WOOLWORTHS

NEW ZEALAND

Woolworths New Zealand Limited's post conference submission to the New Zealand Commerce Commission regarding the market study into the retail grocery sector

23 November 2021

Index

Introduction and Executive Summary

1. Introduction and Executive Summary

1.1. Woolworths New Zealand Limited (**WWNZ**) has engaged constructively throughout the market study into the retail grocery sector (**Market Study**). That is because, like the Commerce Commission (**Commission**), we want to see a thriving grocery sector across New Zealand that provides great value for Kiwis and contributes meaningfully to the communities we serve.

1.2. It is on this basis that we have committed our support to a number of significant reforms that will enhance competition, that have been "tried and tested" overseas, that appear to be supported by broad industry consensus, and that will deliver benefits for New Zealand consumers and suppliers:

1.2.1. We support the introduction of a mandatory grocery code (**Grocery Code**) to enshrine a higher standard of practices across the sector and ensure small suppliers in particular get a fair go;

1.2.2. We support clearer guidance on the way specials and promotions are communicated, clearer terms and conditions for loyalty programmes, and the introduction of a mandatory unit pricing code (**Unit Pricing Code**) to make things clearer for shoppers;

1.2.3. We support a waiver / prohibition of "no supermarket" provisions in leases and land covenants (beyond an initial period to enable investment) as well as changes to overseas investment approvals and planning laws; and

1.2.4. We support oversight from a grocery ombudsman or adjudicator (**Grocery Ombudsman**).

1.3. Each of these reforms represents meaningful change, and will take time to be introduced, and for their benefits to manifest. The grocery market also continues to rapidly change, with accelerating new market entry and expansion (for example, Costco), and trends towards convenience and online.

1.4. We are confident that these reforms will make a difference. As such, we would support a further review in relation to the New Zealand retail grocery sector after an appropriate period of time, say 5 years, to observe and report back. The establishment of the Grocery Ombudsman during that time will also assist the Commission in gathering information on the sector to inform it on the impacts of those reforms and its understanding of the sector more broadly.

1.5. We have also said that if, following the conclusion of the Market Study and sufficient passage of time to implement and assess the impact of the other options we support, there is a view that additional wholesale supply would also be of benefit, then we are open to exploring voluntary commercial wholesale supply.

1.6. However, in relation to some of the more interventionist options canvassed, we believe we have an obligation to draw the Commission's attention to the fact that there are aspects of the Commission's process, findings, and options that we are deeply concerned about. A robust, resilient, and efficient grocery supply chain and sector is too important to New Zealand for untested and unwarranted interventions to be piloted on the basis of (in some cases) incorrect findings, benchmarks, and constrained process, and inaccurate third party submissions and comments at the Commission's consultation conference (**Conference**) (a number of which are addressed in this document). Our concerns on these matters are outlined in Part 7.

1.7. It is crucial that the Commission reach evidence-based conclusions, not conclusions based on an intuitive sense of a problem, anecdotal evidence, or a preconceived notion that a market that appears concentrated is problematic. There must be rigorous analysis to reach any findings, and there must be cost-benefit analysis to make any recommendations. To date, in relation to the more interventionist options, those thresholds have not been met.

1.8. To assist the Commission to consider those matters as it work towards its Final Report, we have sought expert analysis from a number of pre-eminent experts with relevant experience in the matters of importance to the Commission's analysis and process:

1.8.1. Peter Harris AO - former Chair of the Australian Productivity Commission from 2012 to 2018, a role in which he wrote extensively on the intersection between competition law policy, efficiency, and productivity for an economy;

1.8.2. Henry Ergas AO - formerly an expert lay member of the New Zealand High Court, and an economist at the OECD in Paris, including as Counsellor for Structural Policy in the Economics Department, a role in which he wrote extensively on industrial organisation and competition in the retail grocery industry;

1.8.3. Kieran Murray and Dr Veronica Jacobsen of Sapere Consulting (**Sapere**) - with Mr Murray an economist and expert lay member of the New Zealand High Court with expertise in the fields of regulation, competition analysis and public-policy, and Dr Jacobsen an economist with extensive expertise in all aspects of public policy and wide experience at senior levels in government, including the Treasury, the Ministry of Business, Innovation and Employment and the Ministry of Justice; and

1.8.4. James Mellsop and Dr Will Taylor of NERA Economic Consulting (**NERA**) - two of New Zealand's best regarded competition economists, with Mr Mellsop Chair of NERA's Global Antitrust and Competition Practice, and Dr Taylor an Associate Director in NERA's Antitrust and Competition Practice. NERA's report also draws on analysis by KPMG.

1.9. As the Commission will see, these expert reports have identified significant concerns (both substantive and procedural) with the more extreme interventions canvassed in the Draft Report and discussed in the Conference. The approach adopted in the Final Report must address the matters raised in this Submission and those expert reports.

1.10. We reiterate that a robust, resilient, and efficient grocery supply chain and sector is too important to New Zealand for untested and unwarranted, interventionist "options" to be piloted on the basis of (in some cases) incorrect findings, constrained process, and inaccurate third party submissions.

Part 1: The areas of consensus that will make meaningful change

2. We support a number of reforms, and a further review to report back on their impacts

2.1. It was encouraging to see at the Conference that there was broad consensus on a number of options, that have been "tried and tested" overseas, and which would further strengthen competition in the New Zealand retail grocery sector and deliver positive change, including:

2.1.1. the introduction of a mandatory Grocery Code;

2.1.2. appointment of a Grocery Ombudsman;

2.1.3. simplification of pricing, promotions, and loyalty programme terms - including industry guidelines and introduction of a Unit Pricing Code;

2.1.4. regulations to make "no supermarket" provisions in leases and land covenants unenforceable (other than in relation to an initial period required to justify investments); and

2.1.5. reform of the Resource Management Act 1991 (**RMA**) and Overseas Investment Act 2005 (**OIA**) to assist in entry and development of new retail grocery sites.

2.2. We repeat our commitment in our submission in September on the Commission's Draft Report (**September Submission**), and in the Conference, to support such initiatives, including by being part of the cross-industry group that provides input into a Grocery Code to ensure it is fit for purpose.

2.3. We also believe that changes such as the introduction of a Grocery Code, Grocery Ombudsman, clearer pricing and promotion guidelines, Unit Pricing Code, and prohibition on "no supermarket" leases/covenants should be mandatory via regulation and apply to all retailers of grocery products, because a level playing field is critical, and the large number of owner-operated retail grocery stores in New Zealand would mean that a voluntary regime would require a large number of signatories, and heighten the risk of opt-out.

2.4. We are confident that these interventions will deliver meaningful change, as they have in other countries where they have been introduced, and we consider that they are consistent with the evidence-based findings in relation to competition in New Zealand.

2.5. As each of these reforms will take time to be introduced, and for their impact to manifest, we would support a further review in relation to the New Zealand retail grocery sector being conducted, after an appropriate period of time, say 5 years, to observe and report back. The establishment of the Grocery Ombudsman during that time will also assist the Commission in gathering information on the sector to inform it on the impacts of those reforms and its understanding of the sector.

Part 2: Addressing matters relating to returns, prices, innovation and other indicators of competition

2.6. In its Conference, the Commission held sessions to “cover issues of price, quality, range, service, innovation, international pricing and then profitability”[1] to assist its “methodologies and how to go about these assessments in the best possible way”[2] in evaluating “indicators of competition”. The time available at the Conference for WWNZ to provide its perspective on these matters was very short, and accordingly this section expands on this perspective (and includes matters it would have raised in the Conference had sufficient time been available). In particular, in this section we set out that:

2.6.1. That the Market Study should focus on outcomes, not a preconception of market structure. Once outcomes are focused on, the evidence shows that the New Zealand retail grocery sector is delivering outcomes consistent with vigorous competition.

2.6.2. The Market Study needs to apply the correct benchmark to assess returns - and that benchmark is not WACC (which is a theoretical standard of competition).

2.6.3. The Draft Report’s calculation of our returns was incorrect, with it calculating returns more than double our actual returns, by incorrectly excluding a number of our key assets from our asset base. Our returns are likely in the order of 8-9%.

2.6.4. Third party statements in the Conference about our returns were incorrect.[3]

2.6.5. The Final Report needs to address that New Zealand grocery prices have decreased in real terms, a key factor that was not addressed by the Commission in its Draft Report or Conference.

2.6.6. The Final Report needs to apply a correct, consistent, and probative standard to any international pricing comparisons, including in relation to currency conversions, data sources (such as Economist Intelligence Unit (**EIU**)), and the impact of GST on pricing comparisons. A market study must not rely on anecdote, perceptions, unsubstantiated diagrams (such as the Coriolis chart), or improperly framed consumer surveys.

2.6.7. The Final Report needs to apply a more rigorous approach to assessing innovation than contained in the Draft Report, and a proper analysis will show that the New Zealand retail grocery sector is highly innovative.

3. A market study should focus on market outcomes

3.1. In the Conference, Tex Edwards repeated the refrain that “market structure matters” and a number of submitters opined on the degree of concentration in the sector. It is a matter of fact that there are two larger grocery players in each island. However, concentration alone does not mean that there are competition issues.

[1] Page 2. Transcript of Day 4 - Retail Grocery Market Study Conference.
[2] Page 3. Transcript of Day 4 - Retail Grocery Market Study Conference.
[3] There were a number of third party statements at the Conference that were incorrect. In this Submission we have sought to address many of them, but in the time available it has not been possible to address every incorrect statement. We would be happy to provide the Commission further information on our perspective on other incorrect statements at the Conference.

3.2. What is of most importance to the long-term interests of consumers is not “market structure”, but “market outcomes”. This was recognised by the ACCC in its 2008 grocery market study where it noted that “a finding that an industry is concentrated is not itself determinative of competition issues”[4] and that the “level of concentration in the Australian market, although not optimal, is not at an uncompetitive level. For example, there is some evidence that the New Zealand grocery sector, which is more concentrated than Australia’s, has seen more intense price competition in recent years relative to Australia.”[5]

3.3. On the objective evidence of market outcomes, it is readily apparent that competition in the New Zealand retail grocery sector is at least “workably effective” and is delivering outcomes that are in the long-term best interests of consumers. Those objective market outcomes include:

3.3.1. The New Zealand grocery supply chain was efficient, responsive, and resilient enough to continue to deliver food to New Zealanders during one of the largest crises of the last century (the COVID-19 lockdowns of 2020 and 2021).

3.3.2. Retail grocery food prices have fallen in real terms over the last decade.[6]

3.3.3. Expenditure on food in New Zealand is falling as a proportion of household income.[7]

3.3.4. New Zealand retail grocery food prices are not high by global standards when a proper methodology is adopted, despite WWNZ having to pay suppliers 10% more than Woolworths Australia for identical products,[8] despite New Zealand being a small and distant market (that is expensive overall), and despite New Zealand having one of the highest rates of GST on grocery products (15%) in the OECD.[9]

3.3.5. New Zealand already has, by international standards, very high penetration of a discount-oriented / no frills supermarket proposition in the form of PAK’nSAVE, which drives vigorous price competition across the sector.

3.3.6. High-levels of consumer cross-shopping are reflective of high levels of competition, including on price.

3.3.7. WWNZ is a low margin business, with margins lower than those of Woolworths Group in Australia, which operates in a highly competitive market.[10]

3.3.8. WWNZ’s returns are, in fact, less than half that calculated by the Commission in the Draft Report and likely in the order of 8 to 9%.

3.3.9. Even if prices were reduced so that WWNZ’s business made no profit at all, that would not change New Zealand’s position in the Commission’s international food price

[4] ACCC “Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries” (July 2008) at page 45.
[5] ACCC “Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries” (July 2008) at page 67.
[6] See page 3 of our February Submission.
[7] See page 4 of our February Submission.
[8] See paragraph 2.1.4.2 of our September Submission.
[9] See paragraph 2.1.4.5 of our September Submission.
[10] See paragraph 2.2.3 of our September Submission.

rankings.[11]

3.3.10. We are achieving increasing customer satisfaction levels (reflected in significant long term increases in our 'Net Promoter' and 'Voice of Customer' scores).

3.3.11. Suppliers, farmers, and growers continue to report positively on the way we engage with them and those satisfaction levels are also continuing to improve over time (as reflected in our supplier ratings).[12]

3.3.12. We have increased our product variety and range - the number of active barcodes across WWNZ's largest grocery categories (for example, toiletries, cleaning products, biscuits - accounting for about 50% of total WWNZ sales), increased by more than 10% ([ ]) between 2010 and 2021.

3.3.13. We are continuing to increase convenience for our customers - in the last 10 years we have increased the number of bricks-and-mortar supermarkets in New Zealand from 207 to 253 across both our Countdown and our franchised stores,[13] and invested in four e-stores for online fulfilment (Penrose, Grenada North, and Moorhouse, in addition to Grey Lynn Central's eStore conversion).

3.3.14. We continue to invest in significant innovation in our offerings - including in our online, digital, and e-commerce capabilities (such as our investments in four dedicated eStores, New Zealand's first semi-automated fulfilment units (Takeoff MFCs), Pick Up, Drive Through, and Delivery experience innovations, rollout of eLockers and robotic temperature-controlled grocery collection lockers).

3.3.15. We are continuing to invest extensively to provide New Zealand an efficient and resilient supply chain including: a new $100 million Palmerston North distribution centre (**DC**) that opened in August 2021; a new state-of-the-art Produce DC opening later this financial year; partnering with Hilton Food to establish a brand new, state-of-the-art $100 million meat plant; partnering with Americold to establish a $65 million expanded temperature-controlled facility (and supporting wider temperature-controlled capacity into the market); and [ ].

3.3.16. We are delivering world-leading levels of online grocery shopping, with New Zealand's overall online grocery penetration ahead of almost all other countries when adjusted for population density, and over 13% of Countdown's sales now online accelerating further to [ ].

3.4. In our view, it is apparent from the market outcomes that the New Zealand grocery market is highly competitive and dynamic, and is increasingly so, and therefore delivering positive outcomes for the long-term benefit of consumers.

3.5. It is also the case that there is continuing entry and expansion by a significant array of different types of competitors which further contribute to such competitive outcomes, including:

[11] See paragraph 2.1.4.3 of our September Submission.
[12] See page 5 of our February Submission.
[13] Figures exclude e-stores, stores that have undergone rebranding and replacement stores.

3.5.1. Costco, the second largest "bricks-and-mortar" food / grocery retailer in the world expanding into Auckland, Wellington, and Christchurch;[14]

3.5.2. The Warehouse increasingly expanding into grocery products (both instore and online including via TheMarket) - with it noting in its September 2021 results presentation that "Grocery has been a standout category across the year" for its business;[15]

3.5.3. Farro Fresh having expanded to six retail stores across Auckland, and looking to expand into the Waikato, Bay of Plenty, and Christchurch.[16]

3.5.4. Chemist Warehouse having entered the market in 2017, rapidly grown to 25 stores (plus online), and with plans to expand to 70 stores nationwide.

3.5.5. My Food Bag, HelloFresh and WOOP, with the meal kits segment of the grocery market having grown rapidly to ~$400 million in just a few years, and increasingly extending into direct groceries.[17]

3.5.6. Online grocery retailer Geezy Go, part of technology start-up Geezy Global (currently operating in five countries, including the US, UK, New Zealand, India and Australia),[18] announcing in November 2021 that it intends to "build up a network of dark stores in Auckland initially and then Wellington, giving consumers access to a full range of groceries at a competitive price, but slashing traditional supermarket delivery times in New Zealand",[19] with it having "started developing its first site in Auckland CBD, which was expected to open in January, and was close to securing a property in Mt Eden for its second dark store" and having "already hired 10 staff for its Auckland operations, including a warehouse manager and delivery drivers."[20] Geezy Go has announced that it will be fully vertically integrated in New Zealand: "We own our direct supply chain for the brand. It means reduction in cost. We maintain [an] end-to-end supply chain so we don't go and pick the products up somewhere – they've come to the warehouse, we pick it up and send it to your door. We want to make sure it's affordable [for customers]";[21]

3.5.7. New Zealand's Circle K licensee, Pamma Retail Group, announcing in September 2021 that it plans to open more than 100 Circle K convenience stores across New

[14] With land use consent granted to Costco for a site in Rolleston. See: https://extranet.selwyn.govt.nz/sites/consultation/DPR/Shared%20Documents/PDF%20for%20markup%20Rolleston%20Industrial%20Developments%20Limited.pdf

[15] The Warehouse Group. FY21 Annual Results. 29 September 2021.

[16] See paragraph 30.2.1 of our September Submission.

[17] (5 August 2021). My Food Bag expands into groceries, targeting growth from $37b retail food sector. The New Zealand Herald. Retrieved from: https://www.nzherald.co.nz/business/my-food-bag-expands-into-groceries-targeting-growth-from-37b-retail-food-sector/UDZ6EOYNJQY6BOFJP2SIDWSGOE/

[18] (17 August 2021). New online supermarket set to redefine grocery shopping in Australia. MCG Business. Retrieved from: https://www.fmcgbusiness.co.nz/new-online-supermarket-set-to-redefine-grocery-shopping-in-australia/

[19] (1 November 2021). Online grocer Geezy Go readies 20-minute delivery for NZ. Food Ticker. Retrieved from: https://www.foodticker.co.nz/online-grocer-geezy-go-to-bring-20-minute-delivery-to-nz/

[20] (1 November 2021). Online grocer Geezy Go readies 20-minute delivery for NZ. Food Ticker. Retrieved from: https://www.foodticker.co.nz/online-grocer-geezy-go-to-bring-20-minute-delivery-to-nz/

[21] (1 November 2021). Online grocer Geezy Go readies 20-minute delivery for NZ. Food Ticker. Retrieved from: https://www.foodticker.co.nz/online-grocer-geezy-go-to-bring-20-minute-delivery-to-nz/

Zealand[22] (there are more than 14,000 Circle K outlets worldwide);

3.6. This evidence on market outcomes, and new entry and expansion, demonstrates that there is no justification for internationally unprecedented regulatory intervention in the New Zealand grocery market, in particular given the significant costs those would impose, and the risks to important supply chains that are already safely, securely, and competitively delivering groceries to New Zealanders. Indeed, some of the interventions put forward as "options" by the Commission may **deter** some of the entry and expansion referred to above.

4. The Commission's approach to treating WACC as the relevant benchmark

4.1. As we outlined in our September Submission, we disagree with the Commission's core thesis that returns in excess of WACC are evidence of a competition issue. That is because:

4.1.1. Other competition regulators, such as the UK and Australian regulators, have recognised that seeking to use returns assessments to assess whether there is a competition problem is inherently unreliable (given the number of factors that can influence returns - for example, a more efficient firm will have higher returns); and

4.1.2. Comparing returns to WACC is an artificial approach for assessing the "workable competition" standard required by the Commerce Act 1986 (**Commerce Act**) given:

4.1.2.1. almost half of all listed and Crown entities in New Zealand achieve returns greater than WACC;[23]

4.1.2.2. as Peter Harris AO notes, it is only in "conditions of perfect competition [that firms] might expect to see their returns on capital competed down to a level just above WACC";[24]

4.1.2.3. as NERA notes "the level of returns in other grocery markets is a more appropriate benchmark than WACC for the Commission to compare returns against to determine whether they are excessive and also for determining the benefits of intervening";[25] and

4.1.2.4. the Commission's approach to assessing returns is predestined, in our view, to find returns that exceed WACC in most industries that it analyses (even where there has not been any long-term excessive pricing or profits given the approach to depreciated assets).[26]

4.2. Given the Commerce Act defines competition as "workable competition", and under workable competition "returns are going to be materially higher than a WACC",[27] it is apparent that the Commission is not applying the appropriate threshold for the purposes of a Commerce Act

[22] (30 September 202). PRG Set To Open 100+ Circle K Stores & EV Service Stations In NZ. (Scoop). Retrieved from: https://www.scoop.co.nz/stories/BU2109/S00760/prg-set-to-open-100-circle-k-stores-ev-service-stations-in-nz.htm

[23] Armillary Private Capital. Return on Capital Employed. Review of 2019 Returns. Armillary Private Capital. Return on Capital Employed. Review of 2018 Returns.

[24] Peter Harris AO "Views on the Commerce Commission Draft Market Study Report on Grocery Retailing in New Zealand" (November 2021) at [14].

[25] NERA Economic Consulting "Grocery Market Study: Post-conference report" (23 November 2021) at [57].

[26] See paragraph 27.9.2 of our September Submission.

[27] Peter Harris AO "Views on the Commerce Commission Draft Market Study Report on Grocery Retailing in New Zealand" (November 2021) at [14].

market study.

4.3. That the Commission's approach is inherently flawed is illustrated by the fact, as noted by NERA, that "the Commission's own analysis suggests that in grocery markets around the world, measured returns are generally in excess of WACC. The international comparison sample average returns are 11.4% over 2015-2019, which appears to be well in excess of the WACC the Commission would consider reasonable for grocery operators." Accordingly, adopting the Commission's threshold, there is a competition problem in almost every grocery market in the world. That is plainly incorrect.

4.4. The correct position is that WACC is, in fact, a minimum benchmark for firms to be sustainable over the long-term and to attract capital to enable continued investment in products and services that benefit end-consumers. Our view on this is validated by independent analysis from the former Chair of the Australian Productivity Commission, Peter Harris AO, who notes in his report that:

4.4.1. "the WACC is not a commercial benchmark of profitability";

4.4.2. "Workable competition, where returns are going to be higher than a WACC is [the relevant] standard";

4.4.3. "the Commission equates a capital return equal to WACC with a situation of "normal returns". Borrowing language from theory (well known to economists, but not to most politicians and media) leaves an impression that apparently *abnormal* returns are the exception in workably competitive markets. But they are not. Very few potential competitors are ever going to enter a new market on the basis that they will earn what an economist would be comfortable calling normal returns";

4.4.4. "the circumstances of perfect competition are a theoretical construct, not a standard against which to judge whether the market is workably competitive. Firms only invest when they expect to do better than their WACC. It is likely many firms in New Zealand are earning substantially above their WACC"; and

4.4.5. "There are better measures of returns developed by the Commission. If its true objective is to judge whether there is workable competition, it should depend on them and eschew the use of WACC."

4.5. We agree, and emphasise that reasonable levels of returns are necessary to incentivise investments in the New Zealand economy. Further, if the Commission continues to use its current approach to assessing returns across multiple industries through subsequent market studies, there is a risk that incentives for businesses to invest in the New Zealand economy across multiple sectors will be undermined.

4.6. Put simply, the way that the Commission is looking at these topics means that it will find competition issues in almost any sector that it is tasked with looking at, and the Commission's approach will lead to systematic over-intervention in the economy to the detriment of New Zealand businesses and consumers.

5. Supermarket returns are less than half that calculated in the Draft Report

5.1. Even if comparing our returns to WACC was the appropriate benchmark, the Commission's analysis of returns was incorrect, and calculated returns more than double our true returns on our asset base, by excluding a number of our key assets from that assessment, including all of our:

5.1.1. leased assets;

5.1.2. brand assets; and

5.1.3. intangible assets.

5.2. As the Commission would appreciate, we could not operate our business without these assets, so excluding them from our asset base in calculating our returns is incorrect.

5.3. While there was discussion at the Conference on methodological aspects of calculating returns (for example, in relation to leases and goodwill), at no point did the Commission explore the implications for its findings on competition if it were to accept that, in fact, its methodology was flawed. This is a significant omission given the findings in the Draft Report draw so heavily on the Commission's findings in relation to returns.

5.4. The fact that WWNZ's returns, when properly calculated, are less than half that put forward by the Commission in the Draft Report (for the reasons set out in our September Submission), mean that our returns cannot be used as justification for significant and / or unprecedented regulatory intervention (and we note both FSNI and FSSI have similarly submitted that the Commission's calculations have also doubled their actual returns due to methodological issues in the Commission's approach).

The approach to leased assets

5.4.1. In the Conference the Commission sought input on the appropriate treatment of leased assets for the purposes of conducting an economic assessment of returns. In opening that discussion, the Commission asked questions on "the motivation for the International Accounting Standards bodies to introduce [the IFRS 16] change to the accounting treatment of leases." While the specific accounting reason for a change is not determinative of the appropriate treatment for the purposes of an economic assessment, in the interests of assisting the Commission form a view on that question (to the extent it has any relevance), we **enclose** a guidance note published by the New Zealand External Reporting Board (**XRB**) that details its understanding of the reasons for the changes to NZ IFRS 16.[28] Some of the reasons for the introduction of NZ IFRS 16 detailed in that guidance note include:[29]

5.4.1.1. "Distinct accounting requirements for finance leases compared to operating leases meant that economically similar transactions were accounted for very differently. NZ IFRS 16 addresses this concern by requiring the recognition of virtually all leases on the balance sheet";

[28] External Reporting Board. Achieving greater transparency: Important changes to lessee accounting.
[29] External Reporting Board. Achieving greater transparency: Important changes to lessee accounting.

5.4.1.2. NZ IFRS 16 provides “greater transparency about financial leverage and capital employed”; and

5.4.1.3. “By requiring lessees to recognise assets and liabilities arising from leases, NZ IFRS 16 improves comparability between companies that lease assets and companies that borrow funds to purchase assets. At the same time, NZ IFRS 16 still reflects the economic differences between the two types of transactions (for example, the lessee recognises the right to use the leased asset, rather than the underlying asset itself).”

5.4.2. As the Commission will note, the explanations given by XRB of the rationale for the introduction of NZ IFRS 16 provide further third party validation (from “*an independent Crown Entity responsible for developing and issuing accounting and audit & assurance standards in New Zealand*”)[30] of WWNZ’s view that NZ IFRS 16 provides a better economic assessment of the treatment and recording of leased assets than the former accounting standard. As WWNZ noted in the Conference, this is a case where “the accountants have learnt from the economists”[31] by moving to an approach that better reflects economic reality.

5.4.3. In particular, the XRB’s explanation refers to the fact that the introduction of NZ IFRS 16 better reflects the “capital employed” by a business by “requiring the recognition of virtually all leases on the balance sheet”. Similarly, in the USA the literature demonstrates that recent changes have been made to accounting standards to better reflect that the right to use an asset, in the form of a lease, is an asset itself that should be recorded on a business’s balance sheet:[32]

> *“The new standards feature a definition of “lease” that no longer focuses on whether the lessee has obtained effective “ownership” of the underlying asset, but rather on whether the lessee has obtained control over the use of the asset. Thus, a lease is defined as a contract “that conveys the right to control the use of . . . an identified asset . . . for a period of time.” All leases so defined that last more than one year must now be recorded on the lessee’s balance sheet as an asset (the asset being the right to use the asset for the period of the lease) and a liability (the liability being the requirement to pay future rents).”*

5.4.4. Therefore, contrary to a suggestion made by the Commision in the Conference, the introduction of NZ IFRS 16 was more than just recognising “off-balance sheet financing and the obligations that firms have to pay leases”.[33]

5.4.5. Accordingly, we consider it clear that the approach to treating leased assets as capital employed by a business, as occurs now under NZ IFRS 16, is a better approach to assessing the capital employed by a business from an economic perspective.

