



## FOODSTUFFS NORTH ISLAND POST-CONFERENCE SUBMISSION ON THE GROCERY MARKET STUDY DRAFT REPORT

### Outline of submission

- 1 Foodstuffs North Island (**FSNI**) welcomes the opportunity to provide our final submission to assist the Commission to refine its draft findings, and options for recommendations, for its final report.
- 2 As set out in our submission on the draft report, FSNI accepts the challenge for the industry to do better for New Zealand consumers. We have committed to an action plan that will deliver better value for consumers, improve outcomes for suppliers and remove barriers to entry within our control. We've started work immediately, and have continued, to implement that action plan.
- 3 In this submission, FSNI provides additional information and evidence on points that have been raised since submissions on the draft report. The information and evidence further substantiate that:
  - 3.1 the retail grocery sector is currently **workably competitive**, and will be more so as retailers enter and expand. The level of competition is evidenced by:
    - (a) most significantly, actual evidence of the **nature of competition** in grocery retail markets. Nine out of 10 customers are in FSNI's stores on a shopping mission other than the main shop – for all of these missions, FSNI faces strong competition from other retailers as well as from Woolworths New Zealand (**WWNZ**). The evidence shows that competition occurs on price, and non-price, dimensions with respect to:
      - (i) the competitive constraint posed by other retailers, and
      - (ii) the extent of competition with WWNZ, and
    - (b) each of the **indicators of competition** that have been considered. Namely:
      - (i) FSNI's actual return on capital of 9-12% is consistent with the returns made by the appropriate benchmark of overseas supermarkets – the average ROACE of the Commission's international sample of grocery retailers is 11.3%,
      - (ii) international price comparisons say little about the actual level of competition in this market but, in any event, New Zealand ranks 21st in the OECD on a purchasing power parity (PPP) basis,
      - (iii) FSNI is an innovative business and is continually responding to competitive pressure to innovate. FSNI has nearly all of the international innovations that the Commission cites in the draft report. And, in 2021 alone FSNI invested circa \$50m into innovation, and
      - (iv) FSNI competes strongly on the quality, range and service aspects of the retail grocery offer with many players, and

- 3.2 other than the barriers imposed by regulatory requirements including planning law, there are **no material barriers to entry or expansion** for competitors catering for a range of shopping missions, operating different business models, and competing across the price, quality, range and service (PQRS) spectrum. The lack of barriers to entry and expansion is borne out by the entry and expansion that have occurred, or been announced, including during the course of this study (and is also consistent with the competition indicators). As to specific potential barriers noted during the process to date:
- (a) scale is not a pre-requisite for competing with the major grocery retailers, and this is borne out by FSNI's experience daily,
  - (b) access to supply chain infrastructure is readily available from third party providers,
  - (c) there do not appear to be any difficulties with obtaining capital, including both domestic and overseas capital, and
  - (d) relationships with suppliers can be comprehensively established in a short period, and
- 3.3 the market for the acquisition of groceries by retailers is **workably competitive** and the potential concerns expressed to the Commission by some suppliers and their representatives in the course of the study would be comprehensively addressed by the introduction of a grocery code of conduct for the industry.
- 4 The evidence that has been presented during the process to date has implications for the Commission's draft **options for recommendations**. That is:
- 4.1 the options that FSNI has adopted in its **action plan** respond to all of the changes that can be supported by the evidence. FSNI provides an update, and further detail, on the steps outlined in its action plan to:
- (a) deliver value to consumers by improving their ability to make informed shopping decisions,
  - (b) improve outcomes for suppliers and customers by working with suppliers and the Government to develop a grocery code of conduct for the industry, and
  - (c) encourage competition and remove barriers for new entry and expansion by ending the use of restrictive land covenants and exclusivity provisions in leases,
- 4.2 despite a lack of evidence that it would be necessary, FSNI is exploring how it could put together a commercially attractive offer to **supply products** to other retailers, in case this may give rise to potential net benefits for grocery market competition. FSNI believes that, if such net benefits are established, additional access to suppliers' products through FSNI is achievable on a voluntary basis – regulated access would be complex and difficult as well as being unwarranted in a context where there would be several competing suppliers, and
- 4.3 **other options for recommendations** put forward by the Commission in the draft report, and raised by other submitters, are not justified based on the evidence that has been presented during the process, and the further evidence presented in this

final submission. They would also not be likely to improve outcomes for consumers. Those options are:

- (a) forced divestment of some of the major retailers' owner-operator retail stores, supply chain assets, or a combination of both,
- (b) government facilitating new entry – FSNI provides comments to assist consideration of this option while noting that it is a matter for the government whether to become involved in grocery retailing, and
- (c) authorising suppliers to bargain collectively with retailers (outside of the current collaborative activities exception).

5 FSNI provides the following reports with this submission:

- 5.1 Incenta Consulting – Measuring profitability for the grocery retailers: matters arising from the conference,
- 5.2 HoustonKemp – Empirical evidence of grocery sector competition – further analysis,
- 5.3 HoustonKemp – International comparison of grocery prices – further report, and
- 5.4 HoustonKemp – Private label products in retail grocery markets.

6 The points set out in this submission are not comprehensive of FSNI's response to the market study, so it should be read in conjunction with FSNI's previous submissions. Rather, in order to best support the Commission's process, in each of the following sections, we focus on responding to the key points that emerged from the Commission's conference, and providing additional information and evidence that have emerged, or that respond to points made, since the draft report.

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**APPENDIX C**

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## THE NATURE OF COMPETITION IN THE RETAIL GROCERY SECTOR

### FSNI's response to the discussion at the conference, and overview of this section

- 7 FSNI understands the Commission accepts that:
- 7.1 most consumers purchase their groceries by way of shopping missions rather than a traditional main shop, and that major grocery retailers are unable to price discriminate with respect to consumers who are carrying out a main shop, and
  - 7.2 as such, there is no “market power” associated with the main shop that can be exploited, and grocery retailing is potentially contestable by a range of market participants.
- 8 But, from comments made at the conference, the Commission appears to consider that, in practice, this potential contestability has not resulted in material competition emerging. The Commission in their draft report considered this was borne out by market share data, with the Commission’s analysis in the draft report showing that the major retailers have a combined share of between 70 and 90%.<sup>1</sup>
- 9 In the following sections, FSNI first sets out its response to the Commission’s perspective. The key points are:
- 9.1 the market share analysis set out in the draft report does not accurately represent FSNI’s share of the sales for which it competes. None of the Commission’s three market share estimates include the full range of retailers that FSNI competes with (paragraph 11),
  - 9.2 market shares are not determinative, in and of themselves, even if accurate. They are not a substitute for carrying out a full competition analysis (paragraph 19), and
  - 9.3 market shares do not meaningfully explain the constraint exerted on FSNI by other retailers. Rather, the extent of the competitive constraint imposed by other retailers on FSNI can be observed from:
    - (a) actual evidence of their impact on how FSNI competes (paragraph 21) , and
    - (b) market outcomes, including profitability, QRS and innovation (addressed from paragraph 75, below).
- 10 FSNI then addresses other points on which additional evidence has emerged and/or points have been raised since submissions on the draft report, to further demonstrate that:
- 10.1 the Frontier Economics analysis does not support the propositions the Commission seeks to draw from it. In any event, Frontier’s analysis is consistent with Island-wide pricing,
  - 10.2 competition on non-price characteristics is meaningful, and is valued by consumers, and

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<sup>1</sup> Dr Small (Commissioner) at lines 1-6, page 15 and lines 16-27, page 16 of the transcript from the Retail Grocery Market Study Conference, Day 1 (21 October 2021).

10.3 successful present and future competitors are unlikely to adopt the same business model as the existing major grocery retailers.

**The Commission's draft report market share analysis does not present an accurate picture**

- 11 In the conference, the Commission placed emphasis on high and stable market shares as evidence of a lack of competition.<sup>2</sup>
- 12 FSNI does not dispute that the major grocery retailers supply a material share of retail grocery products sales in New Zealand. But the Commission's assessment of market shares overstates the major grocery retailers' combined share, because the Commission did not include the full range of retailers with which the major retailers compete (evidence of the extent of this constraint is set out below from paragraph 21).
- 13 FSNI competes with a wide range of retailers, across many product categories. There is no one measure of market share that includes all of these other retailers. Further, as described below, there are limits to the explanatory power of share of supply data, even if complete. However, the infographic below provides a fuller view of market shares for the North Island than that cited in the draft report. [REDACTED]. It estimates FSNI's market share is 34.9%, and major retailers' combined share is 60.3% (FSNI and WWNZ).<sup>3</sup>

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<sup>2</sup> Day 1, page 15 lines 1-6, "...the market share information which, by our estimates and also by the majors' estimates, seems to be reasonably stable between the two large networks at over 80%. So pretty large and pretty stable over time. We're having trouble reconciling that with the submissions that say that there's increase in competition for non-main shops and that those non-main shops are of an increasing importance."

<sup>3</sup> [REDACTED]:

- [REDACTED].
- [REDACTED].
- [REDACTED].
- [REDACTED].
- [REDACTED].

FY21 Total North Island Retail Grocery Market and relevant adjacencies (\$bn)

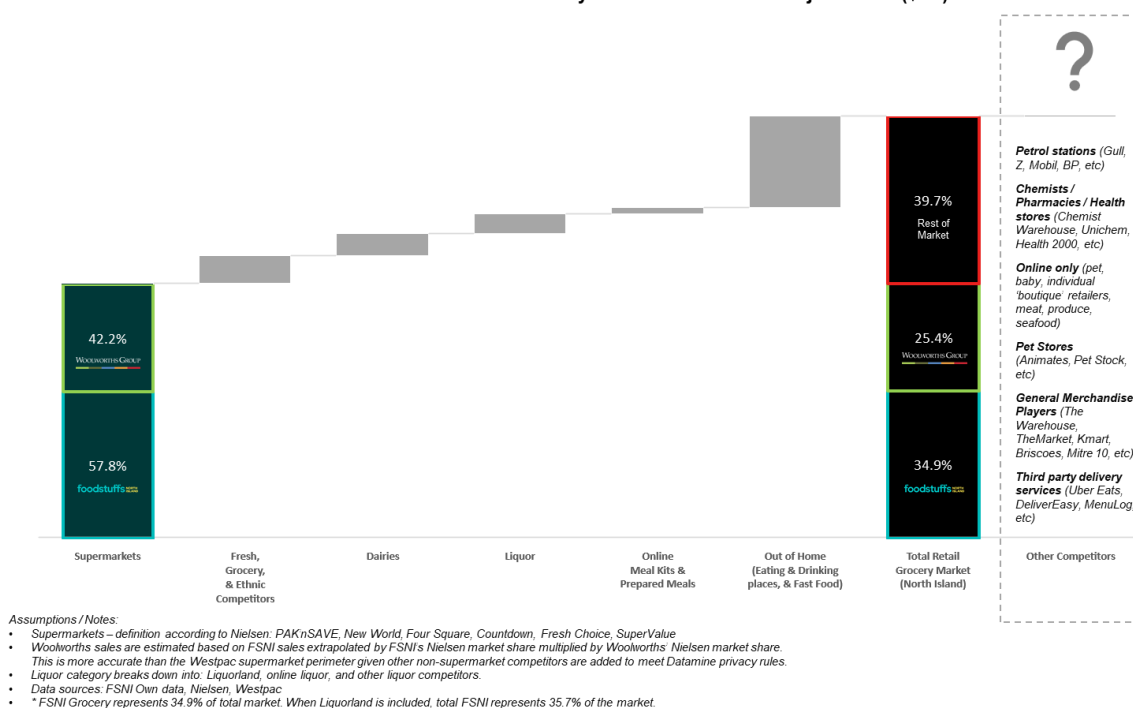


Figure 1: North Island Total Retail Grocery Market FY21 (\$m)

- 14 The Commission presented three different analyses of the major retailers' market shares in the draft report:
- 14.1 adopting the major retailers' estimate of market shares, which the Commission said showed a combined share of 80-90%,
  - 14.2 estimating market share using sales revenue data sourced from financial and management accounts of the major grocery retailers and a small sample of other grocery retailers. This estimate showed the major retailers had a combined share of close to 100%, and
  - 14.3 estimating market share using data obtained from Statistics NZ on the total size of the groceries and supermarkets sector. This estimate resulted in a combined share of between 70-80%.
- 15 In addition, the Commission noted Canstar's "independent assessment" of a combined market share of 85% in 2020.<sup>4</sup> The Commission cited a Stuff.co.nz article as the basis for Canstar's estimate.<sup>5</sup> This article notes that Foodstuffs has a 53% share of the grocery market and Countdown has a 32.4% share, but otherwise provides no detail of how that share was calculated, or what retailers were included in the analysis. FSNI is therefore not able to comment further on that estimate. But, consistent with Figure 1 above, FSNI considers it quite likely that this estimate does not include the full range of retailers Foodstuffs competes with.

<sup>4</sup> Draft report at [5.80.3] and [5.85].

<sup>5</sup> Footnote 292.

- 16 FSNI makes the following observations about the Commission's three assessments of market share:

16.1 FSNI's estimate: [REDACTED].<sup>6</sup> [REDACTED]:

- (a) [REDACTED],
- (b) [REDACTED]:

[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

- (c) [REDACTED].<sup>7</sup> [REDACTED]:

- (i) [REDACTED],
- (ii) [REDACTED],
- (iii) [REDACTED],
- (iv) [REDACTED]
- (v) [REDACTED].

16.2 the Commission's estimate of market share based on its analysis of sales revenue:

this estimate significantly overstates the major retailers' combined share by not including the large set of all other retailers, which FSNI competes with. The Commission notes that it used sales revenue data sourced from a "sample of other grocery retailers", which it obtained in order to carry out its profitability analysis.<sup>8</sup> Those retailers were Farro Fresh, Moore Wilson's and Commonsense Organics.<sup>9</sup> The Commission's estimate therefore excludes most of the retailers operating in the retail grocery market. As such, FSNI does not consider that the Commission's estimate of market shares is accurate. This is made clear from the other estimates of market share, which are significantly lower (by 10-30%), and

16.3 the Stats NZ assessment: this data included the greatest range of other retailers. For example, the data includes other supermarkets, convenience stores and international food stores. However, even then, the Stats NZ data does not include all other retailers that Foodstuffs competes with. For example, the data expressly

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<sup>6</sup> [REDACTED].

<sup>7</sup> [REDACTED].

<sup>8</sup> Draft report at [5.86].

<sup>9</sup> Draft report at [3.28].

excludes specialist grocery retailers (butchers, fishmongers, greengrocers, bakeries and the like), and will exclude non-food grocery retailers.

- 17 None of the market share estimates in the draft report includes the full range of other grocery retailers that FSNI competes with day-to-day. Competitive constraints FSNI faces from a range of other retailers is set out in **Appendix A** which shows each of the shopping missions, the other retailers competing for these missions, and whether or not these retailers were included in the market share estimates. But in summary, retailers omitted from some or all of the market shares analysis, but with which FSNI competes, include:
- 17.1 specialist grocery retailers i.e. butchers, fish mongers, greengrocers and farmers' markets and bakeries,
  - 17.2 regional competitors and individual store competitors,
  - 17.3 liquor stores,
  - 17.4 petrol stations with a convenience offering,
  - 17.5 non-food grocery retailers i.e. The Warehouse, Chemist Warehouse, Kmart, Briscoes, Mitre 10, health stores, pet stores and others. There is a tendency to overlook that supermarkets include a large number of non-food items. FSNI estimates that [REDACTED]% of its products in-store are non-food grocery items (equating to [REDACTED]% of sales).<sup>10</sup> FSNI competes with a wide range of other retailers for these sales. However, no non-food only grocery retailers were included in any of the market share analyses,
  - 17.6 online supermarkets, The Honest Grocer and Supie,
  - 17.7 suppliers operating direct to consumer platforms such Ecostore and Caffé L'Affare,
  - 17.8 other e-commerce only competitors, such as meal kit providers, and e-commerce platforms like pet.co.nz and nappies.co.nz, and
  - 17.9 any out of home consumption i.e. restaurants, cafes and takeaway, including UberEats. Again, FSNI considers that it competes for customers in an overall market food and groceries (i.e., share of stomach). For example, consumers may choose to cook a given meal from scratch, or eat out, or order takeaways. [REDACTED].<sup>11</sup>
- 18 Finally, the extent of other retailers' share in the overall market for food and groceries can be observed from the increase in sales FSNI experienced during the COVID-19 lockdowns. While the initial large increase in sales most likely reflects some panic buying, the persistent increase in sales above normal levels reflects the food and grocery spend that is being diverted from other retailers, which are not allowed to operate during lockdowns, to supermarkets. FSNI's data shows that sales at its stores increased by [REDACTED]% during 30 March to 3 May 2020, compared to 1 April to 5 May 2019, and that these sales were diverted from Out of Home consumption and liquor. FSNI considers it competes for each of these categories in normal trading conditions, to at least some extent.

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<sup>10</sup> [REDACTED].

<sup>11</sup> [REDACTED].

**Market shares have little to say about the nature of competition, in and of themselves**

- 19 The Commission appears to place significant weight on the market shares analysis as demonstrating that the major retailers are not constrained by other retailers. However, a market share analysis is not conclusive evidence of competitive constraints. In particular, as the Commission acknowledges in the draft report, high market shares alone do not necessarily mean a firm has market power.<sup>12</sup> This conclusion is also supported by:
- 19.1 the Commission's Merger and Acquisitions Guidelines, which includes the following statements:<sup>13</sup>
- Market share and concentration measures, and changes in market share or concentration resulting from a merger, can indicate the extent to which firms in a market are subject to competitive constraints, and the extent to which those constraints might change as a result of a merger...
- However, in all cases, market share measures are insufficient in themselves to establish whether a merger is likely to have the effect of substantially lessening competition...
- We use market share and concentration indicators to identify mergers which are less likely to raise competition concerns. These indicators are intended to provide an initial guide to merging firms, but are not a substitute for full competition analysis.
- 19.2 consistent with this, the Commission has not previously reached findings where market shares were treated as definitive. For example, the Commission frequently gives clearance for mergers where the market shares exceed its concentration indicators,<sup>14</sup>
- 19.3 the ACCC Merger Guidelines, which similarly does not treat market share as determinative, noting:<sup>15</sup>
- It is the link between concentration and the strength of competition that is important for merger analysis and this ultimately requires consideration of all relevant factors before a final conclusion can be reached.
- 19.4 Noonan, who states that "simple statistical measures of concentration will rarely provide a complete picture of the competitive conditions in a market".<sup>16</sup>
- 20 As such, the major retailers' significant combined market share is not in and of itself decisive evidence that the major retailers are unconstrained. It is only one factor to be considered in assessing the state of competition in a market and must then be tested against a detailed competition assessment.

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<sup>12</sup> Draft report at [5.78].

<sup>13</sup> See also Commerce Commission *Decision No. 448 Progressive Enterprises Limited; Woolworth (New Zealand) Limited* (14 December 2001) at [110]; and Commerce Commission *Pact Group Pty Limited and Viscount Plastics (NZ) Limited* [2012] NZCC 11 at [79] for similar comments.

<sup>14</sup> See Mark Berry "New Zealand Antitrust: Some reflections on the first twenty-five years" (2013) 10 Loy. U. Chi. Int'l L. Rev. 125 at 146.

<sup>15</sup> ACCC *Merger Guidelines* (November 2008, amended November 2017) at [7.7]–[7.8]. Available at: <https://www.accc.gov.au/publications/merger-guidelines>.

<sup>16</sup> Chris Noonan *Competition Law in New Zealand* (online looseleaf ed, Thomson Reuters) at [14.C.3.2.3].

**Evidence of the competitive constraint imposed by other retailers suggests meaningful constraints**

- 21 FSNI does not consider that the market shares meaningfully explain the competitive constraint posed by other retailers. Rather, the constraint can be observed from evidence regarding how FSNI responds to competition.
- 22 FSNI sets out below concrete evidence of the competitive constraint imposed by other retailers in the retail grocery market, and FSNI's response to it, which has had real positive impacts for grocery consumers. These examples also demonstrate that the "stability" of the Commission's market shares is not reflected in existing competition, which is dynamic in nature.
- 23 [REDACTED].

[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

**Price competition**

- 24 FSNI competes with a range of other retailers on price, as evidenced by FSNI's ongoing and consistent price monitoring of other retailers, and price adjustment in response to that monitoring:
- 24.1 There is significantly more ongoing price monitoring and adjustment based on other retailers than the Commission has recognised to date.<sup>17</sup> It occurs in two main ways, at local and co-operative levels:
- (a) FSNI's Category Managers, [REDACTED]:

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<sup>17</sup> The Commission concluded in the draft report (at [5.47]) that, "although we have seen some evidence of ad hoc price comparisons done by the major retailers of prices charged at other retailers, we have seen little evidence to suggest that these comparisons are done on an ongoing and consistent basis, or that the major grocery retailers adjust their prices in response to such monitoring."

This statement is incorrect.

- (i) [REDACTED],<sup>18</sup>
- (ii) [REDACTED]:<sup>19</sup>
  - (A) [REDACTED]
  - (B) [REDACTED]
  - (C) [REDACTED]
- (b) individual Members compete hard on price every day in their local catchments. [[REDACTED]].<sup>20</sup> For example:

- (i) [REDACTED]:
  - (A) [REDACTED],
  - (B) [REDACTED],
  - (C) [REDACTED],
  - (D) [REDACTED],
  - (E) [REDACTED],
  - (F) [REDACTED],
- (ii) [REDACTED].

This behaviour reflects regular dynamic price competition with a range of retailers.

#### 24.2 [REDACTED].<sup>21</sup>

- 25 FSNI provides the following illustrative examples of product categories where price competition with other retailers frequently occurs (although these are not exhaustive):

Product category	Description of price competition	Evidence/examples of price competition
Produce	FSNI faces price competition Supie, with its produce bundles.	FSNI refers to material from social media which demonstrates that Supie is competing on price (see screenshots below). Supie competes particularly aggressively on price through its

As FSNI explained in its submission on the draft report, the internal documents requested by the Commission relating to the competitive conditions in the retail grocery market were limited to documents created for, or by, senior managers or board members ([REDACTED]). [REDACTED]. That does not mean that FSNI does not carry out price comparisons to other retailers on an ongoing and consistent basis. Rather, it simply reflects that those comparisons are not systematically reported at the particular level to which the Commission's questions were targeted. In part, this is because there is a wide range of competing retailers, many of whom operate in local catchments only.

<sup>18</sup> [REDACTED].

<sup>19</sup> [REDACTED].

<sup>20</sup> [REDACTED].

<sup>21</sup> [REDACTED].

Product category	Description of price competition	Evidence/examples of price competition
		produce bundles, which provide a mix of fresh fruit and vegetables for a set price. A comparison of a Supie \$15 produce bundle to the equivalent products at New World and PAK'nSAVE is shown below. <sup>22</sup> The produce bundle cost approximately \$30 to purchase from PAK'nSAVE and \$40 to purchase from New World.
Produce	<p>FSNI faces price competition from local produce specialists. [REDACTED].<sup>23</sup></p> <ul style="list-style-type: none"> <li>• [REDACTED],</li> <li>• [REDACTED],</li> <li>• [REDACTED],</li> <li>• [REDACTED].</li> </ul> <p>[REDACTED].<sup>24</sup></p> <p>FSNI notes submissions which suggested it earns a 100%, or 300%, margin on fresh produce.<sup>25</sup> That is not correct: FSNI's average margin on produce is [REDACTED].</p>	<p>In September 2021, Newsroom carried out a price comparison between Fruit World Silverdale and PAK'nSAVE, New World and Countdown. Newsroom found that Fruit World had lower prices for five of the nine items it had a promotion on when compared with major supermarkets.<sup>26</sup></p> <p>For the purpose of this submission, FSNI has carried out a price comparison between:<sup>27</sup></p> <ul style="list-style-type: none"> <li>• the Newtown Greengrocer and New World Newtown and found that the Newtown Greengrocer's weekly specials were, on average, 47% cheaper than New World Newtown, and</li> <li>• Fruit World and New World and PAK'nSAVE prices, which demonstrates Fruit World was between 40-50% cheaper.</li> </ul>
Meat	FSNI faces price competition from the Mad Butcher and the Aussie Butcher on meat products.	[REDACTED]. <sup>28</sup> [REDACTED].
Personal care products	FSNI faces price competition from the Chemist Warehouse, and the Warehouse, on personal care products, such as vitamins, hair and skincare products and bath and body products. [REDACTED]. <sup>29</sup>	<p>[REDACTED] [REDACTED]:</p> <ul style="list-style-type: none"> <li>• [REDACTED],<sup>30</sup></li> <li>• [REDACTED],<sup>31</sup></li> <li>• [REDACTED],<sup>32</sup></li> <li>• [REDACTED].<sup>33</sup></li> </ul>
Confectionary	FSNI faces strong competition from The Warehouse in	[REDACTED].

<sup>22</sup> Price comparison carried out on 28 November 2021.

<sup>23</sup> [REDACTED].

<sup>24</sup> [REDACTED].

<sup>25</sup> United Fresh Submission on draft report at [5]-[6] and Waterloo Farms submission on draft report at [1].

<sup>26</sup> <https://www.newsroom.co.nz/supermarket-prices-drive-shoppers-to-local-green-grocer>

<sup>27</sup> Appendix B.

<sup>28</sup> [REDACTED].

<sup>29</sup> [REDACTED].

<sup>30</sup> [REDACTED].

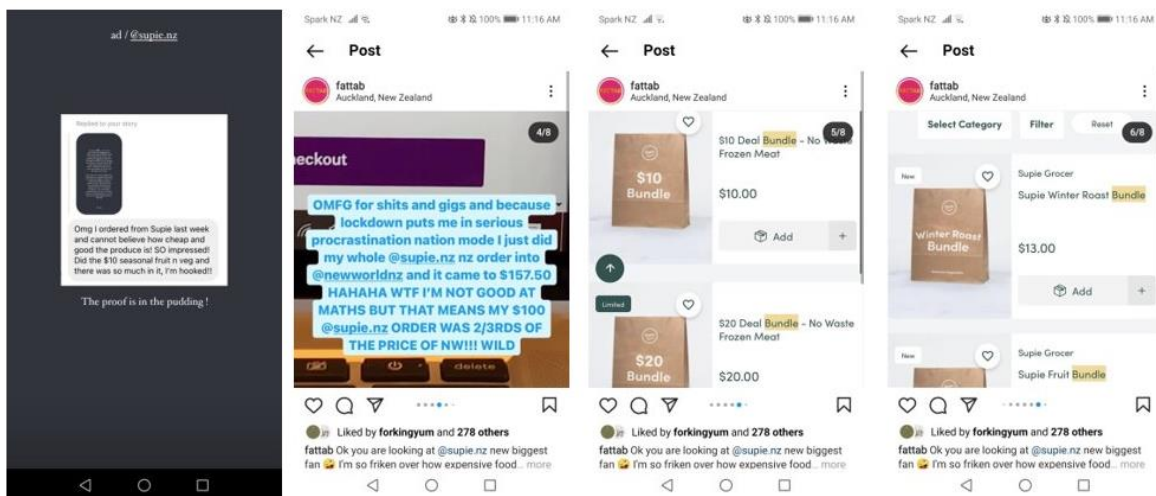
<sup>31</sup> [REDACTED].

<sup>32</sup> [REDACTED].

<sup>33</sup> [REDACTED].

Product category	Description of price competition	Evidence/examples of price competition
	confectionary, particularly around seasonal events (Christmas, Easter).	
Nappies, baby formula and baby food	FSNI faces price competition from The Warehouse and Chemist Warehouse in these categories.	FSNI includes a price comparison for this category in Appendix B, which demonstrates that The Warehouse and Chemist Warehouse are very competitive on price.
Pet food	FSNI faces strong price competition from online retailers (Pet Stock, Pet Direct and pet.co.nz), The Warehouse and Animates.	FSNI includes a price comparison of products in this category in Appendix B, which demonstrates that a range of retailers compete on price.
Dry grocery	FSNI faces price competition from, particularly, The Warehouse in dry grocery categories.	FSNI includes a price comparison of products in this category in Appendix B. This comparison shows that The Warehouse and Supie have competitive offers in this category.
Household products	FSNI faces price competition in household products from a range of retailers, including The Warehouse and Chemist Warehouse.	FSNI includes a price comparison in Appendix B, which demonstrates strong competition on price.

Figure 2: Screenshots and comparison table showing price competition from Supie





Supie \$15 bundle	New World	PAK'nSAVE
Strawberries (punnet)	\$3.99	\$2.99
Apricots (2)	\$1.82	Not in stock
Nectarine (1)	\$2.60	Not in stock
Cherry tomatoes (punnet)	\$4.99	\$4.99
Sweetcorn (2)	\$4.98	Not in stock
Avocado (2)	\$2.00	\$1.98
Asparagus	\$2.99	\$2.69
Cucumber	\$1.99	\$2.99
Red capsicum	\$1.29	\$0.99
Baby carrots	\$3.99	\$2.99
Peas (400g)	\$3.99	\$5.49
Eggplant	\$2.49	\$0.99
King Sweeties capsicum	\$1.66 <sup>34</sup>	\$1.33 <sup>35</sup>
Potatoes	\$2.79 <sup>36</sup>	\$2.79 <sup>37</sup>
<b>Total</b>	<b>\$41.57 (277%)</b>	<b>\$30.22 (201%)</b>

26 [REDACTED]:<sup>38</sup>

26.1 [REDACTED],

26.2 [REDACTED],

26.3 [REDACTED].

