

Fletcher Distribution Limited / Tumu Merchants Limited
Joint submission in response to Commerce Commission Statement of Issues

A. Summary of submissions

1. Fletcher Distribution Limited (**FDL**) and Tumu Merchants Limited (**Tumu**) make this joint submission in response to the Commerce Commission's Statement of Issues.¹ Tumu has also made a separate submission in relation to the likely situation should the Commission decline clearance for the acquisition. FDL's counsel will also make a separate submission on the confidential information provided by third parties.
2. The parties agree with the Commission's conclusion that the acquisition is not likely to substantially lessen competition in frame and truss, or to substantially lessen competition in any market due to vertical effects.²
3. However, the parties disagree with the Commission's concerns that the acquisition would be likely to substantially lessen competition either:
 - 3.1 by reducing the level of service in the Wairarapa and Hawke's Bay markets; or
 - 3.2 by reducing competition for "national" customers (predominantly group home builders ('**GHBs**')).³
4. For the reasons summarised below and explained more fully in this submission, neither of those scenarios is likely. The parties also disagree with several other of the preliminary views expressed in the Statement of Issues.
5. Simply put, the parties submit that there is no reasonable basis on which the Commission can decline clearance.

Acquisition would not result in a reduction in service

6. The parties accept that the Tumu stores have a reputation amongst their customers for providing an excellent overall customer experience. However, there is no reason to think the acquisition would undermine the quality-of-service Tumu provides.
7. Indeed, the parties consider that the acquisition would enhance the service that the Tumu stores can offer by providing them with access to FDL's digital capability and offer, its back-room operational expertise, and its wider range of suppliers and products.
8. The evidence relied upon by the Commission to conclude that Tumu provides a distinct level of service not offered by other merchants is not persuasive. The Commission has only interviewed 17 local customers in total (8 in Wairarapa and 9 in Hawke's Bay), nearly all of whom are Tumu customers. It is unsurprising that these respondents believe Tumu has a good service offering; indeed, virtually any business could elicit favourable commentary from its regular customers. These unremarkable responses do not establish that:
 - 8.1 Tumu's level of service is unique and/or impossible to replicate/improve upon (i.e., that the Tumu stores possess a proverbial 'secret sauce' unknowable to others); or
 - 8.2 FDL would have anything but the strongest incentives to maintain – and, ideally, to improve upon – the existing level of service if the acquisition proceeds. Any contrary

¹ Confidential information in this submission is contained in bolded square brackets and highlighted in yellow (i.e., **[CONFIDENTIAL]**).

² Statement of Issues, at [16].

³ Statement of Issues at [13]-[14].

conclusion would require the Commission to find that FDL would act in a counterintuitive manner, diametrically at odds with its own financial interests.

9. Reinforcing the conclusion that no loss of service competition is likely is the fact that all but one of the existing Tumu minority shareholders – who hold (and will continue to hold) key management positions – will continue as minority shareholders in the FDL-owned Tumu stores. Those shareholders would not want the value of their equity to be compromised by falling service levels and can be expected to do all they can to prevent reduced patronage and profits.
10. Simply put, FDL has no intention of engaging in the building products equivalent of buying a popular restaurant, then firing the chef and changing the menu. That would make no sense. Rather, FDL (and the minority shareholders) would seek to retain what is working and then augment that service offering with, amongst other things, superior IT capabilities. The result would be a superior customer service experience and enhanced competition.

Acquisition would not reduce competition for national customers

11. There is no reason to think that the removal of the Tumu stores from the ITM banner would irreparably compromise (i.e., foreclose) ITM's ability to compete for so-called "national" customers (predominantly GHBs). ITM's own conduct [CONFIDENTIAL] strongly indicates that ITM knows it would continue to be able to compete. ITM would not [CONFIDENTIAL] if it believed its ability to compete would be significantly reduced.
12. ITM had good reason for holding that view. The loss of the Tumu stores would not create any problematic geographic 'gaps' in its network. ITM still has a presence in Wairarapa (ITM Greytown) and into Dannevirke (via ITM Palmerston North and ITM Fielding). ITM cannot, therefore, be foreclosed from those regions by losing access to the Tumu stores.
13. ITM would also not be foreclosed from competing for national customers due to it losing access to the Tumu stores in Hawke's Bay and Gisborne. Even in the extreme (and unlikely) scenario in which ITM was unable to provide services to GHBs in this region over the longer term, the impact on competition for GHBs would be immaterial.
 - 13.1 Over half of the top 21 GHBs in New Zealand are not present in Hawke's Bay and Gisborne. Self-evidently, the acquisition would not affect ITM's ability to compete for these GHBs which, collectively, account for more than half of GHB builds.
 - 13.2 Those GHBs that are present in Hawke's Bay and Gisborne undertake only a small proportion of their builds in Hawke's Bay and Gisborne (9 of the 10 GHBs build between [CONFIDENTIAL]% and [CONFIDENTIAL]% of their new homes in these regions). It is unlikely that a GHB would rule out ITM as a potential supplier of [CONFIDENTIAL]% to [CONFIDENTIAL]% of its builds *even if* ITM could not service the Hawke's Bay and Gisborne regions (temporarily or otherwise).
14. The GHB with the largest proportion of builds in the Hawke's Bay/Gisborne region is [CONFIDENTIAL]: in the 12 months to April 2022, [CONFIDENTIAL]% of all its new building consents were for new builds in Hawke's Bay/Gisborne. However, even [CONFIDENTIAL]% (which is the outlier in the group) is not a very large proportion; it amounts to only 24 houses.
15. In any event, the parties understand that ITM has already offered to supply [CONFIDENTIAL] from Wellington. This would not be unique; ITM already supply [CONFIDENTIAL]. This illustrates that if GHBs were to express concern, there would be nothing to prevent ITM from supplying these customers from outside the region in the short term as it does already in some situations.
16. In addition, ITM always has the option and the ability to re-establish physical stores in these regions. Indeed, ITM has publicly stated its intention to re-enter. If it were necessary for ITM

to have a physical presence in the region to service GHBs, this would provide further impetus for ITM to re-enter.

17. Finally, even if ITM were materially impacted, GHBs would continue to have other compelling options available to them.
- 17.1 FDL and Carters each offer a compelling value proposition and would have strong incentives to compete with one another (the market characteristics are not conducive to the coordinated exercise of market power). The parties submit that this competition alone would be sufficient to prevent any substantial lessening of competition.
- 17.2 Furthermore, Bunnings and Mitre 10 both have national coverage and Bunnings already has preferred supplier contracts with some national customers. Even if the assumption was made that ITM would be marginalised by the acquisition and GHB master franchisees wished to look beyond FDL and Carters, GHBs could readily encourage Bunnings and Mitre 10 to compete for preferred supplier contracts. Local GHB franchisees would also be incentivised to use local competitors outside any preferred supply contract.
18. For these reasons, there is no reasonable basis to conclude that the acquisition would have any material impact on competition for ‘national’ customers – including for GHBs.

The parties disagree with other preliminary views expressed in the Statement of Issues

19. The parties disagree with several other aspects of the Statement of Issues including the following.
- 19.1 First, the Commission has erred in defining a “merchant only” market for the supply of building products and excluding non-merchant sources of supply. In doing so, the Commission has failed to undertake the type of market definition analysis required by the statutory test and the Commission’s own Merger Guidelines.
- 19.2 Second, the error in the Commission’s approach to market definition is compounded by the Commission failing to consider the constraint provided by non-merchant sources of supply that comes from outside the (unduly narrow) market it defines. This is, again, inconsistent with the statutory test and the Commission’s own Merger Guidelines.⁴
- 19.3 Third, the Commission has erred in placing significant weight on expected post-merger market shares. Not only are those market shares likely to be wrong (because they exclude non-merchant sources of supply), but courts have consistently held that market shares are not determinative of the extent of competition.⁵ In relying heavily on market shares, the Commission has inappropriately discounted the constraint that would continue to be provided by existing competitors.
- 19.4 Fourth, the Commission has erred by concluding that barriers to entry and expansion are high. The Commission has identified only one purported barrier to entry and expansion: land covenants. These land covenants do not amount to a barrier to entry or expansion for reasons explained in this submission. The Commission has failed to consider the different ways in which entry or expansion could occur and how any conditions of entry or expansion would differ depending on the strategy adopted. The Commission has also overlooked the numerous examples of entry and expansion that have occurred in various building products markets throughout the country (including in the markets at issue in this application). These

⁴ *Brambles New Zealand Ltd v Commerce Commission* (2003) 10 TCLR 868 (HC) at [137].