5.4.6. Beyond that, in the Conference there was a suggestion from the Commission that the appropriate approach to valuing leased assets (contrary to NZ IFRS 16) is to “value leases at the capital cost of finding and negotiating them”, in other words “the search cost, the transaction costs, the negotiations costs, the execution of the deed”,[34] including because “in subleasing... there doesn’t usually seem to be much of a value attached to them”.[35] With

[30] External Reporting Board. Achieving greater transparency: Important changes to lessee accounting.
[31] Page 25. Transcript of Day 4 - Retail Grocery Market Study Conference.
[32] Merrill, T.W. (Professor, Columbia Law School). The Economics of Leasing. 2020. Published by Oxford University Press on behalf of The John M. Olin Center for Law, Economics and Business at Harvard Law School.
[33] Page 26. Transcript of Day 4 - Retail Grocery Market Study Conference.
[34] Page 31. Transcript of Day 4 - Retail Grocery Market Study Conference.
[35] Page 29. Transcript of Day 4 - Retail Grocery Market Study Conference.

respect, that suggested approach is incorrect - both as a matter of economics and as a matter of commercial reality. In particular, it ignores what a lease fundamentally is. Namely a "lease is a transfer of an asset for a limited time in return for periodic payments called rent",... "[l]easing entails the acquisition of assets for limited periods of time", "the defining feature of a lease is a transfer of an asset for a period less than its economic life", and "[t]he major advantage of leases as a financing device is that they allow assets to be acquired at lower cost".[36]

5.4.7. When the true economic right that arises from a lease is considered, namely the acquisition of an asset for a period of time, it is plain that a leased asset should be valued at the value of the use / enjoyment of that asset for the period of time of the lease, not the transaction costs of entering into the lease (which would not come close to recognising the true economic reality of a leased asset). This point is well-made in NERA's report: "If a business takes on a lease, the business must expect that the net present value of the expected future cash flows generated by that lease will exceed (or at worst equal) the present value of the future lease payments. In other words, the value of the lease to the business must be equal to or greater than the present value of the future lease payments... And this is how IFRS 16 values leases (from the perspective of the lessee)... Accordingly, IFRS 16 sets out a valid methodology for the measurement of the economic value of a lease for economic profitability purposes ."

The approach to brands

5.4.8. We outlined in our September Submission our concern that the Commission's analysis excluded our brand assets from our asset base, noting that we regarded that approach as fundamentally incorrect:[37]

> *"There is no economically sound reason for excluding the value of WWNZ's brand assets. Brands are a key asset that supermarket retailers need to invest in to run a successful business. It is incorrect for the Commission to state that a brand asset "does not represent a specific asset that is being employed to generate earnings."*

5.5. At the Conference, the Commission asked for "views about how we should value brand assets in an analysis like this".[38] To assist the Commission to form a evidenced-based view on that, we engaged KPMG to value WWNZ's key brand assets, namely the Countdown, FreshChoice, and SuperValue brands, as at 30 June 2014. To sensitivity test those valuations, KPMG valued them using both the Commission's estimate of WWNZ's asset beta and WACC, and the asset beta and WACC used by Woolworths Australia for WWNZ.[39] Using those two parameters, KPMG calculated the value of WWNZ's brand assets at [ ] using the Commission's asset beta / WACC, or [ ] using the WWNZ's asset beta / WACC.

5.6. To further sensitivity test those brand valuations, in light of the potential "circulatory" issue identified by the Commission at the conference (while noting we do not agree there is any expectation of excessive returns in New Zealand that would create such an issue), we asked KPMG to sensitivity test its valuations based on assumptions of forecast revenue consistent with WWNZ having an EBIT margin at the average, and at the 25th percentile, of the Commission's global benchmark sample in each year across 2014 to 2016 (being the three

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[36] Merrill, T.W. (Professor, Columbia Law School). The Economics of Leasing. 2020. Published by Oxford University Press on behalf of The John M. Olin Center for Law, Economics and Business at Harvard Law School.

[37] See paragraph 27.7.5 of our September Submission.

[38] Page 33. Transcript of Day 4 - Retail Grocery Market Study Conference.

[39] [ ].

specific years analysed by KPMG). Those sensitivity tests provided a brand value of [ ] using the Commission's asset beta / WACC, or [ ] using the WWWZ's asset beta / WACC, as at 30 June 2014.

5.7. The above reinforces that brand assets are a significant asset of a grocery retailer, such as WWNZ, and that it would be incorrect to conduct a returns assessment that excluded such assets.

<u>The approach to goodwill and intangible assets</u>

5.7.1. In the Conference, the Commission asked for input on the appropriate approach to goodwill for the purposes of determining a business's asset base for an economic assessment of returns.

5.7.2. We strongly disagree with the approach in the Draft Report that all of WWNZ's goodwill can be excluded on the basis that it reflects an expectation of future "rents" (from an expected lack of competition), and we have provided evidence:

5.7.2.1. that supermarket acquisitions in markets that the Commission acknowledged were "all competitive"[40] have generated significant goodwill values (for example, Amazon's acquisition of Whole Foods in the USA, and the sale of Morrisons to private equity investors in the UK), demonstrating it would be fundamentally incorrect to treat all goodwill in the acquisition of a supermarket business as an expectation of future rents; and

5.7.2.2. of the types of assets that were not specifically listed in the accounting book value of Progressive Enterprises at the time it was acquired by Woolworths, including because:

5.7.2.2.1. WWNZ's assets were heavily depreciated at the time of the acquisition, well below true replacement value.

5.7.2.2.2. Land values were recorded on the balance sheet at a historic cost of $59m, not fair market value.

5.7.2.2.3. The value of long-term leases was not capitalised at the time.

5.7.2.2.4. Woolworths expected to generate synergies from the acquisition.

5.7.2.2.5. There were other sources of value in the acquisition, not reflected on the balance sheet - including licences, brands (as outlined above), customer contracts, supplier relationships, and transport contracts / networks.

5.7.3. We understand from the Conference that the Commission agrees that the Draft Report was incorrect to exclude all of goodwill as an expectation of future rents, with a Commissioner noting "I'm sure there are intangible assets and I agree that they probably have a value."[41]

[40] Page 36. Transcript of Day 4 - Retail Grocery Market Study Conference.
[41] Page 35. Transcript of Day 4 - Retail Grocery Market Study Conference.

5.7.4. In addition to goodwill generated at the time of a business acquisition, there is a range of other intangible business assets that accounting standards do not normally recognise as assets on a balance sheet despite being necessary to generate future earnings. Those include assets such as internal intellectual property, team know-how and expertise, Internet domains, information systems, customer data licences, customer contracts, supplier relationships, and transport contracts/networks. As NERA notes "there is an economics literature analysing the importance of intangible assets… However, these investments are captured in accounting records as expenditure items, so they are not reflected in the capital value of firms."[42]

5.7.5. Examples of operating expenses that are, in fact, 'future oriented' and contribute to the intangible assets that generate future earnings for WWNZ include:

5.7.5.1. Marketing - average annual spend [ ]

5.7.5.2. IT - average annual spend [ ]

5.7.5.3. Training our team to develop expertise / know-how [ ]

5.7.5.4. Digital investment [ ]

5.7.6. In its Draft Report the Commission did not attribute any value in WWNZ's asset base to such intangible assets (in effect relying on accounting treatment), but in the Conference the Commission said it wanted to "focus on the economic principles relevant to valuing such intangible assets".[43] We agree that it is necessary to take an economic (not accounting) approach to valuing WWNZ's asset base for the returns assessment that the Commission is seeking to undertake. Accordingly, we consider the fact that the Draft Report did not attempt to include such intangible assets in WWNZ's asset base as a material omission (for example, NERA's analysis calculated an approximate value of [ ] for a subset of WWNZ's intangible assets relating to training, IT, and digital in FY2020).[44] We disagree with Alex Sundakov's suggestion at the Conference that investments in intangible assets that have been expensed should be excluded from a business's asset base. In particular, while attributing a specific value to such intangibles may be difficult, it is still necessary to take them into account (as they are ultimately key assets of WWNZ's business). The NERA report identifies potential options in this regard, that we consider should be adopted in the Final Report:[45]

> *"There are still likely to be other intangible assets that are used by WWNZ to generate earnings, such as the distribution network of the business, customer data licences, customer contracts, supplier relationships, and transport contracts/networks... We suggest two practical options for the Commission to account for the likelihood that the difficulty in valuing these intangible assets means a straight comparison with WACC will overstate economic profits:*
>
> - *Add a margin to WACC (or equivalently, allow some leeway between the WACC estimate and the ROACE estimate before finding that profits are "too high"); or*

[42] NERA Economic Consulting "Grocery Market Study: Post-conference report" (23 November 2021) at [17].
[43] Pag 23. Transcript of Day 4 - Retail Grocery Market Study Conference.
[44] NERA Economic Consulting "Grocery Market Study: Post-conference report" (23 November 2021) at [22].
[45] NERA Economic Consulting "Grocery Market Study: Post-conference report" (23 November 2021) at [25].

- *Compare the calculated ROACE to the calculated ROACEs of the firms in the Commission's sample, as both sets of measurements would be affected by the omission of unbooked intangible assets."*

5.8. We expect that the Commission's Final Report will give proper economic regard to WWNZ's goodwill and intangible assets.

6. Third party statements about returns in the Conference were incorrect

6.1. In the Conference, Tex Edwards also made a number of incorrect and inaccurate statements about WWNZ's returns and investor valuations of supermarkets in Australia and New Zealand.

6.2. First, Mr Edwards stated that "Woolworths NZ accounts mirror the same margins and financial structure as Woolworths Australia."[46] That is not correct, as outlined in our September Submission, WWNZ's EBIT margins (New Zealand 4.4%, Australia Food 4.6%), gross profit margins (New Zealand 24.4%, Australia Food 28.7%) and pre-tax Return on Funds Employed (New Zealand ~9%, Australia Group ~14%) were all lower for WWNZ than Woolworths in Australia.[47]

6.3. Second, Mr Edwards referred to a single analyst report from June 2021 as apparent evidence that the "financial community" considers that WWNZ is making excess returns in New Zealand. That suggestion is false:

6.3.1. The analysis referred to was on Woolworths Group, of which WWNZ comprises less than 10%. The report does not split out WWNZ, and none of the commentary on earnings ratios are applicable to WWNZ.

6.3.2. Further, Mr Edwards sought to infer from that the fact that the report notes that the Woolworths Group trades at 28 times earnings (in comparison to certain European supermarkets) as being indicative of excess supermarket returns. That is not the case. Rather it reflects that Australian stocks are expensive by international norms, reflecting that there are economy-wide and country-specific factors that make Australia an attractive destination for investment capital, therefore, impacting P/E ratios, with the current average earnings ratio for Industrials on the ASX200 at 30 times earnings. It is also important to note that Costco has in recent months had a P/E ratio of 40 times earnings,[48] and Kroger in the USA with a P/E ratio of close to 31 times earnings.[49]

7. New Zealand grocery prices have decreased in real terms

7.1. At the Conference, in seeking views on the best "indicators of competition", in relation to price, the Commission said it would discuss "particularly price comparisons".[50]

[46] Page 5. Transcript of Day 4 - Retail Grocery Market Study Conference.
[47] See paragraph 27.2 of our September Submission for FY2019. These were based on F2019 because of the significant impact on trading from Covid in F20. But even if we looked at the most recent published accounts (F2021), WWNZ had lower Gross Profit margin, lower EBIT margins and significantly lower ROFE than Australia Food (which is the Supermarket business of Woolworths).
[48] See: https://ycharts.com/companies/COST/pe_ratio
[49] See: https://ycharts.com/companies/KR/pe_ratio
[50] Page 3. Transcript of Day 4 - Retail Grocery Market Study Conference.

7.2. As we have consistently described throughout the Market Study:

7.2.1. there are significant difficulties in trying to make international comparisons of grocery prices, which mean that such comparisons are unlikely to be able to be made in any meaningful or informative way and risk being misinterpreted (which is why other competition regulators consider such comparisons of “limited” probative value);[51] and

7.2.2. we consider that the trend in retail grocery prices in New Zealand is a far more informative indicator of competitive intensity, and the fact that retail grocery food prices in New Zealand have decreased in real terms (that is, grown more slowly than the consumer price index (**CPI**) and despite rising input costs) over the last decade (2010 to 2020) is a key indicator that competition is working effectively in New Zealand.

7.3. This perspective was not raised for discussion by the Commission in the Conference despite it having been a key point in both our February and September Submissions, and despite the fact that we raised it in the Conference on a number of occasions. We are unaware why the Commission has not engaged on this key fact, either in its Draft Report or in the Conference. In the context of an objective evidence based market study, we expect this fact will be a key feature of the Commission’s Final Report.

7.4. We also note that the reduction in real grocery prices in New Zealand that we have referred to began from a starting position that was already price competitive. In its 2008 grocery market study (which post-dated Woolworths’ entry into the New Zealand market in 2005 through its acquisition of Progressive Enterprises), the ACCC observed numerous times, and for a number of different reasons, that the New Zealand market had more “intense price competition” than Australia at that time. For example, the ACCC noted:

7.4.1. *“Since 2002, food prices (excluding meals and takeaway foods) in Australia have increased at a greater rate than food prices in New Zealand (chart 2.5). Significantly, from 2002 to 2007, food prices increased in Australia by around 20.3 per cent compared to 7.7 per cent in New Zealand. Despite this, overall consumer price inflation has been remarkably similar for Australia and New Zealand over the same period.”*[52]

7.4.2. *“New Zealand food price inflation has been lower [than Australia] across a range of food products.”*[53]

7.4.3. “*[T]here is some evidence that the New Zealand grocery sector, which is more concentrated than Australia’s, has seen more intense price competition in recent years relative to Australia.”*[54]

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[51] See for example:
- Paragraph 26.2.1 of our September Submission.
- WWNZ submission on the Preliminary Issues Paper (4 February 2021). See response to Question 20.

[52] ACCC “Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries” (July 2008) at page 27.

[53] ACCC “Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries (July 2008) at page 28.

[54] ACCC “Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries” (July 2008) at page 67.

7.4.4. "*[T]he ACCC considers that there is evidence that Woolworths has had to adopt a different competitive strategy in New Zealand. Woolworths does not appear to have had the same freedom to increase margins as in Australia.*"[55]

7.4.5. "*[I]t does appear that when Woolworths entered the New Zealand market with its purchase of Progressive Enterprises, it lowered prices and its entry appeared to have an effect on price competition.*"[56]

7.4.6. "*The ACCC therefore considers that there is some evidence of more intense price competition in New Zealand in recent years than in Australia.*"[57]

7.4.7. "*The ACCC also examined gross margins by trading department for Woolworths' New Zealand operations compared to Woolworths' Australian operations. The analysis confirmed that Woolworths has, on average, higher gross margins in Australia than it does in New Zealand.*"[58]

7.5. Accordingly, we consider that the reduction in real grocery prices over the last decade is a key feature of the New Zealand retail grocery sector that demonstrates the intensely competitive nature of the sector (including in the context of a market with a sizeable and internationally unique food discount / no frills supermarket, in the form of PAK'nSAVE).

7.6. This dynamic needs to be acknowledged, and the implications explored, in the Commission's Final Report.

8. The approach to PPP and inferences about competition

8.1. In the Conference, the Commission sought input on whether international retail grocery price comparisons should be made by converting currencies using purchase price parity (**PPP**) or market exchange rates. For the reasons outlined previously, we consider that there are significant difficulties in trying to make international comparisons of grocery prices in any meaningful or informative way, and that irrespective of methodology adopted, the range of other inputs into grocery prices (including high GST rates in New Zealand, and other country specific factors)[59] mean that few, if any, credible conclusions about competition can be drawn from such comparisons. NERA's report, enclosed with this Submission, makes the same observation: "Even on the Commission's preferred benchmarking methodology, there is no solid support for the proposition that New Zealand grocery prices are high due to a lack of competition, whether conversions are carried out using market exchange rates or PPP exchange rates."[60]

8.2. Nevertheless, for the purposes of assisting the Commission, we outline WWNZ's views on the most appropriate approach to convert currencies (assuming comparisons could be made in any meaningful way).

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[55] ACCC "Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries" (July 2008) at page 114.

[56] ACCC "Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries" (July 2008) at page 114.

[57] ACCC "Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries" (July 2008) at page 114.

[58] ACCC "Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries" (July 2008) at page 120.

[59] See paragraph 26.2.2 of our September Submission.

[60] NERA Economic Consulting "Grocery Market Study: Post-conference report" (23 November 2021) at [37].

8.3. Specifically, in the discussion in the Conference, the Commission indicated that it was considering adopting a "split approach"[61] between the "2/3rds… I think is largely tradable" and the "other 1/3rd which we agree isn't tradable".[62] We do not consider that such a "split approach" would be appropriate or accurate for the purposes of making international pricing comparisons in the case of grocery retailing. The reasons for that are set out in more detail in NERA's report, and include that:[63]

> *"If the Commission is minded to use a hybrid, it is very difficult to know what the balance would be between the market exchange rate and the PPP exchange rate. While we know that 63 cents in the dollar is paid by WWNZ to suppliers, it also the case that:*
>
> - *Not all SKUs are tradable (e.g., fresh bread, fresh chicken, eggs); and*
> - *Even for those SKUs that are tradable, some proportion of the price paid by WWNZ to suppliers will relate to non-tradable services, e.g., domestic transport, storage and in some cases sales teams etc.*
>
> *Therefore it is not clear the hybrid approach can be applied in a robust/precise manner."*

8.4. Accordingly, we consider that the more accurate approach, and the approach more consistent with orthodoxy, would be to use a PPP approach in seeking to make international comparisons of retail grocery prices. We do not consider that a hybrid approach could be used in any robust or precise manner, and in our view reliance by the Commission in the Final Report on either market exchange rates or a hybrid approach, without use of, or sensitivity testing using of, PPP, would be incorrect. In any case, neither approach would be informative of competition, given all the other factors clearly at play.

9. The role of GST and VAT

9.1. We remain concerned that the Commission is seeking to make comparisons of New Zealand grocery prices to other countries, whilst also stating that it is not considering the role of GST in food prices. We do not consider that is a reasonable approach to take or an approach that will lead to conclusions based on probative evidence.

9.2. Those concerns were compounded by incorrect and inaccurate statements made by Nick Hogendijk (who attended the Conference on behalf of Hexis Quadrant, a consultant to the New Zealand Food and Grocery Council (the **NZFGC**)), in the Conference about the application of GST / VAT to food in European countries. Mr Hogendijk's statements were incorrect, and those inaccuracies were identified by the media reporting on the Conference:[64]

> *"But Hexis Quadrant partner Nick Hogendijk said several European VAT (value added tax) rates were significantly higher than New Zealand's 15 per cent GST rate. Standard VAT in Europe ranges from 17 per cent to 27 per cent. In Ireland, which has a population similar to New Zealand, standard VAT is 23 per cent. However, its tiered system means the tax **is not paid on most food** including tea, coffee, milk, bread, butter, cheese, milk, vegetables and meat." [Emphasis added]*

[61] Page 7. Transcript of Day 4 - Retail Grocery Market Study Conference.
[62] Page 8. Transcript of Day 4 - Retail Grocery Market Study Conference.
[63] NERA Economic Consulting "Grocery Market Study: Post-conference report" (23 November 2021) at [44].
[64] (27 October 2021). Supermarkets say lack of competition not to blame for NZ's higher grocery prices. Stuff. Retrieved from: https://www.stuff.co.nz/business/126797330/supermarkets-say-lack-of-competition-not-to-blame-for-nzs-higher-grocery-prices

9.3. As outlined in our September 2021 submission, New Zealand is an outlier in taxing groceries at the same rate (15%) as other goods and services:[65]

> *"Examples of GST treatment of **food**:*
> *Most food exempt: Britain, Ireland*
> *Basic foods exempt: Australia, Canada, Mexico, South Korea.*
> *Food taxed at lower rate: Austria, Belgium, Czech Republic, Finland, France, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, Turkey.*
> *Food taxed at same rate as other goods: Denmark, Japan, New Zealand.*
> *No GST: United States."*
> *[Emphasis added]*

9.4. We repeat the point in our September Submission that seeking to compare New Zealand retail grocery prices to other countries, while ignoring all other factors that influence retail prices (such as GST), results in significant omissions, and we do not consider it a reasonable or objective approach to such comparisons, or a robust basis for any conclusions in relation to competition.

10. The Commission's reference to the Coriolis chart

10.1. The Commision, in the Conference, repeated its citation of analysis by Coriolis saying that there is a price difference between New Zealand and US prices of 2-6% that is driven by competition factors. We would be concerned if the Commission applied any weight to the Coriolis analysis and we have, on several occasions now, raised with the Commission analysis from NERA outlining why the Coriolis chart is "purely stylistic, with no references to evidence, data or quantification to support the claimed components (including their size)" and, therefore, "is of no informative value". In particular:

10.1.1. It appears to be simply an assertion that average New Zealand food / FMCG prices are 20-30% higher than average prices in the US. This is in contrast to the analysis in the 4 February 2021 NERA report, which (while acknowledging the significant difficulties in making international comparisons) analyses a reputable independent database and finds that prices in Auckland and Wellington generally compare favourably with most of the US cities included in the data.

10.1.2. There is no justification or further clarification given for the 1-3% premium attributed to a "duopoly premium" or the alleged "lack of retail format diversity".

10.2. Given the Commission has not been provided with the evidence (if any) underlying the Coriolis chart, it is unclear why the Commission continues to have regard to it.[66] In our view, it would be inconsistent with the evidence-based approach required in the context of a market study for the Commission to refer to the Coriolis chart in the Final Report, or rely on it for any conclusions.

[65] (28 April 2008). Removal of GST on food unlikely - PM. NZ Herald. Retrieved from: https://www.nzherald.co.nz/nz/removal-of-gst-on-food-unlikely-pm/GUQOBX2ONXIL7EYLG7DHQTUEKA/
[66] See footnote 148 of our September Submission.

11. The Commission's dismissal of EIU data

11.1. As we have outlined previously, there are difficulties in making international comparisons of grocery prices (as recognised by other competition regulators). This is why other competition authorities in Australia[67] and the UK[68] have expressly noted the "significant limitations" and dismissed them as not being of probative value for competition analysis.

11.2. However, if the Commission continues to make such comparisons (with the necessary caveats recognised by other competition regulators), it must give due weight to EIU data (notwithstanding that it is not a "national statistical agency" - with that critique raised again by the Commission in the Conference).[69] Our concerns on that point are:

11.2.1. EIU is one of the best regarded private statistical agencies in the world, with a global team of economists, industry specialists, policy analysts and consultants works tirelessly to produce the highest quality data, research and analysis",[70] and users of its data range "[f]rom central banks and government agencies, to foreign affairs, trade and defence departments."[71] As NERA notes in its report: "The product-level price data collected by the Economist Intelligence Unit is passed through a series of internal checks to ensure accuracy."

11.2.2. The Draft Report repeatedly cited, and included charts based on, datasets from Numbeo, which is a Serbia-based privately operated "crowd-sourced" data collector.[72] We have seen criticism of Numbeo's data on the basis that "[t]he numbers are based on user contributed figures and should be taken with a hefty pinch of salt", and appear to be unaudited.[73] While the Commission's Draft Report said that it considered "limited weight can be placed on the Numbeo data",[74] the Draft Report continued to cite Numbeo data in numerous places and charts, used it as a cross check of OECD and ICP datasets,[75] and used Numbeo data for the Commission's analysis of more recent prices ("we still consider there to be some value in looking at more recent data from this source"),[76] including to conclude that "it is unlikely that New Zealand's relative grocery price ranking has changed significantly since 2017".[77]

11.3. As the Commission will recognise, the Draft Report's treatment of the Numbeo and EIU data is inconsistent, and in our view, inexplicably so. If the Numbeo data continues to be cited in the Final Report in the way it was in the Draft Report, without regard being given to the EIU data, this would risk further undermining the integrity of the Commission's findings.

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[67] The ACCC said there are "significant limitations" with international pricing comparisons, noting (amongst other factors) that "differences in quality of goods are not sufficiently reflected across countries". ACCC "Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries" (July 2008) at page 25.

[68] As the UK Competition Commission (**UKCC**) observed in its 2007 Grocery Market Study: "International comparisons of prices are difficult to make as a result of exchange rate issues, comparability of products and pack sizes, the role of tax in food prices, and different property markets and planning regimes. For these reasons, we consider that the value of any extensive cross-country comparison would be limited."

[69] Page 5. Transcript of Day 4 - Retail Grocery Market Study Conference.

[70] EIU website. See: https://www.eiu.com/n/about/

[71] EIU website. See: https://www.eiu.com/n/who-we-help/government-institutions/

[72] Numbeo website. See https://www.numbeo.com/common/about.jsp

[73] (29 August 2012). Harare has poor healthcare and political violence, but property is relatively inexpensive. Property Observer.

[74] Commerce Commission "Market Study into the retail grocery sector – Draft Report" (29 July 2021) at [D26] and [D40].

[75] Commerce Commission "Market Study into the retail grocery sector – Draft Report" (29 July 2021) at [D12].

[76] Commerce Commission "Market Study into the retail grocery sector – Draft Report" (29 July 2021) at [D40].

[77] Commerce Commission "Market Study into the retail grocery sector – Draft Report" (29 July 2021) at [D42]. .

12. Reliance on anecdote or perception, rather that evidence

12.1. As we noted in our September Submission, we have concerns that the Commission's process is placing undue weight on anecdotal perception rather than evidence. Those concerns were compounded by such an approach being repeated by the Commission in the Conference - noting for example, in relation to international price comparisons, that "[m]any of these of course have been quite informal reports from individuals who told us that they perceive grocery prices to be higher in New Zealand than other countries."[78] We repeat our concerns that this is not a robust way to draw findings in a market study such as this. For example, travelling Kiwis are unlikely to be considering different purchasing economies of scale, transportation costs, or GST / VAT regimes, among other relevant factors when shopping in a supermarket.

12.2. Third party experts, with significant experience themselves as regulators, have observed the way in which the Commission's process to date has drawn on anecdote - for example, Peter Harris AO:

> *"I was struck by the way perceptions (eg of higher prices in New Zealand than overseas) are given additional weight in concluding on issues drawn to the Commission's attention, even though it is acknowledged that they are anecdotal and not evidence… Acknowledging what consumers think is not unreasonable. Ultimately, however, deciding a contested matter by favouring perception is not a sound basis for drawing conclusions."*

12.3. The Commission's conclusions can only be based on probative evidence, and so this approach needs to be remedied in the Final Report.

13. The Commission's consumer survey methodology did not reflect best practice

13.1. In our September Submission we expressed our view that the consumer survey the Commission used to draw conclusions about competition had significant limitations. In particular, we were concerned that there were a number of limitations in the way the Commission's survey was designed that did not reflect best practice surveying methodology and, therefore, likely affected the results (see footnote 211 of our September Submission). We invited the Commission to engage further with us if it intended to rely on these survey results in the Final Report. Given the Commission has not yet accepted this invitation, we expect the Commission does not intend to rely on its consumer survey in the Final Report.

13.2. Nevertheless, to further assist the Commission to understand our perspective on the flaws in that survey (and therefore risks to the validity of any conclusions based on it) we provide further context on our concerns as set out in **Appendix Two** (including by drawing on the expertise of our own customer insights team, that has significant expertise in survey methodology). We note that these concerns are in addition to the limitations raised with the Commission's consumer survey identified in FSNI's submission, which we share.[79] In summary, our concerns include:

13.2.1. sampling limitations and potential bias due to using a voluntary online submission methodology (no controlled quota system was used to ensure that the respondent pool was statistically representative, and the survey was open to anyone with the link, with advocacy groups able to 'promote' it to their audiences); and

[78] Page 4. Day 4 - Retail Grocery Market Study Conference.
[79] FoodStuffs North Island's submission on the Draft Report (10 September 2021) at [236] to [239].

