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Tēnā koe

Statement of Unresolved Issues: Proposed merger of Foodstuffs North Island and Foodstuffs South Island

Thank you for this third opportunity to provide written comment to the Commerce Commission regarding the clearance application (the Application) from Foodstuffs North Island Limited (FSNI) and Foodstuffs South Island Limited (FSSI) (together, the Parties) seeking clearance to merge into a single national grocery entity, together with potentially also the existing Foodstuffs (N.Z.) Limited (FSNZ) entity (the Proposed Merger).

We have considered the extensive Statement of Unresolved Issues (SoUI) document, and we have carefully reviewed the 70 areas for additional information that the Commission has requested. We would be happy to meet with the Commission and reiterate our availability to meet in person to discuss any matters raised further.

NZFGC's position

As we have articulated in our two submissions to date, in response to the Commission's Statement of Preliminary Issues and the Statement of Issues, this is one of the most significant and complex mergers that the Commission has ever considered given the grocery industry is one of the most significant markets, as its function and impacts affect all New Zealanders.

Having reviewed the SoUI, it is clear that the points NZFGC has made to the Commerce Commission have been well applied and understood in relation to the broader concerns raised. Based on the information provided to us by our supplier members, while there are mixed views, the overwhelming majority provided to us, both views and evidence, demonstrate the genuine concerns that a merger between FSNI and FSSI would likely result in a substantial lessening of competition in the grocery retail market for suppliers.

Following the publication of the SoUI, we sought further information from members regarding the issues raised. The member feedback received was aligned with the previously submitted information, ensuring consistency in perspectives shared to date.

We submit that the concerns raised in the SoUI against the proposal make sense, and these concerns would make a difference to competition, such that the Commission must confirm its preliminary and subsequent views. The Commission cannot be satisfied that the proposal will not have, or would not be likely to have, the effect of substantially lessening competition.

NZFGC has long advocated for competition reform to address the concentration of market power because it has many challenging impacts on the suppliers we represent and for consumers. The 2022 Market Study identified concerns about the concentration in the grocery sector and subsequent measures to de-concentrate the industry were considered and addressed by the government. It would seem surprising to allow a proposal that would result in further concentration and exacerbate well-known issues.

The Grocery Supply Code was introduced in 2023 to address the issues found in the market study. Since then, however, there have been a number of concerns raised by the Grocery Commissioner about the application of the new Code and the grocery supply agreements offered to suppliers. NZFGC remain concerned that the approach taken by FSNI and FSSI to contract out of the key protections of the Grocery Supply Code in their separate and, prior to intervention by the Grocery Commissioner, substantially different template agreement remains in breach of the Code and the Regulated Grocery Retailers' obligations to act in good faith. The recently announced early review of the Code is welcomed and provides further emphasis that this merger proposal is antithetical to the intention of the Grocery Industry Competition Act. Just 126 days after the Code was fully in effect, with suppliers understandably reluctant to contract out of protections of the Code, the Commission has moved to review the new regulatory regime, as "the desired intent is not being achieved". Further, the recent reforms contemplated at least three, not two, Regulated Grocery Retailer entities. This proposal could frustrate the Parliament's legislative intent for the Grocery Industry Competition Act, and indeed any review, given that FSNI and FSSI are separately listed as Regulated Grocery Retailers in section 8 of the Act.

Given the findings of the Market Study, and that this subsequent regulation was required to address the anti-competitive effects in the market and to provide protections for suppliers, we cannot see how the Commission can be satisfied that the proposal will not substantially lessen competition.

Member responses to additional information requests

We noted in our previous submissions that there is a reluctance for suppliers to provide comment, given the potential ramifications, and that the Commission is unlikely to get the level of responses it would like but this must not be taken to suggest those concerns are not real and abundant.

We have been able to get that information to assist the Commission which we summarise in our submission on the Statement of Issues. The level of feedback, both quantitatively and

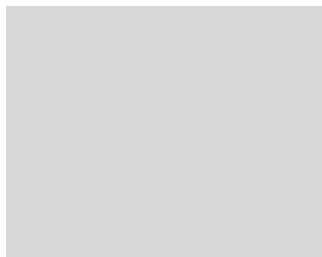
qualitatively, demonstrates its evidential weight. This is fulsomely set out our submissions, Part E onwards of the Statement of Issues Preliminary submission and section 9 onwards of the Statement of Issues submission. Of those asked, 70 suppliers completed the comprehensive survey and provided insights on the proposal and its impacts. Members highlighted the following concerns:

- **Differences in terms and negotiations:** 96% say there are differences in the two Foodstuffs entities operations, negotiations, or terms, 80% have different strategies between the two entities, and 88% think the proposed merger will make it harder for suppliers to do deals directly with individual stores/groups of stores/banners.
- **Increased market power:** 71% believe the status quo of three Regulated Grocery Retailers assists negotiations more than the proposal; 77% think the merged Foodstuffs could have a greater ability to depress prices paid to suppliers.
- **Other impacts:** 76% have concerns about impacts in other parts of the supply chain and/or greater costs being imposed on suppliers.
- **No consumer benefit:** 74% do not expect any merger-specific 'cost savings' (lower prices from suppliers) to be passed on to consumers and 55% think the proposal would make it harder for suppliers to negotiate pass-through.
- **New entry:** Members also thought that the proposal would make new retail entry (or expansion by small/niche players) less likely with 74% believing it would make it harder.

The information provided demonstrates concerns from suppliers regarding the potential consequences of a proposed merger, emphasising the negative effects it could have on supply arrangements and overall competition.

Reiterating the points previously submitted to the Commission, we would strongly encourage a thorough consideration of the merger's impact on suppliers. Many foresee the merger as a significant factor that could disrupt current supply dynamics and competitive balance in the market. We urge you to consider these concerns in your concluding evaluation of the merger proposal.

Ngā mihi nui



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