⁵ *Commerce Commission v Southern Cross Medical Care Society* (2001) 10 TCLR 269 (CA) at [68]-[70] and Merger Guidelines at [3.49].

numerous examples provide real world evidence that barriers to entry and expansion are not “high” as the Commission asserts.

20. An analysis that recognises and corrects these errors would reinforce the parties’ submission that there is no reasonable basis on which the Commission can decline clearance.

Structure of submission

21. The remainder of this submission is structured as follows:
- 21.1 Section B explains why the Commission’s approach to market definition and identifying relevant constraints is incorrect (paragraphs [22] to [39]).
 - 21.2 Section C explains why the Commission’s overreliance on market shares is misplaced (paragraphs [40] to [46]).
 - 21.3 Section D sets out the parties’ response to the Commission’s preliminary views that barriers to entry and expansion are high (paragraphs [47] to [61]).
 - 21.4 Section E explains why the acquisition would not result in a substantial lessening of competition via a reduction in service (paragraphs [62] to [99]).
 - 21.5 Section F explains why the acquisition would not result in a substantial lessening of competition for “national” customers (paragraphs [100] to [144]).

B. The Commission’s approach to defining markets and identifying relevant constraints is incorrect

22. The parties disagree with the Statement of Issues’ approach to defining markets and identifying competitive constraints. The parties submit that the Commission’s approach is inconsistent with the approach required by the Courts and the Commission’s own Merger Guidelines.

Commission has incorrectly ignored competition from non-merchant sources of supply

23. The parties disagree with the Commission’s preliminary decision to define the markets as “merchant only”.⁶ In doing so, the Commission excludes all non-merchant sources of supply despite accepting that non-merchant suppliers of building products offer substitutable products.⁷
24. In reaching the preliminary view that only merchants compete to supply building products, the Commission has not conducted (or at least not described) the type of market definition exercise it is required to undertake by its own Mergers and Acquisitions Guidelines.⁸ Rather, the Commission has simply asserted that the market should be limited to “merchants only” because:
- 24.1 Tumu and FDL are both merchants; and
 - 24.2 trade customers buy “the majority” of their building products through merchants.⁹
25. The relevance of these two observations for the boundaries of the product market are neither clear nor explained by the Commission.

⁶ Statement of Issues at [37].

⁷ Statement of Issues at [36], and [37.2].

⁸ Mergers and Acquisitions Guidelines Chapter 3.

⁹ Statement of Issues at [37].

- 25.1 The fact that Tumu and FDL are both merchants implies nothing determinative about the appropriate scope of the product market, i.e., it says nothing about what products are substitutable as a matter of fact and commercial common sense.
- 25.2 It is not clear on what basis the Commission concludes that trade customers (in aggregate) buy “the majority” of their products from merchants. This figure is not consistent with FDL’s understanding. As described in the clearance application, FDL estimates that [CONFIDENTIAL] of all building products are supplied by non-merchants.¹⁰ In any event, even if trade customers bought the “majority” of their products from merchants, it does not follow that a merchant only market is appropriate.
26. The two observations listed above seem to be of little or no relevance to the approach required by the Courts and specified in the Commission’s Merger Guidelines. Specifically, they provide no basis to presume that a price increase and/or quality reduction would not be defeated by trade customers (and, indeed, DIY customers) switching to the products sold by non-merchant customers – particularly given the large proportion of current sales accounted for by those sources.
27. The parties submit that a properly defined market includes non-merchant sources of supply. As the Commission recognises, non-merchants supply building products that are substitutable as a matter of fact and commercial common sense.¹¹
28. Even if the Commission took the view that non-merchant sources of supply were not in the market, the Commission must still fully consider the constraint provided by those sources of supply in its assessment of competitive effects.¹² They cannot simply be excluded from the market and then forgotten.
29. However, there is no sign of the Commission considering the constraint provided by non-merchant sources of supply in the Statement of Issues. Once they are excluded, non-merchant sources of supply are not mentioned again. This is inconsistent with the approach required by the statutory test¹³, the Merger Guidelines¹⁴ and with the Commission’s own comment in the Statement of Issues that “What matters is that [the Commission] consider all relevant competitive constraints, and the extent of those constraints”.¹⁵
30. Simply put, the Statement of Issues does not consider all relevant constraints at either the initial market definition stage *or* in the subsequent analysis of competitive effects. Rather, the Statement of Issues ignores a large and important source of competitive rivalry. By definition, this makes it impossible for the Commission to reach reliable conclusions on the likely impacts of the acquisition, since it has only looked at part of the picture.
31. It follows that the Commission is incorrect to describe its market definition as “conservative”.¹⁶ The Commission’s approach is not conservative; it is wrong and introduces a bias against granting clearance that cannot be justified.

Commission has ignored supply side substitution in separating DIY/retail and trade markets

32. The parties also have concerns about the Commission’s preliminary view that there are separate trade and DIY/retail customer markets. The basis for the Commission’s view is not clear from the Statement of Issues. The chief contention appears to be that trade customers have fewer options (i.e., more requirements) than retail/DIY customers.¹⁷

¹⁰ Clearance Application at [42].

¹¹ Commerce Act, s 2.

¹² *Brambles New Zealand Ltd v Commerce Commission*, (HC) at [34]-[39] and [157]-[159].

¹³ *Brambles* at [34]-[39] and [157]-[159].

¹⁴ Merger Guidelines at [3.12].

¹⁵ Statement of Issues at [28].

¹⁶ Statement of Issues at [37].

¹⁷ Statement of Issues at [42.1].

33. It is not clear why the Commission has this view. The Statement of Issues only refers obliquely to trade customers requiring structural grade timber.¹⁸ As stated in the clearance application, there is a very high level of supply side substitution between trade and DIY/retail customers and all major merchants service both.
34. Moreover, it seems likely that trade customers would have an even greater propensity to substitute to alternative suppliers – including specialist suppliers – than DIY customers. Trade customers are likely to be more informed buyers (and therefore more cognisant of the alternatives on offer) and have a greater financial incentive to find the best deal.

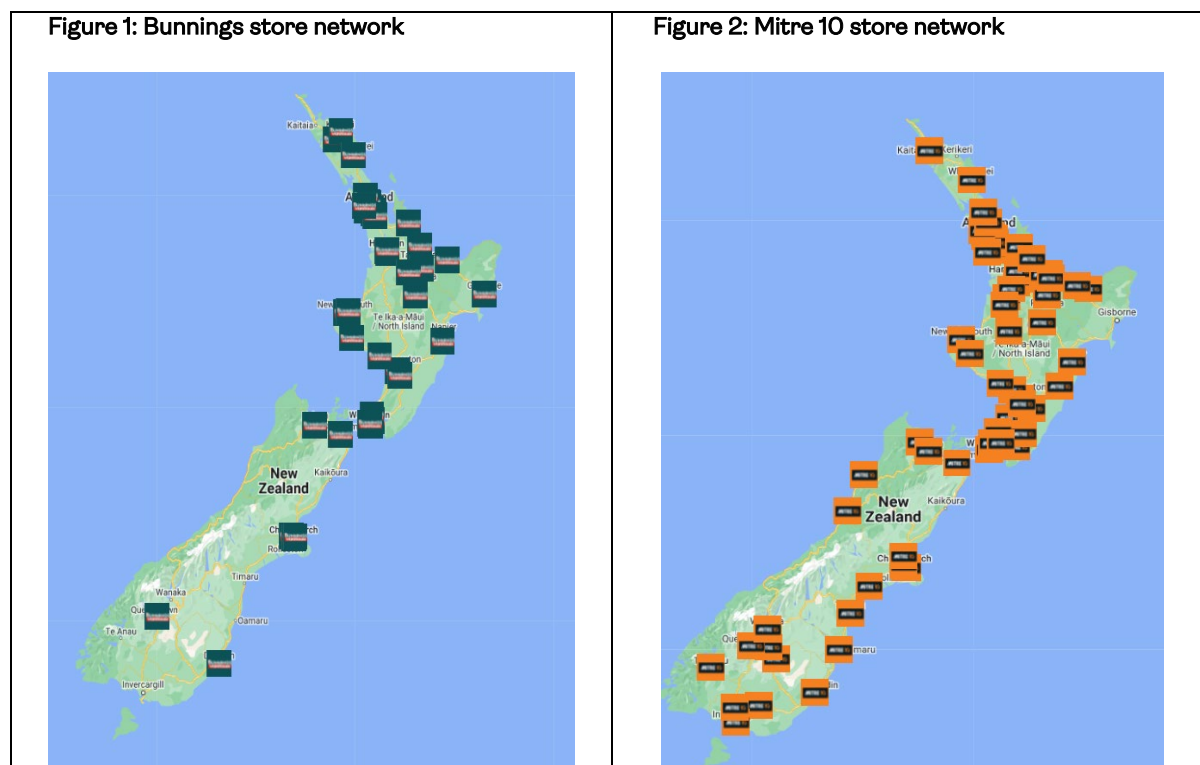
Separate markets for “national” customers and local customers