13.2.2. limitations in the survey design including the use of cognitively challenging or hypothetical questions where consumers are unlikely to be able to respond accurately, and unclear wording.

13.3. As noted above, given the Commission has not engaged with us on these issues, we expect the Commission does not intend to rely on its consumer survey in the Final Report.

13.4. If the Commission were to advise us that it does intend to refer to its consumer survey in the Final Report, we expect that the Final Report will appropriately address what weight can be placed on the Commission's survey given those limitations, and the inevitable impact on the survey's results (including by appropriately caveating and qualifying any conclusions based on those results by reference to the manifest limitations, as well as by comparing, cross-referencing, and triangulating the survey results with the customer research studies already provided to the Commission by WWNZ).

13.5. We also expect the Commission will appropriately interrogate and caveat any third party submissions that purported to include consumer survey results by comparing the methodology of those surveys to best-practice.[80]

14. The approach to differentiation

14.1. In both the Conference, and its Draft Report, the Commission has seemingly sought to portray competitive differentiation in the market as a means of avoiding competition, rather than competition in action. In our view, that is incorrect, and inconsistent with the usual approach to competition law.

14.2. It is also inconsistent with the Commission's views on the implications of differentiation expressed in other parts of the Draft Report:

14.2.1. "In a workably competitive market, we would expect firms to compete to satisfy this diverse range of preferences. Differentiation on the retail grocery offer may therefore offer benefits to consumers through an expanded set of choices and increased competition between grocery retailers."[81]

14.2.2. "[I]n a workably competitive market, we would expect to see a greater level of differentiation."[82]

14.3. Differentiation is one of a number of key competitive strategies that a grocery retailer can use to attract customers. As the UKCC observed in its grocery market study:[83]

> *"There are many factors that differentiate grocery stores... these include price, range (or number) of products, quality of products, service levels, store layout, store location, food counters, cleanliness, parking facilities and opening hours. We refer to these factors as the 'retail offer'. Some of these factors, such as price, quality, range and service (PQRS), can be varied by retailers relatively easily; but other factors, such as parking facilities and the number of checkouts, are less easily changed."*

[80] For example, the use of highly leading survey questions (for example, Monopoly Watch)
[81] Commerce Commission "Market Study into the retail grocery sector – Draft Report" (29 July 2021) at [4.23].
[82] Commerce Commission "Market Study into the retail grocery sector – Draft Report" (29 July 2021) at [4.25]
[83] UK Competition Commission "Groceries Market Investigation" (30 April 2008) at [4.16]. Retrieved from: https://webarchive.nationalarchives.gov.uk/ukgwa/20140402235643/http:/www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2008/fulltext/538_9_10.pdf

14.4. Differentiation in the New Zealand retail grocery market occurs to cater to consumer preferences, and maximise attractiveness to consumers, and is evidence of strong competition across the entire "PQRS" range, including price. That is reflected in the significant extent of cross-shopping between grocery retailers (see section 22 below, showing that consumers are responsive to the grocery retailer that best meets their PQRS demands at a given time, including through ongoing price competition).

14.5. As set out in our September Submission, our view is that the extent to which grocery retailers in New Zealand seek to differentiate their product and service offerings through competing on aspects such as innovation, shopping experience, product range and service levels is evidence of the intensely competitive nature of the sector in New Zealand. We do not consider there is any evidence to the contrary. It is important that the Commission's Final Report gives the proper and usual competition law treatment to the implications of differentiation in a market.

15. The approach to benchmarking innovation

15.1. In the Conference the Commission asked "how we should compare innovation in New Zealand with that in other markets, i.e. what's the benchmark and what are the indicators?"[84] In particular, the Commission asked "[i]s there any method available other than just listing particular innovations that are seen overseas and then checking to see if they're here", with the Commission acknowledging that "is more or less the way that we did it in the draft report".[85]

15.2. As we outlined in both our September Submission, and in the Conference,[86] we consider the approach adopted in the Draft Report to assessing innovation in the New Zealand retail grocery sector was insufficient and incorrect. It appears the Commission's approach to assessing innovation in the Draft Report involved a desktop-based (Internet) search of consumer-facing innovations in overseas markets, followed by an (incorrect) assessment that those innovations had not occurred in New Zealand (including by citing certain innovations from overseas without acknowledging that those had failed or been been discontinued overseas).[87] We do not consider that this approach is sufficient as an objective probative benchmark of the levels of innovation, especially when being used to support adverse findings and radical interventions with the potential to have significant impacts on New Zealand's food supply chain. We also note that we have already implemented almost all of the innovations identified overseas using that approach, and that the Commission has not taken up our offer to conduct a site visit to observe any of our innovations in practice or any other aspects of our operations.[88] We remain of the opinion this would be a valuable exercise.

15.3. We also note the assessment of Peter Harris AO that the Draft Report was too narrow in its conception of what innovation is, by seeking to focus on consumer-facing innovation, and therefore providing very little attention to "production or process-focused innovation":[89]

[84] Page 15. Transcript of Day 4 - Retail Grocery Market Study Conference.
[85] Page 15. Transcript of Day 4 - Retail Grocery Market Study Conference.
[86] Page 18. Transcript of Day 4 - Retail Grocery Market Study Conference.
[87] See footnote 57 of our September Submission.
[88] See paragraph 33.15 of our September Submission.
[89] Peter Harris AO "Views on the Commerce Commission Draft Market Study Report on Grocery Retailing in New Zealand" (November 2021) at [6].

> *"This matters, because the latter is much more likely to be the source of net national benefit via productivity improvements, whereas the former may or may not be temporary phenomena. The examples of consumer-oriented innovation given [by the Commission] appear demonstrably to be of limited utility to the bulk of consumers. Whereas an efficient supply chain is of benefit both to the national economy and to a large number of end-consumer in terms of reliability and product quality.*
>
> *An economic analysis would note the important differentiation between the two, perhaps, but not seek to rate one as more important than the other; and explore likely sustainable benefits from each more thoroughly. Failing to recognise that production process innovation (ie the stuff that generally occurs outside the supermarket) could prove to be the larger contributor to productivity (and the net national benefit of that to employment and income growth) is surprising. The Study does not have to become a discourse on productivity, but in the context of New Zealand (and indeed the developed world's) persistently poor productivity performance since 2000 or so, it deserves some recognition.*
>
> *The Commission could do this best in its final report by assessing both process and consumer-facing innovation somewhat more empirically, eg through scrutiny of the efficiency gains expected in in business cases for improved production processes; and via the assessed value to the proportion of the consumer group who are likely to benefit in the case of consumer innovations."*

15.4. Accordingly, in our view the approach adopted in the Draft Report to assessing innovation was incorrect and insufficient. A desktop search is necessarily only one of a number of different approaches that would need to be considered to form a view on the level of innovation (and even then, a desktop search needs to be combined with an appropriate understanding of the innovations already implemented in New Zealand - not used as a method to suggest innovation is low in New Zealand without making appropriate enquiries or any site visits to assess innovation in the New Zealand context).

15.5. As outlined to the Commission previously, from our perspective there are a number of indicators of the high levels of innovation that exist in the New Zealand retail grocery sector, and it is necessary to take all these factors into account to reach an appropriately informed conclusion - namely:

15.5.1. Customer satisfaction scores: We note that our customer satisfaction scores have been increasing over a number of years,[90] which in our view reflects the extensive innovations and improvements that we continue to make.

15.5.2. Productivity improvements: We note our high levels of productivity improvement, for example, in relation to stock loss, or other productivity measures, which reflect not only competitive market dynamics at play, but also innovation at work. We are also constantly landing new productivity innovations to allow us to keep prices low, for example, new and more efficient promotional ends, new checkouts, wastage and theft reduction initiatives, automation investments (online, Hilton meat), transportation optimisation, store and distribution-centre process innovations, and energy efficiency initiatives. The enhanced efficiencies we have achieved have helped us to reduce our retail prices (in real terms) over the last decade, deliver improved service and quality outcomes, and provide us with the capability and resilience to deal with unexpected shocks to either supply or demand. They also help mitigate supply chain cost increases that would otherwise occur (estimated at [ ] over the next 6 to 7 years).

[90] Reflected in significant increases in our 'Net Promoter' and 'Voice of Customer' scores - see page 4 of our February Submission.

15.5.3. Levels of capital investment: We note that our levels of capital investment, as a high-level proxy of investment in innovation, appear consistent with global grocery retailers around the world.[91]

15.5.4. Desktop research of consumer facing innovations: We reiterate, as noted above, that almost all of the overseas examples of innovation identified in the Draft Report as examples of global grocery innovation not being undertaken in New Zealand are in fact already in place at WWNZ. If anything, the Commission's desktop research demonstrated that the levels of innovation in New Zealand are high.

15.5.5. Pricing innovations: We note that there is significant pricing innovation - specifically:

15.5.5.1. We have introduced Great Price, digital mailers, unit pricing online, electronic shelf labels (**ESLs**), in-app browsing, and an overhauled loyalty scheme.

15.5.5.2. Productivity innovations (as outlined above) are also consistent with high levels of innovation to support intense competition on price.

15.5.5.3. Another important example of pricing innovation in the New Zealand sector is, in fact, PAK'nSAVE. As described previously to the Commission, compared to other supermarket retailers globally, the PAK'nSAVE model is unique - not only in terms of the significant share of market captured by a "no frills discount player", but also the fact that PAK'nSAVE provides for such a "no frills discount" offering across a wide range of branded products (whereas, typically globally such "no frills discount players" are more focused on private label offerings). [ ]

15.5.6. Online penetration outcomes: As we outlined in our September Submission, New Zealand's level of online grocery penetration is high by international standards, and even higher once adjusted for population density. In absolute terms, New Zealand is on par with Australia and Sweden, and already significantly higher than the US, Germany, Italy and Spain. After taking population density into account, it is clear that New Zealand is among global leaders (ahead of even China and South Korea), and at Countdown specifically we have more than 13% online penetration [ ], which is at world-leading levels.[92] [ ].

15.5.7. Levels of digital investment: We are also continuing to invest significantly into our digital capability. This includes establishing four eStores, including dedicated sites purpose-built to support world-leading automated micro-fulfilment capabilities to enhance efficiency and resilience of the "last mile" of our online grocery supply chain (that is, from the warehouse or store to our customers).

15.5.8. Third party recognition of innovation: We have won awards for our commitment to innovation. For example, at the 2020 New Zealand CIO awards, Sally Copland (our Director Brand and CountdownX) was named New Zealand CIO of the Year, and CountdownX was recognised as a finalist in the Business Transformation through Digital and IT category for its initial COVID-19 response. Countdown was also

[91] Source 2020 Annual Report of a sample of Australian, UK, EU and North American Grocery Retailers. The capital expenditure was calculated as a percent of annual revenue. WWNZ was 2.8% compared to the comparison average of 2.4%.

[92] See paragraph 2.4.2 of our September Submission.

awarded the IDC's trans-tasman 2020 Digital Transformer award for Australia and New Zealand.[93] Other examples of recognition include: Countdown winning the Business Leadership Award at the Ministry for the Environment's 2017 Green Ribbon Awards (for its market-leading nationwide food rescue programme)[94]; two innovative projects (Penrose eStore and Rototuna Smart Store) currently nominated as finalists in the retail category of the 2021 NZ Property Council Awards; and Countdown Richmond being the first supermarket (and the first standalone retail development in NZ) to be Green Star accredited.

15.5.9. Growth and churn in our SKU count: Between 2010 and 2021, the number of active barcodes across WWNZ's largest grocery categories (for example, toiletries, cleaning products, biscuits, accounting for about 50% of total WWNZ sales), increased by more than 10% [ ]. We also [ ], in 2020 we ranged [ ] new products from nearly [ ] suppliers, and on average for each of the last three years we have turned over (refreshed) on an average approximately [ ] of our products as we respond to ever-changing customer needs.

15.5.10. Levels of innovation and dynamism: The New Zealand retail grocery sector is also highly dynamic with a number of new entrants competing with innovative and dynamic business models, including:

15.5.10.1. Costco, which will enter with its innovative large-format offering;

15.5.10.2. My Food Bag, the "pioneer" of meal kits in New Zealand,[95] won four awards for innovation within the first 12 months of its launch, including the Excellence in Innovation Award in the Central division of the Westpac Auckland Business Awards for 2014, and its Chair describing it as a "revolution in innovation".[96]

15.5.10.3. Farro Fresh, which notes that "as a premium supermarket we need to constantly demonstrate quality and innovation in everything we do."[97]

15.5.10.4. New digital-only competitors such as Geezy Go, The Honest Grocer, The Warehouse's TheMarket.com, and Supie (which describes itself as "the Netflix for grocery shopping").[98]

15.5.11. We are also having to constantly respond to innovations by FSNI and FSSI, and disagree with comments made at the Conference by the Commission suggesting challenges reconciling "similar profits, but different levels of innovation" including

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[93] (15 October 2020). IRD, Countdown among A/NZ winners in IDC transformation awards. Retrieved from: https://www.reseller.co.nz/article/683725/ird-countdown-among-nz-winners-idc-transformation-awards/

[94] (9 June 2017) Food Rescue leadership recognised at Green Ribbon Awards. Countdown. Retrieved from: https://www.countdown.co.nz/news-and-media-releases/2017/june/food-rescue-leadership-recognised-at-green-ribbon-awards

[95] (30 September 2021). Fresh Start By Food Mage Introduces Six-Week Reset. My Food Bag. Retrieved from: https://www.scoop.co.nz/stories/BU2109/S00761/fresh-start-by-my-food-bag-introduces-six-week-reset.htm

[96] (14 November 2014). My Food Bag wins business award. Retrieved from: http://www.voxy.co.nz/business/my-food-bag-wins-business-award/5/207415

[97] Farro Fresh Supermarkets. Friend of Farro Loyalty Programme. See: https://www.tranxactor.com/our-portfolio/farro-fresh-supermarkets/

[98] (11 November 2021). 'Netflix for grocery shopping' Supie raises $2.5 million in seed round. Stuff. Retrieved from: https://www.stuff.co.nz/business/126948145/netflix-for-grocery-shopping-supie-raises-25-million-in-seed-round

observations relating to “firms that have been slower to adopt online shopping”.[99] This is presumably a reference to the FSSI, yet we note that online shopping is just one dimension of innovation (a point noted by Peter Harris AO) and we are constantly having to respond to FSNI and FSSI’s innovations across a number of dimensions. Examples include, but are not limited to:

15.5.11.1. [ ]
15.5.11.2. [ ][100]

15.5.11.3. [ ][101]

15.5.11.4. [ ]

15.5.11.5. [ ]

15.5.11.6. [ ]

15.5.11.7. [ ]

15.5.11.8. [ ]

15.5.11.9. [ ]

15.5.11.10. [ ]

15.5.11.11. [ ]

15.5.11.12. [ ][102]

15.5.11.13. [ ]

15.5.11.14. [ ]

15.6. When factors indicating the level of innovation are looked at in totality, we consider the evidence is clear that the New Zealand grocery retail sector is highly innovative - and competitive. To reiterate, we consider the approach adopted by the Commission in the Draft Report to assess innovation was insufficient and incorrect.

[99] Page 14. Transcript of Day 4 - Retail Grocery Market Study Conference.
[100] [ ].
[101] [ ].
[102] [ ].

Part 3: The position of certain submitters, and the role of private label products

The NZFGC is the industry association that represents a number of food and grocery suppliers, including many of the world's largest FMCG companies. While it has sought to align itself with consumer advocacy groups during the Market Study in relation to certain discrete issues, the NZFGC represents the interests of its membership base.[103]

While at the Conference, in submissions on the Draft Report, and indirectly via media and social media, a number of views have been heard from the NZFGC's representatives - including in relation to matters of supplier negotiations and private label products - it is important to put the positions of the NZFGC, and its consultants, in their proper context. That includes in relation to the market position and likely interests of certain key members of the NZFGC, and the role that a number of NZFGC's consultants have played during the Market Study.

16. The position of Conference participants

16.1. As the Commission will have observed, many of the issues raised with the Commission during the Market Study (both in submissions, the Conference, and via media and social media) have been with the involvement of the NZFGC. It is, therefore, important for the Commission to recognise that a number of participants in the Commission's Market Study process and Conference are consultants to the NZFGC. For example:

16.1.1. Ernie Newman is a consultant to the NZFGC, with opinion pieces he has written in the media during the Market Study including the 'interests disclaimer' that "[h]e advises a number of clients including the Food and Grocery Council".[104]

16.1.2. Nick Hogendik at Hexis Quadrant has an engagement with the NZFGC in relation to the Commission's market study, with Hexis Quadrants describing itself on its website as "'joined at the hip' to Katherine Rich and the FGC Board" after "the NZFGC Board and CEO asked us to conduct some work".[105]

16.2. In addition to NZFGC's relationship with certain consultants, it is also important to place NZFGC's broader role in its proper context. While we have been disappointed (at times) with some of the views expressed by the NZFGC and its spokespeople during the Market Study, we do not believe those views are representative of the views of the entire supplier community. That is illustrated in the submission to the Commission from Tim Carter in relation to the position taken by the NZFGC,[106] Pernod Ricard,[107] and the statements from Mark

[103] The NZFGC's position has often been to advance the interests of suppliers (rather than the interests of New Zealand consumers). For example, the position taken by the NZFGC in its submission appeared likely to lead to higher retail prices to consumers (less discounting). Great care needs to be taken in this area, as addressing some of the issues raised by the NZFGC could have legal ramifications (for example, one of the concerns raised by the NZFGC was that "[s]uppliers report that their products have been discounted heavily by supermarkets without prior agreement"). As the Commission will readily recognise, any attempt by suppliers to require an agreement from grocery retailers before discounting could amount to illegal resale price maintenance (**RPM**), and would not be in the interests of New Zealand consumers. NZFGC's submission on the Draft Report (26 August 2021) at page 34.

[104] (26 October 2021). Ernie Newman: Supermarket duopoly-breaking goes up a notch. NZ Herald.

[105] (30 July 2021). Hexis Quadrant. An open letter to members of the New Zealand Food and Grocery Council.

[106] Tim Carter's submission on the Draft Report (26 August 2021).

[107] Submission from Pernod Ricard Winemakers submission on the Draft Report (25 August 2021): "Pernod Ricard has always had strong relationships with retailers in New Zealand and we have robust, fair and respectful negotiations in relation to the sale of our products to retailers, who in turn sell to New Zealand

Johnson, of local New Zealand supplier Springbrook Foods, in the Conference. [ ].[108] [ ].

16.3. We are proud of the hard work and progress we have made in building positive relationships with our supplier community, because to be successful we need positive relationships with our suppliers, and for our suppliers to succeed. Reflecting that, the Commission found in its Draft Report, that "many suppliers have good relationships with the retailers they supply",[109] and we have outlined to the Commission on numerous occasions during the Market Study, that we are proud of the fact that suppliers have rated Countdown as the number one grocery retailer to deal with in New Zealand in both of the most recent major grocery industry surveys.[110]

16.4. Accordingly, it is important that the Commission places the NZFGC's views (and those of its consultants Ernie Newman and Hexis Quadrant) in the appropriate context, and seeks out views from a wider range of industry stakeholders.

17. Certain submitters' positions are often unsubstantiated assertions

17.1. The NZFGC's submissions have also referenced a number of "examples of retailer behaviour seen in grocery procurement" that it considers are problematic.[111] Those specific concerns have not been put to WWNZ, appear unsubstantiated (at least in our case), and often appear to be a repetition of concerns made by NZFGC in submissions in other contexts many years ago. To be clear, the allegations do not reflect how we operate as a business, and given they appear unsupported by evidence and have not been specifically put to us by the Commission with an opportunity to respond, we do not consider it consistent with an objective evidence-based market study for them to be relied on by the Commission (insofar as they are assumed to be describing WWNZ conduct) in the Final Report.

18. The acknowledged "market power" of certain suppliers

18.1. While we seek to have positive relationships with our entire supplier community, in many instances our business here in New Zealand is negotiating with FMCG companies that include businesses that:

18.1.1. are some of the largest companies in the world (and many, many, times larger than we are);

18.1.2. in many instances account for 60% to 90% of products sold in a given category (for example, Unilever, Coca-Cola Amatil, Nestle, Procter & Gamble, Mondelez and others);[112]

consumers. We look forward to continuing those relationships and building new relationships with any retailers that enter into the NZ market."

[108] Page 23 and 28. Transcript of Day 7 of the Retail Grocery Market Study Conference. 2 November 2021.

[109] Commerce Commission "Market Study into the retail grocery sector – Draft Report" (29 July 2021) at [8.73].

[110] For example:

- In the Nielsen Barometer survey, WWNZ was ranked first of the three largest grocery retailers for the second consecutive year, including being ranked number 1 across 16 of the 24 attributes measured in the report and with 80% of respondents rating their trading relationship as 'Good or Excellent'.
- In the Advantage Insights Report, the Countdown banner was ranked number one for the second year, including being ranked number one across 20 of the 24 competencies measured in the report, and number one in all four of the key competency areas.

[111] (26 August 2021) Submission from the NZFGC on the Draft Report at [6.15].

[112] See paragraph 2.1.4.3 of our September Submission. Cross refer to Exhibit D6 in our September Submission.

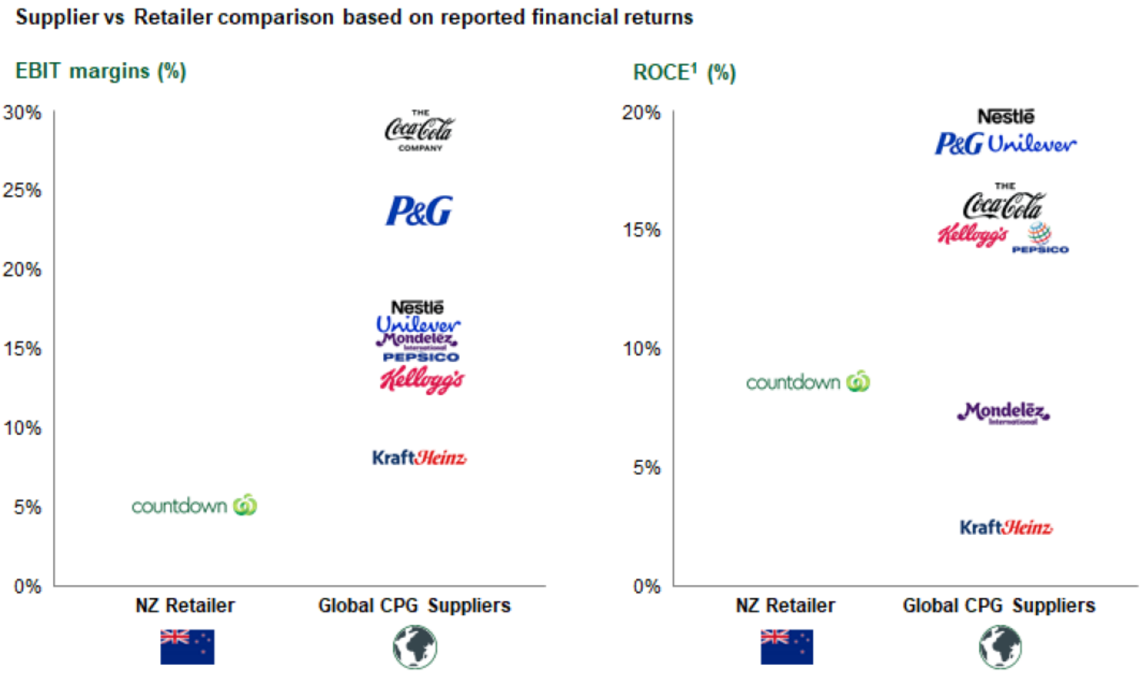
18.1.3. often are supplying us with "must have" products;[113]

18.1.4. are predisposed towards high levels of supplier-controlled promotional funding (see Section 20 below);

18.1.5. account for a very significant portion of total grocery sales - in packaged goods in particular (at Countdown, [ ] of our sales come from products sold to us by just [ ]% of our suppliers); and

18.1.6. typically have EBIT margins and pre-tax Returns on Capital Employed much higher than WWNZ's (see Exhibit 1 below from our September Submission).

Exhibit 1: Supplier margins and returns are higher than retailer margins and returns[114]



18.2. As the NZFGC noted in the Commission's conference, "Yes, in some categories, some suppliers do hold market power",[115] which is consistent with the findings of numerous competition law regulators overseas.

18.3. It is important that WWNZ is able to negotiate robustly to keep input costs as low as possible in order to obtain competitive prices for New Zealanders, especially given that for every $1 spent by a customer in a Countdown supermarket, we pay 63 cents directly to our suppliers

[113] The ACCC noted in its grocery market study that "certain specific brands command such brand loyalty that their absence from the shelves would be reason enough to induce some consumers to change retailers". See: ACCC. ACCC "Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries" (July 2008) at page 313.

[114] These Returns on Capital Employed metrics are calculated using a different methodology to the Commission in the Draft Report. They are based on Orbis database calculations using the standardised formula of (P/L before tax + Interest paid) / (Shareholder funds + non-current liabilities). WWNZ numbers are calculated by applying the same formula to the adjusted financials (post removal of non-grocery items) to enable a like for like comparison. Note: returns are based on closing capital position as of year-end (not average); in all cases margin and returns are based on the latest available financial results (FY20). Source: Orbis, WWNZ adjusted financials.

[115] Page 37. Day 3 - Retail Grocery Market Study Conference.

(with our margin only being 2.4 cents). Further strengthening the negotiating power of suppliers with significant market power is unlikely to result in lower grocery prices for Kiwi consumers.

18.4. That fact was reflected in the ACCC's 2008 grocery market study, where it noted: "many of the companies that dominate this sector are multinational with strong brands that often have significant consumer loyalty. Buyer power, in particular when increased by the use of private label products, may drive down margins and retail prices on branded products to the benefit of consumers."[116] The evidence presented to the Commission is that it is already evident that WWNZ's smaller scale, and greater distance to international markets, means that WWNZ is not able to negotiate as low input prices as larger overseas grocery retailers as demonstrated by the fact that WWNZ has to pay approximately 10% more than Woolworths Australia[117] for ~7,500 identical (barcode matched) longlife grocery and general merchandise products (which itself is a key fact that needs to be included in the Final Report).[118]

18.5. Accordingly, in the context of the positions advanced by the NZFGC, we consider it important that the Commission's analysis reflects that a number of the NZFGC's key members are some of the largest multinational FMCG companies in the world (that will have their own interests to advance in this process), and that the NZFGC does not appear to be speaking for the likes of Springbrook Foods, a smaller New Zealand supplier.

18.6. The NZFGC is also incorrect to suggest that the high concentration of large suppliers in some categories is somehow reflective of the New Zealand retail market structure.[119] This is unsupported by the evidence. Multinational supplier concentration can be observed in other grocery markets worldwide, and is not something that is attractive to grocery retailers because of the associated (and acknowledged) supplier market power outlined above. WWNZ is actively seeking to introduce new suppliers, ranging over [ ] new lines from nearly [ ] suppliers over the last year, including over [ ] small suppliers with annual sales in Countdown of less than $1 million.