### **QRS competition**

- 27 Other retailers exert a competitive constraint on FSNI's quality, range and service offering. The Commission noted in the draft report that it had not seen "any consistent evidence of [the major retailers] adjusting their product and service offerings in response to competition from other retailers".<sup>39</sup> FSNI disagrees with this statement. Examples of FSNI adjusting its

<sup>34</sup> Only available as bag of 3 for \$5.00.

<sup>35</sup> Only available as a bag of 3 for \$3.99.

<sup>36</sup> White washed potatoes, \$2.79/kg.

<sup>37</sup> White washed potatoes, \$2.79/kg.

<sup>38</sup> [REDACTED].

<sup>39</sup> Draft report at [5.48]

product, service or range offering in response to competition from other retailers are set out below.

28 In terms of quality:

28.1 [REDACTED]<sup>40</sup> [REDACTED]:

(a) [REDACTED],

(b) [REDACTED],

28.2 [REDACTED],<sup>41</sup>

28.3 [[REDACTED].<sup>42</sup> [REDACTED].<sup>43</sup> [REDACTED],<sup>44</sup>

28.4 FSNI has developed the Fresh Collective Brand,<sup>45</sup> which recognises the customers' move towards smaller shopping missions and more frequent shops, [REDACTED]. Fresh Collective is a small format store, with an emphasis on showcasing quality produce, meat, cheese and deli products, baked goods and wine. The store features an in-store bakery and butchery, as well as a cafe:



<sup>40</sup> [REDACTED].

<sup>41</sup> [REDACTED].

<sup>42</sup> [REDACTED].

<sup>43</sup> [REDACTED].

<sup>44</sup> [REDACTED].

<sup>45</sup> See <https://designworks.com/work/articles/fresh-collective>.

29 In terms of range:

29.1 meal kits and meal solutions: [REDACTED].<sup>46</sup> [REDACTED].<sup>47</sup> FSNI's response to this competition has been to:

- (a) develop, trial and refine meal kits – a new product offering – in response to the entry of meal kit providers.<sup>48</sup> Notwithstanding that meal kit providers have a small market share (estimated by the Commission at 2%) they exert a real constraint and have stimulated real changes in FSNI's conduct. FSNI now offers meal kits at every New World ("Simply Dinner") and PAK'nSAVE ("What's for Dinner?") across the North Island. [REDACTED]<sup>49</sup>, and



- (b) expand its meal solutions in response to out of home competitors. This includes a range of options, depending on consumer need, including Ready to Cook (e.g. meal kits, salad kits), Ready to Heat (e.g. made in-store fresh pizzas, frozen/chilled meals) and Ready to Eat options (e.g. pre-prepared deli foods including sandwiches, hot food/meals and rotisserie chickens).<sup>50</sup> FSNI has also partnered with YB Sushi and St Pierre's to offer sushi in-store,<sup>51</sup> and
- (c) offer in-store dining options, with cafés and other food options. New World Brookfield opened an in-store eatery, partnering with Mariposa Group (franchise owners) to launch Taco Joint, Ha! Poke and Ha! Juices, in addition to their own café.<sup>52</sup>

29.2 FSNI expanded its range in a number of product categories in order to compete with other retailers, including:

<sup>46</sup> [REDACTED].

<sup>47</sup> [REDACTED].

<sup>48</sup> [REDACTED].

<sup>49</sup> [REDACTED].

<sup>50</sup> [REDACTED].

<sup>51</sup> [REDACTED].

<sup>52</sup> [REDACTED].

- (a) personal care: [REDACTED]. In particular, FSNI partnered with Zuru Edge to deliver a controlled label vitamin range, Health by Habit. [REDACTED].<sup>53</sup> FSNI subsequently partnered with Zuru to deliver another controlled brand in this category, Monday Hair Care. In addition, FSNI ran health and wellness week promotions at PAK'nSAVE and New World, to highlight its product offering, [REDACTED],<sup>54</sup>



- (b) health and wellbeing: FSNI expanded its range of health and wellbeing products [REDACTED].<sup>55</sup> As a part of this, FSNI began stocking a wider range of organic, gluten free and plant based products. FSNI also launched a number of different Pams ranges in this category, including:
- (i) Pams Superfoods, which includes health food products like quinoa, goji berries and cacao nibs,<sup>56</sup>
  - (ii) Pams Organic, with organic fruit, vegetables, meat and dairy products,<sup>57</sup>
  - (iii) Pams Gluten Free, with biscuits, muesli and baking products,<sup>58</sup>
  - (iv) Pams Free Range, with free range eggs and chicken products,<sup>59</sup>
  - (v) Pams Plant Based, which includes alternative meat products, plant milk and plant based ready meals,<sup>60</sup>

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<sup>53</sup> [REDACTED]

<sup>54</sup> [REDACTED]

<sup>55</sup> [REDACTED].

<sup>56</sup> <https://www.pams.co.nz/discover/pams-superfoods>

<sup>57</sup> <https://www.pams.co.nz/discover/pams-organic>

<sup>58</sup> <https://www.pams.co.nz/discover/pams-gluten-free>

<sup>59</sup> <https://www.pams.co.nz/discover/pams-free-range>

<sup>60</sup> <https://www.pams.co.nz/discover/pams-plant-based>



- (c) Simply Milk: FSNI also partnered with Fonterra to launch Simply Milk, New Zealand's first carbon zero milk,
- (d) ethnic products: [REDACTED].<sup>61</sup> [REDACTED].<sup>62</sup> [REDACTED].<sup>63</sup> [REDACTED].<sup>64</sup> [REDACTED]:
  - (i) [REDACTED].<sup>65</sup> [REDACTED].<sup>66</sup> [REDACTED].<sup>67</sup>
  - (ii) [REDACTED].<sup>68</sup> and
  - (iii) [REDACTED].<sup>69</sup>

29.3 Pams Finest: FSNI developed the Pams Finest Range to offer gourmet products, featuring high quality natural ingredients and no artificial colours or flavours,

<sup>61</sup> [REDACTED].

<sup>62</sup> [REDACTED].

<sup>63</sup> [REDACTED].

<sup>64</sup> [REDACTED].

<sup>65</sup> [REDACTED].

<sup>66</sup> [REDACTED].

<sup>67</sup> [REDACTED].

<sup>68</sup> [REDACTED].

<sup>69</sup> [REDACTED].

29.4 bakery products: New World and PAK'nSAVE stores have an extensive bakery offering, with artisan bread and other baked goods, in part to compete with the offering from bakeries and specialist supermarkets,

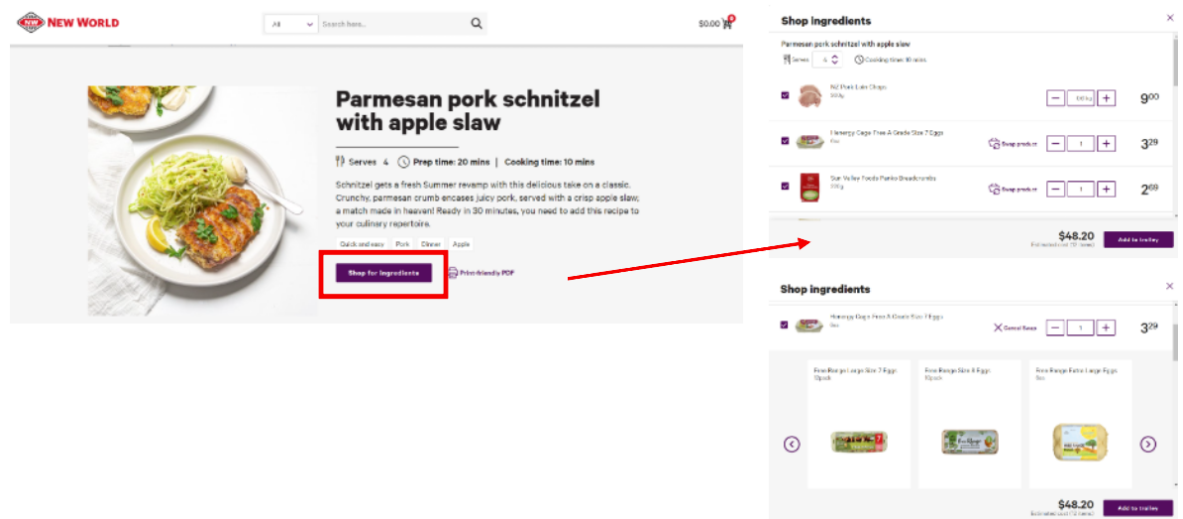
30 in terms of service:

30.1 in order to compete with convenience stores, which again, have a relatively small market share:

- (a) FSNI developed a small store format, initially through New World Metro, and secured land in high cost locations (central Auckland and Wellington) to compete with convenience retailers. [REDACTED]. During the consultation conference, Matthew Lane, the General Manager of Night 'n Day, noted that the major retailers were quickly expanding in the convenience space,<sup>70</sup> and
- (b) FSNI introduced features at all of its stores to minimise the customer burden of entering a large, full range supermarket through means such as “cut throughs”, self-checkouts and grab and go fridges located near checkouts, to enable convenience based shopping,

30.2 in order to compete with meal kit providers and out of home options, FSNI introduced a range of recipe builder options, which reduce the burden for customers of having to plan their dinner meals. For example, FSNI:

- (a) launched the Recipe of the Week at New World, both in-store and online,
- (b) partnered with Love Food Hate Waste to create weekly meal planners for New World customers, which feed four people for five dinners for under \$100 (excluding staple items), and
- (c) launched the first phase of New World's shoppable recipes on 11 November 2021 (a recipe builder tool), shown below:

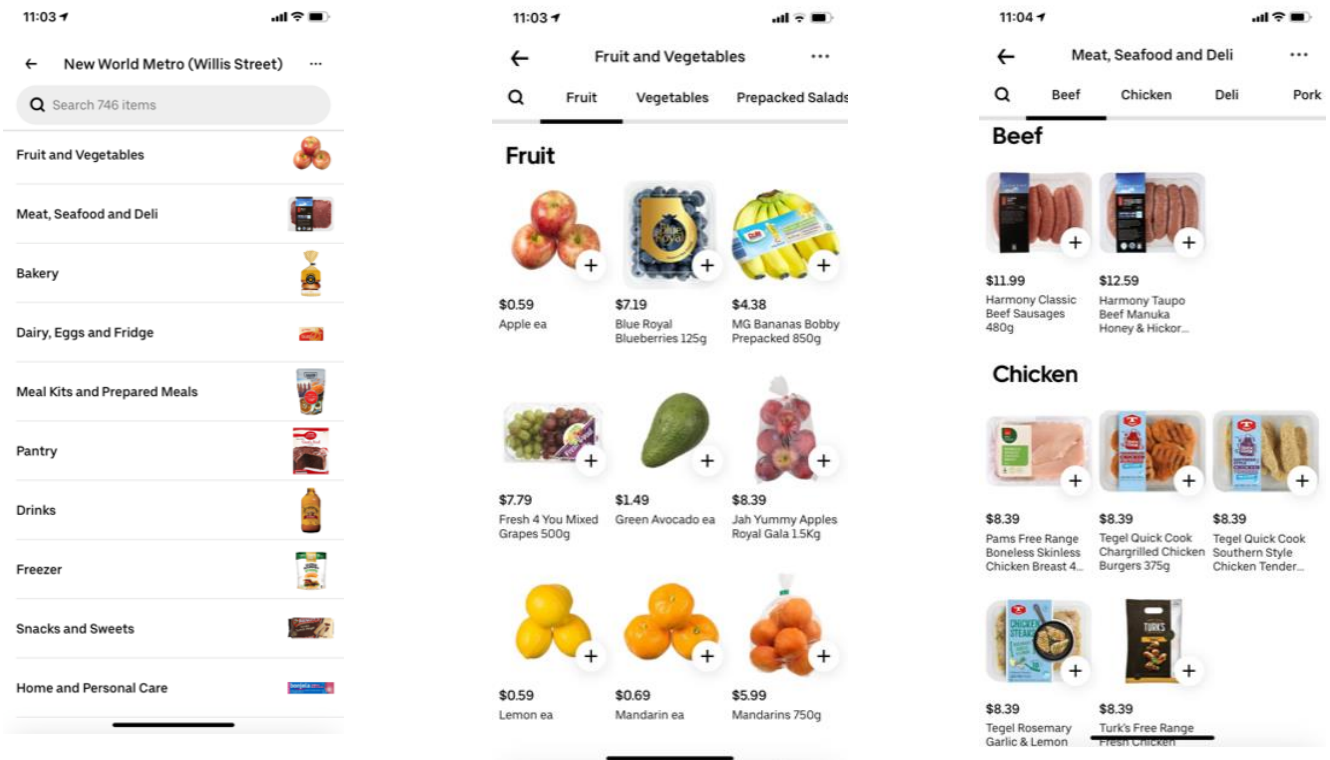


<sup>70</sup> Matthew Lane at lines 26-29, page 23 of the transcript from the Retail Grocery Market Study Conference, Day 1 (21 October 2021).

30.3 FSNI has partnered with UberEats to allow customers to purchase groceries from its stores and have them delivered via Uber. This service was a direct response to:

- (a) UberEats offering customers the ability to purchase other groceries from convenience stores on the app,
- (b) [REDACTED],<sup>71</sup> and
- (c) [REDACTED].<sup>72</sup>

The service is being trialled in Auckland and Wellington in November 2021, [REDACTED]. Customers have access to between 400-800 products across all categories (other than tobacco, liquor and gift cards), with the convenience of delivery targeted within 45 minutes. Screenshots from UberEats are shown below:<sup>73</sup>



30.4 the vast majority of PAK'nSAVE and New World stores have butchers and in store butcheries (where Countdown does not) to provide high quality cuts of meat and to compete on service dimensions with specialist butchers,

30.5 FSNI employs people to explain wine, and craft beer, pairings to customers and provide this additional service as part of its sponsorship of the New Zealand wine

<sup>71</sup> [REDACTED].

<sup>72</sup> [REDACTED].

<sup>73</sup> Screenshots taken from UberEats on 27/11/2021, showing some of the products available from New World Metro Willis Street, Wellington. In total, 739 items were available.

awards, and the beer and cider awards, and to compete with liquor stores and wineries, and

30.6 [REDACTED].<sup>74</sup>

- 31 Again, this demonstrates that regardless of their share of supply, other retailers exert a real competitive constraint on FSNI with real and measurable benefits for consumers.

### **Competition with WWNZ**

- 32 The Commission tends to comment on FSNI and WWNZ's combined market share, which FSNI considers is not an appropriate lens given there is strong competition between the two.
- 33 FSNI faces competition from a large multi-national company, which is able to leverage off of its operations in Australia to compete in New Zealand. WWNZ is a very significant competitive constraint. This is illustrated by the degree of cross-shopping between the two major retailers.
- 34 The evidence supports a conclusion that FSNI and WWNZ compete strongly, for example:

34.1 differentiation of retail banners. Differentiation is pro-competitive. It is a strategy by which FSNI seeks to appeal to different parts of the market, and win customers. Differentiation is not a way to avoid competing, or a strategy to segment the market, contrary to the comments made by Dr Small at Day 1 of the conference. Dr Small queried whether:<sup>75</sup>

its kind of a market segmentation strategy, you see some people who are willing to pay a bit more for an upmarket type New World experience and others [maybe place] more weight on price and less on some of the other dimensions of your offering and they might tend to favour a PAK'nSAVE?

- (a) as the Commission's consumer survey demonstrated, a wide range of factors drive store choice, of which price is just one factor. It is therefore essential that retailers compete on a mix of price and non-price dimensions in order to win consumers. This is a normal part of the competitive process in grocery retail markets overseas (discussed further below),
- (b) just over 15% of respondents in the consumer survey selected "lowest prices overall" as the single most important driver of store choice. Therefore, if the major retailers were to compete with each other solely on price they would not be catering to the majority of consumers. At the simplest level, the fact that some consumers prefer QRS factors in preference to price, is demonstrated by the fact that many consumers choose to shop at Countdown, and New World, in preference to PAK'nSAVE,
- (c) FSNI does not consider that the major retailers have effectively segmented the market with differentiated offerings. One way to test this is to ask whether PAK'nSAVE and New World compete day-to-day for Countdown customers, and FSNI considers they undoubtedly do. This competition reflects that there is a significant overlap in the PQRS offering of each of the major supermarkets, meaning that a segmentation strategy is simply not possible.

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<sup>74</sup> [REDACTED].

<sup>75</sup> Dr Small (Commissioner) at lines 19 to 23, page 38 of the transcript from the Retail Grocery Market Study Conference, Day 1 (21 October 2021).

The competition between supermarkets is best reflected by the fact that two thirds of consumers shop between banners in a given month. This means that the major retailers are competing with each other, and there is competition between FSNI's retail banners,

- (d) similarly, FSNI does not consider that consumer choice, across all types of mission shopping, between retailers is simply driven by location (or convenience).<sup>76</sup> Cross-shopping may equally be driven by access higher perceived quality products, or different range e.g., private label products, or access to a weekly promotion,
- (e) if the major retailers had effectively segmented the market between them, then there would be no need for the conduct which indicates strong competition between the major retailers – which the Commission identifies (discussed below),

34.2 the major retailers regularly monitor the prices, product and service offerings of competitors in order to remain competitive, and adjust their competitive strategies in response:<sup>77</sup>

- (a) the Commission noted that the major retailers “monitor price levels for specific products with the aim of maintaining specified price differentials between the major grocery retailer banners”.<sup>78</sup> The Commission said that this “active management of price differentials may provide a way for the major grocery retailers to avoid direct price competition”,<sup>79</sup>
- (b) FSNI disagrees that monitoring the prices of WWNZ, with a view to achieving a price differential, is a way of avoiding competition. FSNI considers it is pro-competitive for it to monitor WWNZ's prices – certainly, it would be a strong sign of a lack of competition if FSNI did not monitor WWNZ's prices,
- (c) [REDACTED]:<sup>80</sup>
  - (i) [REDACTED],
  - (ii) [REDACTED],
  - (iii) [REDACTED],
- (d) further, the Commission seems to have assumed that FSNI sets prices for particular products at a fixed differential to Countdown, and then does not compete further on price. That is not the case:
  - (i) [REDACTED].

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<sup>76</sup> Dr Small (Commissioner) at lines 32 to 33, page 38 of the transcript from the Retail Grocery Market Study Conference, Day 1 (21 October 2021): “... some of that [cross-shopping] is probably driven by convenience or happen to be different places and for whatever reason...”.

<sup>77</sup> Draft report at [5.103] and [5.104].

<sup>78</sup> Draft report at [5.113].

<sup>79</sup> Draft report at [5.114].

<sup>80</sup> [REDACTED].

(ii) [REDACTED].

(iii) [REDACTED].<sup>81</sup>

(iv) [REDACTED].

(v) [REDACTED],

34.3 the major retailers offer promotions frequently, and on a significant proportion of products,<sup>82</sup>

34.4 the major retailers are constrained to pass through their costs in a way that is far from complete or consistent,<sup>83</sup> and

34.5 frequent and high levels of cross-shopping by customers across supermarket banners and retail grocery stores more generally.<sup>84</sup> The fact that the major retailers spend significant sums each year on advertising demonstrates that each is constantly trying to win customers from the other. For example, in 2019, New World and Countdown spent over \$50m on advertising.<sup>85</sup> This sort of conduct would simply not be necessary, and would amount to wasted cost, if the major retailers had “segmented” the market between them.

35 FSNI now addresses two further arguments raised by the Commission to suggest that competition between it and WWNZ is not strong.

***National pricing does not necessarily facilitate coordinated conduct***

36 During the conference, Commissioner John Small queried whether the national pricing strategies adopted by Foodstuffs and WWNZ may facilitate coordinated pricing conduct.<sup>86</sup> FSNI disagrees that its Island-wide pricing strategy facilitates accommodating conduct. This is consistent with the Commission’s finding in the draft report that there was no evidence of such conduct.<sup>87</sup>

37 Further, as explained by HoustonKemp in its report:<sup>88</sup>

37.1 the literature Commissioner Small refers to uses a highly simplified parameterised example, which is difficult to apply to the complexities and uncertainties of the grocery sector in New Zealand in practice, such as extensive cross-shopping and the sheer number of local markets and SKUs,<sup>89</sup>

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<sup>81</sup> [REDACTED].

<sup>82</sup> Draft report at [7.52].

<sup>83</sup> Draft report at [8.138] and Attachment E.

<sup>84</sup> See, for example, FSNI submission on the draft report at [300] and WWNZ submission on the draft report at [29.2.1]; and Mr Gluckman (WWNZ) at lines 25 to 30, page 8 of the transcript from the Retail Grocery Market Study Conference, Day 1 (21 October 2021).

<sup>85</sup> <https://www.nzherald.co.nz/business/foodstuffs-and-countdown-dump-supermarket-advertising-agencies-for-new-ones-in-major-shake-up/4QCCUJBQM4FUHSSTEGDVXEWCBU/>

<sup>86</sup> Commissioner John Small at lines 28–33, page 36 of the transcript from the Retail Grocery Market Study Conference, Day 1 (21 October 2021).

<sup>87</sup> Draft report at [5.158]–[5.161].

<sup>88</sup> HoustonKemp Empirical evidence of grocery sector competition – further analysis at section 4.

<sup>89</sup> At section 4.1.

37.2 retailers with multiple stores may adopt uniform pricing for a variety of reasons other than to engage in coordination, including to minimise costs, increase customer satisfaction, and due to the difficulties of measuring local demand.<sup>90</sup> Other regulators have accepted that national or uniform pricing can be adopted for reasons other than weakening competition,<sup>91</sup> and

37.3 it is likely to be very difficult to coordinate in the New Zealand retail grocery sector,<sup>92</sup> consistent with the Commission's preliminary findings in the draft report.<sup>93</sup> HoustonKemp demonstrates that it would be difficult for grocery retailers to reach an agreement<sup>94</sup> and monitor compliance with the agreement and punish cheating.<sup>95</sup> In addition, there are a number of other retailers exerting competitive pressure on WWNZ and Foodstuffs, and no material barriers to entry or expansion, undermining the potential profitability of any such coordination.<sup>96</sup>

***Stability of market shares does not mean that major retailers are not competing closely***

38 The Commission notes that the overall stability of the major retailers' market share suggests they are not competing closely.<sup>97</sup> FSNI disagrees and notes that statistics on cross-shopping show that there is a large degree of competition between the major retailers. Further, the Commission's reliance on market shares is misplaced, and not supported by the evidence:

38.1 FSNI has already expressed serious reservations about the accuracy of the market share data. However, in any event, Table 5.2 of the draft report (the Stats NZ assessment) demonstrates that the major retailers' combined share varies from one year to the next by approximately three to six percent,<sup>98</sup>

38.2 the market share data, which is presented in a high-level, aggregated way (Island-wide, or national) on an annual basis will mask:<sup>99</sup>

- (a) fluctuations in market shares which can vary week from week as retailers monitor sales and the conduct of other competitors on a weekly basis and react quickly. For example, [REDACTED],<sup>100</sup>
- (b) variation of market shares because of the exclusion of specialist grocery retailers,<sup>101</sup>

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<sup>90</sup> At section 4.1.2.

<sup>91</sup> At section 4.3.

<sup>92</sup> At section 4.2.

<sup>93</sup> Draft report at [4.35–4.36], [4.55].

<sup>94</sup> HoustonKemp Empirical evidence of grocery sector competition – further analysis at section 4.2.1.

<sup>95</sup> At section 4.2.2.

<sup>96</sup> At section 4.2.3.

<sup>97</sup> Draft report at [5.93].

<sup>98</sup> Draft report at figure 5.2.

<sup>99</sup> See HoustonKemp Empirical evidence of grocery sector competition – further analysis at section 5.

<sup>100</sup> HoustonKemp Empirical evidence of grocery sector competition – further analysis at [292(a)] and [295(b)]; referring to [REDACTED].

<sup>101</sup> At [293].

- (c) the extent of cross-shopping between the major retailers. The effect of cross-shopping will be “cancelled out” in market share data to the extent some consumers switch in one direction, and other consumers switch in the opposite direction,<sup>102</sup>
- (d) dynamic competition within certain product categories (food and non-food), which each make up a small proportion of a large number of SKUs, and
- (e) fluctuation of particular retailers where the market shares of the major retailers and other grocery retailers have been aggregated,<sup>103</sup> and

38.3 instead, the market share data, as discussed above, is limited in scope, focuses on the physical stores nationally and there is still a geographic dimension to how customers purchase groceries. As such, the high-level shares do not capture variations in local competition (or the nuances between local and national competition). FSNi notes that local competition is changing constantly with the growing presence of online platforms such as Supie.

- 39 Put another way, summing a large number of random variations in market share at a local level, is likely to give a national figure that does not change very much over time.<sup>104</sup> To more accurately assess whether market shares are stable, the Commission should look at local market shares split by banner.<sup>105</sup> At a regional level, given the data available, HoustonKemp demonstrates that market shares fluctuate weekly for each banner.<sup>106</sup> For example, for PAKn'SAVE in Auckland, it is not uncommon for market share to [REDACTED], with some weekly changes [REDACTED].<sup>107</sup>

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<sup>102</sup> At [295(a)].

<sup>103</sup> At [295(c)].

<sup>104</sup> At section 5.2.

<sup>105</sup> At [297].

<sup>106</sup> At section 5.2.

<sup>107</sup> At [299].

[REDACTED].

*Figure 3: [REDACTED]*

- 40 Aggregating market shares at an island or national level means that some of the variation at a local or regional level is lost.<sup>108</sup>
- 41 It is also not clear from the draft report what level of stability of market shares would be indicative of a competition problem. Table 5.2 of the draft report demonstrates fluctuations of three to six percent year to year. Further HoustonKemp notes that:<sup>109</sup>
- 41.1 setting aside competition, market shares may be more stable where:
- (a) firms respond quickly to losing market share if a loss of sales has a significant effect on its profits,
  - (b) firms respond quickly to competitors,
  - (c) consumer demand is stable, and
  - (d) firms have similar cost bases (i.e. a similar cost of providing a product).<sup>110</sup>
- 42 Therefore, stable market shares are not in and of themselves indicative of a lack of competition. The Commission has not explored the cause of stable market shares to determine whether it is a problem, such as because of a small proportion of customers switching or accommodating behaviour – both of which FSNi demonstrates do not occur (discussed above).<sup>111</sup>

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<sup>108</sup> At [302].

<sup>109</sup> At [305].

<sup>110</sup> At [306].

<sup>111</sup> At [307]–[311].

- 43 Finally, HoustonKemp notes that market shares are stable in other industries and countries. For example, the market shares for groceries in Great Britain have been stable over a similar period to that looked at in the draft report, notwithstanding that there are a much larger number of retailers.<sup>112</sup>

	Jan-17	Jan-18	Jan-19	Jan-20	Jan-21
Tesco	28.1	27.9	27.7	27.3	27.3
Sainsbury's	16.5	16.3	15.9	15.8	15.9
Asda	15.6	15.5	15.3	14.9	14.3
Morrisons	10.9	10.8	10.6	10.3	10.4
Aldi	6.2	7	7.5	7.9	7.4
The Cooperative	6	5.8	5.9	6	6
Lidl	4.5	5	5.3	5.9	6.1
Waitrose	5.3	5.2	5.1	5	5
Iceland	2.3	2.3	2.3	2.3	2.5
Symbols and Independent	1.8	1.6	1.5	1.6	1.7
Other Multiples	2.9	2.7	3.6	1.7	1.8
Ocado				1.4	1.6

*Table 1: Market share of grocery stores in Great Britain*

#### **Additional information and evidence**

- 44 In the following sections, FSNI provides additional information and evidence on three topics addressed in the draft report and/or at the conference:
- 44.1 the Frontier Economics analysis. FSNI explains why this analysis does not support the propositions the Commission seeks to draw from it, and is consistent with workable competition,
- 44.2 QRS competition. FSNI explains why QRS competition is a normal part of the competitive process and valued by consumers, drawing on market study reports from other competition authorities. As such, FSNI notes that the Commission's competition analysis has, to date, been incomplete as it has not sought to undertake any assessment of the level of QRS competition – and instead has focussed solely on price, and

<sup>112</sup> At [312]; Table 5.1.

- 44.3 future competitors. FSNI explains that the business models of participants in the retail grocery market are changing and, as a result, future competitors are unlikely to look like FSNI.