35. The Statement of Issues purports to define separate geographic markets for ‘national customers’ and ‘local customers’ on the basis that national customers may have different supply requirements/options.¹⁹ Although it is not altogether clear from the Statement of Issues, the parties assume that the Commission has defined separate customer markets for national and local customers, and that the geographic scope of those customer markets varies.
36. It is certainly the case that some customers have chosen to contract with suppliers – including FDL – for the provision of building products across a wide geographic footprint, including nationally. However, that does not mean there is a discrete market encompassing the supply by merchants to those ‘national’ customers. Even if a GHB’s master franchisor has negotiated a preferred supplier contract with a building supplier at a national level, that does not limit the options available to that GHB’s individual franchisees. For example, a GHB franchisee in Hawke’s Bay could:
- 36.1 avail itself of the terms and conditions negotiated by its master franchisor at the national level (the preferred supplier contract); or
- 36.2 if it was dissatisfied with those terms, it could approach another local supplier and contract outside that arrangement²⁰ – including with ‘local’ suppliers without national coverage.
37. The relevant arena of competition is consequently not nationwide. Fundamentally, the rivalry of principal relevance takes place at a regional level. Customers in all locations can choose how they contract with merchants and no supplier would be ignored simply because it does not have a nationwide presence. The suite of potential competitors is the same, although different customers may choose to take advantage of that competition in different ways.
38. Even if it were somehow necessary for a firm to be capable of supplying products across a broad geographic footprint, Carters, FDL, and ITM are not the only providers capable of doing so. For example, as the maps below indicate, both Mitre 10 and Bunnings have stores throughout the country. Moreover, a plethora of non-merchants distribute nationwide (including via online sales).

¹⁸ Statement of Issues, footnote 15.

¹⁹ Statement of Issues at [43].

²⁰ See CC.0032 as an example.



39. Therefore, it would not be consistent with commercial common sense to define a 'national market' that was limited to only, say, FDL, Carters and ITM. The suite of potential competitors is instead far broader and includes at least Bunnings and Mitre 10.

C. Commission's incorrect reliance on market share and unjustified dismissal of competition from existing merchants

40. The Statement of Issues appears to place significant weight on the merged firm's expected post-acquisition market share and that of its competitors. The Statement of Issues describes the merged firm's share as "significant"²¹ and says that the merged firm's competitors would have significantly smaller market shares.²²
41. The Commission has erred in placing the degree of weight it has on the market shares presented in the Statement of Issues.
- 41.1 First, the market shares will be wrong because they incorrectly exclude both non-merchant sources of supply and supply to retail/DIY customers. By definition, therefore, they overstate the expected market share of the merged firm.
- 41.2 Second, the parties do not have access to the market share estimates the Commission is relying on (even on a counsel only basis) and so cannot submit on a fully informed basis. However, based on the parties' understanding, the expected change in their combined market share from the acquisition would be modest even in a narrowly defined trade only market ([CONFIDENTIAL] market share aggregation in Hawke's Bay and [CONFIDENTIAL] in Wairarapa). Moreover, Carters ([CONFIDENTIAL] share in Hawke's Bay and [CONFIDENTIAL] in Wairarapa), Mitre 10 ([CONFIDENTIAL] in Hawke's Bay and [CONFIDENTIAL] in Wairarapa) and

²¹ Statement of Issues, heading above [67].

²² Statement of Issues, heading above [70].

Bunnings ([CONFIDENTIAL] in Hawke's Bay) would remain with strong positions.²³ A review of the Commission's own clearance decisions would demonstrate that the level of market share aggregation involved in this merger is well within the bounds of other transactions previously approved.

- 41.3 Third, as New Zealand courts and the Commission itself have recognised, market shares are not indicative of any particular level of competitive rivalry in and of themselves.²⁴ What matters is whether existing competitors or new entrants are able to expand or enter to defeat any attempt by the merged entity to raise prices above or decrease quality below competitive levels.
42. The Commission's reliance on static market shares – to the exclusion of a sufficient analysis of competitive effects – is evidenced by the brevity of its analysis of existing (and potential) constraints. The Commission's assessment of the constraint provided by existing merchants spans only two paragraphs in the Statement of Issues. The Commission:
- 42.1 refers to the fact that Carters, Mitre 10, and Bunnings will continue to compete in Hawke's Bay, and that Carters and Mitre 10 will continue to compete in Wairarapa,²⁵ but
- 42.2 ignores the fact that ITM will continue to compete in Wairarapa via its store in Greytown and overlooks the presence of a Buildlink merchant in Wairarapa (East Taratahi Building Supplies in Carterton) and a second Mitre 10 in Martinborough. These are significant omissions.
43. The Commission then effectively dismisses the constraint that would be provided by the sub-set of existing competitors it identifies because:
- 43.1 their market shares would be smaller than the merged firm's;²⁶ and
- 43.2 one interviewee sees Bunnings and Mitre 10 as "less trade focussed"²⁷, and another considers that Mitre 10's store is not well located.²⁸
44. These reasons provide no basis to assess, let alone dismiss, the constraint provided by Carters, Mitre 10, Bunnings, and others.
- 44.1 While they might be smaller in static terms, Carters ([CONFIDENTIAL] share in Hawke's Bay and [CONFIDENTIAL] in Wairarapa), Mitre 10 ([CONFIDENTIAL] in Hawke's Bay and [CONFIDENTIAL] in Wairarapa) and Bunnings ([CONFIDENTIAL] in Hawke's Bay) would continue to have significant market share positions even in a narrow "merchant only" trade market.
- 44.2 In any event, it is not existing competitor's market shares that determine the constraint they provide, but their ability to expand supply in the face of the merged entity seeking to raise prices and/or decrease quality. The parties address the Commission's view on barriers to entry and expansion in Section D.
- 44.3 The subjective opinions offered that Mitre 10 and Bunnings are not focussed on the trade are inconsistent with the actual evidence of what Mitre 10 and Bunnings are doing both generally and in these regions (this evidence is set out for the Commission at paragraphs [84]-[86] of the Clearance Application) and the weight

²³ Clearance Application, Table 2.

²⁴ *Commerce Commission v Southern Cross Medical Care Society* (2001) 10 TCLR 269 (CA) at [68]-[70] and Merger Guidelines at [3.49].

²⁵ Statement of Issues at [70].

²⁶ Statement of Issues at [70].

²⁷ Statement of Issues at [70.2].

²⁸ Statement of Issues at [70.1].

of evidence provided by interviewees (see the separate submission on the confidential information provided by third parties).