18.7. The Commission will need to be wary of recommending measures that hinder the ability of New Zealand retailers to negotiate robustly for the benefit of consumers with large multinational FMCG companies, or hinder the ability of New Zealand retailers to achieve successful and enduring relationships with New Zealand suppliers, such as Springbrook Foods.

19. Certain submissions ignore the introduction of new grocery retailers and "outside options"

19.1. As the Commission will be aware, a key-plank of the NZFGC's submission on the Draft Report is that its "ideal scenario" would be the introduction of a "third… integrated wholesaler/retailer"[120] to improve suppliers' bargaining position, but that it does "not see signs of sufficient entry".[121] It is unsurprising to see an organisation that represents some of the world's largest FMCG companies seeking to enhance their bargaining power with New Zealand retailers (even if that entails radical interventions into the food supply chain), in particular in the context where WWNZ already has to pay suppliers on average 10% more

[116] ACCC "Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries" (July 2008) at page 383.
[117] These figures exclude GST.
[118] See paragraph 2.1.4.2 of our September Submission.
[119] Page 29 - Day 7 of the Retail Grocery Market Study Conference..
[120] NZFGC submission on the Draft Report (26 August 2021) at [1.14(c)].
[121] NZFGC's submission on the Draft Report (26 August 2021) at [1.14(a)].

than Woolworths Australia for identical products.[122] This would not be beneficial for New Zealand consumers. [ ].

19.2. Furthermore, as described in our previous submissions, we already consider that suppliers have a range of (increasingly expanding) alternative options to supply their products aside from supplying WWNZ, FSNI, and FSSI, including:

19.2.1. The Warehouse (with grocery its "standout category" in its recent financial report, and several thousand grocery SKUs also now available via TheMarket.com, which is growing at 138%);[123]

19.2.2. Farro Fresh, including online;

19.2.3. Chemist Warehouse (whose instore and online grocery range includes household products, health, vitamins, skincare, baby, haircare and more) as well as other health, body and pharmacy chains;

19.2.4. "Fruit and vege" shops, estimated by Horticulture NZ to account for 60% of sales in Auckland;[124]

19.2.5. HelloFresh, which in addition to meal kits is increasingly expanding into online groceries overseas;

19.2.6. My Food Bag, which has launched an online grocery offering,[125] and as recently as November 2021 it reported that: "My Food Bag is planning to expand its Kitchen product range into new categories, untether orders from its meal kits, and shorten delivery times pitting it directly against supermarkets in a land grab for online grocery spend."[126] In relation to this, My Food Bag's CEO has noted:[127]

> "*This is our first significant step outside of weeknight meals and signals our move beyond providing a solution to the original question of 'What's for dinner?' towards providing more everyday solutions for our customers for more meal occasions. Throughout the first phase of the Kitchen, we achieved rates in line with internal targets of 10% to 15% and an average order value in excess of $20. We also identified significant opportunities to invest and accelerate further to establish ourselves as a source of highly valued solutions, beyond meals, for our customers.*"

19.2.7. Export markets;

19.2.8. Petrol station, convenience and liquor channels including 1,200 retail-supported service stations, 4,000 dairies and 1,000 liquor stores nationwide;

[122] See paragraph 26.3.2 of our September Submission.
[123] The Warehouse Group Annual Report 2021
[124] (12 August 2020). OPEN LETTER: Horticulture | Recognise Independent Fruit & Vegetable Retailers As Essential Services. Scoop. Retrieved from: https://www.scoop.co.nz/stories/BU2008/S00204/open-letter-horticulture-recognise-independent-fruitvegetable-retailers-as-essential-services.htm
[125] (5 August 2021). My Food Bag expands into groceries, targeting growth from $37b retail food sector. The New Zealand Herald. Retrieved from: https://www.nzherald.co.nz/business/my-food-bag-expands-into-groceries-targeting-growth-from-37b-retail-food-sector/UDZ6EOYNJQY6BOFJP2SIDWSGOE/
[126] (19 November 2021). …while its new Kitchen offer hits launch targets, gathers intel for product expansion. FoodTicker. Retrieved from: https://www.foodticker.co.nz/while-my-food-bag-kitchen-hits-launch-targets-gathers-intel-for-growth/
[127] (19 November 2021). My Food Bag confirms dividend, deliveries drop. National Business Review.

19.2.9. Circle K, which has announced that its planned expansion to 100 outlets New Zealand wide will be aided by it having "the buying power of a multinational"[128] (in addition to the more than 14,000 Circle K outlets worldwide);[129]

19.2.10. New online entrants such as The Honest Grocer, Supie and Geezy Go, with Geezy Go having announced that it intends to purchase from "local New Zealand producers" for its online grocery offering;[130]

19.2.11. Z Energy has announced a goal of "a 20 per cent increase in convenience retail revenue to $500m by 2025", including to grow "beverages by 22 per cent to $90m, snacks 14 per cent";[131] and

19.2.12. For many of the NZFGC's key members, New Zealand is often only a very small part of the global market that they operate in.

19.3. Furthermore, even setting aside the range of alternative options described above, the NZFGC submission ignores the fact that Costco is entering New Zealand (the second largest "bricks-and-mortar" food / grocery retailer in the world), and it has already announced plans to become a significant purchaser of grocery products from New Zealand suppliers, not only for its New Zealand Costco operations, but also for its Costco operations in Australia and beyond. It is reported that Patrick Noone, Costco Country Manager for Australia and New Zealand is *"[o]n the hunt for New Zealand food and beverage manufacturers and suppliers*",[132] with Mr Noone noting:

> *"Sure, we'll buy for one warehouse in New Zealand, but the buyers are actually trying to buy for 14 Costcos, not one. So we may test it here and if it's successful we'll bring it across to Australia and sell it there in all the Costcos… Then if it does really well, we show our products all around the world to other Costcos. The reality is that there are around 600-800 Costcos around the world, so that's the potential."*

19.4. That is consistent with the views of the OIO in deciding to grant consent to Costco for its land acquisition in Auckland, with the OIO noting Costco's entry "provides an opportunity for the increased export of New Zealand products to other Costco stores worldwide" (see **Appendix** [**One**]).

19.5. Beyond the entry and expansion of other retailers, it is also the case that suppliers in New Zealand are increasingly developing direct to consumer (**D2C**) offerings that can bypass grocery retailers entirely, consistent with this accelerating global trend. For example, Kraft-Heinz has developed "Wattie's to Home" as a direct to consumer offering in New Zealand (as it has in a number of markets around the world)[133] and brands such as Garage

[128] (30 September 2021). PRG Set To Open 100+ Circle K Stores & EV Service Stations In NZ. Scoop. Retrieved from: https://www.scoop.co.nz/stories/BU2109/S00760/prg-set-to-open-100-circle-k-stores-ev-service-stations-in-nz.htm

[129] (30 September 2021). Global convenience and fuel giant Circle K set for big NZ push. NZ Herald. Retrieved from: https://www.nzherald.co.nz/business/global-convenience-and-fuel-giant-circle-k-set-for-big-nz-push/JF5PZESJHBELZTMN7LAPPGOYQU/

[130] (1 November 2021). Online grocer Geezy Go readies 20-minute delivery for NZ. Foodticker. Retrieved from: https://www.foodticker.co.nz/online-grocer-geezy-go-to-bring-20-minute-delivery-to-nz/

[131] (4 August 2021). Fuel retailer Z Energy targets 20 per cent increase in convenience retail revenue. NZ Herald. Retrieved from: https://www.nzherald.co.nz/business/fuel-retailer-z-energy-targets-20-per-cent-increase-in-convenience-retail-revenue/S6PXBATJO77QXMNE5AYDMZXK34/

[132] (15 June 2021). What Costco is hunting for Auckland superstore… and the world. Foodticker. Retrieved from: https://www.foodticker.co.nz/ffnz-2021-costco-hunts-kiwi-fb-brands-for-auckland-superstore/

[133] See: https://wattiestohome.co.nz/

Project, Ceres and Pics Peanut Butter are also supplying D2C.

19.6. To adopt an objective evidence based approach to its Market Study, it is crucial that the Commission's Final Report take a forward-looking view and take such market developments into account.

20. The importance of addressing the role of promotional rebates

20.1. As we have described to the Commission in our confidential session, supplier controlled promotional funding has an important role in the New Zealand grocery sector. [ ].

20.2. [ ]

20.3. [ ]

20.3.1. [ ]

20.3.2. [ ]

20.3.3. [ ]

20.3.4. [ ]

20.3.5. [ ]

20.3.6. [ ]

20.4. [ ] Indeed, to the extent that the Draft Report noted that options for independent wholesale supply to independent retailers already exist for meat, produce, and some imported products[134] (with a number of very price competitive retailers in those categories, such as Fruit World, Mad Butcher, The Original Aussie Butcher, etc), and many perishable products are already typically supplied by suppliers through a "direct store delivery" (**DSD**) model (such as milk and bread), it seems that the Draft Report's concerns about an apparent lack of wholesale options is exclusively in relation to packaged goods [ ]. This would support WWNZ's view that it is not lack of access to any logistics channels or warehousing facilities that has resulted in any apparent lack of wholesale options (indeed, those precise dynamics are managed in respect of meat, produce, bread, milk, and imported products), but that suppliers' control of promotional funding is *the* defining factor. For example, competition law commentators in Australia have observed that supplier promotional funding may be a reason why Metcash has worse purchasing terms relative to the integrated Australian supermarket chains:[135]

> *"In the past manufacturers of branded products undertook their marketing but today this role has largely passed to the supermarket chains and Metcash. Coles, Woolworths and Metcash negotiate with manufacturers and other suppliers for 'promotional monies' to be used for various purposes, including to pay for the 'rental' of display space and to fund periodic price discounts. It is here that the independent sector has claimed to receive poorer terms, in part reflecting an inability on the part of the independent wholesaler to guarantee that retailers would abide by the terms negotiated with suppliers. More recently, Metcash has largely addressed this via the conditions on which it supplies its retailers. Metcash does not directly*

[134] Commerce Commission "Market Study into the retail grocery sector – Draft Report" (29 July 2021) at [6.127].
[135] Merrett, A. and Smith, R.L., 2013, August. The Australian grocery sector: structurally irredeemable?. In Supermarket Power in Australia Symposium, Melbourne (Vol. 1).

charge its retailer customers for its service but retains part of the promotional money for this purpose, which has caused friction between the parties."

20.5. We believe this is a dynamic that is critical for the Commission to understand and explore further in its Final Report.

21. The NZFGC's position on private label products is incorrect

21.1. As the Commission will be aware, the Draft Report reviewed the perspectives and literature on private label products, and noted the various benefits to consumers that private label products can deliver, including "lower prices and greater choice",[136] "enhance[d] price competition between suppliers",[137] and can "generate manufacturing efficiencies" for suppliers.[138] As a result, the Draft Report concluded that there was no clear indication that any adverse impacts on suppliers from private label products "outweigh any potential benefits to consumers".[139]

21.2. Despite that, the NZFGC has filed multiple further submissions making arguments that private label products result in adverse outcomes for suppliers and consumers.

21.3. In our view, the NZFGC's submissions on the impact of private label products are incorrect and unsupported by fact. [ ]. Furthermore, as NERA notes, the Castalia report filed in support of NZFGC's submission on private label is merely "theoretical and does not consider whether there is evidence that suggests that New Zealand consumers in fact benefit from private labels."[140]

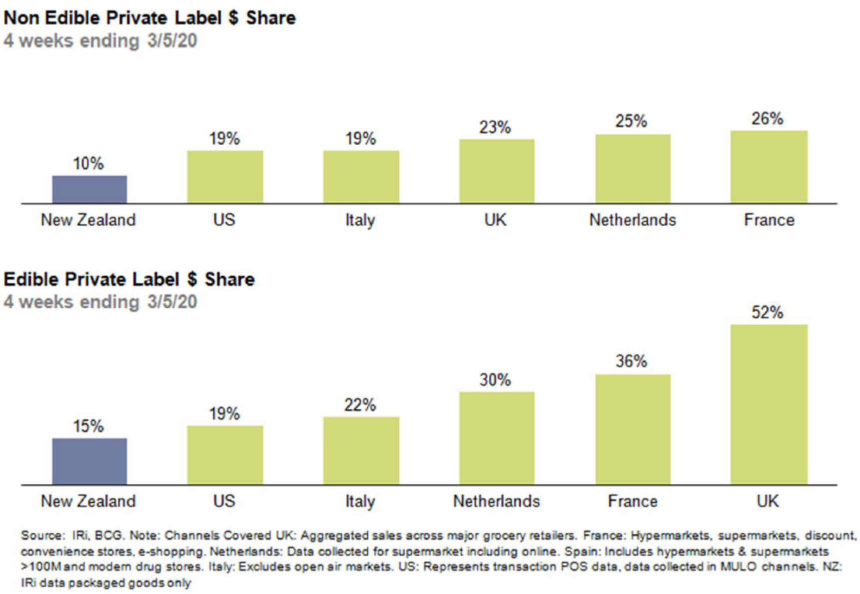
21.4. The following provides additional information to assist the Commission to place NZFGC's submissions in their proper context.

New Zealand penetration of private label products is not high by global standards

21.5. The suggestion in the NZFGC submission that private label penetration in New Zealand is high by global standards is incorrect, and we repeat Exhibit 2 below from our February Submission to demonstrate that.

136 Commerce Commission "Market Study into the retail grocery sector – Draft Report" (29 July 2021) at [8.147].
137 Commerce Commission "Market Study into the retail grocery sector – Draft Report" (29 July 2021) at [8.170].
138 Commerce Commission "Market Study into the retail grocery sector – Draft Report" (29 July 2021) at [8.151].
139 Commerce Commission "Market Study into the retail grocery sector – Draft Report" (29 July 2021) at [8.176].
140 NERA Economic Consulting "Grocery Market Study: Post-conference report" (23 November 2021) at [60].

Exhibit 2 - penetration of private label products by jurisdiction



21.6. In particular, the suggestion in the NZFGC submission that private label penetration in the UK is only 2-3%,[141] because the overall private label penetration can be divided by the number of retailers, is plainly incorrect. It is widely known that "the UK is the most sophisticated private brand retail market in the world with the highest penetration and share of private brands".[142] NERA concludes that the NZFGC's "math is incorrect and misleading".[143]

21.7. In addition, the suggestion in NZFGC's submissions that there has been a significant recent "rise in private label"[144] is also incorrect, at least in the case of WWNZ - as set out in Exhibit 3 below. It also needs to be borne in mind that there are limits on the proportion of private label products that can be offered as our offering needs to be responsive to consumers' preferences (including the many consumers that have a preference for branded products).

Exhibit 3 - WWNZ's penetration of packaged private label products across all categories

[ ]

[141] NZFGC's submission on the Draft Report (26 August 2021) at [6.50].
[142] Steve Howell. From private label to private brands: What US retailers can learn from the UK. Inside Private Brands.
[143] NERA Economic Consulting "Grocery Market Study: Post-conference report" (23 November 2021) at [66].
[144] NZFGC's submission on the Draft Report (26 August 2021) at [6.43] and [6.55(c)].

21.8. Furthermore, as the NZFGC will be aware, supermarkets' use of private label products is not unique to New Zealand - that is seen the world over (and, in fact, as noted in Exhibit 2 above, the penetration of private label products is low in New Zealand compared to a number of other jurisdictions, as illustrated in Figure 17 of our February Submission). For example:

21.8.1. Costco's private label brand, Kirkland, makes up approximately a quarter of Costco's annual revenue;[145] and

21.8.2. In Australia, more than three-quarters of Aldi's sales come from private label products.[146] and

21.8.3. In the UK and Ireland,Tesco has reported its private label share of sales as greater than 50%.[147]

21.9. It is also not unique to the grocery retailers in New Zealand that the Commission has focussed on in its market study - for example, The Warehouse Group also has vertically integrated private label grocery suppliers, for example in confectionery (ChocolateWorks),[148] and among others, Farro,[149] My Food Bag,[150] Circle K have their own private label brands.[151] As do many other retailers in New Zealand, for example, hardware retailers (such as Mitre 10), and clothing retailers (such as Kathmandu), and sporting goods retailers (such as Rebel Sport).

Private label products enhance competition and are good for consumers

21.10. In our view the evidence is clear that private label products have a positive effect on competition at the both the supplier and retailer level and in turn deliver lower prices and increased choice for New Zealand consumers as they:

21.10.1. Are priced very competitively, providing great value and increased choice for New Zealand consumers.

21.10.2. Provide a value benchmark that suppliers need to be cognisant of when pricing their own products and, therefore, enhance price competition.

21.10.3. Enhance competition on innovation, quality, and variety between suppliers (see paragraphs 21.14 to 21.17 below).

21.10.4. Create growth opportunities for new suppliers to enter or expand by producing private label products on our behalf.

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[145] See for example:
- https://www.nasdaq.com/articles/the-kirkland-brand-is-costcos-secret-weapon-when-it-matters-most-2019-11-19
- https://www.retaildive.com/news/at-costco-everything-resonates-with-the-consumer/565064/
- https://www.businessinsider.com.au/costco-kirkland-signature-brand-drives-success-2019-1

[146] (17 August 2021). Private label growth outpaces national brands. IRI. Retrieved from: https://www.iriworldwide.com/en-au/insights/news/private-label-growth-outpaces-national-brands

[147] See: https://www.tescoplc.com/media/754605/the-tesco-group-three-pillars-creating-value-final.pdf

[148] For example, The Warehouse has a shareholding in chocolate producer ChocolateWorks.

[149] See: https://www.farro.co.nz/content/farro-kitchen

[150] See: https://www.getmade.co.nz/

[151] (1 October 2021). Circle K in "multi-million dollar" NZ franchise drive. Food Ticker.

21.10.5. Provide an additional dimension on which retailers compete for customers (including by enhancing innovation and range by offering consumers price/quantity combinations that do not already exist in the market).

21.11. The fact that private label products are good for consumers, including by introducing additional competition to large multinational suppliers, has been recognised by a number of regulators / public bodies. For example:[152]

21.11.1. In its 2008 grocery market study, the ACCC noted that: "many of the companies that dominate this sector are multinational with strong brands that often have significant consumer loyalty. Buyer power, in particular when increased by the use of private label products, may drive down margins and retail prices on branded products to the benefit of consumers."[153]

21.11.2. The Australian Treasury has also recognised that private label products are positive for consumers and the overall economy:[154]

> *"Treasury notes that at the retail end of the supply chain the range of products available in supermarkets has evolved significantly in recent years partly due to the introduction of and growth in private-label products. We also note the concerns of food processors, however, on the other hand, private-label products do also provide consumers with alternative, more affordable options and increased competition and choice, while potentially placing pressure on parts of the operations of food processors is of direct benefit to consumers and to the economy more generally, for example, by effectively raising household disposable income."*

21.11.3. The benefits of introducing such competition to branded suppliers has also been observed by Henry Ergas AO, when writing in his role with the OECD:[155]

> *"In consumer markets, producer power typically arises from product differentiation, branding and product advertising. Strong brands increase total rents and the share of these rents captured by producers rather than distributors. Individual distributors consequently have an interest in countering strong producer brands to secure margins which they would otherwise have to transfer to the supplier of the branded goods. By reducing the power of a brand, they increase the competition it faces in the market, and hence promote lower prices, so that the net effect is to enhance consumer welfare…*
>
> *Where own-brands have developed, they have had four direct impacts. First, there have been some purely re-distributive effects between producers and distributors, as producers of branded goods have had to relinquish some part of their margins in various ways. Second, there have also been effects on consumer prices. Thus, own-brands under-price national brands by a margin which goes from around 30 per cent in Germany, to nearly 20 per cent in the U.K. and 10 per cent in France, with the effective rebate being substantially greater in some instances. Equally, in the United States, generics (unbranded goods), which are available at some 80 per cent of*

[152] Costco's CFO has made a similar observation in relation to private label: "*When a traditional brand is losing shelf space or market share, what do they do? They create a better value*." (23 March 2019). Costco's Kirkland brand has become a secret weapon worth as much as $75 billion. Business Insider Australia.
[153] ACCC "Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries" (July 2008) at page 383.
[154] Mr Bruce Paine, Principal Adviser, Infrastructure, Competition and Consumer Division, Treasury, Committee Hansard, 13 December 2011, p. 29.
[155] Structure and Change in Distribution System: An Analysis of Seven OECD Member Countries. The Service Sector: Productivity and Growth. Proceedings of the International Conference held in Rome, Italy, May 27 - 28, 1993.

supermarket outlets, sell at a discount of 25 to 50 per cent relative to the leading national brands. Third, own-brands have come to play an increasingly important role in extending consumer choice, with retailers seeking to increase their margins both by taking the lead in introducing new products and by up-grading their existing own-brand items. Fourth, they have created a low-cost entry route for new manufacturers, as the distribution expenses are covered by the retailer whose label appears on the product.

Producers of established brands have responded to increased competition by improving the services they provide to distributors, by seeking to reinforce consumer loyalty through promotional campaigns, and by accelerating new product introductions."

<u>New Zealand suppliers are highly innovative, and private label makes a positive contribution to that dynamic</u>

21.12. We do not consider that there is any evidence that WWNZ's approach to private label products is stifling innovation by suppliers. The concerns raised by the NZFGC are a common refrain from bodies representing large branded suppliers in numerous jurisdictions. For example, in its consideration of the 2017 acquisition of Booker by Tesco, the UK Competition & Markets Authority (**CMA**) "received a submission by the British Brands Group, raising a concern about the use of commercially sensitive information by retailers in developing 'private label' products".[156] However, the CMA dismissed such concerns, referring back to the UK Competition Commission's (**UKCC**) prior grocery market study that found "no evidence that such a behaviour had a negative impact on innovation expenditures."[157] To the contrary, the UKCC found that the evidence on R&D expenditure and innovation by suppliers was consistent with private label products having pro-competitive effects.[158]

21.13. The evidence in the New Zealand market is also consistent with the fact that private label products result in positive impacts on the level of innovation and competition in the sector, and that supplier innovation is high in New Zealand. Evidence of that is set out as follows.

21.14. <u>**WWNZ's private label range often leads innovation that then engenders competitive responses from branded suppliers**</u>: Increasingly, innovations in grocery products are led by private label products. As BCG has observed: "Today, private brands are trendsetters in the grocery industry. They are increasingly on-trend, high-quality, innovative, and exclusive products that meet the demands of shoppers for fresher, more convenient, and more sustainable offerings."[159] Indeed, a large number of innovations and new product offerings in New Zealand have been led by WWNZ's private label products. Examples include:

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[156] Competition and Markets Authority "A report on the anticipated acquisition by Tesco PLC of Booker Group plc." (20 December 2017) at [8.78]. Retrieved from: https://assets.publishing.service.gov.uk/media/5a3a7dd7ed915d618542b8df/tesco-booker-final-report.pdf

[157] Competition and Markets Authority "A report on the anticipated acquisition by Tesco PLC of Booker Group plc". (20 December 2017) at [8.79]. Retrieved from: https://assets.publishing.service.gov.uk/media/5a3a7dd7ed915d618542b8df/tesco-booker-final-report.pdf

[158] UK Competition Commission "Groceries Market Investigation" (30 April 2008) at [48]. Retrieved from: https://webarchive.nationalarchives.gov.uk/ukgwa/20140402235643/http:/www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2008/fulltext/538_9_10.pdf

[159] (1 April 2020). The Private-Brand Imperative for Grocers. BCG. Retrieved from: https://www.bcg.com/en-au/publications/2020/private-brand-imperative-grocers

21.14.1. Our Macro private label range of products, which has introduced new organic and wholesome product offerings across a range of categories:[160]

> "*Our customers also live busy lives which is why we work closely with our team of nutritionists to ensure our new range features an assortment of healthier on-the-go foods at affordable prices. These include our nutritious adult snack packs and healthy heat-and-eat soups… We always keep a close eye on what's going on in the world of health and wellness to seek out the latest trends, so we can bring all these benefits to our customers shopping at Woolworths as soon as possible*."

21.14.2. Our work with nutritionists to reduce the salt, fat and sugar across our private label range, to expand the range of healthier products available to our customers. Currently 99% of Countdown's private label range displays the Health Star Rating, and 53% of these products have a Health Star Rating of more than 3.5 stars.

21.14.3. In November 2021 we introduced joint te reo Māori and English language labelling on all our packaged private label New Zealand seafood products (part of Countdown's continued effort to incorporate te reo into everyday life in our stores).[161] [ ].

21.14.4. In August 2020 we completed a three year project to remove artificial colours and flavours from products produced in all of our in-store bakeries.[162]

21.14.5. In November 2020 we launched our private label Plantitude range, which is a range of plant based products for customers looking to reduce their intake of animal products and byproducts (and includes ready meal solutions, frozen desserts cakes, and more).

21.14.6. In 2020 we launched our COOK range of pre-prepared options such as slow cooked meats, one pan dishes, oven-ready meals, roasts and vegetable sides.

21.14.7. In 2016 we launched a new private label brand "Odd Bunch" to offer fruit and vegetables "that most likely wouldn't have made it to supermarket shelves due to small imperfections or cosmetic damage" at a lower price point.[163] Since launching, the Odd Bunch range has been very popular with consumers, with more than 4,000 tonnes of produce sold that could have otherwise ended up as waste. As Countdown's produce merchandise manager has observed: "Customers really enjoy these weird and wonderful fruits and vegetables knowing that they are helping reduce waste but also more affordable at the same time. The boxes give us an opportunity to trial a broader offer to see where we can help our growers out, but also provide more

[160] (4 July 2018). Growing customer demand drives Macro range expansion at Woolworths. Woolworths Group. Retrieved from: https://www.woolworthsgroup.com.au/page/media/Latest_News/growing-customer-demand-drives-macro-range-expansion-at-woolworths

[161] (11 November 2021). Countdown Project lands new fish name in Māori dictionary. Supermarket News. Retrieved from: https://supermarketnews.co.nz/news/countdown-project-lands-new-fish-name-in-maori-dictionary/

[162] (9 August 2020). Countdown ditches artificial colours and flavours in its baking. Stuff. Retrieved from: https://www.stuff.co.nz/life-style/food-to-love/122387843/countdown-ditches-artificial-colours-and-flavours-in-its-baking

[163] (2 November 2020). An odd-looking bunch: Countdown launches mixed fruit and veg boxes in order to reduce waste. The Register. Retrieved from: https://theregister.co.nz/2020/11/02/an-odd-looking-bunch-countdown-launches-mixed-fruit-and-veg-boxes-in-order-to-reduce-waste/

range to customers."[164]

21.14.8. WWNZ's private label range was the first to introduce frozen broccoli and cauliflower rice to New Zealand consumers (see Exhibit 4 below). Since we introduced those products, we have seen competitive responses from branded suppliers, for example with Birds Eye (Simplot New Zealand) introducing a branded alternative to the New Zealand market (see Exhibit 4 below), with both ranged in Countdown stores.

Exhibit 4: Comparison of WWNZ's private label product against a recently introduced branded alternative

21.14.9. WWNZ's private label was the first to introduce recycled PET (**RPET**) plastic packaging for bottled water in September 2018, with others following - for example Coca Cola in December 2019.[165]

21.14.10. [ ].

21.15. **<u>Private label contracts with supermarkets enable innovation and investment by branded suppliers by providing certainty of returns</u>**: Furthermore, contrary to the assertion in the NZFGC submission, the reality is that suppliers entering into private label contracts with WWNZ gain greater certainty of volumes and returns, enabling further investment and innovation. For example, WWNZ often enters into [ ] contracts with private label suppliers for a period of years, enabling investment as well as acting as a hedge against fluctuations in commodity / input prices. One example is the case of [ ], where WWNZ had entered into a [ ] contract with [ ]. During the last [ ].