***The Frontier Economics analysis does not support the propositions the Commission seeks to draw from it and is consistent with Island-wide pricing***

- 45 Based on its comments at the conference (as well as in the draft report), the Commission appears to rely on the Frontier Economics analysis for the following propositions:

- 45.1 local market concentration has little effect on price:<sup>113</sup>

- (a) between the major retailers, which is consistent with the Commission's preliminary finding that price competition between the major retailers is less than in a workably competitive market, and
- (b) between major retailers and other retailers, which confirms that the aggregated effect of competition by other grocery retailers in local markets is not sufficient to increase the intensity of competition at either a local, regional or national level, and

- 45.2 entry and exit has little effect on price. This is inconsistent with the Commission's expectation that prices would increase in a local market if a retailer that was previously a strong competitor exits and that prices would fall if a retailer that is expected to be a strong competitor enters a local market.

- 46 Frontier Economics' analysis does not support the propositions the Commission seeks to draw from it:

- 46.1 first, Frontier's methodology was flawed and contained significant limitations, and

- 46.2 second, Frontier's results were at best inconclusive. Further, Frontier's results are largely consistent with the fact that the major retailers set prices at an Island-wide level (FSNI, FSSI) or national level (WWNZ), and therefore reflect that price competition tends to mostly take place at Island-wide/national level (although FSNI stores also have the ability to also compete locally).

- 47 As set out in HoustonKemp's report, there are a number of limitations with Frontier's analysis, which make it difficult to interpret its results with any confidence. By way of example:

- 47.1 Frontier focussed on the assessment of concentration on local prices, but overlooked the effect on national prices. This is significant because the Commission notes in the draft report that both of the major retailers set prices on a national/Island-wide basis.<sup>114</sup> As such, variation in local prices would not be expected as a result of variation in local concentration.<sup>115</sup> HoustonKemp notes that in a similar assessment in its 2008 market study, the ACCC specifically noted that national price competition would not be captured by the assessment,<sup>116</sup>

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<sup>113</sup> Conference transcript day 1, page 31 from line 21; draft report at [5.124]-[5.131]

<sup>114</sup> Draft report at [4.35]-[4.36].

<sup>115</sup> HoustonKemp Empirical evidence of grocery sector competition – further analysis at [108]-[114].

<sup>116</sup> HoustonKemp Empirical evidence of grocery sector competition – further analysis at [166].

- 47.2 Frontier only analysed price competition, and did not take into account competition on QRS elements of the retail offer. This is significant because the Commission notes that other retailers compete with the major retailers predominantly on QRS factors, and the major retailers differentiate themselves in part on non-price factors.<sup>117</sup> As such, there may well be non-price competitive response to local market concentration, or entry/rebranding, which is not captured by Frontier's study, which focused on price alone,<sup>118</sup> and
- 47.3 Frontier excluded unpackaged fruit, vegetables and meat from its analysis.<sup>119</sup> These are important categories, where there is strong evidence of local price competition (discussed above). Further, Frontier tested for price effects across a price index, comprised of thousands of SKUs, which will not be sensitive to strong competition in particular product categories.<sup>120</sup>
- 48 Against that background, FSNI now considers each of Frontier's analyses and the conclusions on competition that can be drawn.

*Local market concentration analysis*

- 49 In terms of methodology, Frontier assessed local market concentration using two different methods. However, neither method provided a true measure of concentration. In particular, neither method considered the cumulative effect of all retailers competing for grocery sales in a local market. Further, Frontier only considered the effect of other retailers in its second method:
- 49.1 distance weighted share of supply: Frontier's first method assessed how concentration of a major retailer affected prices of the focal store. This method therefore only measured how large Woolworths' (or Foodstuffs') sales are, relative to the sales of Foodstuffs (or Woolworths) in a particular area, and any impact this had on price. This measure did not take into account any of the other retailers which the major retailers compete with, and
- 49.2 proximity: the second measure assessed how the focal store's proximity to other stores affected prices at the focal store. Frontier considered a number of different variations including:
- (a) proximity to the closest store from each of the six major banners,<sup>121</sup>
  - (b) in the first variation, proximity to closest store from each of the six major banners, and the closest other supermarket, closest butcher and closest bulk food store,
  - (c) in the second variation, proximity to the stores in the first variation and proximity to the closest The Warehouse, Chemist Warehouse and convenience stores, and
  - (d) in the third variation, proximity to the second closest store of each banner.

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<sup>117</sup> HoustonKemp Empirical evidence of grocery sector competition – further analysis at [115]-[120].

<sup>118</sup> HoustonKemp Empirical evidence of grocery sector competition – further analysis at [172]-[173].

<sup>119</sup> Frontier Economics report at page 10.

<sup>120</sup> HoustonKemp Empirical evidence of grocery sector competition – further analysis at [135]-[137].

<sup>121</sup> I.e. PAK'nSAVE, New World, Four Square, Countdown, Fresh Choice and SuperValue.

However, Frontier did not consider the cumulative effect of the number of other retailers in a local market (i.e. a true concentration measure). Further, Frontier notes that it rejected the variations involving other retailers because they did not fit the data as well as only using proximity to the closest of each of the six major banners.

- 50 In terms of competition between the major retailers, the Commission relies on Frontier's analysis for the conclusion that "*local market concentration appears to have little or no effect on price competition between the major grocery retailers*".<sup>122</sup> The Commission noted this was consistent with their preliminary finding that price competition between the major retailers was less than it would expect for a workably competitive market. That conclusion is not available on the evidence as Frontier did not reach a conclusive finding on each of its concentration measures:

50.1 distance weighted share of supply:

- (a) Frontier only found a statistically significant positive result at the 5% or 1% level in around half of its results i.e. where prices were higher, and that was statistically significant.<sup>123</sup> In particular, Frontier found that there tended to be higher prices at Four Square, New World and SuperValue when the major retailer, to which those banners belong, has a greater share of total supply of Foodstuffs and WWNZ in a local area,
- (b) however, Frontier did not find any consistent effects for the other major grocery retail banners – PAK'nSAVE, Countdown and Fresh Choice,<sup>124</sup> and
- (c) therefore, Frontier's results were mixed, and do not provide a sound basis for any conclusions,<sup>125</sup>

50.2 proximity:

- (a) of the 18 interactions between competitor banners, Frontier found six interactions that were statistically significant and negative, i.e., where prices were lower. In particular, Four Square stores tend to have lower prices when a FreshChoice or SuperValue is located nearby, and that Countdown, FreshChoice and SuperValue tend to have lower prices when a New World store is located nearby.
- (b) however, as with the first measure Frontier did not find consistent effects for the other major grocery retailers, and notes that "relationships between stores of other banners are less clear",<sup>126</sup> and

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<sup>122</sup> Draft report at [5.125].

<sup>123</sup> HoustonKemp Empirical evidence of grocery sector competition – further analysis at [139].

<sup>124</sup> Draft report at [5.121].

<sup>125</sup> HoustonKemp Empirical evidence of grocery sector competition – further analysis at [140].

<sup>126</sup> Frontier report at [3.9].

- (c) again, this does not provide a sound basis for reaching conclusions – the results were mixed.<sup>127</sup> The large number of statistically insignificant results suggest that more evidence is required before a conclusion can be drawn.<sup>128</sup>

51 In terms of competition between the major and other retailers, the Commission attempts to draw from the concentration analysis the conclusion that “*the aggregated effect of competition by other grocery retailers in local markets is not sufficient to increase the intensity of competition at either a local, regional or national level*”.<sup>129</sup> However, that conclusion cannot be drawn from Frontier’s analysis because:

- 51.1 the first concentration measure did not consider other retailers at all,
- 51.2 while the second concentration method considered other retailers, it does not provide a true measure of concentration. Rather, it measures the distance between the focal store and the closest store of a range of other retailers, without considering how many other retailers are in each local market,<sup>130</sup> and
- 51.3 all of Frontier’s results from this method were statistically insignificant – with three exceptions:<sup>131</sup>
  - (a) proximity to a butcher lowered prices at FreshChoice (full sample), and
  - (b) proximity to a bulk foods store lead to higher prices at Countdown (full and rural sample).

52 Further, the results of Frontier’s analysis are consistent with the major retailers operating a national, or Island-wide, pricing policy:

- 52.1 concentration, between the major retailers, and between banners, would not be expected to have a significant effect on price because both FSNI and WWNZ compete nationally on price. Frontier’s analysis does not take into account that the major retailers’ have a national/Island-wide pricing policy,<sup>132</sup>
- 52.2 in terms of competition with other retailers, as explained above, Category Managers consider other retailers’ pricing, and take feedback from Members, in setting Island-wide prices. This means that competition from retailers who are only present in some locations will be factored in FSNI’s pricing at an Island-wide level. An example of this was Chemist Warehouse’s entry in New Zealand, which occurred in Auckland initially. FSNI responded to its entry, with North Island wide price changes, and
- 52.3 while Members have the ability to discount below the RRP in response to local price competition, which is encouraged by FSNI, this is unlikely to have shown up in Frontier Economics’ analysis because:
  - (a) other retailers were not included in the first concentration measure,

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<sup>127</sup> HoustonKemp Empirical evidence of grocery sector competition – further analysis at [159].

<sup>128</sup> HoustonKemp Empirical evidence of grocery sector competition – further analysis at [151].

<sup>129</sup> Draft report at [5.126].

<sup>130</sup> HoustonKemp Empirical evidence of grocery sector competition – further analysis at [99].

<sup>131</sup> Frontier report at page 31 and footnote 35.

<sup>132</sup> See generally HoustonKemp Empirical evidence of grocery sector competition – further analysis at [154]-[173].

- (b) the second concentration measure assessed the effect of the closest other retailer in certain categories, rather than the effect of all other retailers. Further, Frontier considered the effect of that retailer on the price index of each banner store. The price index is determined using the prices of thousands of core grocery items, many of which are not sold by the other retailers, who stock only particular product categories. This means that Frontier's results will not be very sensitive to local price competition in a particular product category. For example:
- (i) Frontier assessed whether the presence of a Chemist Warehouse store affected the price index of the banner stores. However, Chemist Warehouse only stocks personal care and household products. Therefore, any price effect would be limited to those categories. Such an effect is unlikely to be significant to the overall price index of the store – although Chemist Warehouse may pose a real constraint in the categories it competes in, and
  - (ii) Frontier assessed the effect of the closest butcher and closest other supermarket on the price index of the banner stores. But, Frontier excluded fresh fruit, vegetables and meat that were not packaged and identified with a brand name from its analysis. This is a material exclusion, which means that it is unsurprising Frontier did not find butchers and other supermarkets caused a price effect at the banner store. In particular:
    - (A) in the case of butchers, the exclusion means that most of the products stocked in store (unbranded meat products) were not included in Frontier's analysis,
    - (B) in the case of other supermarkets, this means that a significant proportion of the products were excluded. For example, Farro Fresh and Moore Wilson's, stock a large range of unpackaged and unbranded produce and meat products.

As such, it is not surprising that Frontier found that the presence of the closest other retailer did not have a significant impact on the overall price index at the banner store.

#### *Entry and exit analysis*

- 53 In terms of entry and exit, Frontier looked at the effect of 32 entry and exit events on pricing at the closest competitor store in the 12 months before the event and the 12 months after the event. Thirty of the 32 entry or exit events were related to PAK'nSAVE, New World and Countdown, and two of the events related to Farro Fresh.
- 54 As set out in HoustonKemp's report, there are a number of limitations with the entry and exit analysis including that:<sup>133</sup>
- 54.1 Frontier's analysis only considers whether local market entry or exit has an effect on price, without considering the non-price elements of competition, i.e., quality, range and service. It therefore overlooks any non-price response to entry or exit. The Competition Commission in its 2008 market study found that UK supermarkets often

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<sup>133</sup> HoustonKemp Empirical evidence of grocery sector competition – further analysis at section 3.2.2.

responded to local entry with increased competition on non-price factors, including with store refurbishments, food counter initiatives and increased staffing,<sup>134</sup>

- 54.2 Frontier's analysis only considers the 12 months prior to entry. However, supermarket entry has a significantly longer lead time, and reaction by a close competitor may take place pre-emptively, before the 12 month period that Frontier considered,<sup>135</sup>
- 54.3 a number of Frontier's entry and exit events were not relevant to the question of competition between the major retailers because:
- (a) they occurred within the same banner – Frontier analysed the effect of the entry of a New World on the prices of another New World on four occasions, and
  - (b) they occurred within Foodstuffs – Frontier assessed the effect of entry/exit of New World on the prices of PAK'nSAVE and vice versa,
- 54.4 Frontier did not control for movements in the price of an individual store attributable to other events or decisions. For example, Frontier note that a renovation at [REDACTED] may have caused prices to increase at the same time as [REDACTED], reducing the validity of the results,
- 54.5 Frontier arbitrarily define price changes to be economically significant when they are larger than 0.5%. This means that a number of statistically significant results are excluded from their discussion. A movement in prices of a small number of product categories at a competitor store could produce a small but statistically significant result, which would not be considered.
- 55 Putting the limitations to one side, Frontier considered 46 competitor price effects relating to the 32 events, and of these, 8 were statistically insignificant. Of the remaining 38 results, eight related to the effect of [REDACTED]. That leaves 29 results. These results are summarised in the table below.<sup>136</sup> [REDACTED].

Event type	Number of events	Commission predicted result <sup>137</sup>	Actual result
Exit	[REDACTED]	Prices increase	[REDACTED]
Entry	[REDACTED]	Prices decrease	[REDACTED]
Rebranding	[REDACTED]	Unclear – depends on the specific brand change that occurred	[REDACTED]

<sup>134</sup> UK Competition Commission *The supply of groceries in the UK market investigation* (2008) (**UK Competition Commission investigation (2008)**) at [6.39]-[6.43].

<sup>135</sup> The Commission acknowledges this, but notes that all studies have limitations and that it would expect some of the effect to occur in the period studied: draft report, footnote 327.

<sup>136</sup> [REDACTED].

<sup>137</sup> Draft report at [5.127].

56 The Commission concludes, based on this analysis, that “Frontier... found that there was no systematic relationship between entry, exit or rebranding and the prices charged by close competitor store in the 12 months after the event. This is consistent with their finding that local market concentration levels appear to have little or no effect on price competition between most of the major grocery retailer banners”.<sup>138</sup> Again, this conclusion is not open on the evidence:

56.1 [REDACTED], and

56.2 Frontier’s analysis overlooks that the major retailers operate a national, or Island-wide, price policy. This means that entry or exit of PAK’nSAVE, New World and Countdown would not be expected to have a significant effect on the major retailers’ prices at a close competitor store. For example, a PAK’nSAVE store would not be expected to increase prices if a Countdown store in that catchment closed, or conversely to decrease prices if a Countdown opened in that catchment. The competitive constraint of Countdown on PAK’nSAVE’s prices is already taken into account when prices are set at an Island-wide level. That means that, for example, consistent prices would be expected in a town with only one major retailer and a town with a banner store from each of the major retailers.

57 The Commission concludes in respect of the two Farro Fresh entry events that “the lack of evidence that entry by two new Farro Fresh stores in Auckland constrained the price of the major grocery retailers in close proximity to these new openings seems to support the view that there is little evidence that other grocery retailers have an effect on the prices set by the major grocery retailers”.<sup>139</sup> In respect of Farro Fresh:

57.1 Frontier overlooks that Farro Fresh focuses its competition on quality, range and service aspects of the retail offer, ahead of price. Therefore, its entry would not be expected to have a significant price effect, and

57.2 this was a very small sample size, relating to two entry events of a single retailer. As such, the results cannot be used to support an assertion that other retailers generally do not affect the price set by the major retailers.

***QRS competition is a normal part of the competitive process, and is valued by consumers***

58 Competition between all grocery retailers takes place on price and non-price dimensions of the grocery retail offer. A common theme in the draft report is that competition on QRS is somehow less meaningful, or less preferred, than competition on price.<sup>140</sup>

59 FSNI disagrees with this conclusion. In particular, it is clear that consumers place a high value on the non-price dimensions of the retail offer. As such, differentiation on these

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<sup>138</sup> Draft report at [5.131].

<sup>139</sup> Draft report at [5.132].

<sup>140</sup> For example, the Commission notes that:

- its consumer research shows that many consumers would prefer price competition rather than product and service differentiation (draft report at [3.145]), and
- differentiation of the retail grocery offer between major retailers and other retailers weakens potential competition between them as they compete for consumers on different shopping missions (draft report at [5.59]).

factors is a sign of workable competition between retailers, and is not less meaningful than price competition.<sup>141</sup>

- 60 This is consistent with the approach taken by overseas competition authorities when assessing competition in the retail grocery market. For example, the ACCC assessed drivers of store choice via a consumer survey, and used those results to reach a conclusion that non-price dimensions are important to consumers. The survey results in New Zealand and Australia, and corresponding conclusion in these studies, are set out in the table below.

	ACCC	Commerce Commission
<b>Survey results</b>	<p>The ACCC's survey asked respondents to identify factors as "very important" when choosing where to shop for groceries. While ~80% of respondents rated price as very important, high proportions of respondents rated other factors as very important.<sup>142</sup></p> <ul style="list-style-type: none"> <li>• "food quality" – 90%,</li> <li>• "store characteristics, cleanliness, layout etc" – close to 80%, and</li> <li>• "range of brands", "range of types of products", "availability of favourite brands" and "parking" – between 60-80%.</li> </ul>	<p>One question asked consumers to select from a range of 19 options to reflect why they chose to shop at their main store. Respondents were able to select as many reasons as they felt applied. While 30% of respondents selected "low prices overall" as a reason for choosing their main store:</p> <ul style="list-style-type: none"> <li>• there were other factors that more widely selected than price: <ul style="list-style-type: none"> <li>○ "convenient/easy to get to" – nearly 50%,</li> <li>○ "familiarity with store/service" – 46%, and</li> <li>○ "easy parking" – 45%, and</li> </ul> </li> <li>• there were many other factors that were rated similarly to price: <ul style="list-style-type: none"> <li>○ "wide choice of products" – 34%,</li> <li>○ "good value for money" – 30%,</li> <li>○ "good quality products" – 29%,</li> <li>○ "good specials" – 29%,</li> <li>○ "the store is pleasant to be in" – 28%, and</li> <li>○ "open at convenient times" – 27%.</li> </ul> </li> </ul>
<b>Conclusion</b>	<p>The ACCC concluded that competition on non-price dimensions is a significant element of competition in the grocery industry and provided supermarkets with important opportunities to compete.<sup>143</sup> In particular:</p> <ul style="list-style-type: none"> <li>• specialty stores (butchers, fishmongers, bakeries, greengrocers, produce markets, pharmacies and Asian grocers) tend to compete with the major retailers on quality and service offering. These specialty stores exerted competitive pressure on</li> </ul>	<p>The Commission concluded that respondents consider convenience or price as their main drivers for their choice of main store.<sup>146</sup></p>

<sup>141</sup> See generally HoustonKemp Empirical evidence of grocery sector competition – further analysis at section 2.

<sup>142</sup> Australian Competition and Consumer Commission *Report of the ACCC inquiry into the competitiveness of retail process for standard groceries* (July 2008) (**ACCC inquiry**), Chart 4.2.

<sup>143</sup> ACCC inquiry at pages 73-74.

<sup>146</sup> Draft report at [F5.2] and [2.5].

	ACCC	Commerce Commission
	<p>supermarkets primarily in the fresh category,<sup>144</sup> and</p> <ul style="list-style-type: none"> <li>although the major retailers compete on price, much of the competition between them is on non-price aspects of the retail grocery offer. Non-price attributes offer supermarkets some scope to differentiate their offer and influence consumers' decisions about where to shop. This often involves significant investments by supermarkets, which pay particular attention to non-price aspects such as convenience and the freshness of products.<sup>145</sup></li> </ul>	

61 As the table demonstrates, the Commission adopted the same methodology in its market study, obtained broadly similar results to those in Australia, but reached a different conclusion. To the contrary, FSNI's view is that the results demonstrate that New Zealand consumers like their overseas counterparts place high value on the wider QRS elements of the retail grocery offer.

62 To take another example, the UK Competition Commission's consumer survey in its 2000 study asked consumers which factors influenced their decision about where to do their main grocery shopping. The survey found that, while 58% of respondents identified prices charged as a factor, other factors were also significant determinants affecting store choice, including:<sup>147</sup>

62.1 within easy and convenient reach of home – 55%,

62.2 a large range of grocery products to choose from – 45%, and

62.3 availability of sufficient car-parking space (38%), products I want always in stock (36%) and flexible opening hours (36%).

63 The UK study concluded that the main factor and “most likely influential determinant of store choice” is the ability to one-stop shop. Prices charged, convenience and a wide range of grocery products were also found to be “relatively significant determinants affecting store choice”.<sup>148</sup> The UK Competition Commission adopted a wide range of measurement techniques to identify consumer preferences towards elements of the retail offer, recognising the importance of non-price competition.<sup>149</sup> In its 2008 study, the UK Competition Commission similarly emphasised the importance of PQRS elements on the nature of competition between major retailers.<sup>150</sup>

<sup>144</sup> ACCC inquiry at page 77.

<sup>145</sup> ACCC inquiry at pages 72–74.

<sup>147</sup> UK Competition Commission *Supermarkets A report on the supply of groceries from multiple stores in the United Kingdom* (October 2000) (**UK Competition Commission investigation (2000)**) at Appendix 4.2 at [15].

<sup>148</sup> UK Competition Commission investigation (2000) at Appendix 4.2 at [14] and [15].

<sup>149</sup> UK Competition Commission investigation (2000) at [6.121].

<sup>150</sup> UK Competition Commission investigation (2008)) at [3.39], [4.16].

64 FSNI's view is that the results from the Commission's consumer survey suggest that consumers value QRS factors. Therefore, competition on those factors is important. However, the Commission has concluded the opposite, finding that QRS differentiation is a way to avoid competing and that customers prefer price competition.

65 The Commission has itself previously outlined the importance of non-price competition in the grocery market. In the *Foodstuffs and Woolworths (separately) / Warehouse decision* the Commission took the view that:<sup>151</sup>

In the case of supermarkets, product range and quality, service levels, store layout and convenience are all important dimensions of competition as well as price. This is illustrated by the applicants operating different types of supermarkets, such as discount and full service stores.

66 And in 2019, the UK Competition and Markets Authority assessed the proposed merger between ASDA and Sainsbury by considering the potential effect on quality, range and service, as well as price.<sup>152</sup>

67 As such, FSNI considers it is a normal part of the competitive process for major retailers, and other retailers, to differentiate their retail offering based on non-price dimensions. This differentiation does not reduce competition between retailers – the competition is multi-dimensional.<sup>153</sup> Differentiation on non-price dimensions is a form of a competition, providing consumers with more choice to match their preferences, and which the consumer survey demonstrates is equally important to consumers as price competition, if not more so.<sup>154</sup>

68 However, the Commission has not placed sufficient weight on non-price dimensions of competition.<sup>155</sup> In particular, it has not attempted to analyse in a meaningful, empirical manner the extent of competition between retailers on the basis of quality, range and service.<sup>156</sup> As such, the Commission's assessment of competition is incomplete.

***Successful future competitors are unlikely to look like FSNI***

69 Another theme at the conference (as well as in the draft report) was the notion that other retailers need to “look like” the major retailers in order to be able to compete with them, i.e. have bricks-and-mortar stores, with a full range of groceries to compete for a main shop, and a significant scale or geographic presence. For example, some of the questions at the conference asked what an “optimal competitor” would look like.<sup>157</sup>

70 In FSNI's experience, competition in the retail grocery market comes in all shapes and sizes. There is no one “optimal competitor”, nor a business model that is required to compete. This is especially the case given that consumers purchase their groceries by way

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<sup>151</sup> Commerce Commission *Foodstuffs (Auckland) Ltd, Foodstuffs (Wellington) Co-operative Society Ltd and Foodstuffs (South Island) Ltd; The Warehouse Group Limited* Decision Nos 606 & 607 (8 June 2007) at [190].

<sup>152</sup> UK Competition and Markets Authority *Anticipated merger between J Sainsbury PLC and Asda Group Ltd*, Final report, April 2019 at [21]; see also HoustonKemp Empirical evidence of grocery sector competition – further analysis at [73]–[75].

<sup>153</sup> See HoustonKemp Empirical evidence of grocery sector competition – further analysis at section 2.4.

<sup>154</sup> HoustonKemp Empirical evidence of grocery sector competition – further analysis at [79] and [80].

<sup>155</sup> HoustonKemp Empirical evidence of grocery sector competition – further analysis at [92].

<sup>156</sup> HoustonKemp Empirical evidence of grocery sector competition – further analysis at [83].

<sup>157</sup> Dr Johnston (Commissioner) at lines 29 to 31, page 24 of the transcript from the Retail Grocery Market Study Conference, Day 6 (1 November 2021).

of shopping missions, as demonstrated by the fact that FSNI's average basket size for 2019 was \$45.

- 71 Further, the industry is dynamic, with e-commerce and other technology solutions on the rise. The way that consumers buy their groceries is changing. Many new competitors are entering the market compete with a different business model to FSNI. FSNI expects this trend to continue – as is the case overseas. Each of these competitors constrains FSNI in a different way and, in combination, they provide a significant competitive constraint.
- 72 In particular:
- 72.1 Supie, and The Honest Grocer, compete for the main shop with a purely online offer. As at 19 October 2021, Supie reported 1700% growth in weekly sales over lockdown,<sup>158</sup>
- 72.2 Costco will compete for different shopping missions, including the main shop, with a very different business model to traditional supermarkets. Costco operates a paid membership model, which allows it to offer lower prices, and has a more limited selection of products across a wide range of merchandise categories. Costco has a strong private label presence through its Kirklands brand,
- 72.3 Briscoes has announced plans to expand into gourmet foods, starting with baking mixes,<sup>159</sup>
- 72.4 Circle K has announced plans to open 100 stores in New Zealand.<sup>160</sup> It will compete for shopping missions with a convenience style offering, with a particular emphasis on ready to eat meals,
- 72.5 Geezy Go will compete with an online only offer, using dark stores, and with a 20-minute delivery proposition. Geezy Go has started developing its first site in the Auckland CBD, expected to open in January 2022, and has plans to enter in Wellington,<sup>161</sup>
- 72.6 Mackzan will compete similarly with an online only offer, delivering food from restaurants and groceries “within a couple of hours”.<sup>162</sup> Mackzan is launching in Auckland in 2022,
- 72.7 meal delivery providers, like UberEats, have moved into grocery delivery, and DeliverEasy has noted its intention to also expand into groceries,<sup>163</sup>
- 72.8 My Food Bag has expanded its offering beyond meal kits to include ready-made meals and grocery items, including fruit boxes, breakfast foods, snacks, bread and meat (My Food Bag Kitchen).<sup>164</sup> The same trend is observable with meal kit

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<sup>158</sup> <https://business.scoop.co.nz/2021/10/19/supie-sees-skyrocketing-demand-during-lockdown/>

<sup>159</sup> <https://supermarketnews.co.nz/news/its-not-a-secret-anymore/>

<sup>160</sup> <https://www.foodticker.co.nz/circle-k-in-multi-million-dollar-nz-franchise-drive/>

<sup>161</sup> <https://www.foodticker.co.nz/online-grocer-geezy-go-to-bring-20-minute-delivery-to-nz/>

<sup>162</sup> <https://www.mackzan.com/about/>

<sup>163</sup> <https://www.foodticker.co.nz/covid-came-when-the-market-was-starting-to-mature-delivereasy-and-the-rise-and-rise-of-delivery/>

<sup>164</sup> <https://www.nzherald.co.nz/business/my-food-bag-expands-into-groceries-targeting-growth-from-37b-retail-food-sector/UDZ6EOYNJQY6BOFJP2SIDWSGOE/>

providers in overseas markets. For example, Hello Fresh in the United States has begun offering groceries as a part of its service,<sup>165</sup>

72.9 online platforms of all types, for example pet.co.nz or nappies.co.nz, which stock particular product categories,

72.10 increasingly suppliers are creating with direct to consumer platforms, such as Ecostore for cleaning products, Sanford & Sons or Takitimu Seafoods for seafood, Supreme Coffee for coffee, Neat Meat and Pure South for meat, and Fruit Guys and Bounty Box for produce.

73 It is important that the Commission adopts a forward-looking view of the market, which takes account of these trends in its competition analysis, and resists the temptation to focus on what it would take to foster a “clone” of the major grocery retailers.

#### **Conclusion on nature of competition**

74 The evidence set out above demonstrates that FSNI faces strong competition across the price and non-price aspects of the retail grocery offer, from WWNZ and a wide range of other retailers. FSNI monitors and responds to that competition. As such, it is clear that the market is not a “duopoly with a fringe”, and FSNI does not treat it like one.

### **OUTCOMES IN THE RETAIL GROCERY MARKET**

#### **FSNI’s response to the discussion at the conference, and overview of this section**

75 During the conference, the Commission noted that:<sup>166</sup>

So, while we necessarily discuss all of these [indicators] individually and analyse them individually, all of them contribute together to an overall assessment as to whether or not competition is working as effectively as it can and if not, which might be able to be done to improve it. ...

But as we have noted in the draft report and others have also commented, there are quite significant challenges in [assessing] whether outcomes are consistent with competitive benchmarks. ...

We do not think it's necessary to find conclusively that outcomes are out of line with competitive benchmarks in order to find that a market is not working as well as it could.