- 44.4 One customer's view that, from its perspective, a particular Mitre 10 store is not conveniently located is of no relevance to the broader question of whether Carters, Mitre 10, Bunnings, and other suppliers would exert an effective competitive constraint on the merged firm.
45. In contrast, paragraphs [87] to [92] of the clearance application detail the strong competition between merchants. That evidence is not addressed in the Statement of Issues. The additional material accompanying this submission adds to the significant weight of evidence already before the Commission (see the separate submission on the confidential information provided by third parties).
46. For all these reasons, the parties submit that there is no rational basis for the Commission to dismiss the constraint provided by Carters, Mitre 10, and Bunnings (or, indeed, by other suppliers, including non-merchants).

D. Commission has not identified barriers to entry and expansion or explained why they are "high"

47. The Statement of Issues asserts that barriers to entry and expansion in the Wairarapa and Hawke's Bay markets are high.²⁹ However, the only barrier to entry or expansion explicitly identified in the public version of the Statement of Issues is land covenants. As explained further below, properly considered, these land covenants are unlikely to amount to a barrier to entry.
48. The Commission's assertion that barriers to entry and expansion are high fails to take account of the different ways in which entry and expansion can occur. For example, in these markets:
- 48.1 "Expansion" could simply mean selling more building products using existing capacity (e.g., Mitre 10, Carters, Bunnings or other suppliers selling more product through their existing stores). All this would require would be acquiring more stock and arranging transportation.
- 48.2 "Expansion" could also involve a supplier expanding an existing store (e.g., Carters building its new store in Masterton opposite the Tumu store, and the expansion of ITM Feilding) or a supplier opening a new store in a region in which it is already present in (e.g., Bunnings building a store in Napier to complement its Hastings store, and ITM constructing another outlet in Wairarapa to complement its Greytown store).
- 48.3 "Entry" might involve a supplier starting to deliver into an area from outside the region (e.g., ITM supplying product into Hawke's Bay from Palmerston North, Feilding, Taupo or Wellington). All this would require is the stock and transport logistics to enable delivery.
- 48.4 "Entry" could also mean a supplier building a new store in a region in which it currently has no presence (e.g., Bunnings opening an outlet in Masterton, or ITM re-entering the Hawke's Bay region).
49. All those potential forms of expansion and entry would result in an increase in supply that would constrain any attempt by the merged entity to increase prices or reduce quality. Yet, the Commission appears to be of the view – for reasons it has not adequately articulated –

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Statement of Issues at [79].

that the barriers to these forms of entry and expansion are 'high', and that none of those options would be feasible in the next three to five years. That cannot be correct.

“Expansion” by existing suppliers from existing stores

50. If the merged firm attempted to increase prices or allowed its service to degrade, it is not obvious why existing competitors in the region – including Carters, Mitre 10, and Bunnings in Hawke’s Bay and Carters, Mitre 10 (Masterton and Martinborough), ITM Greytown, and East Taratahi Building Supplies in Wairarapa – would not take the opportunity to increase sales from their existing stores. All sell competing goods and provide services to trade customers. Moreover, most product is delivered to customers’ sites.³⁰ Those suppliers could expand sales without having to make any material investments and they would have every incentive to do so. (See, also, the separate submission on the confidential information provided by third parties).
51. In short, there is simply no basis described in the Statement of Issues for the Commission to conclude that barriers to expansion for these merchants are high.

“Entry” from another region

52. “Entry” by way of supply from a different location would also be straightforward. There are certainly no barriers to that occurring and it is already happening in some cases. All that would be required is transport. Supply between different regions already occurs. As explained further in Section F below:

- 52.1 ITM has offered to supply [CONFIDENTIAL] from Wellington;
- 52.2 ITM Katikati supplies the [CONFIDENTIAL];
- 52.3 ITM has supplied [CONFIDENTIAL] across regions to meet customer needs.

Entry or expansion by building a new store

53. The parties accept that there would be more cost involved in establishing a new store in a region. The cost and time required would depend on the size of the store. A full-size Bunnings or Mitre 10 Mega retail and trade store would take longer and cost more to open than a smaller trade focussed or depot style store.³¹
54. The FDL and Tumu stores are smaller stores than the big box stores of Bunnings and Mitre 10 Mega. Therefore, the type of entry or expansion that would be required to replace any competition lost from this acquisition is a smaller trade focussed store location, possibly as small as a depot (e.g., like FDL in Masterton and Hastings).
55. The numerous new stores that have been opened in the last five years is strong evidence that barriers to opening new outlets – especially trade focussed stores – are not substantial. Specifically:
- 55.1 Mitre 10 opened new outlets in Wanaka and Oamaru in 2020, in Cambridge in 2019 and new trade stores in Taupo and Palmerston North in 2020 and 2017;
- 55.2 Bunnings opened new outlets in Westgate, Christchurch, and Queenstown in 2020, and Trade Centres in Invercargill in 2021 and Tauriko (Tauranga) in 2022;

³⁰ Statement of Issues at [44].

³¹ Paragraph [80] of the Statement of Issues states that [CONFIDENTIAL]. That is not an accurate description of FDL’s view. FDL’s view is that the time needed to develop a new store depends on the type of store being developed. As detailed in the Clearance Application at [100], FDL considers it takes [CONFIDENTIAL] to establish a store on a brownfield site, and between [CONFIDENTIAL] to establish a store on a greenfields site. The reference to [CONFIDENTIAL].

- 55.3 Carters opened a new outlet in Wellington in 2019 and is building a new outlet in Masterton opposite the Tumu store; and
- 55.4 Akarana Timbers (a Buildlink merchant) opened a store in Hamilton earlier in 2022.³²
56. Looking at Hawke’s Bay and Wairarapa in particular, FDL has established depot style stores in Hastings and Masterton in the last five years. Moreover, the parties do not consider that there would be any difficulty in obtaining land in Hawke’s Bay or Wairarapa to establish a trade store, including a depot style site specifically to service GHB’s given materials are delivered to site.³³ If the Commission has different information, the parties request that the Commission supplies this material to them directly.
57. Indeed, ITM has publicly stated that it intends to re-enter the relevant markets and the parties are aware that ITM has been actively seeking land in Hawke’s Bay and an operator to run a store.
- 57.1 As outlined in the Clearance Application, on 17 March 2022, ITM’s CEO Darrin Hughes emailed Tumu Trade Customers about Tumu resigning from ITM and stated: “We aim to be back in town and back to serving our trade customers as soon as we can”. This is a clear and public indication of ITM’s intention to re-establish a physical presence in Hawke’s Bay.
- 57.2 Also on 17 March 2022, [CONFIDENTIAL].³⁴ [CONFIDENTIAL]
- 57.3 [CONFIDENTIAL]
- 57.4 [CONFIDENTIAL]
58. It is difficult – if not impossible – to reconcile ITM’s recent actions (and the intentions they plainly reveal) with the Commission’s conclusion that barriers to entry and expansion are so high as to prevent any new entry or expansion over the next three to five years – even if prices increased or service levels fell. The finding also seems completely at odds with commercial reality, the basic economics of investments in new trade stores and recent history (during which time significant entry has occurred).

Relevance of land covenants

59. The land covenants referred to by the Commission are unlikely to constrain new entry or expansion (certainly they cannot be a barrier to expansion by an existing operator from an existing store). The Tumu land covenants [CONFIDENTIAL]. That does not foreclose competition in any meaningful way because:
- 59.1 it still allows consumers to seek competitive quotes for the work; and
- 59.2 it does not exclude any merchant from participating, and so does not reduce the amount of contestable demand.³⁵
60. Moreover, there are very few such covenants. For Tumu, in Hawke’s Bay it has [CONFIDENTIAL] unbuilt sections with these covenants in place.
- 60.1 as described below, in FY21, 1,055 consents were issued in Hawke’s Bay. In other words, [CONFIDENTIAL] sections (assuming one house per section) represents less

³² See Clearance Application at [99] and 25 May response to Commerce Commission questions at [1].