21.16. **<u>There are private label suppliers that focus on bringing innovative products to New Zealand</u>**: There are private label suppliers that specialise in observing product innovations around the world, in order to bring new product innovations to New Zealand. For example, as

[164] (2 November 2020). An odd-looking bunch: Countdown launches mixed fruit and veg boxes in order to reduce waste. The Register. https://theregister.co.nz/2020/11/02/an-odd-looking-bunch-countdown-launches-mixed-fruit-and-veg-boxes-in-order-to-reduce-waste/

[165] See: https://www.ccamatil.com/nz/Sustainability

James Crisp notes on its website: "James Crisp has introduced literally hundreds of private label products to the New Zealand and Australian markets. To help the process we are able to source and offer a wide selection of food and non-food items as well as contributing innovative new ideas and packaging concepts."[166]

21.17. **Private label contracts create growth opportunities for new suppliers to enter or expand by providing scale economies and additional routes to market**: Entry into private label products with WWNZ has many benefits for New Zealand suppliers by providing them with volumes, economies of scale and contractual certainty to invest in growth, and the opportunity to expand overseas. Notably, more than 70% of WWNZ's private label products (by sales) are sourced from suppliers manufacturing those products in New Zealand, and more than $100 million of private label products manufactured in New Zealand are exported to Woolworths in Australia (thereby providing New Zealand based suppliers with a springboard into the Australian market). Examples of WWNZ suppliers that have benefitted from this include:

Supporting New Zealand suppliers with contractual certainty, volumes, and growth opportunities:

21.17.1. **Speirs Foods**: The launch by Speirs Foods of its own branded range of packaged salads came on-the-back of its previous private label relationship with WWNZ, which underpinned its volumes, and a close partnership with WWNZ. As reported at the time: "Chris Newton, [Speirs Foods'] general manager, said the launch was the culmination of a significant project between the Marton factory and the Countdown deli category management team in Auckland."[167]

21.17.2. [ ].

21.17.3. [ ].[168]

21.17.4. Beyond these smaller suppliers, WWNZ's private label volumes deliver significant volume efficiency benefits for larger manufacturers also, such as [ ].

Supporting New Zealand suppliers to expand to Australia:

21.17.5. [ ].

21.18. **Private label contracts provide education and resources to lift supplier manufacturing standards**: WWNZ maintains extremely high standards for food safety and quality for its private label products. As result, when it wants to work with a smaller New Zealand based supplier to produce private label products, WWNZ will invest in providing training and educational resources to enable that supplier to upgrade its skills and manufacturing facilities to meet WWNZ's exacting standards (with that investment typically underpinned through the volumes / revenues that WWNZ will commit to as part of a multi-year private label contract). Those smaller suppliers can then use those resources and investments to ensure their own branded products are also produced to those same high standards, thereby uplifting the safety and quality of the New Zealand supplier base across both private label and branded

[166] See: http://jamescrisp.co.nz/what-we-do

[167] (5 November 2013). Price is right as Speirs launches pre-packed salads. The Whanganui Chronicle. Retrieved from: https://www.nzherald.co.nz/whanganui-chronicle/news/price-is-right-as-speirs-launches-pre-packed-salads/G6GDJ3OJPAEZZAK7TL253FDYKM/

[168] [ ].

products. A number of smaller New Zealand suppliers have benefited from this in the production of their branded products, including [ ].

21.19. The facts outlined above demonstrate the number of ways in which private label products enhance innovation and investment by New Zealand suppliers. Furthermore, more broadly (and contrary to the suggestion by the NZFGC that private label was a threat to supplier innovation and investment), the evidence is that there is vibrant investment and innovation by New Zealand suppliers - we continue to see high levels of investment and innovation from our suppliers in response to constantly developing market trends and consumer preferences (including shifting to more environmentally sustainable products and packaging), and we consider the level of investment and innovation from New Zealand suppliers is the equal of suppliers in other countries. To take but a few examples:

21.19.1. In October 2021 it was announced that Gisborne-based pre-packaged salad supplier LeaderBrand would be "pumping millions into its pilot undercover growing project to test the environmental and productivity gains it can unlock for its fresh produce business", with "[t]he imported greenhouse is thought to be the first of its kind in New Zealand. The controlled environment meant less water and fertiliser were needed, and infrastructure like rain-water collection and a dam made the whole facility self-sufficient for water."[169]

21.19.2. In October 2021 it was announced that cooking oil supplier Pure Oil (which owns "The Good Oil" brand) would be "investing $2m to build a new 1,250 square metre factory at its current Rolleston site. That would increase oil processing and bottling capacities for its The Good Oil brand and also provide much-needed office and storage space", as well as looking to expand into plant-based protein foods.[170]

21.19.3. In October 2021 it was announced that Nelson-based Tasman Bay Food Co (producer of Juicies) would be expanding to supply its products into 900 Woolworths stores across Australia, with Tasman Bay Food Co having "recently significantly invested in improved automation in our production facility here in Nelson."[171]

21.19.4. In October 2021 it was announced that Hawkes Bay-based cider / seltzer supplier Zeffer had "completed a close-to million-dollar investment into a new canning line and pasteuriser which add contract manufacturing capability to the business's portfolio".

21.19.5. In October 2021 it was reported that Kellogg's had invested "$45m over the last 15 years on research and development" across its Australia / NZ business, including in relation to sugar reduction and introducing gluten free options ("Kellogg is now the market leader in gluten free breakfast in NZ… Gluten free is actually a bigger need in New Zealand than it is in Australia, and then interestingly globally, ANZ is very much

[169] (13 October 2021). LeaderBrand looks for gains from mega-greenhouse pilot. FoodTicker. Retrieved from: https://www.foodticker.co.nz/leaderbrand-looks-for-gains-from-mega-greenhouse-pilot/

[170] (1 October 2021). "Time to tick" - The Good Oil Owner preps plant protein play, new $2m factory. FoodTicker. Retrieved from: https://www.foodticker.co.nz/time-to-tick-the-good-oil-owner-preps-plant-protein-play-new-2m-factory/

[171] (12 October 2021). Nelson export set to cool the Aussies. Exporter Today. Retrieved from: https://exportertoday.co.nz/news/nelson-exporter-set-cool-aussies

at the forefront of the gluten free or gluten avoidance trend.”)[172]

21.19.6. In October 2021 it was reported that Auckland-based premium cereal supplier Blue Frog Breakfast was eyeing expansion to Australia, noting that New Zealand was already ahead of Australia in having developed a “premium cereal category” (“founder and chief executive of the Icehouse Ventures-backed cereal manufacturer, Scotty Baragwanath, said unlike in New Zealand, the premium cereal category ‘doesn’t really exist in Australia’”). The same article noted that: “Blue Frog Breakfast also planned to expand production at its East Tamaki factory, where it employed 12 staff, by moving into a neighbouring building in early 2022, which would see the space nearly double to around 600 square metres.”[173]

21.19.7. In September 2021 it was announced that Bakels, a key supplier of “ingredients to in-store bakeries and Countdown and Foodstuffs supermarkets nationwide” would invest $30 million in a new Auckland factory… The opening of the new factory would see it add a further 20 new hires over two years to its current 30 production staff with a further 40 new hires in the future.”[174]

21.19.8. In September 2021 it was reported that Auckland-based beverage manufacturer No Ugly was “gearing up for growth”, noting “we have different functions we are going to innovate on and put into other formats.”[175]

21.19.9. In September 2021 it was reported that Arnott’s, which purchased Auckland-based cracker manufacturer 180 Degrees in May 2021, intended to spend “hundreds of thousands of dollars” installing additional ovens at 180 Degrees’ Auckland manufacturing site as “an exciting first step in terms of expanding our capacity and it opens up some doors pretty quickly in terms of how we get at growth opportunities”. Arnott’s acquisition was said to be “a strong vote of confidence in the New Zealand market”, and commenting on the extent of supplier innovation in New Zealand, Arnott’s said: “It is a pretty innovative place and there are lots of smaller brand and different opportunities and I think that is what got the business interested in what is possible in this market and how it can benefit the group’s broader strategy.”[176]

21.19.10. In September 2021 it was reported that Auckland-based speciality bread manufacturer Venerdi “re-invest[s] an average of $500,000 annually into equipment and improvements at its Kelston factory in Auckland, increasing capacity annually and setting the plant up for the future”, and that it had recently signed a contract to begin supplying into Californian health food stores.[177]

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[172] (4 October 2021). Kellogg’s NZ boss Tamara Howe on fads, food renovation and gluten free. FoodTicker. Retrieved from: https://www.foodticker.co.nz/kelloggs-nz-boss-tamara-howe-on-fads-food-renovation-and-gluten-free/

[173] (5 October 2021). Blue Frog Breakfast to take a bite of nascent Aus premium market. FoodTicker. Retrieved from: https://www.foodticker.co.nz/blue-frog-targets-75m-sales-in-nascent-aus-premium-market/

[174] (13 September 2021). Bakels add $30m factory to Auckland arsenal. FoodTicker. Retrieved from: https://www.foodticker.co.nz/bakels-adds-30m-factory-to-auckland-arsenal/

[175] (30 September 2021). No Ugly seeks funding for functional expansion. FoodTicker. Retrieved from: https://www.foodticker.co.nz/no-ugly-seeks-funding-in-drive-beyond-functional/

[176] (22 September 2021). Arnott’s ready to ramp 180 Degrees, despite Delta delay. FoodTicker. Retrieved from: https://www.foodticker.co.nz/arnotts-ready-to-ramp-180-degrees-despite-delta-delay/

[177] (23 September 2021). Speciality bread business Venerdi goes stateside. FoodTicker. Retrieved from: https://www.foodticker.co.nz/speciality-bread-business-venerdi-goes-stateside/

21.19.11. In September 2021 it was reported that Martinborough-based frozen burrito supplier Cartel Foods continues to expand, noting that "Cartel moved into a new factory on Princess St earlier this year after quickly outgrowing their second production premises they took up in 2019", and that the "Martinborough factory team has doubled to 13 in two years."[178]

21.19.12. In August 2021 it was reported that Masterton-based Breadcraft would sell its contract to manufacture bread for Goodman Fielder's Quality Bakers brand "to focus on growing its own speciality brands, Rebel Bakehouse and Cottage Lane", noting that it needed the capacity to "grow our business further", that "[a]s well as investing more in its existing brands... the business would develop new products in growing categories in both grocery retail and foodservice", that it had "recently completed its gluten-free manufacturing line at its 'five-bakeries-in-one' manufacturing facilities, located on a near three-hectare site in Masterton, where 110 people were employed," and that it is "continually reinvesting back in the business every single year to make us better, stronger, quicker, more efficient, more effective to ensure the generations to follow also have the opportunity to run such an awesome business."[179]

21.19.13. In August 2021 Auckland-based bagel supplier, Abe's Bagels, commented that "there is still plenty of room for growth at Abe's Bagels", and that "hav[ing] a strong collaborative partnership with your retail partners… is how you both grow." It now employs "110 people across operations in Auckland and Sydney" and is said to be a "multi-million dollar FMCG company".[180]

21.19.14. In July 2021 it was announced that Pavillion Foods would look to invest in a new Christchurch-based production facility, noting that "automation is definitely the way to go. We've been investing a lot back into the business." Pavilion Foods is a leading supplier of gluten free pizza bases, pies, puddings, and desserts to New Zealand supermarkets, and is reported to have "tripled its frozen sales in supermarkets over the past three years".[181]

21.19.15. In July 2021 it was reported that Auckland-based muesli manufacturer Pure Delish (owned by Tasti Products) had just had "a year of innovation", including the "release [of] 20 new products within 12 months with more to come." It is said that its number of "SKUs have grown 64% from 2018 with launches since then into new categories of savoury nuts, snacking clusters and extensions in both the cereals and porridge segments."[182]

21.19.16. In July 2021 it was announced that Lower Hutt-based health snack food company Tom & Luke had formed a joint venture with collagen company, Dose & Co, "to develop business into a "market leader" in the global health and wellness nutritional foods space", namely innovative new snack products that contain "pure bovine

[178] (29 September 2021). Frozen burritos proving hot stuff during lockdown. Stuff. Retrieved from: https://www.stuff.co.nz/life-style/food-drink/126515122/frozen-burritos-proving-hot-stuff-during-lockdown

[179] (17 August 2021). After 53 years, Breadcraft cuts ties with Quality Bakers to drive specialist brands. FoodTicker. Retrieved from: https://www.foodticker.co.nz/after-53-years-breadcraft-cuts-ties-with-quality-bakers-to-drive-speciality-brands/

[180] (6 August 2021). Abe's Bagels on a roll, 25 years on. FoodTicker. Retrieved from: https://www.foodticker.co.nz/abes-bagels-on-a-roll-25-years-on/

[181] (6 July 2021). Gluten free pioneer Pavillion Foods preps for expansion. FoodTicker. Retrieved from: https://www.foodticker.co.nz/gluten-free-pioneer-pavillion-foods-preps-for-expansion/

[182] (12 July 2021). Pure Delish rolls out the launches to stay 'super premium' FoodTicker. Retrieved from: https://www.foodticker.co.nz/pure-delish-pumps-our-product-to-stay-super-premium/

collagen" (manufactured at Tom & Luke's factory in Lower Hutt).[183]

21.19.17. In July 2021 it was announced that Auckland-based jerky supplier, Bootleg Food Company, had secured funding to invest in "scal[ing] up production to meet increasing demand for its dried beef jerky products", with the "company to spend around $250,000 to set-up a new 250 square metre facility with new equipment at Beach Haven, Auckland" to "ramp up production from 50,000 packets of jerky to 120,000 packets in the year following the move to the new manufacturing facility."[184]

21.19.18. In May 2021, the CEO of Asahi Beverages NZ said that "consumers in New Zealand were looking for new flavours to try and exploring more than in previous years, keeping beverage makers like Asahi alert to new trends and tastes", and that "[t]he rate of innovation now is as strong as I've ever seen it across many different categories."[185]

21.19.19. In March 2021 it was reported that New Zealand oat supplier Harraway's had "revealed plans to focus new product development efforts on areas such as fortification and collaborative NPD as the 154-year-old brand moves to keep up with current F&B trends". Such investments and innovation included "a recent NZ$2.5mn (US$1.8mn) upgrade to the mill to use the latest German technology", and launching "a line of fortified packaged oat dubbed Oat-active, an area with a 'lot of opportunity'".[186]

21.19.20. In March 2021 it was reported that Auckland-based nutraceutical beverage supplier Ārepa "is investing over NZ$2 million (US$1.4m) on a series of brain health and performance clinical trials as it looks to create the world's smartest drink". While Ārepa's products are already available in supermarket chains in New Zealand, it "has ambitious plans to double its revenue from last year, and sell over three million units this year in New Zealand and Australia."[187]

21.19.21. In June 2020 wrap and flatbread supplier Farrah's "put the finishing touches to their most ambitious project yet: a state-of-the-art factory in Upper Hutt. Planning for the world-class facility started in 2017 when Farrah's purchased the former Foodstuffs Wellington site."[188]

21.19.22. In December 2020 it was announced that Raglan Food Co invested in a "million-dollar" factory to expand its range of dairy-free yoghurts, which it can be used to "produce 25,000 jars of yoghurt weekly to be shipped off to Countdown and New

[183] (16 July 2021). Tom & Luke gets a Dose of collagen with Zuru tie-up. FoodTicker. Retrieved from: https://www.foodticker.co.nz/tom-luke-gets-a-dose-of-collagen-with-zuru-tie-up/
[184] (14 July 2021). Bootleg Jerky beefs up with new investment. FoodTicker. Retrieved from: https://www.foodticker.co.nz/bootleg-jerky-beefs-up-with-new-investment/
[185] (19 May 2021). Innovation gets faster, quality endures - Asahi's Andrew Campbell. FoodTicker. Retrieved from: https://www.foodticker.co.nz/innovation-gets-faster-but-quality-endures-asahis-andrew-campbell/
[186] (3 March 2021). Ode to oats: NZ's 154-year-old Harraways focuses NPD on fortification and collaboration. Food Navigator Asia. Retrieved from: https://www.foodnavigator-asia.com/Article/2021/03/03/Ode-to-oats-NZ-s-154-year-old-Harraways-focuses-NPD-on-fortification-and-collaboration#
[187] (31 March 2021). 'World's smartest drink': NZ's Ārepa outlines RCTs and Australia expansion plan with new CSO on board. Food Navigator Asia. Retrieved from: https://www.foodnavigator-asia.com/Article/2021/03/31/World-s-smartest-drink-NZ-s-Arepa-outlines-RCTs-and-Australia-expansion-plan-with-new-CSO-on-board
[188] (June 2020). FMCG Business. Volume 7 - No 5. Retrieved from: https://issuu.com/theintermediagroup/docs/fmcg_june_2020

World supermarkets across the country."[189]

21.19.23. Hamilton-based Prolife Foods is an "innovative food business" with a "turnover of over $300 million", including exporting from New Zealand to a range of countries throughout Australasia and Asia. Prolife Foods has said that "[o]ne of the keys to Prolife Foods' international success... is trialing things – then redefining the consumer proposition over time to suit the local market… we invest heavily in understanding how to grow and develop this category, and we always continue to innovate. I believe we can really lead the market globally." Prolife Foods has said that its New Zealand domestic business, and relationships with New Zealand grocery retailers has been key to this international expansion."[190]

21.19.24. DB Breweries has a constant focus on innovation to enhance sustainability, including in 2015 enabling "New Zealanders to become the first in the world to power their cars with commercially-available bio-fuel made from a by-product of beer."[191] DB has also invested in a number of innovations focussed on sustainability: "We're proud of what we've accomplished over the past decade. This includes reducing the amount of water used to brew our beers and ciders by 25 per cent and taking innovative approaches to a circular economy as demonstrated by our DB Export Brewtroleum and Beer Bottle Sand initiatives. Our focus now is on doing what we can to reach the critical milestones we're aiming for over the next 10 years."[192]

21.19.25. Frucor, in partnership with Callaghan Innovation, operates an internship programme for food and technology students to work alongside its research and development teams in Auckland and Napier.[193] In 2020 it was reported that Frucor was "completing a $30 million upgrade of its manufacturing plant at Manukau. This includes adding a new production line", and was "also building a state-of-the-art distribution centre", which would be "the most sophisticated grocery distribution warehouse in Australasia… We'll be at the leading edge with semi-automated racking – a shuttle will run deep into the racking and move pallets. The only one we've seen like this is in Shanghai."[194]

21.19.26. Whittaker's has been perceived as a leading innovator on new SKUs in the supply of confectionary lines in Australia. For example, Whittaker's new "Peanut Butter & Jelly" chocolate block has been reported in the media as causing a "frenzy" in Australia.[195] In reference to that product, Whittaker's has said it "reflects Whittaker's ongoing

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[189] (3 December 2020). New Zealand's largest dairy-free yoghurt company builds million-dollar factory to expand range. Stuff. Retrieved from: https://www.stuff.co.nz/business/300169372/new-zealands-largest-dairyfree-yoghurt-company-builds-milliondollar-factory-to-expand-range

[190] (10 September 2018). '80s child back on trend. Exporter Today. Retrieved from: https://exportertoday.co.nz/article/%E2%80%9880s-child-back-trend

[191] DB Breweries & Gull New Zealand – innovation in biofuel. Retrieved from: https://sustainable.org.nz/sustainability-success-stories/db-breweries-gull-innovation-in-biofuel/

[192] (11 July 2019). DB Breweries announces bold sustainability ambitions. Press Release: DB Breweries. Retrieved from: https://www.scoop.co.nz/stories/BU1907/S00298/db-breweries-announces-bold-sustainability-ambitions.htm

[193] (17 December 2020). Frucor Suntory welcomes research and development students. Fructor Suntory. Retrieved from: https://frucorsuntory.com/news/frucor-suntory-welcomes-research-and-development-students/

[194] (20 March 2020). Frucor: Preparing for long-term growth. Auckland NZ. Retrieved from: https://www.aucklandnz.com/invest/success-stories/frucor

[195] (13 October 2021). 'Unique' New Zealand chocolate block launches in Australia. Retrieved from: https://www.news.com.au/lifestyle/food/eat/unique-new-zealand-chocolate-block-launches-in-australia/news-story/438a39b03222af6b3d79201efee07f03

commitment to innovation because we truly believe 'best is always better'".[196] Whittaker's has been described by research and analytics firm The Navigators as "extremely agile in terms of flavour innovation".[197]

21.19.27. In 2018 Pic's Peanut Butter invested in a new $10 million "2500-square-metre factory building [that] will be more than double the size of the two Pic's factories that currently operate at separate locations on Elms St [in Nelson]."[198]

21.19.28. Griffin's has during 2021 referred to its investment in new manufacturing facilities in New Zealand, and its focus on innovating new products to appeal to New Zealand customers: "We've invested in a new manufacturing plant in Wiri in South Auckland. Making our chips right here means we can pick up local flavour trends and move quite quickly in terms of providing something new and different to the market… We've got an amazing portfolio of brands and we're custodians of that history, but we can't be complacent with it. We have to keep reinventing and reimagining new products to ensure we keep earning our place in Kiwi pantries and Kiwi hearts, but we can't do that by ourselves. We've got to be in the community and listening to what Kiwis want, and we can do this through powerful partnerships [with retailers]."[199]

21.19.29. Heinz-Wattie's describes "formulation and innovation" as being a core part of its business, including having a "commitment to introducing healthier food choices and improving the nutrition of our current products where necessary.... Over the last 5 years we have worked hard to continue to offer more choices in our plant based categories with extensions to our Wattie's SteamFresh frozen vegetables, Wattie's legumes, and Wattie's baby food range."[200] Furthermore, in June 2021 Heinz-Wattie's invested $20 million expanding its Hastings pet food plant.[201]

21.19.30. In 2015 George Weston Foods invested "more than $5 million in new plant and equipment for its Wiri factory." At the time, George Weston Foods commented that: "Innovation is essential, even for a food category as traditional as pies… You can attribute Big Ben's continuing strong performance in a hotly contested category to our willingness to try new ideas that we believe will prove popular with consumers."[202]

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[196] (13 October 2021). 'Unique' New Zealand chocolate block launches in Australia. Retrieved from: https://www.news.com.au/lifestyle/food/eat/unique-new-zealand-chocolate-block-launches-in-australia/news-story/438a39b03222af6b3d79201efee07f03

[197] (19 May 2021). Whittaker's takes 2021 resilience cake. FoodTicker. Retrieved from: https://www.foodticker.co.nz/whittakers-takes-2021-resilience-cake/

[198] (25 June 2018). Peanut butter empire spreading out to take on world. Stuff. Retrieved from: https://www.stuff.co.nz/business/104904803/start-spreading-the-news-pics-new-factory-will-soon-be-the-toast-of-the-town

[199] (25 May 2021). Innovation in the chip aisle for New World customers. Stuff. Retrieved from: https://www.stuff.co.nz/business/innovation/125211881/innovation-in-the-chip-aisle-for-new-world-customers

[200] See: https://www.watties.co.nz/articles/107856300008/committed-to-a-healthier-new-zealand

[201] (1 June 2021). Hastings' Wattie's invests $20 million chasing pet food markets. The New Zealand Herald. Retrieved from: https://www.nzherald.co.nz/nz/hastings-watties-invests-20-million-chasing-pet-food-markets/R6BCJXG5D46GNE5QXDF7YFKBL4/

[202] (1 April 2015). George Weston expands pie plant. National Business Review. Retrieved from: https://www.nbr.co.nz/article/george-weston-expands-pie-plant-ng-170772

21.19.31. When Synlait purchased Dairyworks in 2019 it described it as a "nimble and innovative company".[203] Reflecting that focus on innovation, Dairyworks was recognised in the 2017 Entrepreneur Of The Year Awards, where it was said that: "The firm's innovative and traditional values reflect those that have made New Zealand a world leader in dairy production. The firm promotes continuous improvement amongst its team and ensures that every part of the organisation is encouraged to create ideas and make decisions – 'no idea is ever considered sour'."[204]

21.20. There is no evidence to substantiate the NZFGC's suggestion that private label products are leading to reduced innovation by branded suppliers in New Zealand. To the contrary, the evidence above demonstrates ongoing investment in innovation and research and development by New Zealand suppliers, and quantifiable statistics demonstrate that WWNZ is constantly providing opportunities for new and innovative product offerings from suppliers:[205]

21.20.1. Suppliers with annual sales to WWNZ of less than $1 million represent less than [ ]% of total Coundtown sales, yet these small suppliers supplied more than [ ]% of the new products ranged in 2020;

21.20.2. In 2020, WWNZ ranged over [ ] new products from over [ ] suppliers with annual sales in Countdown of less than $1 million;

21.20.3. Across all products and suppliers regardless of sales volume, over [ ] new lines from nearly [ ] suppliers were introduced over the last year; and

21.20.4. Countdown retails on average 26,000 SKUs and turned over an average of roughly [ ] lines, or roughly [ ]% of its products, annually in each of the last three years.

WWNZ respects and protects our suppliers' intellectual property

21.21. While it is not clear whether NZFGC was referring to WWNZ, WWNZ also refutes any suggestion in NZFGC's submission that WWNZ appropriates the confidential intellectual property of branded suppliers for its private label products, that it provides preferential treatment to ranging decisions for its private label products, or that it refuses cost reductions from its branded suppliers for the purposes of advantaging sales of its private label products. Those are not activities that we undertake or would allow. We have reviewed our records internally and we cannot find any record of, nor are we aware of, any such concerns being raised with us. We do not consider there is any evidence or examples of WWNZ copying suppliers' innovations or intellectual property in development of WWNZ's private label products. Furthermore, to the extent it was considered necessary to address the risk of such conduct, that could be dealt with in an appropriately framed Grocery Code - for example, the

[203] (25 October 2019). Synlait poised to buy Dairyworks. Stuff. Retrieved from: https://www.stuff.co.nz/business/farming/116909450/synlait-poised-to-buy-dairyworks-for-112

[204] Congratulations to New Zealand owned manufacturers Dairworks. Retrieved from: https://www.eqconsultants.co.nz/resources/knowledge-base/congratulations-to-new-zealand-owned-manufacturers-dairyworks/

[205] NERA Economic Consulting "Grocery Market Study: Post-conference report" (23 November 2021) at [59] to [64].

Australian Grocery Code covers such matters (see further at paragraphs 21.32 to 21.35 below).

<u>WWNZ makes customer-led pricing decisions in relation to both branded and private label products</u>

21.22. Again while it is not clear whether NZFGC was referring to WWNZ, we also refute any suggestion that WWNZ has declined the opportunity to take a supplier's product at a lower price because they do not want to undermine their private label product. WWNZ's business model is premised on negotiating the most fair and competitive input prices possible with its suppliers.