76 FSNI agrees that no single indicator is determinative in a competition assessment, that there are challenges with assessing these outcomes, and that profitability should not be treated as a gating or threshold indicator to assess competition in a market. FSNI provided extensive feedback on the challenges with assessing the indicators, as utilised by the Commission, in its submission on the draft report, as well as commenting on the methodology and calculations themselves.

77 However, FSNI disagrees that a finding that the outcomes are consistent with competitive benchmarks provides scope to still conclude that there is no workable competition in the retail grocery market. It is necessary to conclude that, cumulatively, the outcomes are “out of line with competitive benchmarks in order to find that a market is not working as well as it could”.

<sup>165</sup> <https://www.supermarketnews.com/online-retail/hellofresh-market-debuts-adding-grocery-items-meal-kit-service>

<sup>166</sup> Dr Small (Commissioner) at lines 37 to 40, page 3, lines 4 to 6 and lines 13 to 15, page 4 of the transcript from the Retail Grocery Market Study Conference, Day 4 (27 October 2021). [REDACTED].

78 And, taken together, FSNI considers that the indicators of competition, following its submission on the draft report and further submissions below, support a finding that there is workable competition.

79 This section discusses each of the four indicators of competition. Specifically:

79.1 in relation to profitability:

- (a) FSNI agrees that profitability has a confined value as an indicator of competition, but
- (b) it is critical that the Commission assesses profitability accurately, in context, and with the correct comparators, otherwise the results will be misleading,
- (c) the Commission's method for calculating FSNI's returns both contained material errors, and was flawed in concept, and
- (d) FSNI makes a number of additional points on methodology and accuracy in response to the discussion at the conference,

79.2 international price comparisons are fraught with difficulty and in any event, say little about competition. As such, price ought not to be used as an indicator of competition. In any event, New Zealand ranks 21<sup>st</sup> in the OECD on a PPP basis,

79.3 FSNI is an innovative business and has adopted, or is in the process of adopting, most of the international innovations cited in the draft report, and

79.4 FSNI's QRS offering is consistent with workable competition.

### **Profitability**

#### ***Profitability has a confined role in a competition assessment***

80 [REDACTED]. FSNI agrees that profitability is only one indicator of competition. The draft report treated profitability as central, or foundational, to its analysis of outcomes in the retail grocery market and influenced the Commission's conclusions on price, innovation and entry and expansion. For example:

80.1 Price: "While a range of other factors may also influence price, **our analysis of profitability** and our analysis of competition later in this report, leads to our preliminary view that a lack of effective competition is contributing to higher grocery prices in New Zealand than we would expect in a workably competitive market."<sup>167</sup>

80.2 Innovation:

- (a) "However, while there is innovation in the grocery sector, including by major grocery retailers, it is primarily focussed on range and service rather than price and is in aggregate **insufficient to explain the level of excess returns earned by the major grocery retailers** over a sustained period of time."<sup>168</sup>

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<sup>167</sup> Draft report at [3.69].

<sup>168</sup> Draft report at [3.141].

- (b) “Despite lagging in digital innovation and penetration, Foodstuffs stores are earning **persistently high excess returns**... This indicates that high profits are not acting as a reward for innovation in grocery retailing...”<sup>169</sup>
- (c) “Investments aimed at improving the resilience of the grocery supply chains in New Zealand were demonstrated during the COVID-19 pandemic... However, when viewed in the context of other market observations, such as the **persistent high levels of profitability** and pricing levels discussed above, we are not persuaded that consumers are benefitting from these cost-saving investments as would be expected in a workably competitive market.”<sup>170</sup>

80.3 Entry and expansion: “The lack of recent and prospective large-scale entry by a supermarket operator despite the **high profitability of the major grocery retailers** may indicate that conditions of entry and expansion limit the scope for competition to work effectively.”<sup>171</sup>

- 81 The Commission will need to reconsider each of these findings, without the starting assumption that excess profitability suggests a certain outcome.

***It is important the Commission assesses FSNI’s profitability accurately and places it into the proper context of its business, regardless of the approach it takes to measurement***

- 82 It is critical that the Commission calculate FSNI’s profitability accurately.
- 83 That is most obviously true with respect to the accuracy of the findings in the market study i.e. overestimating profitability could lead to the unnecessary pressure for interventions, as the bigger the perceived problem is, the bigger will be the appetite and expectation for intervention.
- 84 But it is also true because of the substantial reputational repercussions for FSNI. The Commission placed significant emphasis and reliance on its inaccurate calculation of profitability in the draft report and in its presentation to the media. Interested parties, including the media and general public, will reasonably take the headline findings of the Commission’s report and presentation without any appreciation for the nuances or disclaimers to inform their commentary and view of the industry. FSNI considers that the Commission’s incorrect analysis of retail grocery profitability has caused significant damage to its brand and industry reputation. FSNI does not now have the ability to correct these views and reverse the impact on our reputation with our customers, staff, shareholders, suppliers and other external stakeholders.
- 85 For these reasons, it’s important to FSNI that the Commission’s final report accurately assess the profitability of its business, the grocery retail industry in New Zealand, and the comparisons to international competitors.

***The Commission’s method for calculating FSNI’s ROACE contained material errors, and was flawed in concept***

- 86 The Commission’s calculation of FSNI’s profitability attempted to artificially separate the retail part of FSNI’s business from the rest of the business. In doing so, the Commission:

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<sup>169</sup> Draft report at [3.156].

<sup>170</sup> Draft report at [3.171]-[3.172].

<sup>171</sup> Draft report at [6.26].

- 86.1 made material errors in its calculation,
- 86.2 assessed profitability for a part of FSNI's business that is unable to operate independently.<sup>172</sup> As a result, the Commission presented a view on profitability which did not attach to any real business, and
- 86.3 compared the returns of FSNI's "retail only" business and on the assumption that this business leases its land and building assets to the returns of the whole of WWNZ's business, and a sample of international grocery retailers who are vertically integrated and (for the international sample) are principally owners rather than renters of assets. This is a misleading comparison.
- 87 [REDACTED].<sup>173</sup>
- 88 [REDACTED].
- 89 [REDACTED],
- 90 The separate analysis performed by the Commission also does not consider the fact that aside from owning land and buildings, the Co-op owns all of the IT assets required to run the retail grocery stores. All of these assets should be attributed to assessing the returns of the grocery retail business, and this is only achieved by completing the whole of business analysis.
- 91 FSNI considers that the only way to accurately assess its ROACE is on a whole of business basis. Calculating profitability on a whole of business basis:
- 91.1 removes the need to make assumptions regarding the non-arms' length transactions that take place between the Co-operative and the retail stores, and therefore reduces the likelihood of error,
- 91.2 reflects that FSNI is vertically integrated, and owns all of its assets. While land and building assets are owned by the Co-operative, FSNI's Members are shareholders and owners of the Co-operative, and
- 91.3 means that FSNI is treated consistently with WWNZ and the international comparator set. The Commission has assessed WWNZ, and the international comparators, appropriately on a whole of business basis, and has not to date provided a rationale for why it has attempted to artificially separate FSNI's business into inoperable parts. FSNI considers its profitability should be assessed consistently with WWNZ and international comparators, as this will allow for a meaningful comparison of the results. If the Commission does not do so, FSNI requests that the Commission provide an explanation of its rationale for artificially splitting FSNI's business, but not WWNZ's, or the international comparators.
- 92 Putting any differences in methodology to one side, FSNI requests that the Commission provide it an opportunity to be involved in reviewing the Commission's final calculations for accuracy to ensure that the final report does not contain material errors as was the case for the draft report.

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<sup>172</sup> See discussion from paragraph 232.

<sup>173</sup> [REDACTED].

***The Commission has materially overstated FSNI's returns, and those of the NZ grocery retail market***

- 93 The draft report stated that FSNI's ROACE (returns) was approximately 25%, when in fact it is less than half of this – a range of 9-12% depending on whether returns are assessed at book value, or adjusted for the market value of the assets.
- 94 It should be noted that the two other major grocery retailers also consider the Commission has incorrectly calculated their profitability. Each retailer's submission states that correctly calculated its returns are around 11%, compared to the Commission's international competitor set of 11.3%.

ROACE	NZCC	Major Grocery Retailer	
		Min	Max
Woolworths NZ	21.60%		11.20%
FSNI Retail	23.80%		
FSNI Whole of Business		9.20%	11.90%
FSSI Retail	22.60%		
FSSI Whole of Business			11.50%
<b>International Competitor Set</b>	<b>11.30%</b>		

- 95 This demonstrates that the Commission has not only materially overstated FSNI's returns, but those of the NZ grocery retail industry overall. In fact, the returns of each retailer are normal and consistent with the international comparator set.
- 96 FSNI requests that the Commission correct its analysis both in the final report, and in the public domain, when it presents its findings.
- 97 The following section addresses discussion points from the conference.

***Additional submissions on methodology and benchmarking***

- 98 FSNI addresses the following points on methodology and benchmarking:
- 98.1 FSNI is and should be treated as an asset owner, not a renter. To the extent that the Commission is concerned with determining revaluation gains and the like, it should simply use the book value of FSNI's assets, and
- 98.2 the Deloitte retail study referred to by other participants at the conference is of little relevance.
- FSNI should be treated as an asset owner*
- 99 FSNI considers it should be treated as an asset owner in any calculation of ROACE. Incenta Consulting sets out a number of reasons for this in its further report, including that:
- 99.1 it reflects reality – FSNI actually owns its assets. While stores pay a “rent” to the Co-operative, the Member who owns and operates that store is also a part owner in the Co-operative, and therefore is a part owner in the underlying land and buildings. Accordingly, the “rent” paid cannot be relied upon as reflecting market rents. By contrast, the value of the land and building assets is known,<sup>174</sup> and
- 99.2 it is likely that if the Commission produces returns based on a renter assumption – and does not apply IFRS 16 – the resulting returns will be misinterpreted. Incenta explains that it is unlikely to be well understood that ROACE calculated on a renter

<sup>174</sup> Incenta Consulting report, November 2021, at [19(c)].

assumption – with a high level of leverage – will produce a high return. In other words, it is not well understood that a highly levered return of 25% or more may well be completely consistent with returns that would be expected from an effectively competitive market.<sup>175</sup>

- 100 Further, treating FSNI as an asset owner will allow for a meaningful comparison to the international comparator sample. As explained in Incenta Consulting's first report, the Commission calculated FSNI's profitability on the basis that it owned approximately 30% of its assets, then compared its return to an international sample that owned nearly 70% of its assets.<sup>176</sup> That was not an "apples with apples" comparison.

*Deloitte retail study*

- 101 During the conference, some participants made reference to a Deloitte retail study as evidence that New Zealand grocery retailers were making excessive returns.<sup>177</sup>
- 102 Incenta Consulting explains that the Deloitte report does not provide additional insight into the returns being made compared to the analysis that has been the subject of consultation. In particular:<sup>178</sup>

102.1 both of the margins referred to – EBIT margin and NPAT margin – are sensitive to either the level of leasing of assets (pre-IFRS 16) or the level of financial leverage, so adjustments will be required in order to make accurate comparisons between firms, and

102.2 there is a lack of detail in the Deloitte report as to the formulae underlying the margin values, so it is not possible to confirm the accuracy of Deloitte's assessment.

**Price**

***International price comparisons for groceries are difficult***

- 103 In the conference, as well as in the draft report, the Commission acknowledged many of the difficulties of comparing prices internationally in a non-homogenous product market,<sup>179</sup> and in particular that it is "extremely difficult to do well due to a range of challenges and particularly in the grocery sector".<sup>180</sup>
- 104 FSNI agrees. FSNI is acutely aware of the issues that may arise when carrying out price comparisons, as it regularly carries out price comparison advertising campaigns for PAK'nSAVE. Potential issues include that:
- 104.1 the products being compared may not be identical, or even substitutable, as there are a number of dimensions to a grocery product including:

- (a) pack size,
- (b) quality,

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<sup>175</sup> Incenta Consulting report, November 2021, at [19(a)].

<sup>176</sup> See Incenta Consulting report, September 2021, at [106]-[107].

<sup>177</sup> Mr Hogendijk at lines 9-16, page 46 of the transcript from the Retail Grocery Market Study Conference, Day 1 (21 October 2021). .

<sup>178</sup> Incenta Consulting report, November 2021, at section 4.

<sup>179</sup> Draft report at [3.86].

<sup>180</sup> Dr Small (Commissioner) at lines 15 to 17, page 5 of the transcript from the Retail Grocery Market Study Conference, Day 4 (27 October 2021).

- (c) nutritional value,
- (d) brand value,
- (e) packaging, and
- (f) sustainability considerations, and

104.2 comparing a “basket” of products that are not identical can materially skew the results of a grocery price comparison.

105 Further, the ICP data that the Commission has used, does not compare prices of like-for-like “baskets”. In particular, the ICP requires countries to collect prices on a range of products that the country deems “representative” or “important” and “less important”, with “representative” or “important” products given a higher weighting to calculate average price than products deemed “less important”. However, it is likely that the “importance” of grocery products will differ from country to country – what is important in New Zealand, may not be important in the Commission’s close comparator countries, including Finland, Iceland and Israel. This means the average prices reported in the ICP data are not made on a like-for-like basis.<sup>181</sup>

106 The comparison of average prices also does not capture the range of prices available to consumer in an environment where competition takes place across the PQRS spectrum. For example, given the methodology by which average prices are derived, new entry by a new high-price, high-service (or a new low-price, low-service) supermarket would increase (or decrease) average prices paid as consumers switch to it, even though under both of these scenarios, competition is clearly increasing.<sup>182</sup>

107 Consistent with these difficulties in drawing any competition-relation conclusions from international price comparisons, overseas competition authorities have cautioned against the use of this sort of analysis.<sup>183</sup> In addition to the statement from the UK Competition Commission’s 2008 market study referred to in FSNI’s submissions on the draft report,<sup>184</sup> FSNI refers to the ACCC’s 2008 findings in its market study:

107.1 the ACCC identified that grocery prices in Australia had been increasing at a faster rate than in many other OECD countries, but cautioned that food prices can increase for reasons other than the level of competition in the grocery sector,<sup>185</sup>

107.2 when it did use international price data, the ACCC used data on *changes* in price levels from the OECD or CPI sources,<sup>186</sup> and

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<sup>181</sup> HoustonKemp International comparisons of grocery prices – further report at [14]–[20].

<sup>182</sup> HoustonKemp International comparisons of grocery prices – further report at [22]–[27].

<sup>183</sup> HoustonKemp International comparisons of grocery prices – further report at [28]–[30].

<sup>184</sup> See UK Competition Commission investigation (2008) at [3.43] and [3.45], cited in FSNI’s submissions on the draft report at [126].

<sup>185</sup> ACCC Inquiry at pages 13–14.

<sup>186</sup> ACCC Inquiry at pages 25–29.

107.3 the ACCC identified that comparisons across countries are difficult but, greater insight is possible where uncontrolled factors are similar, such as between Australia and New Zealand.<sup>187</sup>

***Price should not be an indicator to assess whether there is workable competition in a market***

- 108 The Commission has not tried to determine whether higher prices in New Zealand are the result of relatively less competition compared to its comparator group, or other factors.<sup>188</sup> FSNI has already submitted that the comparison says little about competition in New Zealand.
- 109 Most importantly, HoustonKemp's analysis demonstrated that if FSNI's profits were reduced to Commission's best estimate of WACC, with a 2% change in grocery prices, there would be no material change in New Zealand's international ranking of grocery prices. That is, New Zealand would be ranked seventh, instead of sixth, out of 38 countries.<sup>189</sup> The implication of the very low sensitivity of New Zealand's international price comparison ranking to different hypothetical levels of major grocery retailer levels of profit is that the current level of grocery prices in New Zealand cannot be explained to any meaningful extent by the nature or effectiveness of competition in the retail grocery sector.<sup>190</sup>
- 110 As such, and in combination with the difficulties outlined above, FSNI submits that price should not be used as an indicator of whether workable competition exists in the retail grocery market.

***International price comparisons should be based on PPP***

- 111 Following the discussion at the conference, FSNI remains of the view that, if the Commission continues with an international price comparison analysis, it should adopt PPP to compare prices (and not a blended market exchange/PPP rate).<sup>191</sup> Using a PPP conversion, New Zealand ranks 21<sup>st</sup> in the OECD. Below FSNI sets out additional information and evidence to support the perspective we presented at the conference regarding the use of market exchange rates to compare prices between countries.
- 112 It is appropriate to adopt a market exchange rate-based international price comparison for highly traded products or services.<sup>192</sup> However, most retail grocery items are not actively traded – at least not in the form in which they appear in a retail store.<sup>193</sup> Market exchange rate-based comparison could only apply to retail grocery products to the extent that:<sup>194</sup>

112.1 the products are actively traded (exported from or imported into New Zealand), and

112.2 transaction and transportation costs, as well as taxes and quarantine/biosecurity laws for that product, are sufficiently low to facilitate trade at a common domestic and

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<sup>187</sup> ACCC Inquiry at page 27.

<sup>188</sup> See HoustonKemp International comparisons of grocery prices at [34].

<sup>189</sup> HoustonKemp International comparisons of grocery prices at [78].

<sup>190</sup> HoustonKemp International comparisons of grocery prices at [73].

<sup>191</sup> See FSNI's submission on the draft report at [111]–[116] and HoustonKemp International comparisons of grocery prices.

<sup>192</sup> HoustonKemp International comparisons of grocery prices – further report at [35].

<sup>193</sup> HoustonKemp International comparisons of grocery prices – further report at [36].

<sup>194</sup> HoustonKemp International comparisons of grocery prices – further report at [37]–[39].

international price (i.e. that cross-country arbitrage could be expected to apply – the “law of one price”).

- 113 Dairy or meat products (as major exports from New Zealand) and bulk grains (as they are largely imported to New Zealand) may meet that criteria.<sup>195</sup> However, a market exchange rate-based comparison should only apply to the component of the cost of those goods that is routinely traded – it should not apply to any localised costs such as local processing and packaging for retail sale, or local storage and distribution costs.<sup>196</sup>

## **Innovation**

### ***Caution is needed when comparing innovations between countries***

- 114 The Commission analysed innovation in the draft report by carrying out a desktop analysis that sought to compare overseas innovations to those present in New Zealand. In doing so, the Commission overlooked that FSNI had, or has plans to implement, most of the international innovations it referred to, with the exception of grocery robots and Amazon Go.
- 115 During the conference, the Commission asked whether an international comparison was “valid or fair”. The Commission also asked whether the nature of the innovation mattered. For example, would economy of scale be relevant to some types of innovation, and not others.<sup>197</sup> FSNI considers that is the case. As a result, while benchmarking innovations to other countries is one way of assessing this indicator, care needs to be taken:

115.1 New Zealand has a small population, spread over a large country, and its average household disposable income is less than the OECD average, and less than Australia and the United States.<sup>198</sup> This affects the level of innovation that customers demand,

115.2 New Zealand’s relative size and population affects particular types of innovations differently. For example, the Commission noted in its draft report that New Zealand does not have an equivalent innovation to Amazon Go. FSNI does not consider that was a fair comparison. In particular:

- (a) Amazon is one of the largest retailers in the world,
- (b) there are less than 30 Amazon Go stores in the world. These stores are located in the US and London, with London stores only having launched in March 2021, and
- (c) by comparison, New Zealand simply does not have the population density to make such an innovation viable, considering the large capital cost associated with each store.

- 116 Instead, FSNI has developed, and is trialling, Zoom Trolleys, which is a response to the “checkoutless” trend observable overseas.

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<sup>195</sup> HoustonKemp International comparisons of grocery prices – further report at [40].

<sup>196</sup> HoustonKemp International comparisons of grocery prices – further report at [41].

<sup>197</sup> Dr Small (Commissioner) at lines 1-17, page 15 of the transcript from the Retail Grocery Market Study Conference, Day 4 (27 October 2021).

<sup>198</sup> OECD Better Life Index 2020.

***Retailers act on competitive pressure to innovate, including in response to international innovations***

- 117 FSNI considers that the more meaningful way to look at the issue is to try to directly understand whether it acts on competitive pressure to innovate. FSNI does act on such pressure, as outlined below (and demonstrated by many of the QRS examples in the nature of competition section of this submission). For example, FSNI's largest competitor is a multinational company, WWNZ, which can leverage off innovations in Australia and therefore FSNI feels a lot of competitive pressure to innovate. Competitors in fast-growing missions also stimulate innovations, such as meal kits and store layouts that try to overcome FSNI's competitive disadvantages for smaller, quicker missions.
- 118 While the Commission views FSNI's uptake of online shopping to have been late, FSNI launched its online offer in 2017, when it thought the time was right. That reflected dynamics relating to New Zealand generally, and the prevalence of online shopping. In particular, New Zealand has a very small population, spread over a very large country. That affects the feasibility of any online shopping offer. While WWNZ has had an online offer for some time, before 2017, FSNI's sense was that consumers were not buying much online and therefore that an online offer would not be viable. Now that trend has clearly changed and FSNI believes its online shopping offer firmly responds to what the customer wants.
- 119 That being said, FSNI has, or is planning to implement, all of the innovations noted by the Commission in the draft report, with the exception of Amazon Go and grocery robots (although FSNI does use automation in the supply chain e.g. at the Landing Drive Distribution Centre (LDDC), and the Roberts Line DC). FSNI provided extensive detail on its innovations in its submission on the draft report.<sup>199</sup>
- 120 Since the submission on the draft report, FSNI has launched:
- 120.1 its partnership with Uber Eats on 15 November allowing consumers to purchase up to 800 SKUs from NW Metro and Four Square stores in Auckland and Wellington (see paragraph 30.3 above), and
- 120.2 its New World recipe builder on 11 November (see paragraph 30.2(c) above).
- 121 The table below sets out each of the international innovations the Commission refers to and FSNI's service offering (either implemented or planned) in relation to each:

International innovation	FSNI response
Drive through	FSNI offers drive-up Click & Collect at most New World and PAK'nSAVE stores, at times with a concierge service. This operates in materially the same way as drive-through collection. FSNI also has drive-through options in some stores and has plans to expand this.
Mobile checkouts and apps to connect to personal shoppers	FSNI already utilises apps to connect customers to personal shoppers. All online shopping at New World and PAK'nSAVE is carried out by personal shoppers. FSNI has also launched on UberEats, initially in Auckland and Wellington. This is materially the same as the Unocart example cited in the draft report. <sup>200</sup>
Small store formats and personalised shoppers	FSNI offers small stores (New World Metros and Fresh Collective, [REDACTED]). FSNI also has cut-throughs in most stores, along with self-checkouts and grab and go fridges, to compete for

<sup>199</sup> FSNI submission on the draft report from [136] to [171].

<sup>200</sup> Draft report at [3.160].

International innovation	FSNI response
	missions shoppers. FSNI offers online shopping at PAK'nSAVE and New World using personalised shoppers.
Innovation in-store experiences, like Hema	FSNI's Zoom Trolley offer will be very similar to Hema's app, and will allow consumers to check-out simply by scanning a barcode on the New World app.
Development of innovative store features	FSNI offers the same, or similar features, to those cited in the draft report, such as pick and mix dog treats, large range of speciality health foods and self-service.
Grocery robots	While FSNI does not have the grocery robots of the type mentioned in the draft report, it uses robotics and automation in other parts of our business, including at the DCs.

122 It is important to note that differentiation of the offering on PQRS factors is a normal part of the competitive process. FSNI reiterates that PAK'nSAVE is a price focused supermarket, and that is an appropriate competitive offering, with many features designed to keep costs low.<sup>201</sup> FSNI continuously innovates in the way it designs and builds PAK'nSAVE stores to keep costs low. For example:

122.1 PAK'nSAVE offers a significantly narrower range to New World, which is a key driver of lower operating costs,

122.2 PAK'nSAVE stores are large and “no frills”, with unlined interiors and concrete floors.

122.3 customers are asked to pack their own bags, and

122.4 PAK'nSAVE's online offer is limited to Click & Collect rather than a delivery service.

123 In short, there is a trade-off between aspects of quality, service and range so that PAK'nSAVE can deliver lower prices. WWNZ noted during the conference that it had to compete intensely on price due to PAK'nSAVE's presence as a “no frills discounted oriented player”.<sup>202</sup>

#### ***Innovation at the LDDC***

124 At the conference, it was suggested by Northelia that FSNI's LDDC is not innovative.<sup>203</sup> FSNI disagrees with this assessment. As set out in FSNI's submission on the draft report, the LDDC is a state of the art distribution centre, encompassing new technologies and automation.<sup>204</sup> For example, it includes:<sup>205</sup>

124.1 innovation from a property perspective;

- (a) the LDDC uses New Zealand's largest 1.17 MW (1.5 GWh) solar panel array. It is the first array with larger than 1 MW capacity – a market leading project. The array is correctly sized so that the combined office and LDDC will use

<sup>201</sup> As the Commission has previously recognised, see Commerce Commission *Foodstuffs (Auckland) Ltd, Foodstuffs (Wellington) Co-operative Society Ltd and Foodstuffs (South Island) Ltd; The Warehouse Group Limited Decision* Nos 606 & 607 (8 June 2007) at [19].

<sup>202</sup> Mr Gluckman (WWNZ) at lines 14-20, page 28 of the transcript from the Retail Grocery Market Study, Day 1 (21 October 2021).

<sup>203</sup> Mr Edwards (Northelia) at lines 1 to 7, page 21 of the transcript from the Retail Grocery Market Study Conference, Day 4 (27 October 2021).

<sup>204</sup> FSNI submission on the draft report at [168].

<sup>205</sup> [REDACTED].

~87% of the electricity generated reducing any discounting of supply back into the commercial grid. This configuration is because the cost for imported electricity is much higher than the price received for exported electricity,

- (b) the office contains more features with the basebuild achieving a 6 star Greenstar rating, and the fitout targeting the same,
- (c) LED motion light system with daylight harvesting,
- (d) secure lockers with link to access cards,
- (e) storage for 14,700 pallets stored in Dematic satellite dense storage system, with semi-robotic shuttles,
- (f) 60,000 pallet capacity with selective racking to future-proof for ranging of additional suppliers and variation in product flows,
- (g) smart 5G highly-defined CCTV systems,
- (h) Ulti Impactable pedestrian protection barrier system,

#### 124.2 innovation from a supply chain perspective:

- (a) Steril Combilok Vehicle robotic restraint system – wheel-locks at loading docks to stop unwanted truck detachments,
- (b) automation with the largest bank of semi-automated satellite racking in New Zealand and satellite racking shuttle charging stations,
- (c) improved pallet wrapping by new automated machines (“Wrappers” and “Wulftec” automatic pallet wrappers),
- (d) improved pallet and waste handling facilities for reverse logistics with 100% cardboard and plastic recycling with compactors,
- (e) Crown PC low-level order pickers with remote control,
- (f) tilting laser-guided reach trucks,

#### 124.3 innovation from a technology perspective:

- (a) SAP operating system enhancements,
- (b) new warehouse management system (WMS) and upgraded transport management system (TMS) provided by Blue Yonder,
- (c) FSNI is the most advanced user in New Zealand of OptiSlot (the leader in slotting optimisation software, used widely in Australia and New Zealand) to drive the layout design to optimise “pick paths” in the DC,
- (d) online delivery booking and automated dock allocation systems,
- (e) 200 wireless access points for WiFi,
- (f) 936 speakers, and

- (g) MorphoWave frictionless biometric readers for the access system.

125 This list is not intended to be an exhaustive representation of the innovations at the LDDC. Finally, a comment was made during the conference that the LDDC does not have a “picking service”.<sup>206</sup> FSNI notes that unit pick fulfilment technology in the LDDC is not required, as this is relevant to fulfilling online shopping orders. FSNI does not fulfil online shopping orders from its DCs, but rather uses personalised shoppers in its retail stores to fulfil online orders.

### QRS

#### ***FSNI's QRS offering is consistent with workable competition***

126 FSNI has submitted extensively on its QRS offerings and response to competitors in this space – see paragraph 27 above.

127 The Commission noted in the draft report that it was “not clear” whether the QRS offered to consumers differs materially from what we would expect in a workably competitive market.<sup>207</sup>

128 During the conference, the Commission suggested it was now evaluating QRS as a particular indicator of competition.<sup>208</sup> FSNI responds to questions and comments raised by the Commission at the conference as follows:

128.1 FSNI has an extensive QRS offering.<sup>209</sup> This is consistent with the Commission’s findings that the banners differentiate their offering and have a different approach to QRS.<sup>210</sup>

128.2 The Commission asked how it should assess whether QRS aspects of the retail grocery offer are consistent with overseas benchmarks. FSNI considers this is a flawed question. FSNI does not believe that it would be possible to conduct such an analysis in a principled manner – it would be an inherently subjective assessment. For example, to the extent there were QRS differences between New Zealand and another country, this may well reflect that consumers in those countries value different QRS factors, rather than being a sign that competition was not effective in either country.