³³ Paragraph [80] of the Statement of Issues includes a comment “FDL acknowledged that [CONFIDENTIAL]. That statement is incorrect. FDL has never said [CONFIDENTIAL]. The full statement in the Commission’s file note reads (emphasis added):

[CONFIDENTIAL]

[CONFIDENTIAL]

³⁵ cf Statement of Issues at [74].

than [CONFIDENTIAL] of annual building consents (remembering that a covenant only works once, while new entry will be a multi-year proposition); and

- 60.2 In Wairarapa, Tumu has [CONFIDENTIAL] unbuilt sections with covenants. That is [CONFIDENTIAL] of one year's total consents in the region.
61. Given the nature of the covenants and their relative paucity, they are unlikely to constitute a significant barrier to entry or expansion.

E. Acquisition would not reduce service levels

62. The parties disagree with the Commission's preliminary view that the Tumu companies offer a distinct service quality that would be lost if Tumu was acquired by FDL. Even if there was legitimate cause for concern that some unique non-price attributes might be lost (which there is not), there is no reason to think that other merchants would be incapable of replicating those service levels.³⁶ In summary:
- 62.1 the evidence cited by the Commission does not support a conclusion that Tumu offers a distinct, irreplaceable level of service in the market;
- 62.2 there is no reason to believe that FDL – a well-resourced, profit-maximising enterprise – would have anything but the strongest incentives to maintain and, ideally, to improve upon the existing level of service if the acquisition proceeds; and
- 62.3 the fact that all but one of the existing Tumu minority shareholders would continue as minority shareholders in the FDL-owned Tumu stores and continue to run and operate the stores into the future reinforces the conclusion that no loss of service competition is likely.
63. Indeed, far from decreasing the Tumu service offering, the parties believe that the acquisition will enable Tumu to build on and improve the service it offers today.
64. While Tumu might provide a good service in some areas, it has a weak service offering in others. For example, [CONFIDENTIAL].
65. This has led to Tumu [CONFIDENTIAL].³⁷
66. Consequently, a key advantage of the acquisition is FDL would be able to improve Tumu's digital offering thereby enhancing the level of service overall. Tumu would also have access to FDL's wider range of suppliers and products (see [82] below) and benefit from FDL's systems and processes including improved procurement, IT systems, and HR services. Ultimately, these would all add to the strength of the service offering which, in turn, would increase competition in the region.
67. Therefore, even if it could reasonably be said that some distinct "Tumu service" would be lost if the acquisition proceeds (which is denied), that would need to be balanced against the service dimensions that would almost certainly be improved under FDL ownership.

Evidence does not support Commission's conclusion that Tumu offers a distinct level of service

68. The evidence cited in the Statement of Issues does not support the Commission's conclusion that there "is a distinct service quality component to the competitive offers of the Tumu companies that is not currently replicated by other merchants".³⁸

³⁶ Statement of Issues at [13].

³⁷ [CONFIDENTIAL].

³⁸ Statement of Issues at [74].

Sample is not representative for this purpose

69. The Commission's conclusion that the Tumu stores offer a unique service attribute that could be lost post-acquisition appears to be based on the feedback it received from customers as summarised in paragraph [73] of the Statement of Issues.
70. As far as the parties can make out, the Commission has spoken to 17 (8 in Wairarapa and 9 in Hawke's Bay) out of what is likely to be hundreds of trade customers in the relevant regions. Almost all the customers the Commission has spoken to are regular and loyal Tumu customers.
71. The very fact that those customers are regular Tumu customers indicates that there is something about the Tumu stores that holds a particular appeal. That might be the stores' locations or product ranges, or the customer might simply be on friendly terms with the staff and receive favourable treatment.
72. As already described, it is entirely unsurprising that if you poll longstanding and loyal customers you would find those customers consider Tumu provides good service. Almost any business could find regular customers who would be willing to speak favourably on its behalf.³⁹ Indeed, the parties expect that if the Commission were to speak to customers that predominantly used Mitre 10, Bunnings, or Carters they would get similarly positive reviews about their operations and perhaps quite different perspectives about Tumu's.
73. For those reasons, nothing reliable can be read into the interviewees' statements about Tumu's comparative service levels.
74. At best, the concerns expressed by this sub-set of customers represents the 'highwater mark' for potential adverse effects on service levels. Moreover, as is explained below and in the separate submission that will be made on the confidential information, when the specific concerns expressed by those customers are interrogated more thoroughly, it is apparent that they are either irrelevant or misplaced or are not, in fact, a fair and accurate reflection of what the Commission's file notes record those customers as saying.

Few direct comparisons with all other merchants made

75. Of the 12 pieces of "evidence" listed by the Commission in paragraph [73] (6 from customers in Wairarapa and 6 from customers in Hawke's Bay), only one appears to make a direct comparison between the Tumu stores and all other merchants,⁴⁰ while one makes an indirect comparison.⁴¹ Three others compare certain elements of the service supplied by Tumu and FDL, but not other merchants.⁴²
76. Given there are likely to be hundreds of customers who will have different views, it is difficult to see how the Commission can conclude from these isolated statements that there "is a distinct service quality component to the competitive offers of the Tumu companies that is not currently replicated by other merchants". That conclusion is not available to the Commission based on the evidence before it.

Types of "service" identified are not unique to Tumu

77. There are five elements of "service" identified in the Statement of Issues. The first is Tumu's store locations, which is identified by five interviewees.⁴³ As the Statement of Issues rightly

³⁹ For example, a restaurant might be able to garner positive reviews from ten or twenty regular customers who happen to like the food and the wait staff. But that does not mean those views accurately represent those held by the hundreds (or thousands) of other customers who have dined at the establishment. And nor does it mean that the restaurant's offering is superior to that supplied by other local outlets.

⁴⁰ Statement of Issues at [73.3].

⁴¹ Statement of Issues at [75.5].

⁴² Statement of Issues at [73.1], [73.6], and [73.7].

⁴³ Statement of Issues at [73.2], [73.3], [73.7], [73.8], [73.9].

recognises, Tumu's locations would not change following the acquisition.⁴⁴ Accordingly, the location of stores is not an element of Tumu's overall service that would be lost if the acquisition proceeds and so can be disregarded.

78. A second feature identified by one customer is that Tumu owns its own trucks.⁴⁵ As the Statement of Issues recognises, all merchants offer delivery of their products. It is unclear why Tumu having its own trucks results in it providing a superior service to merchants who outsources this element to a freight provider. In any event, PlaceMakers Napier also has its own delivery truck and driver and there would be nothing to prevent another merchant bringing its own delivery service in-house if doing so was profit maximising.
79. A third feature cited by one interviewee is that Tumu supports community projects.⁴⁶ This is not a distinct Tumu service offering. All merchants will support various community or philanthropic projects. In any event, the parties submit that this is not an aspect of service appropriately considered as part of the assessment the Commission is required to make.
80. That leaves two other themes: the Tumu stores' purportedly superior stock holdings, range, and quality of products is a theme identified by six interviewees, and⁴⁷ customers' strong relationships with the Tumu stores is a theme identified by five interviewees.⁴⁸ The parties address those now.

Stock holdings, range, and quality of products

81. The subjective view of six interviewees that the Tumu stores have better stock holdings, ranges, or quality of products accords with neither the parties' understanding of the position, nor the objective evidence.
82. Tumu's understanding is that its in-store range is [CONFIDENTIAL]. Overall, PlaceMakers (and probably Carters) has access to a wider range of products than Tumu. To illustrate, 85% of the product ordered by PlaceMakers is supplied by [CONFIDENTIAL] suppliers, while 85% of the product ordered by Tumu is supplied by [CONFIDENTIAL] suppliers. As such, a further benefit of the acquisition is that Tumu would have access to all these suppliers.
83. Tumu accepts that there will have been some previous occasions in which it has had stock when other merchants did not. However, the reverse is equally true. There have been instances when Tumu's customers have had to go to other merchants when Tumu has been out of stock. This is unremarkable and is a phenomenon one would expect to observe in almost any market.
84. More generally, it is not correct that Tumu holds more stock than FDL in the relevant regions. Comparable stock holdings can be measured by Days Inventory Outstanding (DIO).⁴⁹ As at the end of April 2022, PlaceMakers' Hawke's Bay stores had a DIO of [CONFIDENTIAL], while the Tumu stores had a DIO of [CONFIDENTIAL]. That is, Tumu stores held less stock relative to the level of turnover than the PlaceMakers' Hawke's Bay stores.
85. With respect to the quality of the products sold at the Tumu stores, it is difficult to understand why some customers would regard it as superior to the likes of Carters, Mitre 10 and Bunnings given building products are relatively homogeneous.