21.23. Private labels often represent the most affordable option for consumers, to their benefit (including because their cost-of-goods do not include the same sales team and marketing overheads as branded equivalents). However, there are also numerous examples of Countdown setting the retail prices of branded products below the prices of its private label products. By way of example (among others), in the last 52 weeks:

21.23.1. Caffe Civo Scuro Coffee 200g was priced lower for 52 weeks, and Aurora Coffee 250g was priced lower for 18 weeks, than Countdown Espresso Coffee 200g Refills;

21.23.2. Much Moore Wonders Ice Cream 2 litre was priced lower than Countdown's Signature Range Ice Cream 2 Litre for 20 weeks;

21.23.3. Rosies Kitchen Lasagne 350g was priced lower than Countdown Chilled Lasagne 350g for 43 weeks;

21.23.4. Avalanche Coffee Flat White 10 pack was priced lower for 16 weeks, and Greggs Cafe Gold Chai Latte 10 pack 200g was priced lower for 14 weeks, than Countdown's Stick Caramel Latte 10 pack;

21.23.5. Alpine Butter 500gm was priced lower for 19 weeks, Anchor Butter 500gm was priced lower for 4 weeks, and Tararua Butter 500g was priced lower for 9 weeks than Countdown Butter 500gm;

21.23.6. Beehive Bacon Shoulder 200g was priced lower than Countdown Bacon Shoulder 200g for 24 weeks;

21.23.7. Pure Drop Water 24pk X 600ml was priced lower than Countdown Still Water 600ml x 24 pack for 20 weeks; and

21.23.8. Griffin's Chocolate Fingers 180g was priced lower than Countdown Chocolate Fingers 200G for 8 weeks.

21.24. Furthermore, it is important for the Commission to understand that WWNZ's private label department operates as its own division within WWNZ, called FoodCo, and that division operates separately from the WWNZ category managers that make the decisions about which products (branded or private label) will be ranged.

21.25. Our FoodCo division has responsibility for developing new private label products that will resonate with consumers, and developing the sourcing relationships with suppliers to enable those products to be brought to market. That division focuses on identifying unmet consumer needs in the market ("gaps"), and then sourcing the right products from the right suppliers to meet those gaps.

21.26. However, just because FoodCo develops an idea for a new private label product, or is able to pitch an available private label product that is already being sold by Woolworths in Australia, that does not mean that the category manager who is making the decision whether or not to range that product will do so. As we have described to the Commission previously, WWNZ's ranging decisions are based on what our customers want (informed by extensive sales data and market research so that we can make customer-led and fact-based decisions in relation to ranging). Those decisions are based on consumer research, scan data, loyalty card insights, and forecasted financial measures - such as expected sales and share.

21.27. As a result, if category managers do not consider that a particular private label product will meet consumers' needs, then those private label products will not be ranged. It is very common for WWNZ's FoodCo division to "pitch" a proposed private label product to a category manager, only for a category manager to choose not to range that product because they do not consider it will resonate with consumers - either because it will not be at a sufficiently low retail price point to be attractive, or because the category manager does not consider that it will meet consumers' needs in a way that is better than existing alternatives.

21.28. By way of example, WWNZ's FoodCo division recently went through a process of reviewing 3,500 existing private label products already sold by Woolworths in Australia to determine which ones did not have equivalent private label offerings in New Zealand. Of those, WWNZ's FoodCo division identified 500 that were not currently offered in New Zealand, and "pitched" those to WWNZ category managers. Of the 500 products pitched, 200 were rejected by WWNZ category managers for various reasons - including that WWNZ could already source branded alternatives at lower prices, the local New Zealand manufacturers were considered better quality, or because WWNZ did not consider that the particular product would resonate with New Zealand consumers.

21.29. This demonstrates that WWNZ takes a customer-led approach, and does not make decisions that are not in customers' interests simply to benefit its private label business. As the UKCC[206] observed in its grocery market study: "We also note that it may be in a retailer's best interest to promote growth of a branded label at the expense of its own label as, in some instances, the performance of a category of product may benefit from increased sales of branded product."[207]

WWNZ provides opportunities for branded suppliers to develop attractive products for consumers

21.30. Any suggestion by NZFGC that WWNZ is using private label products to crowd out branded suppliers is also demonstrably false. Between 2010 and 2021, the number of active barcodes across WWNZ's largest grocery categories (for example, toiletries, cleaning products, biscuits, accounting for about 50% of total WWNZ sales), increased from [ ]. The steady increase of 1% per year in the number of barcodes across the major grocery categories comes despite periodic efforts to rationalise product lines (such as in 2016 when WWNZ reduced the number of toiletry brands). This is further evidence that while private label products are introducing new competition and new innovation, they are not preventing branded suppliers from the opportunity to develop and offer attractive products to consumers. It reflects current trends towards more dynamic, more multi-dimensional (for example, health), and more locally

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206 As it was then known.

207 UKCC "Groceries Market Investigation" (30 April 2008) at [33]. Retrieved from: https://webarchive.nationalarchives.gov.uk/ukgwa/20140402235643/http:/www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2008/fulltext/538_9_10.pdf

curated ranges, requiring ongoing data-driven optimisation that a vertically integrated business is well placed to provide. There is also evidence of a higher turnover of SKUs, as brands become ever more targeted to specific groups of consumers. This trend is supported by technological innovation in the grocery industry that has allowed for increasingly real time monitoring of consumer preferences.

A wide range of branded options are available across all core grocery categories

21.31. As illustrated in Exhibit 5, a wide range of non-Private-Label options are readily available across core grocery categories, including even the most commoditised categories such as milk, butter, pasta and rice.

[ ]

A well framed Grocery Code will provide all industry participants the necessary confidence and assurances

21.32. In the NZFGC's submission, it advocated for "clear rules about private label (including structural separation of that business to avoid conflicts and other behaviour inconsistent with consumer's best interests)."[208]

21.33. As noted at paragraph 21.24 above, we already operate our FoodCo division as an independent team, and the terms of the Australian Grocery Code, which we support being incorporated into a mandatory New Zealand Grocery Code, address any potential concerns of poor behaviour by retailers in relation to private label products, including requiring that retailers:[209]

21.33.1. must publish to suppliers their "*product ranging principles*" and "*shelf space allocation principles*"; and

21.33.2. must apply these principles to all their ranging decisions and shelf space allocation decisions and "*without discrimination in favour of the retailer's... own brand products*"; and

[208] NZFGC's submission on the Draft Report (26 August 2021) at [1.13(b)] and [7.4].
[209] Australian Food and Grocery Code of Conduct. Retrieved from: http://classic.austlii.edu.au/au/legis/cth/consol_reg/caccagr2015655/sch1.html

21.33.3. "*[i]n developing or producing own brand products… must not infringe the intellectual property rights held by a supplier in relation to grocery products, including rights relating to branding, packaging designs or advertising*"; <u>and</u>

21.33.4. "*must not directly or indirectly require a supplier to transfer or exclusively license any intellectual property right held by the supplier in relation to a grocery product as a condition or term of supply of an equivalent own brand product of the retailer.*"

21.34. Accordingly, we consider that any potential behaviour by retailers to favour private label products, or in relation to protection of intellectual property, can, and will, be adequately and appropriately addressed by a well constructed mandatory Grocery Code, as it is in Australia.

21.35. Any more extreme, and unprecedented options, such as "structural separation" (as raised in the NZFGC submission), would be unwarranted given there is no evidence of harm to consumers arising from private label products (to the contrary, they are procompetitive for the reasons outlined), it would further strengthen the market power of certain large multinational suppliers (to the detriment of consumers), it would risk adding 'separation' costs (to the detriment of consumers), and could potentially disincentivise or constrain other international supermarkets (such as Costco and Aldi) from expanding further into the New Zealand market (in particular, given a significant proportion of their business model is premised on private label products - as noted at paragraph 21.8 above).

Part 4: Key dynamics relating to the nature of retail grocery competition

The evidence is that there is vigorous competition between New Zealand grocery retailers, both between WWNZ and FSNI and FSSI stores, but also between WWNZ and the range of other grocery retailers. That is reflected in the strong evidence of competitive outcomes in the market (as outlined at paragraphs 3.1 to 3.6 above), including that retail grocery food prices have fallen in real terms over the last decade, WWNZ is a low margin business, even if if prices were reduced so that WWNZ's business made no profit at all, that would not change New Zealand's food price rankings, and we are continuing to increase convenience for our customers. There are also a number of other grocery retailers that are entering and expanding in the market, which is further enhancing competition, and the Commission's Final Report needs to accurately reflect that. Further evidence on this is as follows.

22. Cross shopping illustrates high levels of competition - including price competition - in action

22.1. In the Conference, in response to FSNI's observation about the significant extent of cross-shopping between competing grocery retail banners, the Commission made an unsubstantiated comment that the extent of cross-shopping "is probably driven by convenience or happen to be different places and for whatever reason, we've certainly noted that evidence."[210]

22.2. The Commission's response suggested that it has not fully appreciated the significant extent and nature of competition and cross-shopping between WWNZ and other FSNI and FSSI banners. It is driven by far more than just convenience, or a customer happening to be in "different places". To the contrary, the significant extent of cross-shopping is reflective of high levels of price competition in action. As we have outlined to the Commission previously, even if we just look at Kiwis who shop at Countdown, PAK'nSAVE, and New World, more than half [ ] of these will shop at more than one of these banners in a given month. That significant extent of cross-shopping means that we need to continue to earn our customers' trust and business on an ongoing basis, and we vigorously compete with the 57 PAK'nSAVE, 146 New World, and 225 Four Square individually owner-operated supermarkets, among others, across New Zealand on a daily basis.[211]

22.3. While for any individual customer there may be many different drivers of cross-shopping behaviour, there is no question that price competition is a significant factor driving cross-shopping dynamics. Customer research demonstrates this:

22.3.1. A customer survey of ~30,000 New Zealand supermarket shoppers by Shopper Intelligence between September 2020 and July 2021[212] illustrated that:

22.3.1.1. At least [ ] shoppers switch or are triggered to a specific retailer on each trip, with <u>price</u> and range the key factors driving retailer switching.

[210] Page 38. Transcript of Day 1 - Retail Grocery Market Study Conference.
[211] Figures based on stores listed on PAK'n'SAVE, New Worlds and Four Square websites as on 22 November 2021.
[212] Shopper Intelligence is a global specialist in measurement of FMCG and supermarket retail shopping behaviour.

22.3.1.2. [ ] of shoppers agreed or strongly agreed with the statement that "Pre-trip promotions in this category encourage me to shop in a particular retailer" (with a strong net-favourable score of [ ]). In 113 of 124 categories surveyed, more shoppers agreed with this statement than disagreed.

22.3.1.3. In some categories more than half of shoppers are choosing a retailer based on pre-store price promotions (for example, net favourable agreement with the statement "pre-trip promotions in this category encourage me to shop in a particular retailer" is [ ].

22.3.2. Detailed 2018 research by Countdown into cross-shopper behaviours also illustrates the role of specials in driving switching between retailers:

22.3.2.1. [ ] of PAK'nSAVE / Countdown cross-shoppers and [ ] of New World / Countdown cross-shoppers cited weekly specials as the activity that 'made them shop more at a supermarket' - with this the [ ] ranked driver of this behaviour across both groups.

22.3.2.2. The next key drivers (in order) were: [213] [ ].[214]

22.3.3. Cross-shopping dynamics in New Zealand are consistent with Kiwis' widely acknowledged bargain-hunting tendencies:

22.3.3.1. "*73% of New Zealanders shop for specials and bargains while 55% of Australians say they tend to hold out for a sale*" (Nielsen, 2017);[215]

22.3.3.2. A 2017 Global Survey of 18,430 online shoppers by KPMG found that "*consumers in Australia, New Zealand, Canada, France, Belgium and South Africa were most likely to be influenced by price or promotions".*[216]

22.3.4. Analysis of [ ] clearly demonstrates that customers are changing where they shop based on price and promotions:

22.3.4.1. [ ]

22.3.4.2. [ ]

22.3.4.3. [ ]

22.3.4.4. [ ]

22.3.4.5. This analysis clearly demonstrated that customers were changing their store selection behaviour based on advertised promotions.

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[213] Countdown Cross Shopper Research - Oct 2018.
[214] Page 40. Transcript of Day 1 - Retail Grocery Market Study Conference.
[215](27 June 2017). Connection and Contrast: Marketing to Australian and New Zealand Consumers. Nielsen. Retrieved from: https://www.nielsen.com/nz/en/insights/article/2017/connection-and-contrast-marketing-to-australian-and-new-zealand-consumers/
[216] KPMG. 2017 Global Online Consumer Report: The Truth About Online Consumers (2017). Retrieved from: https://assets.kpmg/content/dam/kpmg/xx/pdf/2017/01/the-truth-about-online-consumers.pdf

22.3.4.5.1. Specifically, it was proven that [ ].

22.3.4.5.2. In other words, customers were changing where they were doing more of their overall basket shopping, based on advertised price promotions.

22.3.4.5.3. This was particularly the case for [ ].

22.3.5. Online shopping behaviour is consistent with price-checking being a key determinant of supermarket destination selection. We know that [ ] of visitors to our Countdown website are visiting to check prices.

22.3.6. Nielsen Homescan panel insights validate a relationship between cross-shopping and promotion seeking: when “Countdown Main Shoppers” are shopping at New World, they are more likely to be purchasing on promotion (with a [ ] increase in the promotional penetration of their basket when at New World);[217]

22.3.7. Analysis of pricing, promotional and IRI Key Account share data is highly consistent with patterns of retailer switching pre-store:

22.3.7.1. Exhibit 6 looks at the IRI Key Account universe comprising only WWNZ, PAK’nSAVE, and New World, and illustrates a high correlation between Countdown’s price per unit and Nappy category share - consistent with the pre-store decision-making dynamics identified by Shopper Intelligence research above. Exhibit 7 outlines the same dynamic using the example of Skincare.

Exhibit 6: Significant impacts of promotions on Nappies share of IRI Key Accounts (WWNZ / PnS / NW)

[ ]

[217] Source: Nielsen Homescan; [ ].

Exhibit 7: Significant impacts of promotions on Skincare share of IRI Key Accounts (WWNZ / PnS / NW)

[ ]

22.3.8. Additional analysis of Onecard data also illustrates the ways in which individual product promotions contribute towards cross-shopping (see Exhibit 8 below):

22.3.8.1. [ ] are an example of a traffic-driving line. When promoted at [ ], 21% of the [ ] packs sold in that week are coming from customers <u>who did not shop at Countdown at all in the previous week</u>.

22.3.8.2. When [ ] is promoted at [ ], 22% of the [ ] items sold that week come from customers who did not shop at Countdown at all in the previous week.

22.3.8.3. When [ ] is promoted at [ ], 21% of the [ ] items sold that week come from customers who did not shop at Countdown at all in the previous week.

22.3.8.4. For promotions such as [ ], 14-15% of sales come from customers who did not shop at Countdown at all in the previous week (with existing customers also topping up).

22.3.8.5. In contrast, examples of products on Great Price (Everyday Low Prices) such as [ ] see ~3% of sales coming from customers who did not shop at Countdown at all in the previous week.

Exhibit 8: Examples of how promotions contribute towards cross-shopping

[ ]

22.4. Based on the above it is very clearly the case that promotional activity is a significant factor driving cross-shopping dynamics. As such, the high level of cross-shopping that WWNZ has highlighted in previous Submissions, and the high levels of promotional activity observed by the Commission in its Draft Report, are both strongly reflective of high levels of price competition in action. The Final Report needs to reflect this evidence, and to dismiss cross-shopping as customers "just happening to be in different places" would not be consistent with the required standards of making findings based on probative evidence.

23. The nature of competition between WWNZ and FSNI in Auckland and Wellington

23.1. At the Conference, drawing on a submission from Ernie Newman,[218] the Commission noted that "it seems Countdown has a higher market share of stores, a concentration of stores in Auckland. And in Wellington, Foodstuffs is in that position", and asked "how this came about".[219]

23.2. That we have fewer Countdown stores in Wellington than FSNI has PAK'nSAVE and New World Stores is largely a product of history - namely that the original Foodstuffs Wellington Co-operative was formed in 1922,[220] and existed as a standalone entity from the Foodstuffs Auckland Co-operative until they merged in 2013 to form FSNI. This meant that for 91 years the Foodstuffs Wellington Co-operative had Wellington as the home of its head office, and with its property team located there, it had a greater focus on Wellington, and closer connections to developers, land owners, and councils in Wellington. Whereas in the case of WWNZ, it and its predecessors have been Auckland and Christchurch based entities.

23.3. However, it is important to note that a market study is not an exercise in examining products of history, and what is relevant is current and forward-looking competitive dynamics, and those dynamics clearly show vigorous competition in action as we look to increase our presence in the Wellington area. For example:

23.3.1. In the last 10 years we have opened 6 new Countdown stores (Petone, Tawa, Newtown, Crofton Downs, Cable Car Lane, Aotea) and our Grenada e-store in the Wellington region, compared to FSNI having opened two New Worlds (Newlands and Silverstream) in the Wellington region during that time.

23.3.2. We also have plans to open several ([ ]) new Countdown stores in Wellington in the next 4 years ([ ]).

23.4. Furthermore, we do not just compete in-store with other grocery retailers, but also online - and our efforts to build our presence in the Wellington region have contributed to us having a higher level of online grocery sales as a proportion of total sales (with our online penetration in Wellington at [ ] compared to [ ] in Auckland for the year ending October 2021).

23.5. [ ].

[218] Ernie Newman's submission on the Draft Report (26 August 2021). Retrieved from: https://comcom.govt.nz/__data/assets/pdf_file/0021/265800/Ernie-Newman-Submission-on-Market-study-into-grocery-sector-draft-report-26-August-2021.pdf

[219] Page 42. Transcript of Day 1 - Retail Grocery Market Study Conference.

[220] See: https://www.foodstuffs.co.nz/who-we-are/our-story

23.6. In Auckland (where certain of our predecessors, including Foodtown and 3 Guys had their genesis), it is apparent that FSNI is competing hard to increase its presence - with it having opened 13 New Worlds and 4 PAK'nSAVEs in Auckland in the last 10 years (in that same time we have opened 16 new Countdowns in Auckland, and our Penrose e-store, and also in that time Farro Fresh has grown from two stores in Auckland to six).[221] [ ].

23.7. We also note, as the Commission will be aware from the data we have provided it during the Market Study, Ernie Newman's suggestion in his submission that WWNZ "enjoys around three quarters of the Auckland markets and Foodstuffs two third of Wellington" is plainly incorrect.[222]

23.8. Finally, we note the comments in the Conference that there are "a few places around in the country where there's, in provincial cities, where there's two Countdowns right next to each other".[223] While historically, as a result of previous acquisitions and re-branding of stores under the Countdown banner, there were instances where there were two Countdown stores in close proximity to each other, WWNZ has mostly consolidated, in those locations, from two stores into one. Despite consolidation of those sites, we have increased total store numbers from 207 to 253 (across our Countdown and franchisee stores) over the last 10 years, demonstrating that we are continuing to invest in enhancing our store offering for consumers. There are now only two instances of Countdown stores being located within 100 metres of each other, namely in Napier and at Highland Park, Auckland. There are some other areas where two Countdown stores are located relatively close to each other. However, most commonly this is because the stores service different customer shopping missions: for example, one store is located in a shopping mall, and better caters to customers cross-shopping with other retailers in the centre (and often caters to "top up shops"), whereas the other is a freestanding store which better caters for different shopping missions. Other reasons include where the stores are on different arterial routes, or where the two stores are more conveniently accessed from different parts of a catchment (for example, one either side of a town centre).

24. The evidence is that other grocery retailers are entering and expanding

24.1. In the Conference the Commission indicated that it did not accept that WWNZ, FSNI, and FSSI are facing increased competition from other grocery retailers on the basis of a view that WWNZ, FSNI, and FSSI have "had [for some time] very large and stable market shares".[224]

24.2. The Commission's view that WWNZ, FSNI, and FSSI are not facing ever increasing competitive constraint does not accord with the day-to-day reality we experience of competing with a number of different grocery retailers, with different and innovative business models. This likely reflects, among other things, the limitations in the data that the Commission has used to estimate "market shares".

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[221] (9 June 2011). Farro Fresh opens a new Hamilton store. Infonews. Retrieved from: https://www.infonews.co.nz/news.cfm?id=68854

[222] Ernie Newman submission on the Draft Report (26 August 2021). Retrieved from: https://comcom.govt.nz/__data/assets/pdf_file/0021/265800/Ernie-Newman-Submission-on-Market-study-into-grocery-sector-draft-report-26-August-2021.pdf

[223] Page 44. Transcript of Day 1 - Retail Grocery Market Study Conference.

[224] Page 15. Transcript of Day 1 - Retail Grocery Market Study Conference.

24.3. Many of the new and expanding entrants are not captured by traditionally available “market share” reads - all of which carry significant limitations.[225] For example:

24.3.1. IRI Packaged Goods “market share” data for groceries, while referenced widely in the sector, excludes any banners other than WWNZ, PAK’nSAVE and New World (so by definition would therefore not capture any new or expanding entrants).

24.3.2. Nielsen Homescan “market share” is based solely on claimed behaviour by a panel of 2,500 households, [ ].

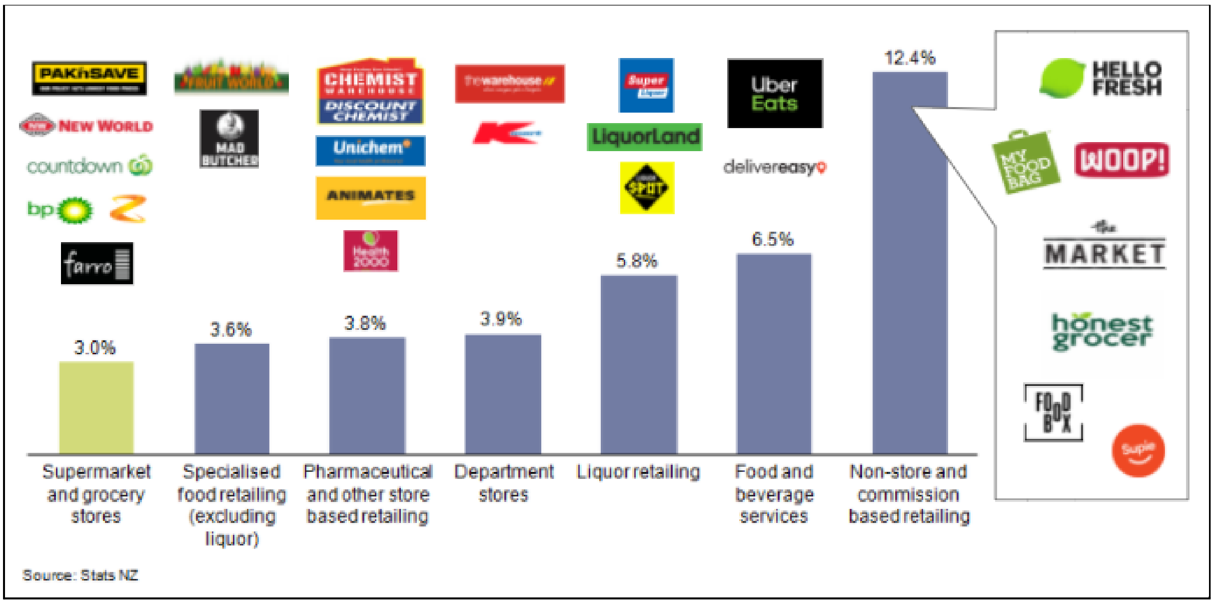
24.3.3. The Commission appears to have relied upon Statistics New Zealand’s reported category of “Supermarket and Grocery Stores” when referencing a $22 billion “market”. However, this category does not capture a very large number of grocery retail competitors and new and expanding entrants. This is illustrated in Exhibit 9 below.

Exhibit 9: Limitations in competitors covered by Statistics NZ’s ‘Supermarket and Grocery’ segment

24.3.4. A wider view of the retail market using Statistics New Zealand data shows faster rates of growth in those categories where the sales of other grocery retailers are captured, especially online (see Exhibit 10 below). However, WWNZ is unable to disaggregate the grocery retail competitors from within this data to confirm - again highlighting the limitations on data series that currently exist.

[225] As outlined in WWNZ’s Market Share Clarification Note to the Commission dated 23 February 2021.

Exhibit 10: Retail sector growth rates - and where competitors are categorised by Statistics NZ (2010-2019 CAGR, % per annum)



24.3.5. As such, there is no readily available 'market share' series available that fully captures this competition dynamic.

24.4. The on-the-ground reality is that in recent years there has been (and will be further) entry and expansion by a significant array of different types of grocery competition. Each of those competitors necessarily takes sales from somewhere, so the notion that WWNZ's business is not being impacted by these competitors is incorrect. For example:[226]

24.4.1. <u>Costco *is* entering New Zealand</u>: Costco is the second largest "bricks-and-mortar" food / grocery retailer in the world, and is opening its first store in Auckland in 2022, with plans to open further stores in Wellington and Christchurch (with land use consent granted to Costco for a site in Rolleston).[227] This will provide it with 40% of New Zealand's population within its 25km destination radius[228] (and in Australia it has launched online shopping and delivery, which would expand its coverage further if also launched in New Zealand).[229] Each Costco store has, on average, the floor space of six Countdown stores,[230] so expansion by Costco to three stores would have

[226] Further details on recent entry and expansion into the New Zealand market are set out in section 30 of our September Submission.
[227] With land use consent granted to Costco for a site in Rolleston. See: https://extranet.selwyn.govt.nz/sites/consultation/DPR/Shared%20Documents/PDF%20for%20markup%20Rolleston%20Industrial%20Developments%20Limited.pdf
[228] Costco is said to be "also actively looking for sites in Christchurch and Wellington", in addition to the Auckland site that is currently in development. See: https://www.odt.co.nz/star-news/star-business/how-much-you-could-save-when-costco-makes-nz-debut
[229] (12 February 2020). Costco has announced it will launch members-only online shopping and delivery in Australia. Business Insider. Retrieved from: https://www.businessinsider.com.au/costco-delivery-2020-2
[230] WWNZ understands that, on average, a Costco store has floor space of 13,470 sqm.

the equivalent floor space of 18 Countdown stores.

24.4.1.1. As noted in the Draft Report,[231] Costco is likely to seek a "price leadership" role in the New Zealand market. For example, in Australia Costco is reported to be "25-30 per cent cheaper than other retailers".[232] As such, it represents an extremely relevant example of a new entrant that can be expected to have nationwide pricing impacts, given the new price benchmark that it is likely to set, and the largely nationwide pricing positions of Countdown, New World and PAK'nSAVE, as well as PAK'nSAVE's "lowest price" policy.[233]

24.4.1.2. In fact, WWNZ finds it hard to imagine a new entrant better suited than Costco to deliver on the type of price competition that the Commission appears to be focussed upon.

24.4.1.2.1. The nature of PAK'nSAVE's uniquely strong "no frills" business model means that any new entrant seeking to undercut PAK'nSAVE's pricing is likely to need both a similarly low cost business model as well as global purchasing scale (something extremely unlikely to be achieved by a divested 'like-for-like' set of stores).

24.4.1.2.2. Costco brings both of these attributes, as does Aldi, whose entry we assess as imminent (and whose entry and expansion could potentially be accelerated by proposed changes to covenants / leases, which we support).

24.4.1.3. The Draft Report, and submitters at the Conference, are therefore incorrect to dismiss the pending entry of Costco as a relevant factor, when the opposite is true.