128.3 FSNI considers that its QRS offer is consistent with workable competition. This is consistent with the Commission’s draft finding that other retailers compete with the major retailers primarily on non-price factors, and that the major retailers differentiate their offering on price and non-price factors. These findings are also consistent with the ACCC’s approach in its 2008 grocery market study, as discussed from paragraph 60 above, where it found that competition on non-price dimensions was a significant element of competition in the grocery industry and provided supermarkets with important opportunities to compete.<sup>211</sup> The ACCC study also found that although the

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<sup>206</sup> Mr Edwards (Northelia) at lines 3, page 21 of the transcript from the Retail Grocery Market Study Conference, Day 4 (27 October 2021).

<sup>207</sup> Draft report at [3.136].

<sup>208</sup> In the draft report, the Commission stated that “given our conclusions about profitability, pricing, innovation and investment, we do not consider that this affects our preliminary view in relation to the effectiveness of competition in the sector” at [3.136].

<sup>209</sup> See also FSNI’s submission on the draft report at [138]-[145] and [157]-[158].

<sup>210</sup> Draft report at [5.54] and [5.58].

<sup>211</sup> ACCC inquiry at pages 73-74.

major retailers compete on price, much of the competition between them is on non-price aspects of the retail grocery offer.<sup>212</sup>

129 In sum, should the Commission consider this indicator in greater detail for its final report, in FSNI's view its QRS offering, and that developed by other retailers, is consistent with workable competition.

130 Finally, FSNI notes that comments in the draft report the range of products in stores is reducing, and the NZFGC's comment that "it appears that a strategy to reduce the number of product (and consumer) choices within categories is being actively pursued with suppliers".<sup>213</sup> FSNI understands that this may be a reference to its range reviews. In response, FSNI notes:

130.1 A key part of the grocery retail offer is deciding what products to range. It is an important part of FSNI's job to make sure that we have the right selection of products on the shelves, which deliver what our customers want. We range over 80,000 products in our stores. But our range – and customer preferences – are not static. This means we are constantly considering customer insights, and using these to inform ranging decisions. As an example, in 2020 we introduced 9,000 new products to our stores and discontinued 3,845 products – a net increase of 5,155 products.

130.2 As the Commission is aware, FSNI is currently carrying out range reviews in particular product categories. This is a key part of FSNI's customer driven transformation. FSNI's has identified that while it offers a large range of products in each category, in some categories the vast majority of sales are across a much smaller number of products. The purpose of the range review is to ensure that the range offered is easy for consumers to choose from, is in stock as much as possible, and represents what the customers want. It will also help to support FSNI's price competitiveness. As a result, we think the range reviews will ultimately improve outcomes for consumers. It also allows FSNI to create space for new ranges, categories, products and innovations.

### **Conclusion on outcomes**

131 The Commission concluded in the draft report that:<sup>214</sup>

none of these observed outcomes is, on its own, a conclusive indicator that competition is not effective. However, viewed in the round, our preliminary view is that they are not consistent with what we would expect to see if a workably competitive market.

132 FSNI agrees that none of the outcomes are conclusive, but all of the indicators support a finding that there is workable competition in the retail grocery market when "viewed in the round".

## **CONDITIONS OF ENTRY AND EXPANSION**

### **FSNI's response to the discussion at the conference, and overview of this section**

133 The discussion at the conference was particularly valuable in relation to barriers to entry and expansion, due to the presence of smaller competitors. The discussion strengthened

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<sup>212</sup> ACCC inquiry at pages 72-74 and 90.

<sup>213</sup> Draft report at [3.135.2]-[3.135.3].

<sup>214</sup> Draft report at page 35.

FSNI's view that, other than the barriers imposed by planning law, there are no material barriers to entry or expansion for different shopping missions. It is also important to acknowledge that, unlike the Commission's position at the time of the draft report, there is no basis for an assumption that there are high barriers to entry and expansion, because:

- 133.1 there are not sustained excessive profits (which, if there was, would suggest there is a good commercial case for entry that is not being taken up),
  - 133.2 in any event, a profitability finding cannot be stretched so far as to draw a meaningful inference about the level of barriers to entry and expansion in a market. The latter is consistent with the Commission's updated view that there is a reduced role for profitability, and
  - 133.3 consumer shopping behaviour is pivoting towards missions shopping, and the conditions of entry and expansion for shopping missions are quite different to those for the main shop.
- 134 In the following sections, FSNI provides additional evidence regarding conditions of entry and expansion, including:
- 134.1 the lack of barriers to entry and expansion has been borne out by the entry and expansion that has recently occurred, or been announced, including during the course of this study,
  - 134.2 access to supply chain infrastructure is readily available from third party providers,
  - 134.3 there do not appear to be any difficulties with obtaining capital, including both domestic and overseas capital,
  - 134.4 scale is not a pre-requisite for competing with the major grocery retailers, and this is borne out by FSNI's experience on the ground, and
  - 134.5 FSNI does not participate in any behaviour that might constitute a strategic barrier to entry. In any event, FSNI considers that any concerns in this regard can be addressed by a grocery code.

**There is a large number and wide range of recent entry and expansion**

- 135 The lack of barriers to entry and expansion has been borne out by the entry and expansion that has recently occurred, or been announced, including during the course of this study. Adopting the perspective of missions shopping, and accepting the material constraint FSNI faces from many types of retailer, these examples show vibrant and meaningful constraints across FSNI's business.
- 136 The new entry and expansion that that has occurred or been announced since the market study commenced includes:<sup>215</sup>
- 136.1 Supie entry: May 2021,
  - 136.2 My Food Bag expansion into groceries: August 2021,
  - 136.3 Circle K expansion to 100 stores: announced September 2021,

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<sup>215</sup> This topic is discussed in more detail at paragraph 72, above.

136.4 Geezy Go entry: announced November 2021, planned for early 2022, and

136.5 Briscoes expansion into groceries: November 2021.

- 137 These examples are consistent with the points made in the following sections regarding specific aspects of the conditions of entry and expansion.

**Retailers can readily access supply chain infrastructure**

- 138 Supply chain infrastructure is readily available and does not limit entry or expansion. Any retailer will need to establish its own supply chain i.e. ambient, and chilled/frozen, storage and transport. However, any retailer has the choice of either investing in its own supply chain infrastructure, or partnering with a third party logistics provider. There are many third party logistics companies providing these services in New Zealand, which a new entrant could access.

- 139 Third party options are readily available and commonly used, even by vertically integrated retailers:

139.1 there is a large range of third party logistics providers, including for temperature-controlled transport, such as Americold, 3PL, Halls' Transport, Hughes Transport, Refrigafreighters and Booth's,

139.2 FSNI currently uses third party logistics to transport chilled and frozen products, in addition to its own chilled infrastructure. FSNI also understands that WWNZ largely relies on third party logistics providers,<sup>216</sup> and

139.3 no retailers raised concerns during the conference associated with accessing supply chain infrastructure.

- 140 Furthermore, rapid establishment of logistics services (including for the delivery of refrigerated goods) is possible, as evidenced by The Warehouse's development of its own refrigerated delivery service for TheMarket in 2020.<sup>217</sup>

- 141 FSNI also notes that a large proportion of products are supplied by suppliers directly to retail stores utilising their own supply chain infrastructure, or third party providers. For example, approximately [REDACTED]% of FSNI's SKUs are delivered direct to store.

**New entrants can access capital**

- 142 A number of retailers submitted that access to capital poses a barrier to entry and expansion.<sup>218</sup> However, FSNI understands that:

142.1 new entrants have experienced success in raising capital in New Zealand. For example, Supie was able to raise \$2.5 million (the seed round's cap) in its first seed round in November this year. The raise was well oversubscribed, such that Supie has now opened a convertible note for investors who missed out,<sup>219</sup>

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<sup>216</sup> Mr Gluckman (WWNZ) at lines 20 to 26, page 13 of the transcript from the Retail Grocery Market Study Conference, Day 5 (28 October 2021).

<sup>217</sup> <https://insideretail.co.nz/2020/07/09/themarket-has-doubled-its-range-reached-over-165000-in-first-year/>

<sup>218</sup> Ms Balle (Supie) at lines 8 to 26 and Mr Edwards (Northelia) at lines 33 to 2, pages 14-15 of the transcript from the Retail Grocery Market Study Conference, Day 5 (28 October 2021).

<sup>219</sup> <https://www.stuff.co.nz/business/126948145/netflix-for-grocery-shopping-supie-raises-25-million-in-seed-round#:~:text=A%20supermarket%20start%20Dup%2C%20which,with%20over%20200%20food%20suppliers.>

142.2 it seems unlikely there would be serious difficulties accessing capital if, as the Commission suggests, existing retailers' ROACE was in excess of 20%,

142.3 market participants do not think they would "have trouble finding" overseas investors,<sup>220</sup>

142.4 during the conference there were no comments that indicated that overseas capital was less advantageous than local capital,<sup>221</sup> and

142.5 FSNI understands Northelia has \$1 billion of available funds.<sup>222</sup>

143 Therefore FSNI takes the view that there is no evidence to suggest that access to capital is barrier to entry and expansion in New Zealand, especially as access to overseas capital is readily available.

144 Even if access to capital was a barrier to entry and expansion, it would be a matter best ameliorated by considering issues associated with the Overseas Investment Act 2005 (OIA) regime (discussed further at paragraph 214).

**There is no minimum scale required for entry, particularly when focusing on the different shopping missions**

145 There is no minimum scale required for entry. FSNI's current competitors come in all shapes and sizes, including very large, medium and small retailers, competing nationally and locally for various shopping missions. For example:

145.1 larger retailers like The Chemist Warehouse and The Warehouse and soon Costco compete with the major retailers for particular grocery items, on a nationwide basis, but equally

145.2 smaller retailers, such as local greengrocers, butchers and fishmongers compete with major retailers, across PQRS dimensions, for specific shopping missions.

146 And, even entrants that compete for the main shop may well adopt a disruptive or different business model to ours. For example, Supie confirmed that it competed for the main shop using an online only offer, which drastically reduces the overhead costs associated with bricks-and-mortar stores. Another example overseas is Aldi, who competes for the main shop with quite a different range, relying heavily on private label products.

147 Retailers do not need access to scale or efficiencies to compete on price. FSNI faces price competition from a range of other retailers, including smaller retailers, for various shopping missions. An example of competition from a small retailers, includes the price competition FSNI faces from local greengrocers, discussed at paragraph 25 above. The Commission's focus on scale suggests a focus on the main shop as the locus of competition, which FSNI

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<sup>220</sup> <https://www.nbr.co.nz/node/232107>. Also refer to Ms Balle (Supie) at lines 24 to 25, page 14 of the transcript from the Retail Grocery Market Study Conference, Day 5 (28 October 2021), where it is noted that a key consideration for Supie is for Supie's ownership to remain in New Zealand, indicating that there would be access to capital from international investors.

<sup>221</sup> Ms McWha (Commissioner) at lines 40 to 9, pages 16-17 of the transcript from the Retail Grocery Market Study Conference, Day 5 (28 October 2021).

<sup>222</sup> <https://www.stuff.co.nz/business/126546059/tex-edwards-proposed-supermarket-venture-secured-meeting-with-comcom>

considers to be too narrow to properly assess the nature of competition in the retail grocery market.<sup>223</sup> More generally, FSNI makes three observations:

- 147.1 while volume results in price advantages, as the Commission acknowledges, economies of scale and volume discounts are common features in all retail sectors. Consumers ultimately benefit when these efficiencies are passed-through in the form of lower prices (and FSNI's profitability, and the pass-through analysis, demonstrate that is the case),
- 147.2 scale advantages are demonstrably not necessary to compete effectively with the existing major grocery retailers. This reflects that there is more than one way to compete in grocery retailing. Specifically:
  - (a) there are different ways to compete to offer lower prices. For example, The Honest Grocer and Supie can compete with the major retailers by having significantly lower overhead costs through an online only model. Likewise, smaller retailers are likely to face lower overhead costs, as they have much smaller retail sites. Costco will offer lower prices when it opens in New Zealand with only one store. Entering in more densely populated areas first allows an entrant to "cherry pick" lower-cost, higher-volume store locations, compared with national market participants that try to keep prices even throughout New Zealand, and
  - (b) price is not the only dimension other retailers compete on, nor the most important dimension to consumers. Every day consumers choose to shop at New World and Countdown – or smaller specialist retailers - instead of PAK'nSAVE, because price is not the most important factor to them, and
- 147.3 joint buying is already the subject of a Commerce Act exception, which smaller retailers could use to access volume discounts.

- 148 Taking these parts together, FSNI considers that there are no material barriers to entry or expansion for different shopping missions.

**Any strategic barriers to entry can be addressed by the grocery code**

- 149 There was discussion during the conference as to whether the following constituted a strategic barrier to entry:
  - 149.1 most favoured nation clauses (**MfNs**), or exclusivity arrangements, and
  - 149.2 alleged behaviour by the major retailers to discourage suppliers from offering supply to new entrants.
- 150 FSNI agrees with the Commission's view, expressed in the draft report, that MfNs and exclusive supply arrangements are unlikely to have a significant impact on entry and expansion in the retail grocery sector.<sup>224</sup> In addition:
  - 150.1 FSNI uses MfNs in large supply contracts relatively rarely to ensure it remains competitive over time and can continue to offer the best prices for consumers. Mutually agreed exclusive supply arrangements are also rarely used, and

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<sup>223</sup> See FSNI's submissions on the draft report at [175]-[235].

<sup>224</sup> Draft report at [6.173].

150.2 FSNI considers these arrangements carefully under the existing Commerce Act framework to ensure that they do not have the purpose or effect of substantially lessening competition.

151 Further, FSNI expects that a grocery code, either explicitly or implicitly, should ensure that the engagement and negotiation between any supplier, wholesaler and retailer is conducted in good faith. This should address any concerns regarding the negotiation of these clauses. However, FSNI would be concerned if the Code prevented parties from negotiating genuine commercial terms in good faith and for the benefit of consumers. The FGC likewise noted that it was important that suppliers retained commercial freedom to enter into these arrangements.<sup>225</sup>

152 In terms of alleged threats of delisting and the like with the intent of discouraging suppliers from supplying new retailers:

152.1 FSNI does not participate in such conduct, nor does it have any evidence that its Members are involved in this sort of conduct. FSNI respects a supplier's right to choose which retailers they offer their product to, and

152.2 FSNI considers that a grocery code can protect suppliers' freedom to supply other retailers. In particular, any wrongful supply-limiting behaviour could be expressly prohibited in a grocery code, or otherwise dealt with by a general obligation to comply with applicable laws/act in good faith. Threats of deletion would also be dealt with in the code.<sup>226</sup>

## ACQUISITION OF GROCERIES BY RETAILERS

### **FSNI's response to the discussion at the conference, and overview of this section**

153 In its submission on the Commission's draft report, FSNI made the following key points:

153.1 there are limitations in the information the Commission had available to it on the interactions between retailers and suppliers,

153.2 FSNI values its supplier relationships, and noted that those relationships are generally positive and constructive,

153.3 many key product categories are concentrated on the supply-side and suppliers have material bargaining power,

153.4 as regards the Commission's examples of conduct arising from buyer power:

(a) bargaining can be complex and flexibility is required, but FSNI considers that current common commercial terms generally reflect appropriate and efficient risk allocation for the context in which they are agreed,

(b) FSNI has no interest in promoting reduced transparency over price and non-price terms of supply, and

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<sup>225</sup> Ms Rich at lines 29-37, page 14 of the transcript from the Retail Grocery Market Study Conference, Day 7 (2 November 2021).

<sup>226</sup> Likewise, the FGC noted that it considered a grocery code would adequately deal with this issue: Mr Matthews at lines 4-6, page 14 of the transcript from the Retail Grocery Market Study Conference, Day 7 (2 November 2021).

- (c) FSNI does not consider there is any evidence to support a finding that it anticompetitively limits the terms on which suppliers may supply other retailers,

153.5 the Commission's cost pass-through analysis demonstrates that major retailers' cost pass-through behaviour is consistent with workable competition, and

153.6 private label is pro-competitive and provides value, quality and range to customers.

154 As part of its action plan, FSNI confirmed its support for a grocery code focused on improving outcomes for consumers, and its willingness to work with suppliers and Government to develop a code.

155 FSNI was pleased to have the opportunity to discuss these issues in the context of the "Grocery code of conduct, private labels and collective bargaining by suppliers" conference session. FSNI has also carefully reviewed the additional submissions/material provided by submitters both prior to and as part of the conference.

156 In this part of the submission, FSNI addresses the following topics:

156.1 continuing limitations in the information the Commission has had available to it,

156.2 conduct allegations made by the NZFGC and other submitters,

156.3 countervailing market power of suppliers, and

156.4 private label, including innovation and structural/operational separation.

#### **Continuing limitations in information available to Commission, and impact on findings**

157 In its draft report, the Commission reached a preliminary view that "competition is not working well for suppliers" and more specifically that "retailers are exercising buyer power in ways that are likely to ultimately harm consumers". In its submission on the draft report, FSNI submitted that to reach these conclusions with sufficient certainty (including to form a basis for regulatory intervention) would require significantly more evidence and analysis, including analysis of supplier margins and pricing behaviour.

158 With its specific and practical focus, the supplier-related conference session provided very limited opportunity to discuss broader issues of competition for the acquisition of groceries, including countervailing market power of suppliers. FSNI generally agreed with the more limited approach, particularly in light of the support already expressed by Foodstuffs and WWNZ for a grocery code. FSNI also found the session valuable and constructive. However, the limitations in information and analysis available to the Commission (acknowledged in its draft report, and noted in FSNI's submission) remain.

159 It will be important that these continuing limitations are reflected in any findings in the Commission's final report. As a minimum, FSNI remains of the view that the evidence is not sufficient to properly reach the conclusions set out in paragraph 157, above.

160 FSNI's view is that the information limitations are also relevant in the context of the further steps the Commission takes to further develop its options for recommendations. More specifically:

160.1 FSNI would not support the Commission making recommendations regarding the specific content of a grocery code – further reasons for this are set out at paragraph 199, and

160.2 there is no established need for enhanced collective bargaining mechanisms.

**Conduct allegations made by NZFGC and other submitters**

161 As was noted by the Commission, FSNI took a constructive and positive approach to the Commission's supplier session (rather than focussing on seeking to rebut specific allegations of poor conduct). Throughout the market study we have also highlighted our continuing engagement with suppliers and emphasised our willingness to work co-operatively with suppliers, their representatives (including the NZFGC), and the Commission to address any specific conduct of concern.

162 [REDACTED].

163 In Appendix C, we provide an updated table of allegations which have been made against the major grocery retailers and the FSNI response. Generally, we see those allegations falling into two categories. First, there is alleged conduct which would universally be regarded as unacceptable and is either currently unlawful or would clearly fall within any grocery code. Second, there are allegations which relate to matters which FSNI views as consistent with workable competition. For example, FSNI's minor damage allowance (MDA) policy (which is based on global standards/practices) and its approach to display agreements. The constraints inherent in a market study have not allowed these issues to be fully explored/discussed with the Commission. FSNI anticipates that the code development process will provide an opportunity for these issues to be fully canvassed and be subject to further robust analysis.

164 In the conference session, the Commission invited suppliers to again raise concerns regarding any additional conduct not already made known to the Commission. No matters were raised in the public session. However, as noted above, FSNI confirms its willingness to engage further with the Commission in this regard.

**Countervailing market power of suppliers**

165 As acknowledged by the Commission in its draft report, some suppliers have countervailing market power and there are a range of factors which would potentially improve the negotiating position of suppliers, including brand strength and the number of suppliers in a product category. However, the Commission reached the preliminary view that "in most cases there appears to be an imbalance of bargaining power in favour of the major grocery retailers". The extent of this imbalance then coloured and formed the basis of the Commission's analysis that followed regarding use of buyer power and ultimately potential harm to consumers.

166 As noted by the Commission, the major grocery retailers have thousands of suppliers. However, in its submission on the draft report, FSNI noted that the bulk of groceries purchased by consumers on a regular basis is sourced from a much smaller group of suppliers where the relevant upstream market is more concentrated and there is a higher degree of countervailing market power. For example, across FSNI's total grocery sales (excluding fresh produce and meat) in the 13 weeks ending on 8 August 2021:

166.1 25% of sales were attributable to 9 of New Zealand's biggest suppliers,

166.2 90% of sales came from just 228 suppliers, and

166.3 an additional 1644 suppliers made up the last 10% of sales.

167 In its submission on the draft report, FSNI provided the information on supplier concentration set out at paragraph 173 below, evidencing suppliers' countervailing market power across many key product categories.

168 In addition, in its submission FSNI also noted:

168.1 there are a number of fresh products with a high level of supplier concentration, including bananas where two suppliers supply 90% of the value of FSNI's sales, mushrooms where one supplier supplies approximately 85% of the value of FSNI's sales, and chicken where FSNI understands that two suppliers supply approximately 80% of the market, and

168.2 as regards fresh products, FSNI competes with international retailers for access to New Zealand produce, meat and seafood, and prices are dictated by relevant international markets. For example, in 2019, produce from New Zealand's horticultural industries reached an estimated \$9.5 billion, of which \$6.2 billion (65.2%) were exports.

169 Consistent with the above, FSNI continues to face, with increasing frequency, cost increases from suppliers.

170 The conference session provided no opportunity to discuss countervailing market power of suppliers. Conference participants also did not address FSNI's submissions on these issues. FSNI's view remains that:

170.1 in assessing the extent of buyer power issues and associated concerns, the Commission's analysis should have regard, and give appropriate weighting, to the relative volume/value of different product categories purchased by New Zealand consumers (including as part of a main shop), and

170.2 bargaining and buyer power cannot properly be assessed/understood without a more comprehensive analysis of interactions between suppliers and retailers including an analysis of supplier margins and pricing behaviour.

**Private label, including innovation and structural/operational separation**

171 The benefits of FSNI's consumer-driven private label offering were extensively canvassed in its submission on the Commission's draft report and during the conference session. These benefits were not seriously challenged by any submitter at the conference and in its additional written material, the FGC expressly state they do not dispute these benefits.

172 FSNI provides with this submission a further report from HoustonKemp, which considers and addresses the issues raised in the Castalia report on private label products prepared for the NZFGC.

173 The table set out below highlights the role which private label plays in addressing supplier concentration in relevant markets for the acquisition of groceries:

Product category	Total number of suppliers in category	Number of major suppliers	Percentage of sales generated by major suppliers	Foodstuffs private label/controlled brands offering
Butter	18	3	[]%	Y
Cheese	37	3	[]%	Y
· Block cheese	7	3	[]%	Y
Bread	46	2	[]%	Y
· Loaf Bread	21	2	[]%	Y
Yoghurt	32	3	[]%	N

Canned fish	13	2	0%	Y
Canned fruit	29	2	0%	Y
Canned vegetables	44	4	0%	Y
Baked beans and spaghetti	7	1	0%	Y
Sugar	13	1	0%	Y
Biscuits	90	3	0%	Y
Frozen	188	12	0%	Y
· Frozen fish	7	2	0%	Y
· Frozen poultry	9	2	0%	Y
· Frozen vegetables	21	2	0%	Y
· Frozen potatoes	17	4	0%	Y
· Ice cream	29	3	0%	Y
· Ice cream – take home standard only	6	2	0%	Y
Chips	52	2	0%	Y
Confectionery	111	2	0%	Y
· Chocolate blocks	31	2	0%	N
Carbonated beverages	71	2	0%	Y
Nappies	15	2	0%	Y
Pet food	56	4	0%	Y
Laundry	29	5	0%	Y
Liquor	296	2	0%	Y
· Beer	129	3	0%	Y

174 A topic discussed at the conference was the alleged appropriation of intellectual property by retailers and the extent to which private label products are of a type where there is scope for innovation. FSNI has given further consideration to the topic of private label and innovation and notes the following:

174.1 in general terms, both in New Zealand and in other overseas markets, private label products have been developed to “even up” an imbalance of bargaining power held by suppliers of commoditised items (who were viewed as effectively asking too much for their brand component). This, in itself, qualifies as an innovation;

174.2 as private label brands have gained greater customer acceptance (and so their own brand value), supermarkets including FSNI have extended the model to items that are less commoditised (for example, the Pams Finest range) – this too is innovative;

174.3 FSNI views both these trends as pro-competitive (so long as there is no appropriation of branded suppliers' intellectual property) because the result is that the consumer gets more choice and lower prices.

175 As discussed in the session, FSNI strongly rejects any suggestion that it appropriates the intellectual property of any branded supplier or other third party. Any broader industry concerns could be appropriately addressed in the grocery code (as is the case in Australia and the UK).

- 176 As also discussed at the conference, concerns regarding FSNI unreasonably favouring private label over branded products are not supported by economic theory or any evidence of such favouritism/discrimination.
- 177 From an economic perspective, the allegations of discriminatory or distorted allocation of shelf space are not something that a supermarket operator has any incentive to undertake. This is because shelf space allocations are critical business decisions which are made to maximise the value that is derived from constrained space. Once the price for a contracted private label product is established, there is no reason to allocate space to that product on anything other than the usual basis.
- 178 This economic perspective reflects FSNI's practical experience, including the challenges FSNI faces in seeking to grow the volume of private label sold by its members. The reality of scarce shelf space allocation means there is a natural competitive tension with branded products and a commercial need for all products to perform on a competitive basis. This tension is enhanced in the case of FSNI where there is a dedicated private label team, and in light of the decision-making role played by owner-operators in stocking and placement - noting that this is very different from regulated operational separation of the type suggested by the NZFGC.<sup>227</sup>
- 179 With regard to the NZFGC proposals, in the conference session, the NZFGC was asked to provide the conference with further detail of its suggestion to structurally separate the private label businesses of Foodstuffs and Woolworths. Very little information was provided to either establish a need for such an unprecedented measure or how it would operate in practice. The NZFGC has provided further written material seeking to clarify its proposal, now both for structural separation of private label, and operational separation as a next best alternative. In summary, the NZFGC proposes that structural separation would work as follows:
- 179.1 private label businesses would be a separate company with accompanying ring-fencing and confidentiality obligations,
  - 179.2 retailers would be prohibited from setting targets for private label sales or profitability, and
  - 179.3 retailers would be subject to non-discrimination rules.
- 180 Regarding proposed operational separation:
- 180.1 retailers would have a separate private label business unit,
  - 180.2 confidential information provided to retailers would not be passed on to the private label business unit,
  - 180.3 private label procurement would only be done through the private label business unit,
  - 180.4 the retail business unit would be prohibited from setting private label sales or profitability targets, and

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<sup>227</sup> Staff engaged by Foodstuffs Own Brands Limited (**FOBL**) report to the FSNI CEO, Chris Quin and are responsible for negotiating purchase terms for private label products. These products are then acquired by both FSNI and FSSI (and are on-sold to their respective members). Also, support centre ranging and shelf allocation decisions are made by the support centre merchandising team, rather than FOBL. Against this integrated structure, operational separation would be a very significant regulatory intervention (with significant associated costs and risks of unintended consequences).

- 180.5 retailers would be subject to non-discrimination rules, including private labels paying the same charges as branded products and having separate accounts to demonstrate that they are covering their costs/making a reasonable return.
- 181 Regardless of the separation measure, the NZFGC also submits that private label businesses should be required to annually disclose their proportion of sales by product category.
- 182 In essence, FSNI's view is that the NZFGC proposals would, if adopted, effectively remove private label as a competitive tension on suppliers, and provide suppliers with a level of protection that is not in the best interests of consumers. The proposals contemplate regulatory interventions which are impractical, unnecessary for the reasons set out in paragraphs 176 to 178 above, and unprecedented globally. Such interventions would require the identification and evidence of a significant competition problem created by private label. No such problem has been identified - to the contrary, the evidence is that private label in New Zealand has resulted in tangible benefits to consumers in the form of lower prices and for the predominantly locally-based suppliers of Foodstuffs' private label offering (who gain economies of scale from increased manufacturing output). Any intervention, with its associated costs and risks, would also be against a background of relatively low private label market penetration by international standards.
- 183 It is also important to note that all major global retailers in the grocery industry (including Costco and ALDI) have a substantial private label offering. Intrusive regulation, beyond that which exists in other jurisdictions, may in fact deter further entry into the New Zealand market by those global retailers.
- 184 Consistent with its action plan, FSNI is open to any reasonable concerns around protection of confidential information and unfair application of ranging policies being considered as part of development of the proposed grocery code (noting that the Australian code requires the non-discriminatory application of ranging policies by retailers across both private label and branded products).

## OPTIONS FOR RECOMMENDATIONS

- 185 In terms of the Commission's draft **options for recommendations**:
- 185.1 The options for recommendations that FSNI has adopted in its **action plan** are comprehensive of the changes that can be supported by the evidence. FSNI provides an update, and further detail, on the steps outlined in its action plan to:
- (a) deliver value to consumers by improving their ability to make informed shopping decisions by simplifying our pricing and promotional practices,
  - (b) addressing any conduct concerns by working with suppliers and the Government to develop a grocery code for the industry, and
  - (c) encourage competition and remove barriers for new entry and expansion by ending the use of restrictive land covenants and exclusivity provisions in leases.
- 185.2 Despite a lack of evidence that it is necessary, FSNI is exploring how it could put together a commercially attractive offer to **supply products** to other retailers, in case this would give rise to potential net benefits for grocery market competition. FSNI believes that, if such net benefits are established, additional access to suppliers' products through FSNI is achievable on a voluntary basis – regulated access would

be complex and difficult as well as being unwarranted in a context where there would be several competing suppliers.