⁴⁴ Statement of Issues at [74].

⁴⁵ Statement of Issues at [73.6].

⁴⁶ Statement of Issues at [73.2].

⁴⁷ Statement of Issues at [73.1], [73.3], [73.4], [73.5], [73.6], and [73.10].

⁴⁸ Statement of Issues at [73.2], [73.4], [73.9], [73.11], [73.12].

⁴⁹ (Closing inventory / Average prior 3 months COGS) *30.

Tumu's strong relationships

86. It is to be expected that Tumu would have strong relationships with its customers. That is tautological since, without exception, firms that are unable to build effective relationships with their customers fail.
87. There is no reason to believe that Tumu possesses an ability to develop strong relationships with customers that is unique in the sector. There is certainly no reason to believe that other merchants have not been (and would not be) able to build similarly strong relationships with their customers. If they had not been able to do so, it is unlikely they would still be in business.
88. In any event, even if Tumu was somehow uniquely placed to build relationships, there is no reason that would not continue post-acquisition. Alternatively, if it did not, there is no reason to believe that other merchants would not be able to build similarly strong relationships with those customers.

No reason to believe service would decline under FDL ownership

89. As FDL has already submitted to the Commission, if it were the case that Tumu's sales were driven by a unique level or type of service that was profit maximising today, it is not logical for the Commission to expect FDL to discontinue that strategy post-acquisition. And even if FDL chose to abandon that strategy by forsaking those service attributes (despite the ostensible financial downsides of doing so), there is no reason to believe that another merchant (e.g., Carters, Mitre 10 or Bunnings) would not respond by adopting that same strategy.⁵⁰
90. For example, if Tumu genuinely possessed a service edge with respect to stock holdings, range, and quality of products, then FDL would have every incentive (and the ability) to retain that advantage. Those service elements are either profit maximising or they are not – irrespective of whether the transaction takes place.
91. With respect to relationships, these relationships are built by people. For the Commission to conclude that Tumu's customer relationships would suffer if the acquisition proceeds, requires the Commission to believe either that (a) Tumu's people would no longer be inclined to nurture relationships with their customers because they are owned by FDL, or (b) that FDL is not as adept (or is inherently poor) at managing relationships.
92. There is no foundation for either conclusion. Tumu people would have the same incentive to manage their relationships with customers (and have at their disposal superior tools and technology for doing so), and FDL's track record of success throughout the country means there is no basis for the Commission to conclude that it is inherently poor at managing relationships.
93. In any event, even if certain relationships soured post-acquisition, there is no basis for the Commission to believe that Carters, Mitre 10, or Bunnings, could not establish equally strong relationships with any departing customers.

Management will be incentivised to maintain – and improve – service levels

94. As FDL has previously advised the Commission, FDL would retain the Tumu brand, the Tumu stores, and the Tumu staff.⁵¹ FDL recognises that Tumu stores offer an attractive price/service proposition, which is precisely what FDL is seeking to buy.⁵²

⁵⁰ FDL's 17 May response to Commerce Commission questions at [5.1]-[5.4]

⁵¹ FDL notes that paragraph [52] of the Statement of Issues states that "the Tumu stores would be rebranded as Tumu PlaceMakers". This is incorrect. As stated in paragraph [6] of the Clearance Application, FDL would have a royalty free licence to use the "Tumu" brand for [CONFIDENTIAL] from completion. FDL expects to rebrand the Tumu stores as PlaceMakers stores before the end of that period. For the avoidance of doubt, FDL has no intention to brand the stores as Tumu PlaceMakers.

⁵² FDL's 17 May response to Commerce Commission questions at [5.2].

95. As part of the overall transaction, the current Tumu minority shareholders will obtain new minority stakes in the Tumu branches. Specifically:
- 95.1 [CONFIDENTIAL]
 - 95.2 [CONFIDENTIAL]
 - 95.3 [CONFIDENTIAL]
 - 95.4 [CONFIDENTIAL]
96. All shareholders would have the ability to increase their shareholdings up to a [CONFIDENTIAL] stake based on performance targets being met.
97. The method by which these shareholdings will be acquired is as follows.
- 97.1 Prior to completion, Tumu Merchants would buy out the minority shareholders. At that point, Tumu Merchants would own 100% of the Tumu Companies.
 - 97.2 On completion, Tumu Merchants would sell 100% of the shares in the Tumu companies to FDL. That is the acquisition to which this clearance relates.
 - 97.3 Immediately after completion, FDL would sell and the minority shareholders would acquire the relevant minority stakes in the relevant FDL-owned Tumu companies.
98. The continuation of the minority shareholders and their ability to grow their equity stakes would provide an ongoing incentive for the Tumu stores to maintain and ideally improve the level of service they do today. In particular, those minority shareholders would not want the value of their equity to be compromised by falling service levels and can be expected to do all they can to prevent reduced patronage and profits.⁵³
99. While the parties do not consider the proposed transaction would lead to a reduction in service levels, if the Commission continues to believe that a unique service attribute would be lost, FDL is prepared to provide a Divestment Undertaking to the Commission under s 69A of the Commerce Act in respect of the sale of minority shareholdings if that would remedy the Commission's concerns.

F. No lessening of competition for "national" (GHB) customers

100. Contrary to the preliminary views expressed in the Statement of Issues, the acquisition would not substantially lessen competition in any market for national trade customers (in particular, GHBs) due to unilateral and/or coordinated effects.⁵⁴
101. The Commission's "concern" is that FDL's acquisition of the Tumu stores "could mean that ITM's ability to win and retain national customers could be significantly impeded" and this "could significantly undermine the competitive constraint ITM poses on FDL and Carters, which are the other main competitors for national customers".⁵⁵ However, this concern is unjustified because:
- 101.1 the Commission has misinterpreted the way in which competition for "national" customers takes place and therefore inappropriately downplayed the significance of existing competition from Mitre 10 and Bunnings (as well as non-merchants) for national customers;

⁵³ More generally, [CONFIDENTIAL].

⁵⁴ Statement of Issues at [12.2] and [14].

⁵⁵ Statement of Issues at [14].

- 101.2 the evidence does not support the proposition that the acquisition would significantly impede ITM's ability to compete for national customers and ITM's own conduct serves to further contradict any such contention; and
- 101.3 the Commission has incorrectly reached the view that "national" customers do not possess significant countervailing power, and that they therefore could not exert that influence (e.g., by seeking out or sponsoring alternative suppliers) should the need arise.

The nature of competition for national contracts

102. The Commission's concern about rivalry for "national" customers rests on a basic misunderstanding of the way in which competition for these customers occurs. Specifically, the concerns rests on the premise that the only competitors for GHBs that operate in multiple regions of New Zealand are FDL, Carters, and ITM. Even putting aside the question of whether Bunnings and Mitre 10 are competitors or potential competitors for these national contracts (which is returned to below), this premise is wrong.
103. In essence, the Commission has assumed that "national" customers (predominately GHBs) have fewer options open to them to acquire building products than local customers, who would have access to FDL, Carters, ITM as well as any local Mitre 10 or Bunnings.⁵⁶ This assumed distinction between "national" and "local" customers is artificial and misconstrues the way in which competition in the market takes place.
104. As described above, what the Commission describes as the "national" market is really just a collection of all the local/regional markets in which competition takes place. GHBs have access to any merchant that operates in a particular area.
105. For the most part, national customers such as GHBs are franchises. A GHB's master franchisor will often negotiate contract terms with one or more suppliers that its individual franchisees can avail themselves of throughout the country. By definition, in order to enter into such agreements, a supplier must be capable of supplying beyond a narrow location. During such negotiations, the master franchisor will seek to achieve the best supply terms for their individual franchisees.
106. While the master franchisor signs preferred supply contracts, subject to service levels, it is the local franchisee that acquires building products. If an individual franchisee has a better option in a particular location (say, if the terms agreed under the national supply contract are not competitive in the local region), the franchisee can step outside the preferred supply contract and purchase from another 'non-preferred' supplier. In that respect, a local franchisee has just as many sources of supply available to it as any other "local" customer, but with the advantage of a default preferred supply contract to fall back on.
107. There are numerous examples of local GHB franchisees acquiring product outside the preferred supply contract negotiated by their master franchisors. For example:
- 107.1 [CONFIDENTIAL]
- 107.2 [CONFIDENTIAL]
- 107.3 [CONFIDENTIAL]
- 107.4 [CONFIDENTIAL]
108. What this means is that there are two ways of competing for business from "national" customers (GHBs): compete to win the preferred supply contract and then seek to convince the local franchisee to purchase under the preferred supply agreement or

⁵⁶ Putting aside non-merchant suppliers.

compete to win work from the local franchisee at the local level without a preferred supply contract.

