
|---|---|---|---|
| [14], [19], [23] – [25] | Chapman Tripp letter | • The co-operatives' lawyers sent a letter to Stuff and the University of Auckland requesting the op-ed be taken down. The purpose of this letter was to 'chill critical discussion of the merger'.<br>• The claim that the co-ops have an agreement to not poach retail customers is not defamatory – it is a statement of fact. The market allocating practice is anti-competitive, but that doesn't mean it is illegal/criminal. | The letter sent to Stuff and the University of Auckland focused on a narrow issue, being statements of fact by this submitter regarding the Parties engaging in unlawful (and potentially, criminal) conduct. The letter simply stated that these imputations were false and not based on facts and requested that the relevant articles be amended to remove the defamatory statements. To clarify, the Parties have not sought to chill critical discussion of the merger. |
| [28] | Market allocating arrangements | • There is a need for the Commission to clarify its stance on the co-ops' market allocating arrangements. If the co-ops can be treated as separate entities in the proposed merger, it is not clear why they can be considered as a single 'person' in terms of deploying restrictive practices.<br>• The Commission should explain its previous tacit approval of Foodstuff's co-ops market allocating practices, and reassess its position in light of its 2022 findings on the substantial market power of supermarket chains. | This submission mischaracterises the Commission's assessment at paragraph 64 of the SOUI that there is no arrangement between the Parties to not compete. It is clear that the Commission has considered the Parties as separate "persons" for the purposes of its analysis. The Parties have never suggested that they should be treated as a single person. |
| [32] | Retail market power | • The 2022 Market study highlights significant market power in the grocery sector and past evidence suggests that new entrants are unlikely to effectively challenge the dominance of existing players. | No merger effect is identified. In any event the "market power", or market position, of the Parties is not expected to be enhanced by the Proposed Transaction. The Parties consider the Proposed Transaction would not be likely to result in a substantial lessening of competition, which would therefore preclude impact on barriers to entry. |
| [33] | Divestment | • The Commission should seek government or court authority, if needed, to split the Foodstuffs Co-operative into two or more independent competitors. | An applicant for clearance may offer divestments where that would remedy an identified competition concern. The Parties' position is that no lessening of competition can arise from the Proposed Transaction and therefore no divestment remedy need be offered. |
| **Grocery Action Group** | | | |
| [1] – [1.4] | Key recommendations | The GAG recommends that: | The Parties agree that consumers should be at the centre of the Commission's decision-making. However, the Parties disagree that the merger is |

| Ref | Topic | Key points from submission | Comments |
|---|---|---|---|
| | | • the merger be declined, because it is anti-competitive and not in the interests of the long-term benefit of consumers,<br>• consumers should be at the centre of the decision-making as per the purpose of s 1A of the Commerce Act 1986,<br>• regulators should be given the tools they need to force reasonable competition in the supermarket sector and fair treatment of suppliers, and<br>• there needs to be urgency so that kiwi families can afford to make healthy eating choices. | not in the long-term benefit of consumers. Conversely, the Proposed Transaction would result in consumer benefits at the retail level, relative to the counterfactual. The Parties have stated their intention to share buying benefits with consumers (including [REDACTED]), and this would be consistent with their incentives. |
| [2.8] | Impact on consumers | GAG contends consumers will be materially adversely affected if the merger proceeds because it would effectively:<br>• decrease competition in an already uncompetitive market by consolidating power in the largest supermarket operators,<br>• heighten the barriers for any new market entrant, denying consumers choice, variety, quality and fair/competitive pricing,<br>• increase prices to consumers because there would be no competitors to hold the duopoly back, and<br>• drive some suppliers out of the market because of their reduced margins, meaning less choice and innovation from which consumers could benefit. | The Parties disagree. In particular:<br>• Key evidence provided by the Parties as to the nature and scale of the potential change in bargaining power is set out at paragraphs 61ff of the Parties' submission on the SOUI.<br>• Retail barriers would not be altered by the Proposed Transaction as the Proposed Transaction would result in no material change to retail competition.<br>• 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.<br>• The Parties would continue to have the same incentives to meet customer demand that they have currently, including choice, variety, quality and fair/competitive pricing.<br>• The Parties are committed to prioritising low prices for customers, particularly in an environment of increased inflationary pressures and new competitors. Given there would be no change to retail competition arising from the Proposed Transaction, the merged entity will have |