185.3 **Other options for recommendations** put forward by the Commission in the draft report, and raised by other submitters, are not justified based on the evidence that has been presented during the process, and is presented in this final submission. They would also not be likely to improve outcomes for consumers. Those options are:

- (a) forced divestment of some of the major retailers' retail stores, supply chain assets, or a combination of both,
- (b) forced divestment of the major retailers' private label brands,
- (c) government facilitating new entry – FSNI provides comments to assist consideration of this option while noting that it is a matter for the government whether to become involved in grocery retailing, and
- (d) authorising suppliers to bargain collectively with retailers (outside of the current collaborative activities exemption).

## **FSNI'S ACTION PLAN TO IMPROVE OUTCOMES FOR CONSUMERS**

### **FSNI's response to the discussion at the conference, and overview of this section**

186 FSNI is committed to improving customers' shopping experience and to ensuring that customers are able to access value by making informed purchasing choices. FSNI believes that, provided promotions are communicated clearly, they deliver value to customers, and are pro-competitive.

187 FSNI put forward a comprehensive action plan in its submission on the draft report, which included a commitment to simplify and clarify its pricing and promotional practices, and the terms of its loyalty programme, as well as progressing unit pricing. This work is already underway, and FSNI has presented its proposals to the Commission. FSNI considers its direction was endorsed by the discussion at the conference.<sup>228</sup>

188 In the following sections, FSNI provides further detail of its proposals to simplify its pricing and promotional practises and simplify its Clubcard terms and conditions. FSNI also provides further comments regarding a unit pricing standard.

### **FSNI has committed to simplifying its pricing and promotional practices**

189 FSNI considers that its promotions offer genuine value to consumers. It therefore disagrees with certain points raised at the conference (noting that there was no evidence presented in support of any of these), specifically that it:

189.1 designs promotions to confuse or mislead consumers.<sup>229</sup> This is not correct – FSNI does not design promotions to confuse customers,

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<sup>228</sup> FSNI submission on the draft report at [378]–[394].

<sup>229</sup> For example, see the comments made by Mr Duffy (Consumer NZ) at line 2, page 5 of the transcript from the Retail Grocery Market Study Conference, Day 2 (22 October 2021).

- 189.2 treats breaches of the Fair Trading Act 1993 are merely a “cost of doing business”.<sup>230</sup> FSNI takes its compliance obligations seriously. There is no evidence otherwise. Further, FSNI disagrees that a consumer information standard is required in order to clarify retailers’ obligations under the Fair Trading Act – those are already clear, and
- 189.3 treats promotions as an opportunity to sell excess stock rather than compete.<sup>231</sup> FSNI designs promotions to provide value to consumers, and meet consumer preferences. Promotions are pro-competitive and allow retailers to respond to competitive constraints in the market.
- 190 Nevertheless, FSNI acknowledges the Commission’s finding that some consumers may find retail grocery suppliers’ practices confusing, and is committed to making changes to its display of prices and to simplify the promotions it uses. FSNI agrees with the Commission’s preliminary view in the draft report that voluntary changes would be sufficient, in particular because:<sup>232</sup>
- 190.1 FSNI intends to work closely with the Commission and finalise the changes taking into account any feedback from the Commission, so while technically voluntary the proposals will be discussed with the consumer protection regulator,
- 190.2 pricing and promotions are not suited to regulation. Pricing and promotions touch all areas of the retail sector – so any regulation would have wide-ranging impact, and
- 190.3 pricing and promotional practices for retail groceries are dynamic, particularly with a very large number of non-homogenous products (including the difference between dry products and fresh produce).<sup>233</sup> Suppliers and retailers require flexibility and need the ability to initiate promotions as needed to respond to supply and demand considerations.
- 191 FSNI has already engaged with the Commission to discuss the changes it is considering. These changes are set out below:
- 191.1 [REDACTED]:<sup>234</sup>
- (a) [REDACTED]:
    - (i) [REDACTED],
    - (ii) [REDACTED],
  - (b) [REDACTED].<sup>235</sup>
  - (c) [REDACTED].

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<sup>230</sup> Mr Duffy (Consumer NZ) at line 26, page 5 of the transcript from the Retail Grocery Market Study Conference, Day 2 (22 October 2021).

<sup>231</sup> Mr Edwards (Northelia) at line 36, page 12 of the transcript from the Retail Grocery Market Study Conference, Day 2 (22 October 2021).

<sup>232</sup> Draft report at [9.167].

<sup>233</sup> For example, refer to the comments made by Mr Chapman at page 15 of the transcript from the Retail Grocery Market Study Conference, Day 2 (22 October 2021).

<sup>234</sup> [REDACTED].

<sup>235</sup> [REDACTED].

[REDACTED]

191.2 [REDACTED]:

- (a) [REDACTED]:
  - (i) [REDACTED],
  - (ii) [REDACTED],
- (b) [REDACTED],
- (c) [REDACTED],
- (d) [REDACTED].

[REDACTED]

191.3 [REDACTED].

191.4 [REDACTED].

192 [REDACTED].

**FSNI will make changes to improve its loyalty programmes terms and conditions**

193 FSNI and FSSI have a national Clubcard loyalty programme for New World shoppers. The Clubcard loyalty programme is simple and easy for customers to join. Nevertheless, FSNI and FSSI have listened to the feedback regarding the Clubcard terms and conditions and has made a voluntary commitment to improve the clarity of those terms. There is only one set of Clubcard terms and conditions and a single Privacy Policy which applies to both FSNI and FSSI, so the changes proposed would apply to both. Consistent with the Commission's recommendations,<sup>236</sup> Foodstuffs is considering the following changes, which it has shared with the Commission:<sup>237</sup>

193.1 [REDACTED],

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<sup>236</sup> Draft report at [9.163] and [9.166].

<sup>237</sup> [REDACTED].

193.2 [REDACTED],

193.3 [REDACTED],

193.4 [REDACTED],

193.5 [REDACTED],

193.6 [REDACTED],

193.7 [REDACTED].

**FSNI agrees that regulations could be introduced to simplify and standardise unit pricing**

- 194 FSNI supports the Commission's recommendation that unit pricing should be used more widely and consistently, and is willing to work with the Commission and other retailers towards industry-wide standards for unit pricing.
- 195 FSNI considers that the Australian Unit Pricing Code is a useful starting point. However, reflecting on the application of the Australian code in practice, FSNI's view is that unit pricing standards:
- 195.1 should apply to all retailers selling groceries, subject to a minimum floor space requirement to exclude certain retailers. FSNI suggests a minimum floor space threshold of 650m<sup>2</sup> would be appropriate,
  - 195.2 FSNI agrees that the minimum floor space threshold should not apply to its stores. That is, all FSNI stores, including Four Squares and New World Metros, will be required to comply with any unit pricing requirements (subject to the limitation regarding SAP, noted below),
  - 195.3 should not include a requirement for retailers to supply the minimum range of food-based grocery items. Taking this narrow approach would mean that general merchandise retailers, such as The Warehouse, would not be required to show unit pricing. Unit pricing should apply to all retailers selling grocery items equally, as it would help to achieve the Commission's aim of helping consumers to compare grocery prices between retailers,
  - 195.4 should require unit pricing to be displayed both in store and online, in close proximity to the selling price, including for products on promotion, and
  - 195.5 should not apply to all forms of advertising as it would add to the compliance costs and unit pricing is far more likely to be useful at the point of sale, rather than on advertising material.
- 196 FSNI cautions against overly swift introduction of unit pricing requirements as there could be significant compliance costs for FSNI and presumably other retailers. More particularly for FSNI:
- 196.1 FSNI would like to work with the Commission to see if its current systems can accommodate any unit pricing requirements, so as to avoid unnecessary system enhancements. FSNI currently uses electronic shelf labels (**ESLs**) and systems in stores, which are regarded as the best standard in the industry. It will be important to design unit pricing requirements bearing in mind the capability of those ESLs. This is because there will be a significant cost to FSNI, or store owners, if new ESLs are

required to be sourced. There is also the possibility of a long lead time on these tickets as any ESLs would need to be imported from overseas, and

196.2 as noted in FSNI's submission on the Draft Report, FSNI intends to roll out SAP, and related ticketing tools, to non-SAP Four Square stores over the next few years. FSNI would seek an exemption to any unit pricing requirements for these stores until the roll-out is complete.<sup>238</sup>

197 As such, it will be important to carefully work through unit pricing requirements and ensure a sufficient lead time before the introduction of a mandatory unit pricing standard.

## **OPTIONS TO IMPROVE COMPETITION FOR THE ACQUISITION OF GROCERY PRODUCTS**

### **FSNI's response to the discussion at the conference, and overview of this section**

198 FSNI found the conference session considering a potential grocery code valuable, including in terms of developing its thinking as to how a code might operate. The session confirmed that there appears to be universal agreement that a mandatory code is appropriate. Feedback, in particular from the overseas former regulators, confirmed that a well-thought through code can be effective in addressing a range of competition issues (including by ensuring that suppliers are not pressured or bullied regarding the terms on which they supply competing retailers).

199 FSNI remains of the view that is not generally appropriate for the Commission to make specific recommendations regarding the substantive content of the proposed code (other than to acknowledge that the Australian code provides a useful starting point for code development). Among other things:

199.1 as discussed below, content development requires robust discussion and analysis from a range of industry perspectives - by necessity, it is not possible for a market study process to descend to the requisite level of detail,

199.2 while the 2008 UK market study did, to some extent, make recommendations regarding proposed content, this was in the context of amendments to an existing supermarket code of practice (which allowed more structured analysis and feedback from industry participants),<sup>239</sup>

199.3 substantive recommendations regarding the content of the code, risk duplicating future work to be undertaken as part of the code development and potentially constrain important policy decisions, and

199.4 such recommendations are not necessary because the Australian code already provides a useful framework for future work.

### **Grocery code features and development**

200 Consistent with our position in the conference, a robust development process in partnership with industry will be needed to achieve a grocery industry code that is fit for purpose in New Zealand and practically workable. Processes from the development of other codes such as the Code of Professional Conduct for Financial Advice Services and/or the Takeovers Code may be apposite. In the Australian context, FSNI understands that industry played a key

<sup>238</sup> FSNI submission on the Draft Report at [390].

<sup>239</sup> At paragraph 11.301 of the 2008 report, the UK Competition Commission noted that "we took the provisions of the [Supermarket Code of Practice] as our starting point in considering the content of the [Grocery Supply Code of Practice]."

part in developing the content of their voluntary prescriptive code (with drafting and technical support provided by the usual central government entities).

- 201 It is critical that any code is flexible and does not prevent FSNI offering the best possible value to New Zealand consumers by preventing rigorous negotiation or arbitrarily allocating risk to either party, including by applying “one size fits all” rules. This is what we mean by a consumer focussed code. Given the code will apply across the industry, the countervailing market power of many suppliers discussed in paragraph 165 to 170 needs to remain front of mind.
- 202 In general terms, it is important that the code is simple and promotes agility with a view to avoiding/removing unnecessary cost (thereby enabling New Zealand retailers and suppliers to innovate). Along the same lines, it is critical that an appropriate review and change process is established to cater for changing market conditions.
- 203 We see the Australian code, as opposed to the UK code, being the best starting point to inform discussion on the content of the code. This includes the Australian dispute resolution code arbiter framework (given the size of the New Zealand market FSNI queries whether the case for an all-encompassing ombudsman role has been made out). Care also needs to be taken that the New Zealand code is not a haphazard combination of different aspects of the UK and Australian code framework. For example, if the more prescriptive Australian approach is adopted, it may not be necessary or desirable for a UK-style adjudicator (with associated broad powers and discretions) to be appointed.
- 204 However, as was generally agreed at the conference, the code needs to be carefully tailored to New Zealand market conditions. At a high level, the code should focus on the process by which retailers and suppliers interact with each other, rather than imposing prescriptive rules with limited or no exceptions. As was canvassed on the final day of the conference, mutually agreed MFN and exclusivity arrangements which do not substantially lessen competition should remain available to retailers and suppliers.
- 205 In terms of the scope of the code, there was some discussion at the conference regarding possible thresholds and how those might apply to FSNI and its stores, particularly smaller stores. The Commission has also subsequently asked FSNI to explain its views on how a mandatory grocery code of conduct would apply to FSNI, given the role of the co-operative versus individually owned/operated stores.
- 206 Generally, FSNI sees this as a topic which is best resolved as part of the development of a legislative framework following the market study. Much will also turn on the exact content of the code and whether any purpose would be served by imposing the relevant obligations on all retailers. With regard to the application to FSNI:
- 206.1 both the Australian and UK codes apply only to large organisations (the current threshold in the UK is 1 billion pounds) – and are not designed such that individual stores (particularly smaller stores) are individually responsible under the code. For example, in Australia Metcash has recently signed up to the code but its individually owned stores (IGA) are not signatories,
- 206.2 however, as we highlighted in the session, the overriding point is that FSNI supports the development of a code and is happy to “sign up” to any code on a *whole-of-business basis* meaning “all” parts of the organisation are obliged to comply with it, but not all stores need to be signatories to it to achieve this effectively. A breach of any of FSNI’s stores would be a breach of the code and have consequences for the organisation. FSNI (rather than its member stores) would “own” and be responsible for compliance with all the code obligations and primarily participate in any dispute resolution process effectively on behalf of itself and its members. FSNI can then

procure that its members meet applicable obligations under the code via its membership arrangements. FSNI will obviously need to consider this topic further as development of the code unfolds, and

206.3 irrespective of whether stores are individually "signed up" to any code, given the unique co-operative structure and respective functions of FSNI and its stores, careful consideration will need to be given as to how the different rules will practically apply to the support centre and relevant stores.

#### **Authorising suppliers to bargain collectively with retailers (outside of current collaborative activities exemption)**

207 FSNI sensed little support from conference participants for any changes to the existing authorisation regime. Leaving aside economic arguments, participants appeared keenly aware of the very practical difficulties involved with aligning the interests of a diverse group of suppliers. As reiterated in the session, FSNI is willing to deal with any supplier or group of suppliers. However, the status quo, which allows the pros and cons of collective arrangements to be considered on a case-by-case basis, appears to best serve the interests of consumers.

#### **IMPROVING ACCESS TO SUITABLE SITES**

##### **FSNI's response to the discussion at the conference, and overview of this section**

208 As set out in its submission on the Commission's draft report and in accordance with its action plan, FSNI has committed to remove restrictive covenants and exclusivity provisions in leases, and make no further use of them. FSNI was pleased to be able to update the Commission at the conference on the progress to date on this significant project.

209 FSNI also supports removal or mitigation of regulatory requirements that impact access to suitable sites.

##### **Restrictive covenants and exclusivity covenants in leases**

210 FSNI has removed any requirements for restrictive covenants or exclusivity provisions from its standard sale and lease documentation. Also, FSNI confirms that it is actively continuing to progress steps required to release existing covenants and exclusivity provisions in leases. A number of covenants have been released to date. With regard to the significant task of proactively removing the remaining covenants, FSNI is in the process of identifying third party landowners, seeking to obtain contact details and then contacting those landowners with a view to reaching agreement on release documentation (and entering into such documentation). FSNI anticipates this process will take several months and is happy to update the Commission from time to time as the project progresses.

211 If, despite the voluntary commitments made by FSNI, FSSI, and WWNZ, the Commission remains of the view that further steps are required, FSNI's views are as follows:

211.1 FSNI favours a solution that is industry-wide and results in a level playing field.

211.2 The precise way in which that is best achieved is a matter for further consultation. Consultation and careful consideration will be needed to avoid any unintended, adverse consequences or market distortions.

211.3 There is time available for appropriate consultation and consideration, given the voluntary commitments that have been provided to the Commission (and which are being acted on by FSNI).

212 Beyond restrictive covenants and exclusivity provisions in leases, there is no basis or need for further interventions relating to sites. For example, acquiring and holding land for future

store development is a legitimate, complex and essential strategic exercise for supermarkets. The Commission acknowledged this in its draft report. The cost and risk of holding unused land is a sufficient deterrent for any land-holding that is not required for potential future store development.

#### **Planning regulations and other regulatory barriers**

- 213 There appeared to be universal support at the conference for the Commission's options for recommendations regarding potential changes to planning law, including that the proposed Natural and Built Environments Act could include mechanisms for ensuring the potential benefits of competition are a relevant consideration. FSNI looks forward to working with the Commission and Government on implementation of these options for recommendations.
- 214 FSNI highlights and endorses the submission made by The New Zealand Initiative, where it was put to the Commission that zoning restrictions and other regulatory barriers such as the processes currently in force under the Overseas Investment Act were causing more harm than covenants. The Initiative submitted that covenants would not be a problem if zoning regulations were more liberal, as this would increase site availability materially.

#### **ACCESS TO PRODUCTS AT THE "WHOLESALE" LEVEL**

- 215 There is insufficient evidence of a competition problem, or barriers to accessing supply, to justify a recommendation regarding access to products at the "wholesale" level. FSNI's basis for this position is set out in the previous sections.
- 216 It is also not clear that such access has the potential to benefit retail competition. The process has not clearly identified potential demand, or potential benefits, that might arise from access to wholesale.
- 217 Nevertheless, in response to the ideas canvassed in the draft report and the comments presented at the conference, FSNI is exploring how it could put together a commercially attractive offering to supply products to other retailers, in competition with suppliers and potentially WWNZ. FSNI is committed to continuing to engage with the Commission as part of this process.
- 218 In the following sections FSNI:
- 218.1 first, describes the context within which a potential offering would be developed, and
- 218.2 [REDACTED].
- 219 Given the complexity and short timeframes associated with FSNI's and the Commission's thinking, the Commission may well have additional questions. In any event, to the extent the Commission remains interested in wholesale access as a potential option, [REDACTED].

#### **Supply should be explored on a voluntary basis**

- 220 FSNI's potential offering would be best achieved on a voluntary basis.
- 221 First, based on the process to date FSNI does not consider a case is made out that would justify a regulated wholesale solution. There are not competition issues that warrant it, in particular there is no monopoly facility. For example, there is a natural monopoly in the electricity transmission system (national grid, operated by Transpower) or, historically, Telecom had a natural monopoly in fixed line telecommunications. Comparatively, for grocery products, as FSNI has demonstrated, there is competition at all levels of the supply chain. In particular, if FSNI introduced an offering to supply other retailers, it would be doing so in competition with suppliers' direct offerings, and likely an offering from WWNZ, in

addition to existing wholesalers' offerings in particular product categories. To the extent FSNI offered distribution centre and warehousing services as part of its supply to other retailers, it would again be doing in competition with transport and logistics companies, suppliers, (potentially) WWNZ and others.

222 Secondly, based on the work carried out to date by the Commission and others, it is not clear whether wholesale access has the potential to have a substantial impact in improving retail competition. For example, as detailed further below, the few retailers represented at the conference appeared likely to have varying demand profiles, and many of those that were not represented do not appear likely to take up a wholesale offering from FSNI. Given this, even if it were justified by a competition problem, regulation would be at best premature and at worst counterproductive. Given a regulated outcome is inevitably expensive, these are very meaningful risks.

223 Thirdly, there are a number of complexities and uncertainties associated with supply to retailers, which FSNI describes in more detail in the following sections, including:

223.1 (as yet unknown and unclear, but potentially) varied customer demands, and

223.2 uncertainties regarding whether, and on what terms, suppliers may be willing to deal with FSNI as a wholesaler.

224 [REDACTED]. It is not yet clear what a successful wholesale offering, and thus the basis for regulation, would look like. For example:

224.1 To what extent would and should suppliers continue to control how their products are competitively positioned across various retail channels?

224.2 What would be the threshold for an obligation to offer wholesale supply to be triggered? Unless the obligation would be specified to apply to the existing major grocery retailers (which would be a static and unprincipled approach), the threshold would immediately form a significant barrier to retailers that wish to expand e.g. Costco. Furthermore, what type of grocery retailer would the obligation apply to – would it be based on a certain range of products being offered? In this regard, would The Warehouse's range be sufficient? Or would there be some other basis?

225 Given there is no "bottleneck" facility and FSNI would be competing with a number of alternative offers to supply retailers, operational or indeed structural separation would be unnecessary and unjustified. This would remove a key focus of regulation. [REDACTED].

226 [REDACTED].

227 [REDACTED].

#### **Potential demand**

228 FSNI does not have a clear sense that there is real demand for it to supply other retailers, whether they are existing or new, or what services would be competitive or beneficial. [REDACTED]:

228.1 [REDACTED],<sup>240</sup>

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<sup>240</sup> [REDACTED].

228.2 [REDACTED],

228.3 [REDACTED]. In this respect, it is noteworthy that only a small portion of the retailer industry was represented at the conference. Retailers that were not represented included several that FSNI would consider very material constraints, such as Chemist Warehouse, Costco, Aldi, Farro, My Food Bag, Hello Fresh, Circle K and other fresh retailers such as Mad Butcher and Fruit World. Given they did not participate in the conference, and based on FSNI's knowledge of their businesses, it may be appropriate to assume that none of these market participants are potential customers.

229 Nevertheless:

229.1 the Commission in the draft report considered that access to wholesale was necessary to allow other retailers to "access more competitive prices for products than they would be able to negotiate purely with their own volumes".<sup>241</sup> The Commission thought there was "likely to be some demand" for a new wholesale offering,

229.2 at the conference, the Commission tested two propositions regarding how efficient wholesale access arrangements could potentially promote retail competition by:<sup>242</sup>

- (a) reducing a barrier to expansion for existing grocery retailers, or
- (b) reducing a barrier to entry by one or more large, new, at scale grocery retailers, and

229.3 in conversations at the conference in response to these two propositions, a small number of retailers indicated potential demand for access to products through the major grocery retailers. Each had different demands, that is, FSNI understands that:

- (a) Supie has built a fully integrated supply chain and developed a suite of supply relationships in a period of approximately 18 months. Supie would prefer to maintain its existing integrated distribution centre and supply chain infrastructure but would like to be able to access retail products at better prices,
- (b) Night 'n Day wanted access to better prices for dry groceries, and
- (c) Northelia wanted temporary access to supply chain while it establishes its own fully integrated retail grocery business. This requirement is, of course, dependent on Northelia becoming a grocery market participant. FSNI assumes Northelia's particular proposal is unlikely to eventuate (based on the evidence that has been presented during the market study to date). Nevertheless, the idea of temporary access while a new entrant sets up represents one of the propositions the Commission sought to test.

230 FSNI is actively exploring an offer to supply any other retailers that respond to the first of the Commission's propositions set out above, and the potential demand suggested at the conference. With respect to the second proposition, the demand a single such retailer

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<sup>241</sup> Draft report at [6.150.1].

<sup>242</sup> Dr Small (Commissioner) at lines 1-5, page 25 of the transcript from the Retail Grocery Market Study Conference, Day 5 (28 October 2021).

represents may be significant, and also uncertain and transient, meaning, for example, that substantial investment in supply chain would need to be made, and then recovered over a short period. These features would be likely to materially affect the terms that FSNI could offer, and may make them unattractive.

### **The work FSNI is doing**

- 231 In the following sections, FSNI sets out the key issues identified to date and initial thinking on how they would be resolved.

### ***Role and functions of the Co-op and retail stores***

*The Co-op and retail stores are fully integrated and interdependent rather than able to function as separate “wholesale” and “retail” businesses*

- 232 In considering FSNI’s work to put together an offer, it is important to understand the existing structure of its business, particularly the role and functions of the Co-operatives and the retail stores, and the existing set-up of teams. This is also important context for the profitability analysis.
- 233 The draft report described the Co-operative as “service providers to the grocery retailers [the stores], including wholesale purchasing, warehousing and distribution of groceries” and so on.
- 234 As set out in the submission on the draft report, and discussed in our confidential sessions, this is not an accurate characterisation – FSNI is a fully integrated grocery retailing business. The retail stores provide the customer facing retail execution, but the Co-operative provides the majority of the other functional expertise required to fulfil the operations of a grocery retailer. The Members own a business, lease a building and employ some functions and are shareholders in a set of shared services for the rest. They cannot operate without the shared services:
- 234.1 the Co-op makes the key strategic decisions relating to how Foodstuffs competes – brand positioning, format and pricing, product ranging, promotions, digital innovation, and marketing, while also providing the key services required to operate such as supply chain infrastructure, HR, Finance, Legal and IT, and
- 234.2 the Members carry out the daily retail execution locally at store level, and can adjust prices, promotions and ranging in their own stores, including to respond to local competition.
- 235 The Co-op, in consultation with Members and governance from its board, makes the key decisions relating to how FSNI competes in the long term, operator selection for retail stores and training, selecting sites for new stores, development and execution of strategy including customer facing retail innovation, and development of store formats and designs.
- 236 These are not functions that a “wholesaler” would provide. The stores could not function or operate as standalone retail businesses without the Co-op.

*FSNI is an integrated retailer*

- 237 Currently, there is no separate, or separable, wholesale function within FSNI’s grocery retailing business. [REDACTED]:

237.1 [REDACTED],

237.2 [REDACTED].

### ***How FSNI’s business could be adapted to present an offer***

- 238 [REDACTED]:

238.1 [REDACTED].

238.2 [REDACTED].

239 [REDACTED].

240 [REDACTED].

241 [REDACTED].

### **Pricing and terms of supply**

#### *Structure of current pricing*

242 In considering how to set up (and evaluate the potential success of) a wholesale offering, it is important to understand the structure of the pricing that suppliers currently agree with FSNI (and other grocery retailers). For most product categories, there are two parts to prices:

242.1 purchasing terms: the price that Foodstuffs pays suppliers for products. This price often reflects the cost savings that suppliers experience from the high volumes Foodstuffs purchases as well as any supply chain related services offered by Foodstuffs (e.g. cost to collect and distribute product via Foodstuffs centralised and integrated supply chain) which also provides efficiencies for the supplier compared to the supplier storing and distributing the product directly to the retail store, and

242.2 suppliers' trade and marketing spend: the money that suppliers spend with Foodstuffs to market, promote and discount their products.

243 Retail trade and marketing spend is an important part of how suppliers control how their products are presented to consumers through various channels. As groceries are differentiated products, there are several considerations in addition to sales volumes that contribute to the overall prices suppliers will agree, and the structure of those prices. [REDACTED].

[REDACTED]	
[REDACTED]	[REDACTED]
[REDACTED]	<ul style="list-style-type: none"> <li>• [REDACTED]</li> <li>• [REDACTED]</li> </ul>
[REDACTED]	<ul style="list-style-type: none"> <li>• [REDACTED]</li> <li>• [REDACTED]</li> <li>• [REDACTED]</li> <li>• [REDACTED]</li> </ul>
[REDACTED]	<ul style="list-style-type: none"> <li>• [REDACTED]</li> <li>• [REDACTED]</li> <li>• [REDACTED]</li> </ul>
[REDACTED]	<ul style="list-style-type: none"> <li>• [REDACTED]</li> </ul>

244 Suppliers (like retailers) are competing for sales of their products through retail channels. In that context, trade and marketing spend is often a key lever at their disposal. Suppliers allocate trade and marketing across retail brands in a way that they consider most likely to help them achieve their goals. [REDACTED].

245 [REDACTED].

*Figure 4 – [REDACTED]<sup>243</sup>*

[REDACTED]

246 [REDACTED].

*Figure 5 – [REDACTED]<sup>244</sup>*

[REDACTED]

247 [REDACTED].<sup>245</sup>

248 Trade spend appears to be a feature of grocery retailing elsewhere. For example, the UK Competition Commission (now the Competition and Markets Authority) referred to supplier discounts, being volume or promotion related, as a “normal feature of negotiations” in 2000.<sup>246</sup> Similarly, the ACCC noted that “trading terms do not simply encompass the different volumes of products purchased by various retailers and wholesalers”, it also includes negotiations for the level of support that the retailers provide suppliers.<sup>247</sup>

249 To FSNI’s knowledge, there have been no previous adverse findings about, or attempts to regulate, trade and marketing spend. Unsurprisingly, findings elsewhere suggest that, if retailers (or suppliers) have market power, there will be insufficient pressure to pass through

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<sup>243</sup> [REDACTED].

<sup>244</sup> [REDACTED].

<sup>245</sup> [REDACTED].

<sup>246</sup> UK Competition Commission investigation (2000) at [11.88] and [11.91].

<sup>247</sup> ACCC Inquiry at p 345.

good prices.<sup>248</sup> In New Zealand, competitive conditions suggest that is not an issue at the retailer level and, as above, there is no justification for regulation at this level of the market.<sup>249</sup> Competitive conditions at the supplier level have not been considered within the scope of the market study, and would presumably need to be considered to justify intervention in supplier pricing.

[[REDACTED]

250 [REDACTED].

251 [REDACTED].<sup>250</sup>

252 [REDACTED]. [REDACTED].<sup>251</sup>

253 [REDACTED].

254 [REDACTED]:

254.1 [REDACTED],

254.2 [REDACTED].