109. Therefore, it is an oversimplification to say that there is a national market in which only some merchants compete. Competition exists at both levels. That is, when a merchant is bidding for a preferred supplier contract and deciding price and non-price terms, it is not only bidding against merchants who are also seeking the preferred supply contract, but also against merchants (and non-merchants) who will be competing to win work at a local level on a day-to-day basis.
110. By focussing only on competition between merchants seeking the preferred supply contract, the Commission has inadvertently ignored an important source of competitive rivalry. This has consequences for the Commission's assessment of both unilateral and coordinated effects. The Commission has failed to consider the strong probability that any attempted exercise of unilateral market power by the merged firm (i.e., price increase or quality decrease) would be defeated by individual GHB franchisees switching to other local suppliers.
111. The continued existence of a strong, sizeable competitive fringe of local suppliers would similarly undermine any attempt by the merged firm to coordinate prices (or divvy up markets) with other national suppliers. The disruptive influence of that competitive fringe would make it impossible to arrive at a sustainable coordination agreement (either explicitly or tacitly) or to monitor ongoing adherence to any such arrangement. The market structure would therefore not be conducive to the coordinated exercise of market power.

Losing ITM stores would not undermine ITM's ability to compete for GHB customers

112. Even if the constraining impact of other merchants were put aside, the proposed merger would only lessen competition if it undermined ITM's ability to compete for national customers. The parties submit that the Commission can be satisfied that the acquisition would not undermine ITM's ability to compete for GHBs (even accepting, for the sake of argument, the counterfactual adopted by the Commission a matter on which Tumu will make a separate submission).

ITM's own actions imply it does not believe its competitiveness will be undermined

113. On 12 November 2021, [CONFIDENTIAL].
114. Although [CONFIDENTIAL], shows that ITM itself does not believe that its ability to compete would be harmed by the loss of the ITM stores. If ITM had been concerned about the competitive impact of losing the ITM stores, it would not have [CONFIDENTIAL] at all, let alone when it did.
115. Similarly, following the sale and purchase agreement for this transaction being finalised, Tumu and ITM agreed that Tumu would exit ITM on 30 April. The fact that ITM agreed for Tumu to exit ITM before the Commission had granted clearance and the sale to FDL had been completed, again shows that ITM does not sincerely believe that its ability to compete will be negatively impacted. ITM's view, as revealed through its conduct, is also consistent with the marketplace evidence as explained below.

ITM would still have a presence in Wairarapa and into Dannevirke

116. First, even without the six Tumu stores, ITM would continue to have a store in the Wairarapa market (Greytown) that would fall in the same market as Tumu Masterton. It would also have stores in the Manawatu region (Palmerston North and Feilding (currently under expansion)) that would fall in the same regional market as Tumu Dannevirke.
117. It follows that ITM's ability to compete in these regions would not be undermined by not having access to Tumu Masterton or Tumu Dannevirke.

Very limited GHB builds in Hawke's Bay and Gisborne

118. Second, even though ITM would cease to have a physical presence (i.e., a store) in Hawke's Bay and Gisborne (although there would continue to be an outlet in Wairoa), that would not undermine its ability to compete for GHB contracts.
119. Statistics New Zealand reports that in the year to June 2021, 44,299 new building consents were issued throughout New Zealand. Of these consents, 2.4% (1,055 consents) were issued in the Hawke's Bay, and 0.3% (131) were in Gisborne.⁵⁷ That is, in FY2021, only 2.7% of all consents for new builds were in Hawke's Bay and Gisborne.
120. Hawke's Bay and Gisborne comprise an even smaller fraction of GHB builds. This is reflected in both parties' sales to GHBs.
- 120.1 Tumu's sales to GHBs made up only [CONFIDENTIAL] of its total sales in the year to 30 June 2021. Moreover, neither [CONFIDENTIAL].
- 120.2 FDL's sales to GHBs in Hawke's Bay account for only [CONFIDENTIAL] of FDL's nationwide sales to GHBs.
121. The small number of GHB sales in Hawke's Bay and Gisborne is also reflected in Table 1 below which provides data on consents for the top 21 GHBs in New Zealand in the period from May 2021 to April 2022.

Table 1: GHB consents May 2021 to April 2022 (Source: <https://www.bcicentral.com/> (supply consent and construction data))

GHB	Total number of consents	Does the GHB operate in Hawke's Bay?	Proportion of the GHB's consents in Hawke's Bay
1. GJ Gardener	[CONFIDENTIAL]	Yes	[CONFIDENTIAL]
2. Williams Corporation	[CONFIDENTIAL]	No	0%
3. Fletcher Residential	[CONFIDENTIAL]	No	0%
4. Mike Greer Homes	[CONFIDENTIAL]	No	0%
5. Classic Builders	[CONFIDENTIAL]	No	0%
6. Signature Homes	[CONFIDENTIAL]	No	0%
7. Jennian Homes	[CONFIDENTIAL]	Yes	[CONFIDENTIAL]
8. Golden Homes	[CONFIDENTIAL]	No	0%
9. Stonewood Homes	[CONFIDENTIAL]	Yes	[CONFIDENTIAL]
10. A1 Homes	[CONFIDENTIAL]	Yes	[CONFIDENTIAL]
11. Lattitude Homes	[CONFIDENTIAL]	Yes	[CONFIDENTIAL]
12. David Reid Homes	[CONFIDENTIAL]	Yes	[CONFIDENTIAL]
13. Versatile/Totalspan	[CONFIDENTIAL]	Yes	[CONFIDENTIAL]
14. Platinum Homes	[CONFIDENTIAL]	Yes	[CONFIDENTIAL]
15. Generation Homes	[CONFIDENTIAL]	No	0%

⁵⁷

For completeness, 1% (450) were in Wairarapa, and 0.1% (63) in Tararua (including Dannevirke).

GHB		Total number of consents	Does the GHB operate in Hawke's Bay?	Proportion of the GHB's consents in Hawke's Bay
16.	Milestone Homes	[CONFIDENTIAL]	No	0%
17.	Trident Homes	[CONFIDENTIAL]	No	0%
18.	Barrett Homes	[CONFIDENTIAL]	No	0%
19.	Navigation Homes	[CONFIDENTIAL]	Yes	[CONFIDENTIAL]
20.	Landmark Homes	[CONFIDENTIAL]	Yes	[CONFIDENTIAL]
21.	Universal Homes	[CONFIDENTIAL]	No	0%
Total consents		[CONFIDENTIAL]	Consents in Hawke's Bay	[CONFIDENTIAL]