| Ref | Topic | Key points from submission | Comments |
|---|---|---|---|
| | | | the same incentives and therefore priorities. For further detail, refer to paragraphs 95 to 106 of the Parties' submission on the SOI.<br>• Evidence about the impact on competition (including quality, choice and innovation) is addressed in Section 2 of the Parties' submission on the SOUI. 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). |
| [3.1] | Upstream and downstream market competition | • The upstream impact on suppliers does inevitably negatively affect the downstream impact on consumers – the lack of choice, innovation, quality and price being some of those impacts. | This submission confuses the relationship between acquisition and retail markets. The Parties' incentive in relation to acquisition markets is primarily to present a competitive retail offering downstream. 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. The Proposed Transaction is not capable of altering those incentives because it would not result in any aggregation in retail markets. |
| [4.1] – [4.3] | Previous merger experience | • The 2013 Foodstuffs merger was expected to result in efficiency gains, which would be passed on to consumers through lower prices.<br>• However, the merger did not yield expected efficiencies or cost savings. Instead, cost increased for co-op members, margins grew, head office expenses soared, and more category managed managers were also hired. | FSNI has seen no evidence that the 2013 merger resulted in a lessening of competition in any market involving the acquisition of groceries. Further, FSNI considers retail prices decreased as a result of the 2013 merger and presented evidence to that effect in the 26 April submission – see from paragraph [141]. |
| [5.1] – [5.2] | Centralisation impacts on negotiation | • GAG's discussions with suppliers support the Commission's view that there are differences in | While FSSI is proud to foster new and innovative suppliers, it is not clear to the Parties the basis |

| Ref | Topic | Key points from submission | Comments |
| --- | --- | --- | --- |
| | | suppliers' negotiating powers, with regard to FSNI and FSSI.<br>• Suppliers either located in the South Island or supplying to the South Island have more proactive, individualised relationships with stores and greater autonomy, than with the North Island, where the power is more centralised. Suppliers can try new products with individual stores before spreading the net wider. The individual approach gives store operators more autonomy to make decisions about what gets stocked on their shelves.<br>• If the merger was cleared, all of this would be lost in the move to centralise, which is bad for competition and consumers as some suppliers may leave the market altogether or just begin exporting. | on which FSSI may be seen as having more proactive, individualised relationships with suppliers. (To the extent this proves to be the case, the Parties will be seeking to incorporate this advantage into the practices of the merged entity in conjunction with the Emerging Suppliers Forum launched by FSNI, given the Parties' focus on fostering new and innovative products.)<br>The Parties consider it may be the case that this impression has been formed by the fact that FSSI is less far along in rolling out its centralised buying practices and there is a perception (which the Parties do not consider accurate for the reasons given elsewhere) that centralised buying will be less favourable to smaller suppliers. But this is not correct.<br>Further:<br>• There will be no change to local ranging, as well as to the Emerging Supplier Programme, 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).<br>• It is incorrect to say that centralisation would reduce competition. The degree of centralisation merely reflects the co-operatives' view of how to best optimise their competitiveness at a given time, and is subject to change (in the factual and the counterfactual). |
| [6.4] – [6.5] | | • The proposed merger will result in Foodstuffs having significant procurement power. This procurement power (simply due to its size and market size), could achieve terms and pricing that could not be offered to a new entrant or competition that has significantly less market share. | Key evidence provided by the Parties as to the nature and scale of the potential change in bargaining power is set out at paragraphs 61ff of the Parties' submission on the SOUI. Evidence regarding the merged entity's incentives in upstream markets is provided at paragraphs 75-86 of the Parties' submission on the SOUI. |

| Ref | Topic | Key points from submission | Comments |
|---|---|---|---|
| [6.6] | | • The only other viable national competitor, the Warehouse faced supply issues with Sanitarium over Weetbix, which was resolved only through public and consumer pressure. This incident was likely influenced by the duopoly, and is an example of how such practices could worsen if the merger is approved. | The Parties note that they had no direct or indirect involvement with the Weetbix incident, and had and have no role in The Warehouse's role with Sanitarium. The Parties further understand the Commission has looked closely at the incident (and it has not raised any concerns with the Parties). |
| [7.2], [7.3] | | • The Act and regulations only partly level the playing field, but miss the opportunity to address key issues. Without additional power, such as those that would allow for, say forced divestment, the legislation and code can do nothing but fiddle with an already uncompetitive market.<br>• GAG urges the Commission, MBIE and the Government to give more power to regulators and complete the cost-benefit analysis into forced divestment. | This submission presents a law reform proposal. As such, it falls outside the scope of the existing process. |