24.4.1.3.1. Patrick Noone, the Managing Director of Costco for Australia and New Zealand has stated that the entry of Costco "will bring a lot of value and savings and competition" to New Zealand, stating that "[t]here's 1.8 million people in Auckland, we want to have 1.8 million members."[234]

24.4.1.3.2. Elsewhere it has been noted that "[m]any executives at Costco believe this will ultimately be a huge game changer in New Zealand and provide a great customer experience while continuing the company's global expansion and potentially opening up additional stores in other cities in New Zealand."[235]

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[231] Commerce Commission "Market Study into the retail grocery sector – Draft Report" (29 July 2021) at [6.137].
[232] (11 June 2019) Costco is coming to New Zealand, changing the way we shop. Stuff. Available at: https://www.stuff.co.nz/business/113355280/costco-is-coming-to-new-zealand
[233] Pages 8 and 45. Transcript of Day 1 - Retail Grocery Market Study Conference.
[234] (15 June 2021). What Costco is hunting for Auckland superstore… and the world. Footticker. Retrieved from: https://www.foodticker.co.nz/ffnz-2021-costco-hunts-kiwi-fb-brands-for-auckland-superstore/
[235] (25 April 2021). Costco in New Zealand. Global Marketing Progressor. Retrieved from: https://globalmarketingprofessor.com/costco-in-new-zealand/

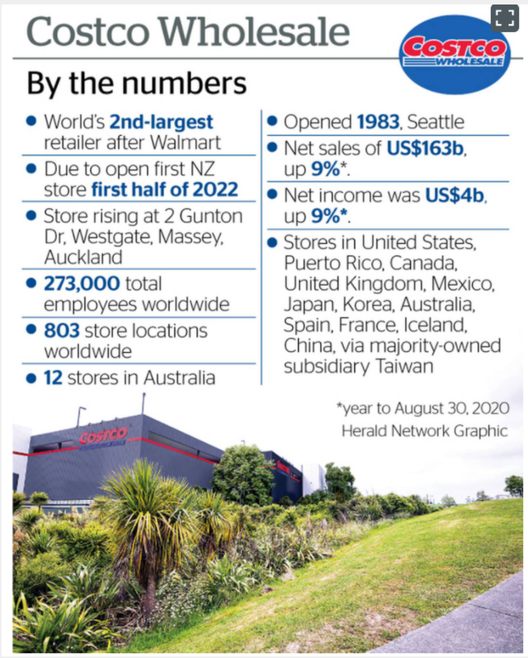
24.4.1.3.3. That is consistent with the views of the OIO in deciding to grant consent to Costco for its land acquisition in Auckland, with the OIO noting Costco's entry will deliver "increased market competition and options for consumers" (see **Appendix One**).

24.4.1.3.4. In Australia, for example, Costco has 12 stores and has achieved revenue of AUD$2.6 billion, which is approximately AUD$225 million per store. Accordingly, Costco's planned three stores for New Zealand could be assumed to achieve revenue of approximately $700 million, representing an enormously significant market entry.

Exhibit 11: The entry of Costco to New Zealand

The entry of Costco to New Zealand

Costco's first New Zealand store will open in Westgate, Auckland in the first half of 2022. It is understood that construction of [t]he three-level $100 million-plus Costco Wholesale Auckland Warehouse" is well advanced, with the roof installed in May 2021. Job recruitment also began at that time for retail roles.[236]



Current status of the construction of Costco Westgate in Auckland,[237] and artist impression of Costco Westgate in Auckland when complete:[238]

[236] (31 May 2021). Roof going on $100m+ Costco Wholesale, jobs open, world's 2nd-largest retailer opens 2022. NZ Herald. Retrieved from: https://www.nzherald.co.nz/business/roof-going-on-100m-costco-wholesale-jobs-open-worlds-2nd-largest-retailer-opens-2022/S4BFKEX5AEZYMGYZKAYH7C53VY/

[237] Photograph as at November 2021.

[238] (28 April 2020) Costco grocery superstore will be the size of two rugby fields. Stuff. Retrieved from: https://www.stuff.co.nz/business/121300819/costco-grocery-superstore-will-be-the-size-of-two-rugby-fields


24.4.2. The Warehouse *is* growing its grocery offer both instore and online, as outlined in detail in our Submission on the Draft Report. In fact, The Warehouse Group's September 2021 results presentation expressly noted that "Grocery has been a standout category across the year" for its business.[239]

24.4.3. Chemist Warehouse *is* rapidly growing and expanding. Since opening its first store in 2017, it has quickly grown to 25 stores and is expected to reach 35 stores by the end of the year (with plans to expand to 70 stores nationwide).[240]

24.4.4. The Mealkits segment *is* rapidly growing and expanding, with this segment having now rapidly grown to over $400 million of sales in just a matter of years while competing directly for the at-home cooking occasion, and increasingly extending into pantry groceries.

24.4.4.1. Since launching in September 2013, My Food Bag has grown to sales of $191 million with a nationwide delivery presence.[241] My Food Bag is now expanding into supplying a range of grocery products through its "Kitchen" offering, which My Food Bag's CEO says is expected to "tak[e] a greater share of New Zealand's substantial grocery spend"[242] ("[n]ew products include pantry staples, baking mixes, dessert kits, healthy breakfasts and sides, as well as gourmet local cheeses, meats and ready-made meals, including My Food Bag's own sauces and spices". My Food Bag has announced to its investors that its growth strategy is to "tak[e] a greater share of New Zealanders' substantial grocery spend" and "disrupt wider categories and channels".[243] See paragraph 19.2.6 above.

24.4.4.2. Since launching in just September 2018, HelloFresh has grown its sales to $194 million in the 2020 financial year (at growth of >150%), aided by a nationwide delivery presence. Overseas, HelloFresh is increasingly

[239] The Warehouse Group. FY21 Annual Results. 29 September 2021.
[240] See paragraph 30.7.4 of our September Submission.
[241] My Food Bag. Annual Report 2021. Retrieved from: https://investors.myfoodbag.co.nz/FormBuilder/_Resource/_module/yjlwqod6gUO7ZC-T4Wdz6Q/file/My_Food_Bag_2021_Annual_Report.pdf
[242] My Food Bag's CEO says its "Kitchen" grocery delivery offering is expected to "tak[e] a greater share of New Zealand's substantial grocery spend." (20 August 2021). My Food Bag gets grilling from shareholders at first AGM since listing. The New Zealand Herald. Retrieved from: https://www.nzherald.co.nz/business/my-food-bag-gets-grilling-from-shareholders-at-first-agm-since-listing/SYC4FN6KOE3QMY3E3OSQQIXADA/
[243] (20 August 2012). My Food Bag presentation to investors.

expanding into offering "an accompanying online grocery store" called "HelloFresh Marketplace", and it "envision[s] such an offering growing to as many as 2,000 products over five years" with "a very, very clear path how you can get to 15% to 20% revenue share with those add-on products"[244]

24.4.4.3. WOOP launched in 2015 and between 2016-2019 grew its Upper North Island sales 576% and 168% between 2019-2021[245]. WOOP's rapid growth has been recognised through the Deloitte Fast50 awards, and it is described as "New Zealand's fastest growing food business".[246] WWNZ estimates WOOP's sales are likely to be in the order of [ ] per annum.

24.4.5. Fruit World *has* grown and expanded. Since its founding in 2001, the franchise has "grown exponentially from seven stores to include 22 stores in the North Island, and is the largest, independent franchisee green grocer store in New Zealand".[247] Together with other independent fresh fruit and vegetable retailers, it is estimated these independent fresh specialists "make up around 20% of the market nationally, which rises to 60% percent in Auckland."[248] The ACCC similarly recognised the importance of this dynamic in its grocery market study:[249]

> *"Speciality stores command a significant share of retail sales in fresh groceries, and the ACCC recognises that they represent an important part of the grocery industry. Specialty retailers provide consumers with a significant alternative to supermarkets in purchasing fresh products. The vast number of specialty retailers and the lower barriers to setting up specialty grocery outlets mean specialty retailers provide a strong competitive force in retailing fresh products."*

24.4.6. Farro Fresh *has* grown and *does* plan to expand having grown to six retail stores across Auckland, with 300 staff, and revenue in excess of $100 million.[250] Farro Fresh now offers an extensive online delivery service and is looking to expand into the Waikato, Bay of Plenty, and Christchurch.[251]

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[244] HelloFresh is increasingly expanding into online grocery delivery services in overseas markets through its "HelloFresh Marketplace" offering, which it is planning to continue to expand.

[245] See: https://www2.deloitte.com/nz/en/pages/deloitte-private/articles/fast-50-index-deloitte-fast-50.html

[246] (2 February 2021). Learning from New Zealand's fastest growing food business. The University of Auckland Business School. Retrieved from: https://www.cie.auckland.ac.nz/newsroom/learning-from-leading-new-zealands-fastest-growing-food-business/

[247] See: https://fruitworld.co.nz/pages/our-story

[248] August 2020. NZ Grower. Horticulture New Zealand. Retrieved from: https://www.hortnz.co.nz/assets/News-Events/Magazines/NZGrower-August-2020-.pdf

[249] ACCC "Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries" (July 2008) at page 176.

[250] (12 April 2018). Workers of Huckleberry grocery store pack up strike action following pay negotiations. NZ Herald. Retrieved from: https://www.nzherald.co.nz/business/workers-of-huckleberry-grocery-store-pack-up-strike-action-following-pay-negotiations/Q6VSZUMARE7E3UV43GMOV2Y4CI/

[251] See paragraph 30.2.1 of our September Submission.

24.4.7. Circle K *has* entered and *is* about to turbocharge expansion plans. The Circle K New Zealand's Circle K licensee, Pamma Retail Group, announced in September 2021 that it plans to open more than 100 Circle K convenience stores across New Zealand.[252] (There are more than 14,000 Circle K outlets worldwide).[253]

24.4.8. Night n Day *does* appear to be growing based on statements made (outside of the Commission's conference) about the significant and rapid growth of its convenience offering, and recent Deloitte Fast50 growth awards (see paragraph 25.1 below).

24.4.9. New online grocery retailers *are* increasingly entering the New Zealand market.

24.4.9.1. Online grocery retailer Geezy Go, part of technology start-up Geezy Global (currently operating in five countries, including the US, UK, New Zealand, India and Australia),[254] announced in *November 2021* that it intends to "build up a network of dark stores in Auckland initially and then Wellington, giving consumers access to a full range of groceries at a competitive price, but slashing traditional supermarket delivery times in New Zealand",[255] with it having "started developing its first site in Auckland CBD, which was expected to open in January, and was close to securing a property in Mt Eden for its second dark store" and having "already hired 10 staff for its Auckland operations, including a warehouse manager and delivery drivers."[256] Geezy Go has announced that it will be fully vertically integrated in New Zealand: "We own our direct supply chain for the brand. It means reduction in cost. We maintain end-to-end supply chain so we don't go and pick the products up somewhere – they've come to the warehouse, we pick it up and send it to your door. We want to make sure it's affordable [for customers]."[257]

24.4.9.2. The Honest Grocer launched in New Zealand in *December 2020* as an online only supermarket with the stated aim of being a "retail disruptor" and already delivering North Island-wide.

24.4.9.3. Supie launched in *May 2021* and has also spoken of its rapid growth, including in announcing its recent successful and over-subscribed capital raise, referring to the "growth of the start-up, since it launched in May", and seeing "growth of 1700% per week" during Auckland's recent

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[252] (30 September 2021). PRG Set To Open 100+ Circle K Stores & EV Service Stations In NZ. Scoop. https://www.scoop.co.nz/stories/BU2109/S00760/prg-set-to-open-100-circle-k-stores-ev-service-stations-in-nz.htm

[253] (30 September 2021). Global convenience and fuel giant Circle K set for big NZ push. NZ Herald. Retrieved from: https://www.nzherald.co.nz/business/global-convenience-and-fuel-giant-circle-k-set-for-big-nz-push/JF5PZESJHBELZTMN7LAPPGOYQU/

[254] (17 August 2021). New online supermarket set to redefine grocery shopping in Australia. MCG Business. Retrieved from: https://www.fmcgbusiness.co.nz/new-online-supermarket-set-to-redefine-grocery-shopping-in-australia/

[255] (1 November 2021). Online grocer Geezy Go readies 20-minute delivery for NZ. Food Ticker. Retrieved from: https://www.foodticker.co.nz/online-grocer-geezy-go-to-bring-20-minute-delivery-to-nz/

[256] (1 November 2021). Online grocer Geezy Go readies 20-minute delivery for NZ. Food Ticker. Retrieved from: https://www.foodticker.co.nz/online-grocer-geezy-go-to-bring-20-minute-delivery-to-nz/

[257] (1 November 2021). Online grocer Geezy Go readies 20-minute delivery for NZ. Food Ticker. Retrieved from: https://www.foodticker.co.nz/online-grocer-geezy-go-to-bring-20-minute-delivery-to-nz/

lockdown.[258]

24.5. It cannot be correct to assume that all of these retailers have expanded in the way that they have, with further and future plans on the horizon, without that impacting the sales and market share of WWNZ, FSSI, and FSNI and without imposing competitive constraints. Furthermore, it is essential the Commission's Market Study take into account (as is recognised by competition regulators the world over) that it is the "marginal customers" - those switching most readily / frequently between these supply options - that drive competitive outcomes.

24.6. Furthermore, and reflecting the competition for marginal customers, many of these retailers have also talked about the trend towards convenience by customers, and how that provides opportunities for smaller competitors to compete with larger retailers. For example, Geezy Go has spoken of how it has "multiple dark stores operating at a radius of 3 – 5km in high-density population areas. These allow us to serve the consumers at speed. We love bikes – they are quick to get around, and help keep us sustainable. The big supermarket brands want you to spend more time in store, we want you to spend more time at home doing the things you love and we'll deliver the groceries to your door."[259] As Professor Gar Mortimer, a specialist "in the areas of food retailing, retail marketing and consumer behaviour"[260] at QUT University has observed in relation to Geezy Go's expansion in Australia, "time has now become the currency of e-commerce retailers today, it is all about speed of delivery, not necessarily price."[261]

24.7. Similarly, Matthew Lane has spoken about the importance of its grocery delivery partnership with Uber Eats, noting: "We are living in a Netflix economy. People are time-poor, so what we are offering is convenience to the front door",[262] and Supie has described itself as the "Netflix for grocery shopping."[263]

24.8. The shift by consumers towards online shopping, which has accelerated as a result of recent COVID-19 restrictions, enables the additional entry and expansion of new entrants, including those without the need for any "bricks and mortar" outlets, such as Geezy Go, The Honest Grocer, and Supie. Accordingly, the market reality contradicts the comments in the NZFGC's submission that "online shopping has made it more difficult for smaller retailers to compete with large retailers" due to the "financial investment" required to trade online.[264] Furthermore, even for those competitors that do operate "bricks and mortar" stores, the trend towards convenience, which favours smaller footprints, lowers the threshold for establishing physical stores.

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[258] (4 November 2021). Kiwi Supermarket Start Up Secures $2.5 Million In Seed Funding. Supie Press Release. Retrieved from: https://www.scoop.co.nz/stories/BU2111/S00137/kiwi-supermarket-start-up-supie-secures-25-million-in-seed-funding.htm

[259] (16 August 2021). Online only supermarket Geezy Go launches in Sydney. Inside Retail. Retrieved from: https://insideretail.com.au/e-commerce/online-only-supermarket-geezy-go-launches-in-sydney-202108

[260] Professor Gary Mortimer - Biography. Queensland University of Technology. Retrieved from: https://www.qut.edu.au/about/our-people/academic-profiles/gary.mortimer

[261] (November 2021). Nine News item about Geezy Go. Retrieved from: https://www.birchal.com/company/geezy-go/activity

[262] (19 December 2019). Taking a fresh look at corner dairies. Otago Daily Times. Retrieved from: https://www.odt.co.nz/business/taking-fresh-look-corner-dairies

[263] (11 November 2021). 'Netflix for grocery shopping' Supie raises $2.5 million in seed round. Stuff. Retrieved from: https://www.stuff.co.nz/business/126948145/netflix-for-grocery-shopping-supie-raises-25-million-in-seed-round

[264] NZFGC submission on the Draft Report (26 August 2021) at [3.10] to [3.11].

25. Night 'n Day's statements in the conference were inconsistent with its public statements

25.1. We note that the General Manager of Night 'n Day Foodstores, Matthew Lane appeared at the Conference to suggest that the growth of his business is constrained.[265] The perspectives presented by Matthew Lane at the Conference are different from information about the Night 'n Day Foodstores that Matthew Lane has presented elsewhere - in which he suggested that it is a business achieving success and growth. For example:

25.1.1. Night 'n Day Foodstores achieved nineteenth place on the Deloitte Fast 50 index of fastest growing companies in 2019 , with revenue growth of 279%. It also placed fourth in the Deloitte Fast 50 in 2021, and thirty-fifth in 2018.[266]

25.1.2. In 2019 Night 'n Day was also named a regional category winner for The Fastest Growing Retail or Consumer Products Business for Otago and Southland.[267]

25.1.3. In 2021 Matthew Lane was quoted as saying that Night 'n Day is "achiev[ing] consistent growth in the business", that it has plans to further expand its convenience store in the North Island and the "current climate is very good for us", that the business "invest[s] heavily in research and development to be able to support such an extensive product range", and that "Night 'n Day stores average a turnover 75% higher than independent stores, 52% higher than the industry gross profit and 109% higher than industry net profit."[268]

25.1.4. In April 2021 Matthew Lane was quoted as saying "[w]e have actually seen the number of enquiries from potential franchisees grow fivefold since pre-COVID, with a lot of this opportunity in high profile locations. We have got two new outlets scheduled to open in 2021 and we are in serious discussions regarding another two."[269]

25.2. It is important the Commission considers any statements at the Conference in light of these facts.

25.3. Matthew Lane also made reference to Night 'n Day's current supply relationship with WWNZ. It is necessary to provide some important context in relation to that supply relationship. [ ].[270] [ ]. We consider this to be important context that was missing from the Conference.

25.4. Finally, we note that in the Conference Night 'n Day referenced having made submissions to the Commission, which we have not yet seen.[271] To enable a transparent process, we would expect that all submissions the Commission has received are being published on its website, in the same manner that WWNZ's submissions are.

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[265] See comments from Matthew Lane on Day 'n Day from day 5 of the consultation conference (28 October 2021) on pages 5 - 6 of the transcript.
[266] (27 October 2020). Adapt to thrive: Night 'n Day's innovative 30-year journey. Retrieved from: https://www.deloitteprivate.co.nz/blog/group-1/adapt-to-thrive-night-n-day-s-innovative-30-year-journey/
[267] (2021). Night 'n Day network continues to grow. Retrieved from: https://www.waterfordpress.co.nz/night-n-day-network-continues-to-grow/
[268] (2021). Night 'n Day network continues to grow. Retrieved from: https://www.waterfordpress.co.nz/night-n-day-network-continues-to-grow/
[269] (27 April 2021). The backbone of convenience. FMCG Business. Retrieved from: https://www.fmcgbusiness.co.nz/the-backbone-of-convenience/
[270] Page 36. Day 6 - Retail Grocery Market Study Conference.
[271] Page 25. Day 6 - Retail Grocery Market Study Conference.

26. Local area competition

26.1. During the Conference,[272] and in a follow-up email to the Commission,[273] Tex Edwards suggested that WWNZ was seeking to establish suburban monopolies, and made reference to the new Metro store that WWNZ is establishing on Jervois Road, Herne Bay. This suggestion was unfounded and incorrect:

26.1.1. First, WWNZ is establishing the new store in Herne Bay because it is a growing area, "with an increasing number of new apartment buildings and commercial development", with third party real estate agents identifying that the growth of the area requires even further grocery stores.[274]

26.1.2. Second, we consider that our Metro offering will be an attractive and welcome amenity to the residents in the area, and will introduce new choice for those residents: "Gibbons said he was encouraged by friends and neighbours in Herne Bay who were excited to have a new supermarket in the area... everyone thinks it would be great for the neighbourhood. People are excited, they can stop and pick up dinner on the way home."[275]

26.1.3. Third, while Mr Edwards' email to the Commission did not show it, there are a range of other third party competitors in that local area that compete directly with WWNZ. That includes:

26.1.3.1. Farro Fresh, Grey Lynn;

26.1.3.2. New World, Victoria Park;

26.1.3.3. GoodFor, Ponsonby;

26.1.3.4. Fruit World, Grey Lynn and

26.1.3.5. Many other smaller format convenience stores, including a new Night 'n Day convenience store currently being established in Grey Lynn - see Exhibit 12 below.

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[272] Page 44. Day 1 - Retail Grocery Market Study Conference.
[273] Tex Edwards email to Keston Ruxton dated 21 October 2021.
[274] (19 January 2021). $40m Herne Bay Countdown: Agents say there's room for two more supermarkets. Oneroof. Retrieved from: https://www.oneroof.co.nz/news/herne-bay-countdown-agents-say-theres-room-for-two-more-supermarkets-38905
[275] (19 January 2021). $40m Herne Bay Countdown: Agents say there's room for two more supermarkets. Oneroof. Retrieved from: https://www.oneroof.co.nz/news/herne-bay-countdown-agents-say-theres-room-for-two-more-supermarkets-38905

Exhibit 12 - New Night 'n Day Grey Lynn store

26.2. In summary, we regard Mr Edwards' comments on this issue as unfounded and incorrect.

27. Access to capital

27.1. We note that Sarah Balle of Supie focused her comments at the conference on her apparent inability to raise capital for her business. However, just 48 hours after the end of the conference Supie announced that it had raised $2.5 million in seed funding through an over-subscribed capital raise:[276]

27.1.1. "The round was well over-subscribed at $2.5 million and the new funds will be invested in driving growth through marketing and continuation of innovation through the deployment of technology and customer service enhancement."

27.1.2. Supie has also announced that "[n]ext year, the business would be looking at [a further] funding round for "a significant amount", expected to be more than $10 million and likely only to be open to institutional investors as a means to fund the national expansion,"[277] with media reporting that "Supie's business model has clearly been attractive for early investors".[278] Supie's Sarah Balle has indicated it will use the current capital raising round to invest in its technology platform:

> *"The current funding round is to deploy technology within our current platform for customers, and make it more personalised and provide a better experience for them. We're really new having only been trading for five months. We know what Facebook was like when they launched and what their platform looks like now is completely different. So, upgrading and deploying more awesome features on our website is very important to keep that innovation happening there."*

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[276] (4 November 2021). Kiwi Supermarket Start Up Secures $2.5 Million In Seed Funding. Supie Press Release. Retrieved from: https://www.scoop.co.nz/stories/BU2111/S00137/kiwi-supermarket-start-up-supie-secures-25-million-in-seed-funding.htm

[277] (4 November 2021). Supie bags $2.5 seed funding, series A slated for 2022. Food Ticker. Retrieved from: https://www.foodticker.co.nz/supie-bags-2-5m-seed-funding-series-a-slated-for-2022/

[278] (4 November 2021). Supermarket startup's seed round raises $2.5m. Business Desk.

27.2. There are many other examples of new entrant grocery retailers who have successfully raised capital to enter and / or expand in the market:

27.2.1. The growth of My Food Bag is a good example, with My Food Bag, which was launched in 2013, securing investment from Kevin Roberts in early 2015,[279] Waterman Capital in 2016 (said to be "one of the most significant transactions involving such a young New Zealand business"),[280] and then raising $342 million in an IPO in 2021 (being "the largest IPO by amount raised since 2014" in New Zealand).[281]

27.2.2. Imminent New Zealand entrant, Geezy Go, is another example. It is said to be "fundraising for up to A$5m through Australian platform Birchal to fund its global expansion."[282]

27.2.3. Similarly in Australia "Send, a six-month old start-up with the ambitious aim of becoming an entirely online inner-city supermarket chain, has raised $3.1 million in a seed funding round as it looks to launch in ideal lockdown conditions",[283] with it "backed by German fund Cherry Ventures and New York-based FJ Lab, and it is hoping to imitate the success of Gorillas, a European [rapid grocery delivery] start-up juggernaut that has achieved a valuation of more than $1 billion in 14 months."[284]

27.3. Furthermore, the significant amount of capital being injected into on-demand, online-only (including The Warehouse's investment in TheMarket.com), and meal-kit grocery suppliers serves to further demonstrate that the Draft Report's focus on bricks-and-mortar "main shop" grocery retailing does not take into account the increasing way in which consumers seek to purchase groceries, nor how competition will inevitably take place in the future. For example, in September 2021 the Financial Times observed that "the market for rapid grocery delivery, which barely existed in western Europe a year ago" was now leading to "[t]he transatlantic battle to replace convenience stores with fleets of delivery riders ... becom[ing] the frothiest tech trend of the past 12 months, with billions of dollars of venture capital funding going into start-ups in the US and Europe', and the significant growth in grocery delivery app downloads demonstrating that this will be a significant feature of grocery retailing going forward - as the figures from the UK in Exhibit 13 below demonstrate.[285]

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[279] (9 March 2015). Kevin Roberts joins My Food Bag. Stuff. Retrieved from: https://www.stuff.co.nz/business/industries/67132873/kevin-roberts-joins-my-food-bag

[280] (19 October 2016). Waterman Capital invests in My Food Bag ahead of sharemarket listing. Retrieved from: https://www.stuff.co.nz/business/industries/85495813/my-food-bag-announcement-expected-over-companys-future

[281] (5 March 2021). My Food Bag joins New Zealand share market. Retrieved from: https://www.stuff.co.nz/business/300244960/my-food-bag-joins-new-zealand-share-market

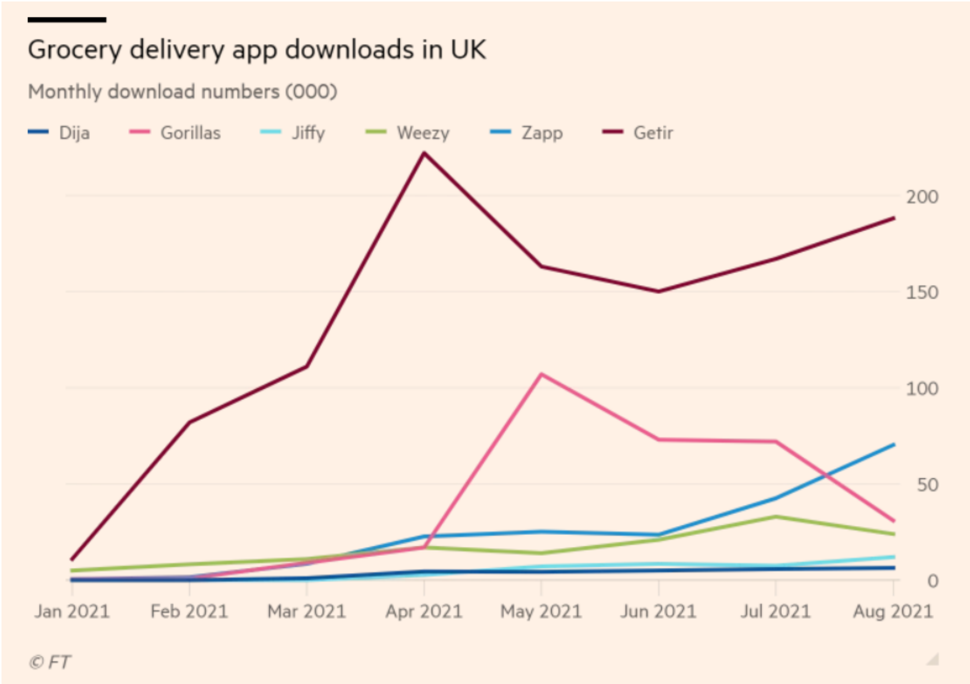
[282] (1 November 2021). Online grocer Geezy Go readies 20-minute delivery for NZ. Food Ticker. Retrieved from: https://www.foodticker.co.nz/online-grocer-geezy-go-to-bring-20-minute-delivery-to-nz/

[283] (30 August 2021). Ignition Lane's Weekly Wrap: SPAC moonshots, on-demand snacking, OnlyFans flip. Start Up Daily. Retrieved from: https://www.startupdaily.net/2021/08/ignition-lanes-weekly-wrap-spac-moonshots-on-demand-snacking/

[284] (23 August 2021). On-demand grocery start-uo promises 15-minute deliveries. Australian Financial Review. Retrieved from: https://www.afr.com/technology/on-demand-grocery-start-up-promises-15-minute-deliveries-20210812-p58i2j

[285] (26 September 2021). Europe's instant grocery start-ups deliver frantic summer of dealmaking. The Financial Times. Retrieved from: https://www.ft.com/content/dd874d12-a4a3-4565-b5ce-0e52f5ade680

Exhibit 13: Diagram showing UK grocery delivery app downloads



27.4. For these reasons, it is essential that the Commission take a holistic and forward looking view in its Final Report of the relevant competitive set, and that it does not pursue unjustified and unprecedented regulatory interventions that undermine efficiencies, impact stability of food supply, and hamstring the ability of existing players to respond dynamically in the face of a rapidly changing sector.