122. Table 1 shows that Hawke's Bay and Gisborne account for only [CONFIDENTIAL] of these GHB's builds; the overwhelming majority of GHB builds ([CONFIDENTIAL]%) took place elsewhere in the country.
123. Moreover, Table 1 illustrates that of the top 21 GHBs in New Zealand, 11 do not have any presence in Hawke's Bay or Gisborne. In other words, even if ITM could not service this region (which the parties do not accept), it would not materially undermine ITM's ability to compete for these 11 GHB customers (who account for more than half of all GHB builds).
124. In relation to the remaining 10 (of the top 21) GHBs that do have a presence in Hawke's Bay and/or Gisborne, consents in Hawke's Bay and Gisborne make up a very small proportion of their total new builds.
- 124.1 For all but one of those GHBs, the proportion of their demand that is in this region is between [CONFIDENTIAL], i.e., [CONFIDENTIAL] of all new builds occur outside this region.
- 124.2 For one GHB customer, [CONFIDENTIAL], the proportion of consents in Hawke's Bay and Gisborne is [CONFIDENTIAL]. To put that in perspective, [CONFIDENTIAL] is only 24 homes in total (assuming one home is built per consent).
125. Based on these figures, it seems very unlikely that a GHB would discount or disregard ITM as a potential supplier even if ITM could not service Hawke's Bay (which is not accepted).
126. In any case, the parties submit that not having a store in the region would not prevent ITM from supplying products to customers in these locations. As the Statement of Issues recognises, the majority of job lots are delivered to site. All ITM would need to do to supply customers in Hawke's Bay and Gisborne in the near-term would be to make deliveries from its stores located outside the region.
127. The parties believe that ITM could service GHBs in the Hawke's Bay from its outlets in Palmerston North, Feilding, or Taupo. Indeed, as highlighted above, the parties understand that ITM has already offered to supply [CONFIDENTIAL] from ITM stores in Wellington. There are also various other examples of ITM supplying customers from outside a region:
- 127.1 ITM supplies the [CONFIDENTIAL];
- 127.2 [CONFIDENTIAL]; and
- 127.3 ITM has, in the past, supplied [CONFIDENTIAL] across various regions.

128. Furthermore, if ITM thought that it needed a small local depot to service GHB customers, it could establish one without opening a fully-fledged store and without having to overcome any significant entry barriers (see discussion in Section D above). Tumu entered the Napier region in precisely this fashion. It began by opening a small depot in 2008, which subsequently expanded to a full offering in 2011. In a similar vein, PlaceMakers Masterton was initially set up as a depot to provide services to GHBs, and PlaceMakers Hastings was established primarily to service the Kāinga Ora maintenance contract.

Relevance of FDL's Kāinga Ora contract

129. In seeking to highlight the importance of a national network to win national customers, the Statement of Issues refers to one of FDL's rationales for the acquisition being "to fill existing gaps in its network with the Tumu stores is so that it can better service and supply national customers, in particular Kāinga Ora".⁵⁸
130. Being able to better serve the Kāinga Ora maintenance contract is one of the advantages of the acquisition for FDL. However, the nature of this maintenance contract is unique and very different to GHB contracts for the supply of building products for new builds. As its name suggests, the Kāinga Ora maintenance contract is a contract to provide building supplies to Kāinga Ora contractors who are performing repairs and maintenance on Kāinga Ora's housing stock throughout New Zealand. The nature of that demand is very different to a GHB building a new house.
- 130.1 The Kāinga Ora contractor will not know what supplies they will need in advance and will need supplies on demand. Therefore, having a physical site and stock available on the day is critically important, although even in this scenario Kāinga Ora has contracted with FDL despite its lack of presence in Gisborne.
- 130.2 In contrast, a GHB (or any house builder) plans its orders in advance and those orders are delivered to site. Physical location is much less important.
131. Therefore, the Commission cannot reasonably infer from the fact that the acquisition would better enable FDL to serve the Kāinga Ora contract, that ITM would be competitively disadvantaged when competing for GHB customers. These are two fundamentally different types of contract and completely different types of demand.

Other options open to GHBs

132. Even if the acquisition would materially inhibit ITM's ability to compete to be the preferred supplier for national customers, that would still not mean that competition would be substantially lessened.
133. For competition to be substantially lessened, the Commission would also need to satisfy itself that neither Bunnings nor Mitre 10 would respond by competing for a larger proportion of national contracts or seeking to win work locally.
134. The Statement of Issues does not explain why Bunnings and/or Mitre 10 would not respond to any attempted exercise of market power by seeking to expand. As shown above in Figure 1 and Figure 2, both Bunnings and Mitre 10 have national coverage and supply the types of building products sought by GHBs.
135. Moreover, Bunnings is already competing to win national GHB contracts. For example, Bunnings is already a supplier for Landmark Homes and FDL understands **[CONFIDENTIAL]**. Bunnings also has preferred supplier or supply contracts with buying groups or customers who operate on a multi-region basis including:
- 135.1 CRT Farmlands (also supplied by Mitre 10)

- 135.2 Combined Building Supplies Co-operative
 - 135.3 Refresh Renovations
 - 135.4 N3
 - 135.5 CSC Buying group
 - 135.6 Sheds 4u
 - 135.7 Maintain To Profit
136. While Mitre 10 has not, to date, seemed to focus on winning GHBs at a national level, there is nothing that would prevent Mitre 10 from competing for national contracts should it see a commercial opportunity to do so. The fact it has not focussed on these contracts when competition for these contracts is strong, does not mean that it would not change its approach if competition weakened for any reason and an opportunity emerged.
137. Furthermore, the Commission's view that competition could be harmed requires the Commission to believe that GHBs would be powerless to do anything if the merged firm sought to increase prices or reduce quality. That is, the Commission would need to conclude that GHBs would be unable to switch to or sponsor alternative suppliers or restructure their tenders to exert countervailing power.
138. The Statement of Issues does not explain why GHBs would not be able to exert countervailing power in these ways. The parties submit that GHBs have all these options at their disposal and every incentive to counteract any attempted exercise of market power (unilateral or coordinated).

Observations on Commission's view that the market is prone to coordinated conduct

139. FDL disagrees with the Commission's view the proposed merger would change the market's structural characteristics in a manner that may facilitate the coordinated exercise of market power.
140. The Commission's view is predicated on its assumption that the merger could, in effect, result in consolidation of the number of competitors from three to two by reducing ITM's significance as a rival. For the reasons explained above, the acquisition would not reduce ITM's significance as a competitor, i.e., the number of potential competitors would not be reduced.
141. The Commission is also wrong to suggest that there would only be three competitors in this market in the counterfactual. Bunnings and Mitre 10 would be highly relevant competitors in all scenarios and, therefore, this acquisition cannot reasonably be characterised as a "3:2" merger.
- 141.1 Four merchants (FDL, ITM, Carters, and Bunnings) are already active competitors to win preferred supply contracts.
 - 141.2 One merchant chain (Mitre 10) actively competes to win GHBs locally and would have every incentive to compete for national contracts should prices increase above/service levels decrease below, competitive levels.
 - 141.3 The Commission has not explained why Bunnings and Mitre 10 face high barriers to entry and expansion to compete for GHB customers given they already have extensive existing national branch networks and already supply the same or similar building products.

- 141.4 The Commission has not explained why GHBs themselves would be unable to combat any coordination between FDL and Carters by purchasing from the likes of ITM, Mitre 10 or Bunnings.
142. There are also other problems with the Commission's analysis of the conditions for coordination. For example, in one part of the Statement of Issues, the Commission appears to take the position that price and terms of service are visible⁵⁹ but, in another, the Commission refers to prices and terms as being "not readily observable".⁶⁰ These statements are irreconcilable. The parties consider the accurate position is that prices charged to GHBs are not transparent (unless GHBs believe it is in their best interests to share that information between merchants to obtain a better deal overall), which makes coordination between rivals nigh on impossible.
143. As a second example, the Commission has neither identified the "industry forums" in which the merchants supposedly interact, nor explained how this would increase the probability of coordination occurring post-transaction.
144. In summary, the acquisition would not be likely to lead to coordinated effects because it would be unlikely to undermine ITM's ability (or incentive) to compete. However, even if the acquisition did have this effect, coordinated effects would not occur because (amongst other things):
- 144.1 prices and terms of service are not transparent (which would make it very difficult to reach an agreement and monitor compliance with it);
 - 144.2 each preferred supply contract is significant in its own right (which would provide strong incentives for parties to 'cheat' on any such agreement); and
 - 144.3 FDL and Carters would continue to face strong competition from other suppliers, including ITM, Bunnings, Mitre 10 and a strong competitive fringe. Simply put, coordination would be impossible.

⁵⁹ Statement of Issues at [102], and [106].

⁶⁰ Statement of Issues at [110.1].