*FSNI is not able to speak for suppliers' preferences*

255 FSNI encourages the Commission to discuss pricing with suppliers, and particularly the larger suppliers that have high shares in specific categories such as Coke, Unilever and Goodman Fielder. FSNI notes that there has not been representation in submissions or at the conference from the full spectrum of suppliers, particularly larger suppliers. Better pricing, rather than any particular service or product, was an important part of the Commission's thinking on this issue. FSNI does not have control, let alone visibility, of suppliers' pricing and pricing strategies, so is limited in the commitments it can make regarding pricing – [REDACTED]. Given the significance of suppliers' pricing objectives to how any "wholesale" offer by grocery retailers would look, it is critical that the Commission understand this perspective.

***The range FSNI could offer***

256 At this stage, FSNI notes:

256.1 FSNI offers a wide range of products in retail stores, and its buying is directly responsive to the range it seeks to offer in stores. FSNI has approximately 80,000 products, a range that is constantly changing as new products are introduced and other products are discontinued. [REDACTED].

256.2 Potential wholesale customers are likely to have different needs in terms of range, as they would more generally. For example, as noted above Night 'n Day sought

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<sup>248</sup> For example, see UK Competition Commission investigation (2000) at [2.446]; and ACCC Inquiry at p 345: "Ultimately, rebates and allowances assist retailers and wholesalers to reduce the price paid for stock. This in turn, in a competitive environment, should lead to the reduction of prices paid by consumers (and in the case of wholesalers, being on-sold to retailers). In a less competitive environment, where there are less incentives for retailers to pass on the reduced costs, rebates and allowances may allow retailers to increase their margins at the expense of suppliers with little benefit to consumers".

<sup>249</sup> FSNI submission on the draft report from [357].

<sup>250</sup> [REDACTED].

<sup>251</sup> [REDACTED].

access to dry groceries only – presumably because it is able to access products itself in all other categories on terms it finds acceptable.

256.3 [REDACTED].

256.4 [REDACTED].

***Private label***

257 In respect of private label, FSNI does not see any basis for being treated other than as any supplier – private label isn't a bottleneck in and of itself – noting that the Commerce Act would apply. The evidence in this respect is set out from paragraph 171, above.

**Next steps**

258 As set out above, there is insufficient evidence of a competition problem, or barriers to accessing supply, to justify a recommendation regarding access to products at the “wholesale” level. FSNI’s basis for this position is set out in the previous sections. It is also not clear that such access has the potential to benefit retail competition.

259 Nevertheless, FSNI acknowledges that it and the Commission have had only a short timeframe to consider a very complex set of issues, and as such the thinking is likely to remain materially incomplete at the time the Commission must finalise its market study report. Furthermore, FSNI will be continuing to explore over coming months the potential for a wholesale offering that is more targeted at other retailers. The Commission is likely to have a legitimate interest in the upshot of this work.

260 As a result, FSNI proposes to continue to engage with the Commission as it finalises its report and beyond, as FSNI continues to explore a wholesale offering, to the extent the Commission remains interested in this option. FSNI considers that the most appropriate recommendation the Commission could make, at this stage, would be one of continued engagement between FSNI and the Commission and/or Government, as the potential is explored. To this end, FSNI proposes quarterly engagement, as well as on request.

**OTHER OPTIONS FOR RECOMMENDATIONS**

**FSNI’s key points**

261 As regards each option for recommendations put forward by the Commission in the draft report, and raised by other submitters, FSNI’s key points are:

261.1 the Commission has not established that forced divestments are justified based on the severity of the competition concerns identified, nor that the intervention would lead to beneficial outcomes for consumers,

261.2 FSNI provides comments to assist consideration of this option while noting that it is a matter for the Government whether to become involved in grocery retailing, and

261.3 the status quo for collective bargaining should remain and appears to best serve the interests of consumers.

**The Commission’s recommendation to force divestment of either retail stores and/or supply chain assets is unjustified and would be ineffective**

262 FSNI considers that the Commission has not established that direct intervention in retail competition by requiring the major retailers to divest retail and/or wholesale assets is necessary to improve competition and provide benefits for customers.

263 FSNI makes the following points in response to the discussion at the conference:

- 263.1 the Commission has not established that the nature of competition in grocery markets justifies what would be the most intrusive intervention ever implemented in New Zealand,
- 263.2 the Commission's Merger and Acquisition Guidelines do not raise all necessary considerations which should and would need to be accounted for when determining the appropriateness of forced divestments,
- 263.3 there is no specific composition of assets which if divested would produce an "effective" competitor, and
- 263.4 it is unclear that divestments would be practically achievable or effective. Instead there are complications and unintended negative consequences associated with divestments.
- 264 FSNI elaborates on each of these points below.

***The Commission's draft findings do not meet the threshold for recommending forced divestments***

- 265 Forced divestment is not a regulatory solution that should be adopted lightly. Confiscation (even with recompense) of a privately owned family business for competition reasons would be unprecedented in New Zealand and, to FSNI's understanding, in the grocery sector globally. Given forced divestments are more intrusive than any intervention previously implemented in New Zealand, the competition problem justifying the intervention would also need to be unprecedentedly severe and unable to be solved by less intrusive remedies.
- 266 The Commission's draft findings regarding the nature of competition, even taken at face value, do not prove that any issues are unprecedentedly severe or unable to be otherwise resolved. FSNI agrees with the Commission's statement in the draft report that such an intrusive intervention should only be implemented as a last resort, only to be considered if other measures had proven not to be feasible or to be ineffective.<sup>252</sup>
- 267 As a matter of general principle, FSNI takes the view that it would be unlikely for any market study to ever identify a competition problem that would justify recommending the confiscation of private property.
- 268 It is not enough to say that there are other examples where divestments have been forced upon vertically integrated suppliers without consent.<sup>253</sup> These examples are rare, predominantly historical, and have been justified on the basis of competitive effects (i.e. the general principle identified in the paragraph above, and considered further in this section). To FSNI's knowledge, the Government has never required divestments in order to reduce market power, with the possible exception of the virtual asset swaps conducted between state-owned electricity generator-retailers.
- 269 Further, FSNI notes that:
- 269.1 the use of Telecom as an example confuses the point. The Government did not strictly require, and neither did Parliament legislatively mandate, the structural separation of Telecom. Instead, as part of its policy decision regarding its investment in an ultra-fast fibre broadband rollout nationally in 2009, the Government required

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<sup>252</sup> Draft report at 9.106.

<sup>253</sup> Mr Matthews (Matthews Law) at lines 31 to 37, page 6 of the transcript from the Retail Grocery Market Study Conference, Day 6 (1 November 2021).

private sector partners bidding for its investment funding to contribute to an “open access, wholesale-only, passive fibre network infrastructure”<sup>254</sup> – i.e. partner participants could not be vertically integrated as Telecom was at that time. Accordingly, Telecom made a commercial decision to separate its business, and

- 269.2 the examples referred to in the United States, such as the Banking Act of 1933 (Glass-Steagall Act),<sup>255</sup> have typically applied to a sector as a whole, rather than selected participants – albeit the sector may have comprised a single monopolistic entity. This is clearly not the case in the New Zealand retail grocery market. And, to hypothetically narrow the scope of intervention, legislation that would narrow the scope of divestments or separation to entities over a minimum size threshold would establish a barrier to growth as participants would need to change their business model as they reach this threshold. Such an intervention would create perverse outcomes for committed new entrants such as Costco and Circle K.
- 270 Most importantly, the Commission would need to have a very high degree of confidence that any adverse conclusions on the state of competition were soundly based and had been determined following a rigorous process. As discussed at in this submission, given the analysis presented in FSNI’s earlier submissions and the discussions had during the conference, it is clear that some of the Commission’s draft findings on the nature of competition, particularly the constraints imposed by smaller competitors, and the Commission’s findings about FSNI’s profitability and innovation and international price comparisons, do not withstand scrutiny.
- 271 To recommend such a severe intervention, there would need to be unequivocal evidence that the potential benefits for consumers would outweigh the harms and the costs. FSNI does not believe the Commission has shown such evidence. It would be necessary for the Commission to:
- 271.1 have a high degree of assurance that the proposed divestment was appropriate for addressing the competition problem, and proportionate to the magnitude of the problem identified,
- 271.2 carry out a careful assessment of potential for unintended consequences, and
- 271.3 carry out a comprehensive weighing of the cost and benefits. As, for example, it is required to do when conducting a regulatory inquiry under Part 4 of the Commerce Act, or reviewing an authorisation under Part 6.
- 272 The Commission has not undertaken this analysis.
- 273 It is important that a high threshold be applied when considering the level of competition concerns that could justify forced divestments in order to protect New Zealand’s reputation as a place to do business and provide certainty to New Zealand business owners. Confiscation of private property rights from individual owners in New Zealand communities, especially without prior warning about the type of conduct that may give rise to this result i.e. no breach of existing law, would rightly be a frightening message to business owners and potential investors both in New Zealand and overseas. New Zealand ranked first, out of 190

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<sup>254</sup> Steven Joyce *Ultra-fast broadband investment proposal finalised* (media release, 16 September 2009), available at: <https://www.beehive.govt.nz/release/ultra-fast-broadband-investment-proposal-finalised>. To be eligible, bid participants needed to demonstrate compliance with the open access requirements in the invitation to participate, including divesting any existing retail business; see New Zealand Government Ultra-Fast Broadband Initiative Invitation to Participate in Partner Selection Process” dated October 2009, available at: <https://www.crowninfrastructure.govt.nz/media/4824/invitation-to-participate.pdf>.

<sup>255</sup> In addition, the Glass-Steagall Act was about prudential regulation, i.e. trying to solve a different problem.

economies, in the World Bank's 2020 assessment on the ease of doing business. That reputation would be damaged beyond repair by the forcible confiscation of private property rights. This raises questions regarding whether Costco and Circle K or other global players would proceed with their plans to launch in New Zealand in that climate.

***Caution should be taken in applying the Commission's merger guidelines to assess the viability of a forced divestment***

- 274 The Commission outlined in the draft report that the Commission's Merger and Acquisition Guidelines provide some guidance on the factors that are likely to influence the viability of a divestment, including whether there is an available purchaser, the composition of the divested assets and whether the divested assets would deteriorate in the divestment process.<sup>256</sup> FSNI understands the Commission is interested in industry participant's views on the applicability of the Commission's Merger Guidelines as setting a framework for divestment.<sup>257</sup>
- 275 The Commission's Merger and Acquisition Guidelines deal with voluntary sales of assets necessary to avoid an acquisition lessening competition. That question is, in principle, a completely different question to appropriateness of unilateral confiscation of private property. The considerations to be applied when setting a framework for forced divestments by an existing business would be importantly different.
- 276 To illustrate this point, some of the difficulties which would need to be accounted for include:
- 276.1 Consideration of the divesting party: In mergers, the applicant's sale of a part of the acquisition remains voluntary. The applicant would only make the voluntary sale if it was commercially advantageous to do so. Therefore, there can be a tacit assumption that following the divestment the applicant will continue to be a commercially effective competitor. Alternatively where a divestment is forced, the key consideration should be the impact of the divestment of the ongoing operational efficiency of the party who is forced to divest. FSNI notes that Foodstuffs operates a long-term network strategy identifying strategic property purchases many years ahead. This means there may well be real challenges to FSNI in getting back into catchments that have been forcibly divested, lessening the competitive constraint FSNI would pose on any new player and essentially shifting the competition problem. Further potential impacts on FSNI are discussed below at paragraph 282.
- 276.2 Purchaser risk: Purchaser risk in the context of a voluntary asset sale is not easily comparable to in the context of a forced divestment. In mergers, the Commission will consider the purchaser, requiring them to have the necessary expertise to operate the divestment assets as an effective long-term competitor. However, this purchaser risk is considered as a trade-off where the applicant is selling voluntarily part of an acquisition. As discussed at paragraph 276.1, it is assumed in this context that the divesting party will continue to be an effective competitor. In the context of a forced divestment this is less certain. Therefore, the threshold for considering purchaser risk would need to be considerably higher than for a voluntary asset sale. Having said that, purchaser risk does helpfully identify that, for a divestment to be successful, the purchaser of the divested assets must have, or have access to, the necessary expertise, experience and resources to be an effective long-term competitor. Given the complexity of FSNI's business, it is expected this criterion would be of real importance in any divestment process. For example, it will be

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<sup>256</sup> Draft report at 9.104.

<sup>257</sup> Commissioner Johnston asked about the applicability of the Commission's Merger Guidelines as setting a framework for divestment.

important for the Commission to consider any prospective purchaser's brand proposition and marketability. There is no guarantee that consumers will want to shop with a divested competitor.

276.3 Composition risk: The composition risk associated with a forced divestment is more significant than for a voluntary sale of assets. Separation of the relevant assets would need to be practically achievable, and the assets would need to be sufficient to create a viable and competitive entity. There is a range of associated complexities which are discussed further from paragraph 277.

***There is no specific composition of assets which would produce an "effective" competitor***

277 When considering the potential impacts of forced divestment, it is important to consider what would be required to create a viable and competitive entity, and whether that is practically achievable. It would be much more complex than simply selecting a combination of stores from FSNI and WWNZ and giving them to a third player – without branding or a price proposition.

278 FSNI understands that the Commission is considering, in order to determine what composition of assets would be appropriate for divestment, what an "optimal" competitor would look like.<sup>258</sup> In the draft report the Commission suggested a successful divestment, being a divestment producing an "optimal" competitor, would require a network of retail stores, a wholesale business or access to wholesale on competitive terms, a distribution business or access to logistics services on competitive terms, and back office support at least on a transitional basis.<sup>259</sup> This would not be straightforward. Further, this assumes that competitors need to resemble the major retailers in order to compete. FSNI does not take the view that this reflects the nature of competition today. There is no "optimal" competitor and no minimum efficient scale required to be a viable and effective competitor to the major retailers. Instead FSNI suggests the Commission should consider what makes an "effective" competitor.

279 New and "effective" national main shop competitors are likely to have a different model to FSNI and the other major retailers. For example:

279.1 an online only model, in which case no stores are needed (Supie), or

279.2 a fully private label offering (Aldi), or

279.3 a mixed model involving grocery and general merchandise options (Costco).

280 Further, "effective" competitors do not necessarily compete for the main shop. This is demonstrated by the fact nine out of ten FSNI customers are on a mission other than the main shop. Effective competitors for shopping missions come in all shapes and sizes. Only a single store is necessary to compete for a particular shopping mission. For example, as discussed at paragraph 25, Newsroom carried out a price comparison which showed that Fruit World Silverdale had lower prices for five out of nine items when compared to the nearby PAK'nSAVE, demonstrating it competes directly with PAK'nSAVE.

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<sup>258</sup> [Reference to conference].

<sup>259</sup> Draft report at 9.105.

281 FSNI takes the view that there are a number of ways to be an “effective” competitor and there is no specific composition of assets which, if divested, would create viable and competitive entity.

***It is unclear that divestments would be practically achievable or effective***

282 As discussed, the Commission has indicated that a successful divestment would require a network of retail stores, wholesale access, and access to logistics services and back office support. FSNI notes that there are complications and unintended negative consequences associated with the divestment of each of these assets:

282.1 Retail stores: FSNI’s stores are individually owned, which is different from WWNZ and most other retailers. There is no fair way for force divestments across FSNI Members. Further, a divestment would need to be representative of FSNI’s network. It would not be appropriate, for example, to “cherry pick” the highest volume and lowest cost to serve stores, as this may create a potentially disproportionately profitable set of stores, and a competitive disadvantage in the retailer forced to divest.

282.2 Retail banners: If the Commission persisted in recommending forced divestments, the major retailers would need to be treated consistently. It would not be appropriate to require divestment of an entire banner from one of the major retailers, and not the other, as this would create a huge competitive disadvantage. FSNI operates a portfolio of banners in order to compete. They are each part of one competitive package. Taking away one banner will have implications for FSNI’s costs and ultimately the price paid by consumers.

282.3 Wholesale business: As FSNI is an integrated business with some scale shared services, there is no clear delineation in Foodstuffs’ grocery retailing business between wholesale and retail.<sup>260</sup> That means FSNI would need to effectively create a separate wholesale business, at great cost, and amend business processes before it could be divested. If the wholesale and retail aspects of FSNI’s business were separated and (even partially) divested this would likely lead to a higher cost of supplying grocery products in New Zealand as a result of:

- (a) double marginalisation, by adding additional commercial margin at the wholesale level,
- (b) compromised supply chain agility by adding an extra layer of complexity. As an example, one only needs to imagine how much more difficult it would be to manage the COVID-19 lockdowns, and global supply chain challenges if FSNI had to go through a separate wholesaler to source product. Even outside of COVID times, managing FSNI’s supply chain to ensure adequate stock across our stores is a complex task, and
- (c) a competitive advantage being given to other new entrants – and players such as Costco and Circle K – which plan to enter on a vertically integrated basis.

Further, it is not clear that the divestment of wholesale assets would be beneficial to the new entrant. Other retailers have expressed that the key advantage sought is

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<sup>260</sup> [REDACTED].

access to the same price the major retailers pay, including trade and marketing spend. This is not something which could be divested.

- 282.4 Supply chain logistics: There is no need to divest supply chain assets as both warehousing, supply chain logistics and transport requirement are accessible from third party providers.

**Government facilitated new entry is associated with a range of issues**

- 283 The Commission has noted the possibility of a Government sponsored new entrant in retail or divestiture of existing stores. FSNI does not consider it appropriate to comment on whether the Government ought to become involved in grocery retailing, and instead notes that:

- 283.1 the Commission's conclusions in the draft report do not appear to warrant facilitation of entry – even taken at face value,

- 283.2 in the conference, no barriers to entry were raised that justify facilitation of entry. For example, building capital and building relationships with suppliers have not been raised as insurmountable barriers to entry. Instead the focus should be on other potential legislative barriers (which the Government is able to control) such as OIA, RMA and zoning issues, and

- 283.3 in facilitating entry there are a number of challenges which would have to be considered.

- 284 FSNI notes the following considerations will be relevant in determining whether facilitation entry is appropriate:


















































- 284.1 whether a new grocery retailer would increase competition or bring down prices. FSNI operates as though there is a strong prospect of new entry at all times, so we doubt this threshold is met,

- 284.2 whether, if there were a commercial opportunity due to high prices/profits or complacent industry participants there is a private solution, or whether the Government needs to use taxpayer money to subsidise an entrant or get involved itself. The imminent entry of Costco and Circle K and the ongoing entry of disruptive market participants such as Supie, Farro, Hello Fresh, suggest there is a real question as to whether this is the case,























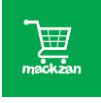














































- 284.3 whether facilitated entry would benefit all New Zealanders equally i.e. entry must equally subsidise consumers in Westport to the same extent as Auckland, and





































- 284.4 any other questions of policy and politics that are for the Government and voters, not existing grocery retailers, to decide on.

## APPENDIX A: SHOPPING MISSIONS AND COMPETITOR SET

Shopping mission	Competitors (included in market share)	Competitors (excluded in market share)
Full shop (buying multiple categories with no dominant mission)	<p><b>National:</b>   </p> <p><b>Regional:</b>    </p> <p>Others include Tai Ping, Huckleberry, Commonsense and Jadan Supermarket.</p> <p><b>Online:</b>   </p>	<p><b>Online:</b>    </p> <p>  </p>
Top-Up (fruit, veges, tea)	<p><b>National:</b>  </p> <p><b>Regional:</b>     </p> <p>Others include Farro, Da Hua, Moore Wilson's, Jadan Supermarket, Indo Spice World and other independent produce stores.</p> <p><b>Online:</b>  </p> <p>Others include My Food Bag, Hello Fresh and WOOP.</p>	<p><b>Regional:</b>  </p> <p>  </p> <p><b>Online:</b>       </p>
In home snacking (buying soft drinks, chocolate blocks, sharing bags)	<p><b>National:</b>   </p> <p>Others include Bin Inn, and liquor specialists (Liquor King, Super Liquor, Bottle-O, Thirsty Liquor, Huckleberry).</p> <p><b>Regional:</b>   </p> <p>Others include Da Hua, Tai Ping, Commonsense, Farro, Four Candles and Moore Wilson's.</p> <p><b>Online:</b>  </p>	<p><b>National:</b>    </p> <p>Others include vending machines.</p> <p><b>Regional:</b>    </p> <p>Others include Circle K, Costco.</p> <p><b>Online:</b>    </p> <p>Others include Uber Eats, The Honest Grocer, Brunch Box, Supie</p>

Shopping mission	Competitors (included in market share)	Competitors (excluded in market share)
Quick and easy meals (prepared meats, bread, ready meals)	<p><b>National:</b></p>    <p><b>Regional:</b></p>        <p>Others include Tai Ping and Moore Wilson's.</p> <p><b>Online:</b></p>    	<p><b>National:</b></p>    <p><b>Regional:</b></p>   <p><b>Online:</b></p>           
Cooking from scratch (buying raw meat, tinned tomatoes etc.)	<p><b>National:</b></p>    <p><b>Regional:</b></p>      <p>Others include Da Hua, Tai Ping, Commonsense, Aussie Butcher and Jadan Supermarket.</p> <p><b>Online:</b></p>   	<p><b>Regional:</b></p>    <p><b>Online:</b></p>        
On the go (sushi, pies, water, cold foods)	<p><b>National:</b></p>    <p><b>Regional:</b></p>          	<p><b>National:</b></p>    <p>Others include vending machines and farmers markets.</p> <p><b>Regional:</b></p>    <p><b>Online:</b></p>      <p>Others include Supie, This Local Piggy</p>
Indulge now (buying dessert, chips)	<p><b>National:</b></p>    <p><b>Regional:</b></p>     	<p><b>National:</b></p>   <p>Others include Petrol stations with convenience stores (BP, Mobil, Z) and vending machines.</p> <p><b>Regional:</b></p>    

Shopping mission	Competitors (included in market share)	Competitors (excluded in market share)
	 <p>Others include Tai Ping and Indo Spice World.</p> <p>Online:</p>  	<p>Others include Costco, Asian Sari Sari Store, Good For.</p> <p>Online:</p>     <p>Others include Supie, This Local Piggy.</p>
Beer and wine	<p>National:</p>      <p>Regional:</p>        <p>Online:</p>  	<p>Regional:</p>  <p>Online:</p>   
Homecare and pet (buying cleaning products, batteries, pet food)	<p>National:</p>    <p>Regional:</p>       	<p>National:</p>      <p>Others include farmers markets.</p> <p>Regional:</p>    <p>Online:</p>      
Personal care and wellbeing (buying toiletries and vitamins)	<p>National:</p>    <p>Regional:</p>   	<p>National:</p>     <p>Regional:</p>     <p>Online:</p>      

Shopping mission	Competitors (included in market share)	Competitors (excluded in market share)
<p>Breakfast (buying yogurt, fruit and cereal)</p>	<p><b>National:</b>  </p> <p><b>Regional:</b>   </p> <p> 太平亞洲食品超市 TAI PING TRADING CO asian supermarket</p> <p><b>Online:</b>   </p>	<p><b>National:</b> Includes petrol stations with convenience stores (BP, Mobil and Z) and farmers markets.</p> <p><b>Regional:</b>    </p> <p><b>Online:</b>    </p> <p>  </p> <p>Others include Uber Eats, Menulog, Deliver Easy, Mighty Ape.</p>
<p>Vegetables (buying root veges, tomatoes, potatoes etc.)</p>	<p><b>National:</b> </p> <p><b>Regional:</b>     </p> <p>  太平亞洲食品超市 TAI PING TRADING CO asian supermarket</p> <p></p> <p>Others include other independent produce s</p> <p><b>Online:</b>  </p>	<p><b>National:</b> Includes farmers markets</p> <p><b>Regional:</b>  </p> <p><b>Online:</b>   </p>

**APPENDIX B: PRICE COMPARISON****Newtown Greengrocer to New World Newtown**

<b>Product</b>	<b>Newtown Greengrocer<sup>261</sup></b>	<b>New World Newtown<sup>262</sup></b>	<b>New World price difference (%)</b>
Strawberries	2 for \$5	1 for \$2.99  (or 2 for \$5.98)	+19.6%
Cauliflower	\$1.99	\$4.49	+125.6%
Tomatoes	\$3.99 per kg	\$3.99 per kg	0
Asparagus	\$1.99	\$2.99	+50.3%
Eggplant	\$1.99	\$2.49	+25.1%
Avocado	6 for \$5	1 for \$1.25  (or, 2 for \$2)  (or, 6 for \$6)	+20%
Cucumber	\$1.99	\$2.99	+50.3%
Courgette	\$4.99 per kg	\$9.99 per kg	+100.2%
Cabbage green	\$2.99	\$3.99	+33.4%
<b>Average price differential</b>			<b>+47%</b>

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<sup>261</sup> Advertised sales 19 to 21 November 2021.

<sup>262</sup> Based on searches of New World website on 24 November.

**Fruit World to New World comparison**

Product	Fruit World <sup>263</sup>	New World <sup>264</sup>	New World price difference (%)
Avocado (Hass)	4 for \$2.99	3 for \$3.99	+77.93%
Courgette	\$5.38 per kg	\$10 per kg	+85.87%
Cucumbers (telegraph)	\$1.99	\$1.79	-10.05%
Mushrooms (white button)	\$9.99 per kg	\$13.49 per kg	+35.04%
Strawberries	\$2.99 per 250g	\$3.99 per 250g	+33.44%
Spinach	\$1.99 per bag	\$3.99 per 120g bag	+100.50%
<b>Average price differential</b>			<b>+53.79%</b>

**Fruit World to PAK'nSAVE comparison**

Product	Fruit World <sup>265</sup>	PAK'nSAVE <sup>266</sup>	PAK'nSAVE price difference (%)
Avocado (Hass)	4 for \$2.99	\$0.99 each	+32.44%
Courgette	\$5.38 per kg	\$9.99 per kg	+80.69%
Cucumbers (telegraph)	\$1.99	\$2.29 each	+15.08%
Mushrooms (white button)	\$9.99 per kg	\$12.99 per kg	+30.03%
Strawberries	\$2.99 per 250g	\$2.25 per 250g	-24.75%
Spinach	\$1.99 per bag	\$3.49 per 120g bag	+120.60%
<b>Average price differential</b>			<b>+42.35%</b>










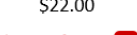


















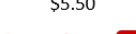






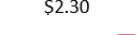



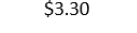


<sup>263</sup> Weekly specials on the website 29 November 2021.

<sup>264</sup> Based on searches of New World website on 29 November 2021.

<sup>265</sup> Weekly specials on the website 29 November 2021.













<sup>266</sup> Based on searches of the Pak'nSave website on 30 November 2021.

## Price competition – pet category

		Cheapest → Most Expensive				
	Purina Fancy Feast Flavoured Cat Food, 85g	\$1.19 	\$1.33 	\$1.69 	\$1.70 	\$1.79 (48 for \$48) 
	Iams Proactive Health Dry Cat Food, 1.59kg	\$15.99 	\$16.79 	\$22.00 	\$21.99 	\$23.99  
	Dine Daily Cuts/Slices Wet Cat Food, 85g	\$1.19 	\$1.39   	\$1.49  	-	-
	Temptations Cat Treats Tasty Chicken, 180g	\$4.99 	\$6.00 	\$7.59 	\$7.69 	\$8.09 
	Pedigree DentaStix 10-25kg Dog 7 pack	\$5.00 	\$5.50 	\$6.65 	\$6.79 	\$7.99 
	Whiskas Adult Cat Oh So Fishy Loaf Style, 400g	\$1.99 	\$2.29 	\$2.30 	-	-
	My Dog Wet Dog Food, 400g	\$2.29 	\$2.49 	\$3.30 	\$3.48 	\$3.49 

Data taken from respective online ecommerce websites, week beginning 29/11/21. Prices are non-promotional, do not include multi-deal pricing and represent the unit stated.







## Price competition – baby products

		Cheapest → Most Expensive				
	Huggies Little Swimmers 7-12Kg, 12pk	\$9.99 	\$11.00 	\$12.49 	\$12.99 	\$13.49 
	Aptamil – Gold+1 Infant Formula 900g	\$27.99 	\$28.99 	\$29.00 	\$29.99  	\$30.00 
	Only organic Stage 2 Baby Food, Apple Banana and Mango	\$1.69  	\$1.79  	\$1.99 	-	-
	Johnson's Baby Powder –255g cornstarch	\$4.89 	\$4.99  	\$5.00 	-	-
	Huggies Ultra Dry Nappies 6-11kg	25.99 	31.99 	36.99 	-	-
	Huggies baby wipes frag free 80pk	\$3.49 	\$4.49  	\$4.99 	-	-

Data taken from respective online ecommerce websites, week beginning 29/11/21. Prices are non-promotional, do not include multi-deal pricing and represent the unit stated.








foodstuffs ISLAND

## Price competition – household products

	Cheapest					Most Expensive
	\$4.99 <b>PAKhSAVE</b>	\$6.49 <b>CHEMIST</b> DISCOUNT CHEMIST	\$6.99 <b>NW</b> <b>ecostore</b> Supie	\$7.00 countdown	-	
	\$16.95 <b>Pharmacy Direct</b>	\$17.89 <b>PAKhSAVE</b>	\$17.99 <b>CHEMIST</b> DISCOUNT CHEMIST	\$18.40 thewarehouse	\$20.59 <b>NW</b>	
	\$12.99 <b>PAKhSAVE</b>	\$13 thewarehouse	\$13.19 <b>NW</b>	-	-	
	\$2.99 <b>CHEMIST</b> DISCOUNT CHEMIST	\$3.19 <b>PAKhSAVE</b>	\$4.09 Supie	\$4.39 <b>NW</b>	-	
	\$3.29 Handee <b>PAKhSAVE</b>	\$3.49 Viva <b>CHEMIST</b> DISCOUNT CHEMIST	\$3.50 Tuffy Supie	\$4.50 Viva catch	\$6.00 Handee thewarehouse	
	\$16.49 <b>PAKhSAVE</b>	\$18.99 <b>CHEMIST</b> DISCOUNT CHEMIST	\$19.99 <b>NW</b>	-	-	
	\$3.98 thewarehouse	\$4.79 <b>NW</b>	\$4.99 <b>CHEMIST</b> DISCOUNT CHEMIST	-	-	

Data taken from respective online ecommerce websites, week beginning 29/11/21. Prices are non-promotional, do not include multi-deal pricing and represent the unit stated.

## Price competition – grocery

	Cheapest					Most Expensive
	\$1.35 <sup>1</sup> thewarehouse	\$1.69 <b>PAKhSAVE</b>	\$1.99 <b>NW</b>	\$2.50 Supie	-	
	\$1.49 <b>PAKhSAVE</b>	\$1.99 Supie <b>NW</b>	\$2.00 thewarehouse	-	-	
	\$0.89 <sup>2</sup> thewarehouse	\$2.29 <sup>3</sup> <b>PAKhSAVE</b> HONEST GROCER	\$3.00 Supie	\$3.49 <b>NW</b>	-	
	\$1.69 <b>PAKhSAVE</b>	\$2.00 Supie	\$2.19 <b>NW</b>	\$2.35 thewarehouse	\$4.20 <sup>4</sup> HONEST GROCER	
	\$3.29 thewarehouse	\$3.79 <b>NW</b>	\$3.89 <b>PAKhSAVE</b>	\$4.00 Supie	-	
	\$2.75 thewarehouse	\$2.79 <b>PAKhSAVE</b>	\$2.99 <b>NW</b>	\$4.26 Supie	-	
	\$9.99 <b>NW</b>	\$10.00 thewarehouse	\$10.50 Supie	\$10.99 <b>PAKhSAVE</b>	\$13.00 countdown	

Data taken from respective online ecommerce websites, week beginning 22/11/21. Prices are non-promotional, do not include multi-deal pricing and represent the unit stated..

1 Oak Spaghetti, 420g | 2 Pasta Maria Spaghetti, 500g | 3 The Honest Grocer - Divella Fusilli, 500g | 4 Proper Crisps, 150g | 5 Happy Happy Soy Boy Original, 1L

## APPENDIX C

## Foodstuffs North Island Limited's response to paragraph 174 of NZFGC Submissions on Preliminary Issues Paper dated 4 February 2021

	Type of behaviour	Who benefits	FSNI comment
1	<b>Shifting risk and cost from the supermarket to the supplier</b>		
1.1	Requiring a supplier to guarantee a retailer's margin regardless of price.	Retailer	FSNI does not require a supplier to guarantee margin regardless of price.
1.2	Margin expansion – the practice of extracting higher margins from suppliers and at the same time increasing the on-shelf price.	Retailer	FSNI negotiates with suppliers across a category and then stores compete in the retail market. Customer insights and competitive factors are used to set retail prices. Changes in retail prices are generally discussed with suppliers.
1.3	Tender processes where double and triple the trading margin is expected from suppliers.	Retailer	A target margin is established at the start of the tender process and the target is based on commercial insight from other markets (i.e. insight from international markets), other supplier's margins, and an understanding of FSNI costs and the costs to operate a store.
1.4	Demands for payments from suppliers for costs which are instead genuine retail costs e.g. staff costs for placing products on the retailer's shelf.	Retailer	Suppliers view sales representatives and merchandisers in store and the role they play including shelf replenishments as a benefit and some suppliers go further and see it as a competitive advantage.  In many instances suppliers and stores agree the level of Merchandising to be provided in store and where a supplier is not willing or able to meet the agreed level (this can be for various reasons) some suppliers agree to pay the stores to arrange for people to complete the Merchandising of shelves. Suppliers can choose not to enter into such agreements.
1.5	Demands to pay for store theft, shrinkage and waste.	Retailer	

	Type of behaviour	Who benefits	FSNI comment
1.6	Demands to pay for product damage not the fault of the supplier or risk deletion.	Retailer	Shrinkage, waste and damage are funded by either the store or the supplier depending on the circumstances. Further details were provided in our answer to question 23.4 Information Request 3 on minor damage allowance.
1.7	Demands for retrospective payments from suppliers for previous financial years for perceived gaps in margin or other vague benefits the supplier is deemed to have received.	Retailer	FSNI does not support or allow this practice.
1.8	Over-ordering and cancelling; overordering due to retailer forecasting errors and then returning the stock.	Retailer	Should forecasting errors occur we work with the suppliers to find a solution. In some instances, these order errors are driven by the suppliers own vendor managed inventory ordering team. Ordering and stock management over the last 18 months has been incredibly complex due to Covid, global supply and local port challenges.  Further details were provided in our answer to question 23.4 Information Request 3.
1.9	One-sided contracts e.g. having no exit clause for suppliers; prohibiting suppliers from seeking legal or professional advice on tender documents without approval from the retailer.	Retailer	Supplier agreements including Leaf, display, and Minor Damage Allowance (MDA) agreements include two-way exit clauses. If a supplier has a historic agreement with no exit clause for suppliers FSNI will amend the agreement if this is brought to FSNI's attention.  Commercial documents are provided to suppliers under a Non-Disclosure Agreement (NDA) and FSNI ask suppliers to respect this agreement. FSNI does not restrict suppliers from seeking legal or professional advice and NDA obligations do not prohibit the seeking of this advice.
1.10	Retrospective variations to contracts to favour the retailer.	Retailer	FSNI does not support this practice and no issues have been raised with FSNI.

	Type of behaviour	Who benefits	FSNI comment
2	<b>Extracting additional payments/fees from suppliers</b>		
2.1	Demands to pay a percentage of sales as a “display” payment when the product has not, and most likely will not, be displayed. Some larger suppliers extract agreements for displays in return, but most signed agreements are without any guaranteed activity from the retailer at all.	Retailer	<p>FSNI has display agreements in place with suppliers for New World. See our answer to question 47.2 Information Request 3.</p> <p>Suppliers were invited to participate in the New World display agreement and the benefits were shared with suppliers at a series of supplier briefings.</p> <p>Some suppliers have elected not to sign a New World display agreement.</p> <p>When we introduced the display agreement, we converted the prior year display trade spend into a % of supplier retail sales (i.e., dividing trade spend by total sales of the supplier’s products, whether displayed or not).</p> <p>Each display agreement was negotiated with each supplier and resulted in an agreed % of retail sales (some negotiations resulted in lower forecast trade spend than prior years).</p> <p>The agreements cover all product ranged by the supplier and include a two-way exit clause enabling suppliers to exit the agreement with a notice period.</p> <p>The promotional and display programme is agreed with suppliers as part of the annual planning process and can change at the request of supplier or FSNI as circumstances change.</p> <p>Approximately 60% of displays are arranged through FSNI with the balance of displays recommended to stores enabling efficiency gains through less visits to stores, less time negotiating each display, significant reduction in administration time. These benefits flow to both the supplier and FSNI.</p>
2.2	Demands to pay for shelf space or floor space or risk deletion.	Retailer	FSNI does not support this practice and no issues have been raised with FSNI. Also see answer to 2.1 above.
2.3	Listing and ranging fees.	Retailer	FSNI does not support this practice and no issues have been raised with FSNI.

	Type of behaviour	Who benefits	FSNI comment
2.4	"Auctions" and tenders for shelf space.	Retailer	FSNI considers auctions and tenders are an important commercial option to ensure supermarkets can compete well to obtain the best overall product costs and prices for consumers.
2.5	Unreasonable claims for payment of services or credits dating back more than two years following "forensic audits".	Retailer	FSNI does not support this practice and no issues have been raised with FSNI.  FSNI does seek to recover genuine or provable shortfalls from suppliers. In practice these have been minimal and should be well understood by suppliers.
2.6	Demands for payment of a % of sales for waste or damage which is over and above actual waste or damage.	Retailer	See 1.5 above and further details were provided in the answer to Question 23.4 Information Request 3  MDA is designed to improve efficiencies for both suppliers and stores when dealing with minor damages and credits. This process was developed with the FCG Industry Relations Working Group including the final approach being presented to the FGC Board of Directors where it was supported in principle by that Board.
2.7	Introducing new and unbudgeted costs e.g. a product "neck tag" fee, a product recall fee or some other new cost.	Retailer	In August 2016, FSNI introduced a recall/withdrawal fee to assist with recovering costs incurred when managing and supporting a supplier-initiated product recall, precautionary withdrawals and labelling errors. The fee is \$2,500.  FSNI only supports introducing fees where the fee represented a recovery of cost for a request or incident caused by suppliers.
2.8	Negotiating a discount from the supplier for a consumer promotion and then not running the consumer promotion. While price is not discussed the negotiation takes place with the supplier intention and expectation that there will be activity in the market of some kind which benefits consumers.	Retailer, Consumer loss	FSNI does not support this practice and no issues have been raised with FSNI.

	Type of behaviour	Who benefits	FSNI comment
2.9	Demands that a supplier uses the retailer's transport system which is often more expensive, less efficient and less accountable. Threats of punitive action should a supplier wish to leave the retailer's primary freight service.	Retailer	<p>FSNI believes there are often industry wide efficiencies and sustainability gains that can be obtained through effective utilisation of FSNI's distribution network.</p> <p>Where a supplier and FSNI see benefits in using FSNI transport this is negotiated between both parties and if both parties agree the supplier uses FSNI's distribution network. If the negotiation is not agreed between the parties the supplier is able to arrange distribution to stores. FSNI absolutely refutes allegations of threats or punitive action.</p>
2.10	Demands to purchase retailer data eg. Dunnhumby.	Retailer	FSNI is offering 'dunnhumby shop' for suppliers to purchase. This is at the supplier's discretion. At the time of submission 20 suppliers have agreed to purchase the data.
3	<b>Reducing or delaying payment to suppliers</b>		
3.1	Deducting a settlement or prompt payment discount despite making late payments.	Retailer	<p>The settlement discount applied by Foodstuffs is not and was never intended as a prompt payment discount. It was introduced to recognise the position Foodstuffs take in administering and managing the credit control of the independently owned and operated stores within the network.</p> <p>As far as possible, standard terms options are available to ensure an even playing field between suppliers.</p>
3.2	Slow and extended payment terms for goods; payments made months after the retailer has sold the goods; unreasonable payment delays, irrespective of undertakings as to timeliness in contracts.	Retailer	<p>Payments made outside terms:</p> <p>Foodstuffs is committed to paying its suppliers in full and on time (according to terms). This is monitored and reported, and we are continually working to improve the supplier experience.</p> <p>The most recent measures show that 94.6% of all supplier invoices are settled within terms. Detailed review with specific suppliers who have raised this complaint have also highlighted to them that incidences of late payment are actually infrequent and typically explainable.</p>

	Type of behaviour	Who benefits	FSNI comment
			<p>Processing for separate stores in the cooperative is more complex than it would be for a corporate. On average, between 90,000 and 100,000 inbound invoices are processed each week. High levels of automation and process standardisation are needed to ensure that we can minimise cost in the supply chain and service customers most efficiently. In practice the reason for delayed payments can be varied. We do experience internal issues which we are continually working to minimise, however the majority typically result from the supplier side. These include:</p> <ul style="list-style-type: none"> <li>• Not sending valid tax invoices (or sending them late);</li> <li>• Incomplete information provided (e.g. missing purchase order or incorrect store details);</li> <li>• Unresolved underlying issues on the delivery (not delivered what is ordered, incorrect pricing etc.); and</li> <li>• Lack of responsiveness from offshored shared service centres.</li> </ul> <p>The length of payment terms is dealt with below.</p>
3.3	Unreasonably long payment terms for high volume goods. For example, a supplier sells product to retailer on 1 December and it sells on 2 December. The retailer pays the supplier 20 January and often later.	Retailer	<p>Foodstuffs offers a number of standard terms which are intended to create as even a playing field between suppliers as possible.</p> <p>Different standards will apply across different categories with a number of categories being settled on 7 day terms e.g. fresh suppliers are typically paid on shorter terms. In addition, the business has supported a number of small and local suppliers over the COVID 19 lockdowns and continues to do so.</p> <p>For Foodstuffs North Island, the average days payable outstanding at March 2021 was 30.4 days. For context, across the whole business, including stores, there is an estimated 26.5 days of inventory in stock.</p> <p>Suppliers are able to select shorter standard terms but there is a commercial cost to this.</p>

	Type of behaviour	Who benefits	FSNI comment
3.4	A practice by some stores of regularly and significant claiming for short delivery of shipments (signed as received) when the supplier has no doubt the product has been delivered.	Retailer	FSNI does not support this practice. One instance of this issue has been raised with FSNI via the Industry Relations Working Group. FSNI followed up directly with the store as well as requesting specific information for the store to review records. The FGC Industry Relations Working Group followed up no information has been provided.
3.5	Arbitrary deductions of large sums from remittance without consultation. There is little most suppliers can do to get disputed claims back.	Retailer	FSNI does not support this practice.  NOTE: that there is a substantial value of claims and receivables outstanding which are due from suppliers to our individual stores. As at April 2021 there are \$7.6m of overdue claims and \$5.6m of receivables > 60 days. In extreme situations, total values outstanding will be withheld from outstanding payments to suppliers. This is not arbitrary and is strictly for suppliers we are already working with and who we have discussed this approach. It is only applied where we receive confirmation that the balances are not already in dispute or have been paid and not cleared.
4	<b>Product deletion threats and other retribution</b>		
4.1	Constant threats of deletion as a default and “negotiation” shortcut.	Retailer	FSNI does not support any alleged “short cut” practice or threatening behaviour.
4.2	Threatening to move supplier’s product to a lower shelf to make it harder for consumers to secure other retailer benefits.	Retailer	Shelf space is a finite resource in our stores, FSNI follows a constant range review process to ensure we are offering a range that meets our customers' needs.
4.3	Banning a supplier from promotional activity as a punitive measure for not complying with some other demand or activity.	Retailer, Consumer loss as there are fewer opportunities to buy those brands at a	FSNI has the right to decide which product to range in its stores (including new products), where it positions products on shelf, and which products to promote and as working hard to do this based on customer insight and for the customers benefit.  Decisions to range product are made for many reasons including customer needs, sales growth, potential sales growth availability of supply, retail price, cost and ROI.

	Type of behaviour	Who benefits	FSNI comment
		reduced price.	Range decision are important decisions for our supermarkets to ensure we are able to compete in a market with many options.
4.4	Rejection of all new product development as a punitive measure for not complying with some other demand reducing consumer access to products and innovation.	Retailer, Consumer loss.	
5	<b>Inducing supplier to refuse to deal with competitive retailers</b>		
5.1	Demands not to supply competitors with exclusive packs or other product variants.	Retailer	FSNI has a preference (outlined in an internal policy) for suppliers to offer their products to all retailers as we believe this promotes competition and enables scale and efficiency in a market of NZ size. FSNI respects a supplier right to choose which retailers they offer their product to.
5.2	Threatening deletion of a product or applying other pressure if a supplier supplies products to another new entrant in the New Zealand market.	Retailer	FSNI does not allow threatening behaviour.  As outlined in 5.1 above, FSNI has a preference (outlined in an internal policy) for suppliers to offer their products to all retailers as we believe this promotes competition and enables scale and efficiency in a market of NZ size. FSNI respects a supplier right to choose which retailers they offer their product to.
6	<b>Requirements to participate in uneconomic promotions</b>		
6.1	Requiring suppliers to participate in promotions where the ROI is unclear or unlikely. See 2.9 regarding the purchasing of retailer data.	Retailer, in some cases consumer.	FSNI does not require suppliers to participate in promotions.  Each supplier is able to decide if they would like to promote a product.  It is important to note that some suppliers offer products to our stores which, when they are not on promotion, sell at a negative margin.

	Type of behaviour	Who benefits	FSNI comment
6.2	Demands that suppliers move to a “6 week on, 2 weeks off” promotional rotation which would mean in effect that all stock is purchased from the supplier at the promotional price.	Retailer, Consumers benefit only during the promotion “on weeks” when the lower price is passed on.	FSNI stores may forward buy products at the promotion cost price to enable stores to offer value to customers over a period longer than the specific promotion.  Forward buying by a store is with the consent of the supplier and where the supplier is concerned a supplier may look to restrict the amount a store can purchase via an allocation of stock or a retrospective product cost price discount based on volume of retail sales (i.e., scan).
7	<b>Requirements to provide free products or perks</b>		
7.1	Demands for significant amounts of free product at store before accepting what should be, according to head office decision, a compulsory stocked line and on the shelf.	Retailer	FSNI does not support demands and requests for significant free products and discourages gifts or incentives.  Suppliers offer free product to stores for store openings and are regularly offering free product and incentives including travel and events to stores to build relations with store buyers.  Further details were provided on supplier credits in our answer to question 23 Information Request 3.
7.2	Requests for petrol vouchers, restaurant meals, free product and other personal gifts either personally or for staff.	Retailer, Personal	
7.3	Free overseas travel and accommodation.	Retailer, Personal	
7.4	Demanding suppliers credit all stock after a punitive deletion.	Retailer	
8	<b>Buyer-induced bundling</b>		
8.1	Requiring suppliers to use retailer-owned or affiliated services eg transport, distribution centres – even when this is a more expensive route to market.	Retailer	There is no requirement to use FSNI owned or affiliated transport or distribution centres. We offer this as a service to suppliers and we sell our proposition the same way a supplier sells us their products.

	Type of behaviour	Who benefits	FSNI comment
			<p>FSNI believes there are industry wide efficiencies and sustainability gains that can be obtained through effective utilisation on FSNI's distribution network. As part of the discussions with suppliers FSNI presents our view of the value we believe using our transport offers.</p> <p>Where a supplier and FSNI see benefits in using FSNI's distribution network this is negotiated between both parties.</p>
8.2	Requiring or pressuring a supplier to purchase retailer data and insights at significant cost.	Retailer	<p>FSNI is offering 'dunnhumby shop' for suppliers to purchase. This is at the supplier's discretion. At the time of submission 20 suppliers have individually agreed to purchase the data.</p> <p>The cost of the accessing the insights has been benchmarked against dunnhumby rates internationally.</p>
9	<b>Requiring collusive behaviour in supplier market</b>		
9.1	Rejecting offers from suppliers for lower priced goods for consumers because the offers would be cheaper than the retailer's private label product.	Retailer	<p>FSNI is not aware of this practice and no issues have been raised with FSNI.</p> <p>FSNI does endeavour to negotiate best in market wholesale pricing to enable our retail stores to offer best in market retail pricing to our customers.</p> <p>FSNI decides which product to range in its stores (including new products and private label products), where it positions products on shelf, and which products to promote based on a combination of factors. Further details provided in 4.1.</p>
9.2	Demands to know from a supplier information or details about retail competitor's promotional programme or pricing	Retailer	<p>FSNI is not aware of this practice and no issues have been raised with FSNI.</p> <p>FSNI is aware of and trains our people on their Commerce Act responsibilities. Any allegation of anti-competitive behaviour made known to the General Counsel will be investigated fully and is dealt with appropriately.</p>

	Type of behaviour	Who benefits	FSNI comment
10	<b>Appropriating IP for supermarket's own brands</b>		
10.1	Copying or demanding the use of supplier's intellectual property for private label products and in some cases subsequently deleting the supplier's product.	Retailer	<p>Foodstuffs Own Brands are not aware of this practice or examples.</p> <p>In order to meet our obligations for Food Safety, Corporate Social Responsibility and Ethical Sourcing commitments, we do ask suppliers for full transparency in relation to ingredients, raw material sources and 3rd party manufacturing sites.</p> <p>If disclosure of this information is of concern to suppliers, we offer to sign a non-disclosure agreement protecting their interests and Intellectual Property (<b>IP</b>).</p> <p>We do not ask for information in relation to unique manufacturing processes or other IP apart from any necessary information required to meet the above obligations.</p>
11	<b>Inadequate health and safety measures</b>		
11.1	Bullying of sales representatives, poor treatment of merchandisers leading to mental health concerns.	No one benefits	<p>FSNI does not condone bullying, poor treatment of sales representatives or merchandisers, or poor health and safety practices. Any incident identified by internal staff or suppliers should be immediately escalated to our General Manager People and Capability, General Manager Merchandise, General Counsel or Chief Executive and will be investigated in full and dealt with appropriately.</p>
11.2	Poor health and safety practices in store	No one benefits	

**Foodstuffs North Island Limited's response to additional or related/additional allegations made by NZFGC in its response to the Commission's draft report dated 26 August 2021**

	Type of behaviour	FSNI comment
1	General culture of bullying, intimidation and retribution	FSNI does not condone or support bullying, intimidation or conduct that amounts to retribution. For a number of years we have had our own internal processes and policies, and have been in regular dialogue with the NZFGC. We also support such conduct being addressed as part of the development of an industry grocery code of conduct.
2	Demands to pay supermarkets for merchandising services which is a discretionary spend and not a term. This has previously been explained to suppliers as an "investment in the wages account" of the store, to offset the retailers' wages bill.	<p>Suppliers view sales representatives and merchandisers in store and the role they play including shelf replenishments as a benefit offered to and accepted by stores and some suppliers go further and see it as a competitive advantage.</p> <p>To optimise the efficiency of store operations and ensure people are on hand to ensure stock is available on shelf, stores work with suppliers to agree the hours of Merchandising suppliers will provide stores.</p> <p>In many instances, where a supplier is not able to meet the agreed level (this can be for various reasons) they are asked and agree to pay the stores to arrange for people to complete the merchandising of the supplier's product on shelves. Suppliers can choose to enter or not to enter into such agreements.</p> <p>The services offered by suppliers have been in place for a long period of time.</p>
3	Suppliers negotiate product supply with each of the head offices of Foodstuffs North Island and Foodstuffs South Island. Suppliers are then often required to renegotiate with individual retail outlets under the same banner as the head offices.	<p>For a long time standard trading terms have been negotiated by Foodstuffs with major suppliers.</p> <p>[REDACTED].</p> <p>[REDACTED].</p> <p>[REDACTED].</p> <p>[REDACTED].</p> <p>[REDACTED].</p>

	Type of behaviour	FSNI comment
		[REDACTED].
4	The level of 'pass through' of promotional discounts and other cost efficiencies to consumers is sub-optimal.	This is not supported by the Commission's own pass-through analysis in the draft report (which FSNI believes is consistent with workable competition). As submitted by FSNI, among other things, pass-through is far from complete, which likely reflects the intensity of competition and therefore the inability of individual competitors to pass through firm-specific cost changes. Sector-wide pass through is much more complete or consistent, which is also what would be expected under intensive, effective competition.
5	FSNI has pursued its new business model to significantly increase margins and supplier costs, while consolidating categories which reduce consumer choice throughout the whole COVID experience, adding enormously to supplier pressures at a time of considerable stress.	<p>As has been communicated throughout the market study, FSNI's new business model is customer-driven.</p> <p>The customer drivers for the model are convenience and value, which means making it easier for FSNI's customers to shop FSNI stores by ensuring the range on offer is easy to choose from and represents the products that matter most to them. It is also about ensuring FSNI delivers on its responsibility to buy well for New Zealanders.</p> <p>In FSNI's experience, suppliers have consistently asked for three things:</p> <ul style="list-style-type: none"> <li>• A chance to have one conversation with FSNI's Support Centre and to have their products ranged across all stores, rather than have many conversations with FSNI stores,</li> <li>• Consistent range layout across FSNI stores, and</li> <li>• A simpler, lower-cost engagement model.</li> </ul> <p>FSNI's commercial model is delivering on these requests.</p> <p>FSNI has been transparent about its range review and commercial model process and has covered this extensively with suppliers and in the market study submissions and information provided.</p>

	Type of behaviour	FSNI comment
		<p>The process is similar to those used by many world class retailers in New Zealand and globally.</p> <p>There are many examples of quality, new and/or innovative suppliers/products that have been successful under the new model (for example, in FSNI's review of frozen products, 133 suppliers have been successful, and in 93% of these cases the product is either manufactured in New Zealand or is New Zealand-owned).</p> <p>These suppliers' voices may not be as represented by industry groups or in the media.</p>
6	FSNI is pursuing a strategy with suppliers to reduce the number of product (and consumer) choices within categories.	<p>As set out above, behind FSNI's new business model are the customer drivers of convenience and value. The model will make it easier for FSNI's customers to shop FSNI stores by ensuring the range on offer is easy to choose from and represents the products that matter most to them, and will also ensure FSNI delivers on its responsibility to buy well for New Zealanders.</p>
7	Examples cited of recent decisions by FSNI to delete brand leaders, that is, the most popular products with consumers based on their purchase decisions.	<p>FSNI disputes that there is any particular strategy or practice of deleting popular products of brand leaders. To the contrary, FSNI's shelf allocation decisions are driven by the customer drivers for convenience and value, which make it easier for FSNI's customers to shop FSNI stores by ensuring the range on offer is easy to choose from, represents the products that matter most to them, and represent value to all customers including our price conscious customers.</p> <p>Generally, as set out in FSNI's submission on the draft report, with over 80,000 products, including 9,000 new products on shelves annually:</p> <ul style="list-style-type: none"> <li>• ranging decisions and assessments based on customer data are constantly being made by FSNI (and are subject to a number of considerations, including how FSNI responds to competitive supplier activity, innovation within the relevant product category and developments in other product categories), and</li> <li>• given the finite shelf space and the very significant pipeline of new products being developed, deletion decisions are made from time to time (often with</li> </ul>

	Type of behaviour	FSNI comment
		input from suppliers) even where products are not performing poorly. In those circumstances, individual suppliers may be unhappy with the outcomes of what is a properly structured process.
8	Retailers can effectively enforce price floors, particularly when there are competing private label products in the same category or a favoured supplier has product in the category.	FSNI does not establish or enforce price floors in this manner. FSNI endeavours to negotiate best in market wholesale pricing to enable our retail stores to offer best in market retail pricing to our customers.
9	The requests for retrospective payments set out above at 1.7 also sometimes relate to promotions run during previous years, theft, or product "wastage" or "shrinkage" that occurs in-store or are the result of claims that historic invoices remain unpaid. In particular, some Foodstuffs stores regularly claim over and above rates of other stores (and in some cases for more than the supplier sold in the first place).	<p>FSNI does not support unreasonable claims for payment of services or credits.</p> <p>FSNI does seek to recover genuine or provable shortfalls from suppliers. In practice these have been minimal and should be well understood by suppliers.</p> <p>Shrinkage, waste and damage are funded by either the store or the supplier depending on the circumstances.</p> <p>MDA is designed to improve efficiencies for both suppliers and stores when dealing with minor damages and credits. This process was developed with the FCG Industry Relations Working Group including the final approach being presented to the FGC Board of Directors where it was supported in principle by that Board.</p> <p>Further details are provided in our answers to conduct described in 1.5, 2.5 and 2.6 above and were provided in question 23.4 Information Request 3 on MDA.</p>
10	Unilaterally imposing additional costs (often promotional costs) or discounting items without prior agreement.	<p>Unilaterally imposing additional costs has not been raised as a topic or issue by the FGC in the fortnightly Industry Relations Working Group Meetings or through the escalation mechanism included within the Supplier Relationship Guidelines.</p> <p>[REDACTED].</p>

	Type of behaviour	FSNI comment
11	Refusing to pay agreed costs to suppliers (including for having no physical proof of delivery despite product being delivered).	FSNI does not support this practice.  The topic or issue has not been raised by the FGC in the fortnightly Industry Relations Working Group Meetings, which have taken place over an extended period.
12	Display fee implemented by Foodstuffs North Island. Previously suppliers would negotiate for and pay for specific displays which would be delivered. Foodstuffs North Island moved to a percentage deduction as a 'display fee' for which a supplier may or may not get any displays. NZFGC has fielded numerous reports from suppliers who have paid significantly more but have received either none or fewer displays in return for this increased expenditure. One supplier complained they had received no compulsory displays at all and while finally given the right to three compulsory displays by Foodstuffs North Island, were allocated zero stores for these compulsory displays.	[REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].
13	Using a 'pay to play' model where suppliers pay for data in order to achieve transparency regarding, among other things, margin targets. NZFGC claims this has pushed suppliers to use in-store media hubs. Suppliers allegedly say this is expensive but it helps them get listed.	Further information is required to understand the allegation.  Suppliers are able to purchase a subscription to the dunnhumby Shop tool which provides access to FSNI store by store product and customer data to enable suppliers to analyse their performance in with our stores.  The model adopted is similar to the approach used by dunnhumby in other parts of the world.