28. The Warehouse's ability to expand its groceries supply chain

28.1. We note that The Warehouse's submission on the Draft Report suggests it would not look to use a wholesaler to compete in groceries, indicating that an entity of its size is "most likely to procure goods directly from the growers and producers to secure supply at the best price once they have built sufficient scale."[286] Rather, The Warehouse indicates that it would like Government investment support to obtain an "end-to-end supply chain (chill / frozen) infrastructure" or "intervening in the incumbent vertically integrated structures to provide access to other parties".[287]

28.2. From our perspective, The Warehouse's submission could be taken to amount to an attempt to seek government funding for a significant and successful private enterprise (or an attempt to "intervene" in the supply chains of its competitors to disadvantage them). In reality, The Warehouse is already announcing to its investors that "Grocery has been a standout category across the year" for its business,[288] and it already has significant supply chain infrastructure.

[286] The Warehouse Group submission on the Draft Report (26 August 2021). Retrieved from: https://comcom.govt.nz/__data/assets/pdf_file/0031/265765/The-Warehouse-Group-Submission-on-Market-study-into-grocery-sector-draft-report-26-August-2021.pdf

[287] The Warehouse Group submission on the Draft Report (26 August 2021). Retrieved from: https://comcom.govt.nz/__data/assets/pdf_file/0031/265765/The-Warehouse-Group-Submission-on-Market-study-into-grocery-sector-draft-report-26-August-2021.pdf

[288] The Warehouse Group. FY21 Annual Results. 29 September 2021.

28.2.1. The Warehouse delivers stock to more than 260 retail sites across New Zealand, including 90 “The Warehouse” red shed stores, as well as ranging over 2.5 million SKUs via TheMarket.com and it has distribution centres in the North Island and South Island that it uses to distribute its grocery offerings.[289]

28.2.2. Specifically, we understand that The Warehouse distributes its dry grocery goods from a distribution centre in Wiri (a part of Auckland) that is believed to be approaching the size of our own Auckland National Distribution Centre.

28.2.3. The Warehouse also has a significantly sized distribution centre in the South Island - which we have seen described as "the biggest single-level building in the South Island”.[290]

28.3. To the extent that The Warehouse is (perhaps) referring to temperature controlled supply chain infrastructure, or supply chain infrastructure for perishable goods, as being a potential difficulty for it, it is not clear to us why that would be difficult or require intervention. In particular:

28.3.1. WWNZ contracts with third party providers, such as Americold and [ ] (our main transport provider nationally for Chilled, Frozen and Produce goods) for our temperature controlled logistics. Those relationships are not exclusive, and so The Warehouse could readily do the same and reach service contracts with those or other competing providers.

28.3.2. [ ] of WWNZ’s total sales (by value) are made up of products delivered Direct to Stores (**DSD**) by suppliers, and [ ] of WDL’s franchisees total sales (by value) are made up of products delivered DSD by suppliers, including perishable products such as milk and bread. In our view The Warehouse could readily negotiate similar DSD supply arrangements to its stores.

28.3.3. [ ]. In our view there is no reason why someone like The Warehouse could not readily implement a similar arrangement.

28.3.4. My Food Bag has successfully established temperature controlled capacity at its three distribution centres - see Exhibit 14 below.

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[289] The Warehouse Group’s 19.9% shareholder, James Pascoe Limited, has a further 59 Farmers stores, among its portfolio of retail brands that also includes Pascoes, Stevens, and Whitcoulls. See:
- The Warehouse Group. Annual Report 2021.
- https://www.linkedin.com/company/farmers-trading-company-ltd/?originalSubdomain=nz

[290] (6 May 2016). Giant $13 million expansion for The Warehouse's distribution centre. Stuff. Retrieved from: https://www.stuff.co.nz/business/industries/79654004/giant-13-million-expansion-for-the-warehouses-distribution-centre

Exhibit 14 - My Food Bag's distribution centres[291]

28.4. In relation to the ambient supply chain, WWNZ also cannot see any impediments to The Warehouse replicating the supply chain that WWNZ has established (in fact, The Warehouse already has such a supply chain). Notably, WWNZ partners with various third party transport providers to manage the transport of goods through the supply chain, and The Warehouse could readily do the same. WWNZ's relationships are structured through various service agreements, and there are a number of transport providers that we use and the services they provide range from:

28.4.1. picking up stock and containers from port;

28.4.2. delivery to third party logistics (**3PL**) facilities or our DCs; and

28.4.3. picking up stock from our DCs and delivery to stores.

28.5. WWNZ's main ambient transport providers are [ ], our main transport provider across the North Island for Ambient deliveries, and [ ], our main transport provider across the South Island for Ambient deliveries.

28.6. Furthermore, to the extent that The Warehouse did not consider its existing (already significant) distribution centres sufficient to expand its (already significantly growing) grocery offering, it is not the case that it would need to invest the upfront capital itself to establish a further distribution centre. It is very common for specialist property funds to want to invest in and own distribution centres subject to "lease backs" to retailers, with industrial property seen as an attractive and sought-after asset class in New Zealand at present, due to strong rental and capital returns and growing demand due to ecommerce and supply chain demand.

[291] My Food Bag. Product Disclosure Statement. 11 February 2021.

28.7. For example:

28.7.1. We understand The Warehouse's Wiri distribution centre is owned by ACC (as a long-term investment).

28.7.2. My Food Bag will lease the new South Island distribution centre that is currently being developed for it in the Christchurch,[292] and it leases its two distribution centres in Auckland.

28.7.3. WWNZ's distribution centres are owned by a range of entities, and recent DCs developed for WWNZ have been funded by external parties, for example WWNZ's new AFDC is being developed in partnership with LOGOS and will be owned on completion by the Australian Super Fund, and WWNZ's new PRDC was developed in partnership with, and owned on completion by a private JV - PMB Carrus). Other key WWNZ DCs are also owned by third party investors, namely:

28.7.3.1. Argosy Property, in the case of WWNZ's Auckland DC.

28.7.3.2. A syndicate managed by Centuria, in the case of WWNZ's Christchurch DC.

28.7.4. The above demonstrates that a distribution centre with a "lease back" to a major retailer, such as The Warehouse, would likely be an attractive investment or development proposition, and there are a number of large and well funded institutional investors who specialise in industrial property, including:

28.7.4.1. Goodman Property Trust, listed on the NZX;

28.7.4.2. Property for Industry, also listed on the NZX;

28.7.4.3. Industre, majority owned by NZX listed Stride Property Group;

28.7.4.4. LOGOS Property, who specialise in the development and management of logistics real estate throughout Asia-Pacific.

28.8. All of these organisations, and many more, have specialist teams whose key focus is on the development and ownership of industrial property such as retail distribution centres. In addition to this, there are numerous other private and public agencies (including the likes of ACC and the NZ Super Fund) who invest directly or through various special purpose vehicles in owning and developing industrial property such as retail distribution centres.

28.9. Accordingly, there is no need for a new entrant to fund the development of their distribution centres, and so any suggestion by The Warehouse that access to capital is an issue is not credible. If a new entrant retailer needed to access capital and expertise to establish distribution centre(s) in New Zealand they would have any number of specialist and well-resourced industrial property owners and developers lining up to assist them.

[292] (14 September 2021). My Food Bag to get multimillion-dollar distribution centre for South Island. Stuff. Retrieved from: https://www.stuff.co.nz/business/126375151/my-food-bag-to-get-multimilliondollar-distribution-centre-for-south-island

28.10. Fitting out a DC is also not a barrier to entry that requires upfront capital. One of the larger costs is racking, and in more modern DCs this can include automation. There are numerous entities that will invest in owning and leasing-back industrial racking and automation. For example, large international racking providers such as Dematic have their own leasing arms, so that they can deliver the racking and then lease it to end users. [ ].

28.11. The reality is that The Warehouse is a large and sophisticated business and all of the requirements above are matters that it has already achieved in relation to both its existing general merchandise and grocery offering. There is no reason why it could not continue to do so to expand its grocery offering further as we are already seeing it doing.

Part 5: We are open to voluntary wholesale supply

29. We are open to voluntary wholesale supply

29.1. As outlined in our September Submission, and at the Conference, WWNZ's view is that wholesale access is not required:

29.1.1. The market is already competitive (as evidenced across a number of outcomes),[293] already becoming even more competitive (as evidenced by observed entry and expansion)[294], and there are a number of measures proposed, and that we support, which, if implemented, would accelerate further the entry and expansion of new competitors;[295]

29.1.2. The New Zealand grocery market has already seen, and is already seeing, entry and expansion that is not reliant on wholesale access (for example, Costco, HelloFresh, My Food Bag, The Warehouse, Farro Fresh, Geezy Go, and many others);[296]

29.1.3. There are good reasons why vertical integration is such a common and prevalent model among grocery retailers worldwide (for example, Tesco, Walmart, Kroger, Coles, Costco, Aldi). This includes significant benefits in relation to efficiencies, agility, and stability of supply;[297]

29.1.4. There are major risks of significant costs, unworkable complexities, and risks to stability of food supply if vertically integrated models are inappropriately disrupted, or impacted by regulatory overreach;[298]

29.1.5. Wholesale access is unlikely to be a recipe for the type of price competition the Commission seems to want, with that type of price competition much more likely to take the shape of global vertically integrated players - such as Costco, who are already about to open their first store in Auckland, and Aldi whose entry we assess as imminent (and whose denials cannot be relied upon given prior form of denying plans to expand to certain geographies, before proceeding to do just that);[299] and

29.1.6. There are a number of other measures that WWNZ's supports[300] that are "tried and tested" overseas, where there appears to be consensus, and that, if implemented, would accelerate the entry or expansion of new competition. It makes sense to implement these first.

29.2. If, however, following the conclusion of the Market Study and sufficient time to implement and assess the impact of the other measures we support, the Commission or Government considers that additional wholesale supply would be of benefit, WWNZ has an open mind toward voluntarily negotiating commercial wholesale supply contracts with other retailers.

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293 See, for example, points made in pages 4 to 15 in our September Submission.
294 See section 30 of our September Submission.
295 See sections 12 to 18 of our September Submission.
296 See section 30 of our September Submission.
297 See section 20 of our September Submission.
298 See section 23 of our September Submission. See also the enclosed paper by Henry Ergas AO.
299 See paragraph 30.7.2 of our September Submission.
300 See paragraph 1.6 of our September Submission.

29.3. As outlined in WWNZ's Submission on the Draft Report and at the Conference, this would not be as simple as "flicking a switch" and would involve significant costs and a number of complex considerations to be worked through including, but not limited to: buying and selling terms; supply chain capacity; system capabilities; and establishing reasonable and mutual obligations with wholesale customers.[301]

29.4. In WWNZ's view, these challenges are not insurmountable, and in principle wholesale supply is feasible. This would require investment,[302] enough lead-in time, and the support from our suppliers to amend our buying terms to reflect a wholesale business (see Exhibit 15).[303]

Exhibit 15: Supplier terms and considerations in relation to wholesale

Our supply contracts with suppliers are currently predicated on WWNZ being a retailer, with supplier promotional funding - linked to retailer promotional activation - a key consideration (see *Section 20*).

This promotional funding is a significant factor in the net cost of goods realised by WWNZ. Specifically, promotional funding lowers the effective cost WWNZ pays for goods by on average [ ]] of a supplier's first cost (and often much more for the larger multinationals that are particularly wedded to this dynamic). The funding delivers benefits that flow on to consumers in the form of promotions, and is also an important competitive dynamic for suppliers, who use these investments to compete with each other in categories, to the net benefit of consumers. This is the case in grocery retail markets all around the world.

This promotional funding dynamic is essential for the Commission to understand and consider when thinking through the workability of any wholesale supply.

For WWNZ to provide wholesale supply on terms that would enable other retail customers to be competitive in the market this would require supplier support. [ ].

- [ ]
- [ ]
- [ ]
- [ ]

.[ ].

As noted by Henry Ergas AO notes in his paper: "*It is unclear how the Commission would proceed if supplier consent became a material hurdle, for instance whether wholesale access would be extended to include suppliers, or whether the Commission would seek to coerce suppliers to change their terms and conditions*." However, WWNZ would consider voluntary commercial arrangements as the right place to start if additional wholesale supply is considered necessary.

29.5. As is evident from the above, there are many details to be worked through. Nevertheless, WWNZ is prepared to engage in relation to voluntary wholesale supply - as a "less worse" option (for WWNZ, the New Zealand grocery sector, New Zealand consumers and New Zealand taxpayers) than the other more interventionist, costly, risky and onerous options the Commission may be considering - particularly given there is, in our view, no proper basis for a

[301] See Exhibit C4 of our September Submission.
[302] [ ].
[303] See Exhibit C4 of our September Submission.

number of the Commission's preliminary findings.[304]

29.6. In addition, voluntary commercial agreements would be much more likely to deliver efficient, flexible and fit-for-purpose solutions. As such, in the context of a hierarchy for regulatory intervention, they should be the place to start if any wholesale intervention were to be considered necessary based on the evidence.[305]

29.7. WWNZ would be incentivised to make any voluntary commercial wholesale supply, if pursued, a success:

29.7.1. WWNZ understands the context of the Market Study, and the merits of delivering a workable voluntary solution if considered necessary in the context of an appropriately applied hierarchy of intervention;

29.7.2. WWNZ would anticipate any voluntary commercial wholesale arrangements to still involve some ongoing interaction with, or interest from, a Grocery Ombudsman;

29.7.3. If we were going to invest to develop the capability, we would be incentivised to realise a return on that investment, and to grow the business. Woolworths Group's foray into commercial wholesaling through their recently established Australian Grocery Wholesalers (**AGW**) unit demonstrates the credibility of WWNZ's appetite to explore commercial wholesale supply (Exhibit 16*),* notwithstanding all the challenges to be addressed.

Exhibit *16: Case Study of Australian Grocery Wholesalers (AGW)*

Woolworths Group in Australia established a commercial wholesale business trading as AGW. AGW commenced trading in October 2019, initially to support the supply of wholesale products into Ampol (previously Caltex) petrol stations in Australia.

While still at the relatively early days ([ ]), this is an illustration of Woolworths' general willingness to invest in wholesale, and is likely to provide some lessons that can be leveraged for New Zealand.

Our understanding is that:

- AGW has had to invest extensively into organisational capabilities (people, process and systems), including but not limited to [ ].
- [ ].
- [ ]
    - [ ]
    - [ ]
    - [ ]
    - [ ]
    - [ ]

[304] See section 2 of our September Submission for an overview.
[305] See sections 4 and 5 of our September Submission.

○ [ ]

29.8. It is in this context that the topic of 'operational separation', as raised at the Conference, needs to be addressed.[306] This is because, while WWNZ would certainly envisage voluntary wholesale arrangements involving some distinct elements, poorly designed 'separation' (even if 'operational') would carry significant costs and risks..

29.9. For example, while extensive further exploration would be required (as well as costs to establish), it is possible that voluntary wholesale supply could comprise:

29.9.1. [ ]

29.9.2. [ ]

29.9.3. [ ]

29.10. However, it would be essential to design any model so as to engage with the capabilities of WWNZ's vertically integrated model (for example, buying, warehousing, logistics and end-to-end product flows) **in a way that <u>bolted on</u> to existing end-to-end efficiencies, rather than broke them apart** (or inadvertently had a similar effect). Otherwise there would remain significant risks to costs, prices, customer-led innovation and stability of supply[307] (the enclosed paper by Henry Ergas AO explores these significant costs and risks in the context of a forced separation of WWNZ's business).

29.11. For example, there are significant benefits in the end-to-end efficiencies and positive customer outcomes of having a single, retail-facing, buying team. Disrupting this would risk significant unintended consequences:

29.11.1. The way that WWNZ buys is intimately connected to how we meet customers' needs, how we compete, how we are able to work with suppliers to constantly improve our offer, and how we are able to constantly optimise decisions across efficiency and other end-to-end dimensions.

29.11.2. Each year Countdown undertakes hundreds of category reviews [ ] (for example, into breakfast cereals, or snacks, or cleaning) and through this process we will range thousands of new products every year up to [ ]. This is essential, as we know that if we stop innovating and stop refreshing our offer, we lose customers and market share and this is very evident at the category level.

29.11.3. This requires an end-to-end multi-dimensional focus from our buyers that includes optimising for a wide range of factors. For example:

29.11.3.1. Optimising limited shelf space;

29.11.3.2. Understanding store processes and operational capacity;

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[306] Day 6 - Retail Grocery Market Study Conference.
[307] See part C of our September Submission.

29.11.3.3. Managing supply chain constraints, and supporting efficient logistics practices;

29.11.3.4. Balancing cost of goods and commercial considerations;

29.11.3.5. Delivering competitive prices and compelling promotions; or

29.11.3.6. Ensuring product ranges are suitable and that quality is high.

29.11.4. This is a challenging task, but this process creates an environment in which there is a perpetual cycle of innovation and optimisation. For example:

29.11.4.1. Working to reduce carton sizes to increase range within the same physical space constraint (for example, moving from a 24 pack to a 12 pack);

29.11.4.2. Trialling new product ranges in selected stores, before committing to a national rollout (for example, some international foods or local wines);

29.11.4.3. Introducing a new deal structure with a supplier to trial a new pricing strategy or type of promotion (for example, Great Price, or an online deal);

29.11.4.4. Partnering with a supplier to bring a new innovation to the market in response to a new trend (for example, organic ranges, eco-concentrates); or

29.11.4.5. Trialling new merchandising equipment in stores (for example, coffee pod stations).

29.11.5. WWNZ's buyers are focussed on the needs of customers, and by ensuring that their focus is end-to-end, they make us a more efficient retailer overall. An environment where the perspective of buyers is narrowed, for example through some kind of operational separation of buying functions, would significantly increase the risk of low quality decisions, with negative impacts in our supply chain and certainly negative outcomes for customers.

29.11.6. For example, separate buying capability would likely be extremely inefficient:

29.11.6.1. it would be highly duplicative, increasing system costs;

29.11.6.2. it would like be less able to access Countdown's buying scale advantages; and

29.11.6.3. it would be a recipe for highly inefficient product flows through the supply chain because of the increased number of decision makers in play.

29.11.7. Buying capability sitting inside a separated wholesale function would similarly risk very poor customer outcomes. For example:

29.11.7.1. How could this effectively meet and respond to customer needs and competition dynamics at the retail level?

29.11.7.2. How could this model effectively work on innovative solutions with suppliers? (for example, Shelf Ready Trays? Packaging innovation? Test ranges?)

29.11.7.3. How could this model make effective decisions on ranging based on end-to-end costs?

29.11.7.4. How could this model manage the constant dynamism observed in grocery retail (for example, suppliers moving from direct-to-store delivery into delivery via the DC, or the constant improvement and optimisation of product range as part of category reviews?)

29.11.7.5. How could this model work in the case of supply shocks (for example, earthquakes, pandemics, other natural disasters)?[308]

29.11.8. As a minimum, any wholesale model would therefore need to ‘bolt onto’ rather than disrupt these existing buying processes and benefits. Among many other considerations, this might mean drawing from the Countdown range, or leveraging existing volume-based terms.

29.11.9. Any arrangement where it was assumed that a wholesale entity would be buying and then ‘supplying into Countdown’ as it did to third parties would not be workable, efficient, or in customers’ interests for all of the many reasons outlined above.

29.12. There are also significant benefits in the end-to-end efficiencies of WWNZ’s existing DC, supply chain and logistics processes. Disrupting this would risk significant unintended consequences.

29.12.1. WWNZ does not buy to hold stock in a warehouse. WWNZ buys to meet constantly changing customer needs, and our supply chain serves to get products from suppliers to customers as efficiently as possible, at a high service level, and just-in-time.

29.12.2. Countdown’s existing operations are supported by integrated store-connected systems that support high quality demand forecasting, systematised ordering and highly efficient replenishment and end-to-end product flows. Introducing wholesale orders with lower accuracy and less integrated store-to-supply-chain information flows would result in higher costs into the system (for example, inefficient rosters, need for buffer stock) and lower quality service delivery (for example, poorer availability of supply). These costs would need to be factored in. Given the length of the supply chain for many products, these forecasting challenges cannot be underestimated.

29.12.3. Other operational considerations would also need careful design, so as to avoid negative impacts and unintended consequences. For example, in addition to other considerations highlighted in Henry Ergas’ paper:

29.12.3.1. [ ]

29.12.3.2. [ ]

29.12.3.3. [ ]

308 See Exhibit 18 below.

29.12.3.4. [ ]

29.12.3.5. As a minimum, any wholesale model would therefore need to ‘bolt on’ to rather than disrupt these existing supply chain processes. [ ].

29.13. These issues are not insurmountable. However, they reflect the careful thought and design that would be required to support efficient voluntary wholesale supply, and to manage the significant risks of any ‘separation’ to existing efficiencies and processes, and therefore to avoid negative customer outcomes in relation to pricing, on-shelf-availability, and stability of supply. These same issues also underscore why more extreme wholesale and structural interventions would be costly, complex, and highly counterproductive for New Zealand and consumers (see the enclosed Henry Ergas AO paper), and why voluntary arrangements, if considered necessary, would make more sense as a place to start.

Part 6: Comparisons between grocery retailing and telecommunication are not valid

30. Comparisons between grocery retailing and telecommunication are not valid

30.1. Some submitters have suggested that historic developments in the telecommunications sector provide some type of model (or even blueprint) for what could be done in the grocery sector to improve competition. As we set out in our September Submission, there is no valid comparison between telecommunications and grocery retailing - with some of the key distinctions illustrated in Exhibit 17 below.

Exhibit 17: Characteristics that define industries where access is typically regulated globally

Characteristics that define industries where access is typically regulated globally — *Illustrative*

	Communications (telco, internet)	Energy (gas, electricity)	Transport (rail, ports)	Wholesale access to fuel	Wholesale access to grocery retail	Comments (on grocery retail)	Conclusions
Extent of natural monopoly (where duplicating infrastructure would not be in customers' interests due to high sunk costs)	High	High	High	Medium	Low	• Not as capital-intensive, more variable costs and possible to duplicate cost-effectively.	The wholesale grocery retail sector does not meet the need for wholesale access regulation
Limited/ no other alternative for access to market by retail competitors	High	High	High	High	Medium	• New market entrants do not need incumbents as only way to source product	
Complete control over asset and resulting pricing	High	High	High	Medium	Low	• Grocery wholesaler does not have full control over access to supply or pricing	
Non-substitutability of end-product	Medium	High	High	High	Low	• There is substitutability in grocery retail (e.g., via other stores, restaurants, takeaway food, online etc.)	
Homogenous product(s) with minimal/no changes to offering over time	Medium	High	High	High	Low	• Thousands of differentiated SKUs, non-product / non-price values important to customer, ever-changing preferences	The wholesale grocery retail market is far more complex to regulate than other typically regulated markets
Ease of participation in access regime (e.g., plug and play)	High	High	High	High	Low	• Requires catered service offering for different wholesale customers; no "one-size-fits-all"	

30.2. The distinctions are clear, and it is a point that Peter Harris AO (who spent a significant proportion of career involved in telecommunications wholesale separation in Australia), observed a number of times in his paper - noting:[309]

30.2.1. "grocery sales are not like telecommunications";

30.2.2. "Structural or operational separation of services per se (rather than the traditional infrastructure asset that is subsequently used to provide a service) is not a well traversed policy path";

30.2.3. "the assets and processes to be separated [in grocery] will prove hard to define, unlike the asset in focus in traditional separation policies which tends to be overt,

[309] Peter Harris AO "Views on the Commerce Commission Draft Market Study Report on Grocery Retailing in New Zealand" (November 2021) at [167], [30], [79], [80] and [150].

physical, of very large scale and stable for long periods"

30.2.4. "The root cause of these complexities is that the asset being separated is a sort of right to a set of prices, not a natural monopoly asset of a physical infrastructure kind, as is commonly the case with separation or access arrangements under competition policy around the world. Because of this, the tool it proposes to use is not designed – and based on the list above could not reliably be redesigned – for this purpose."

30.2.5. "The difficulty of defining the asset to be divested arises because the Commission is looking to apply a tool designed and most often applied to monopoly infrastructure situations (telecoms, electricity, a cement plant in the UK) in an environment that does not feature it."

30.3. Henry Ergas AO similarly notes in his paper "that the Commission's proposed interventions are entirely unrelated to the conceptual basis for access regulation, either as regards (natural monopoly) utilities regulation or even access to essential (infrastructure) facilities".

30.4. The above reflects why no other developed market economy has ever sought to apply natural monopoly frameworks to the retail grocery sector.

30.5. For those reasons alone it is misguided to seek to draw analogies with the separation of Telecom. The specific context of the Telecom split (which was voluntary, and in return for access to $1 billion of Government funding) also bears repeating for those seeking to mistakenly draw the analogy:

30.5.1. As a starting point, telecommunications was for many years a protected government monopoly (run by the Post Office, then a government department). In the 1980s, Telecom was corporatized and sold in a now completely deregulated environment (aside from the KiwiShare to protect free local calling) – which maximised the return for the Government. It was perhaps not surprising that from that point of privatisation there was an ongoing challenge to create market conditions that would allow competition to develop.

30.5.2. Telecommunications and supermarkets therefore have very different histories and features. Clearly, it is not the case that the grocery market is now in a state that could justify the same type of regulatory intervention as telecommunications experienced. The fundamental difference is that there are no monopoly features of the groceries market, while, as explained below, telecommunications regulation was all about ensuring that monopoly aspects of the market did not prevent or distort competition.

30.5.3. In particular, the key distinguishing features between telecommunications and grocery that it is necessary to bear in mind are that:

30.5.3.1. Regulating telecommunications in the way that it was, was not new or unique to New Zealand. To the contrary, it could be argued that New Zealand was slow to adopt regulatory access frameworks for monopoly services that were common in other OECD countries.

30.5.3.2. While structural separation of Telecom and Chorus was a feature of the 2011 reform, it is important to understand the context in which it occurred.

In brief:

30.5.3.2.1. Rolling out fibre was a flagship Government policy – it was to invest $1.35 billion into the sector in partnership with private sector bidders.

30.5.3.2.2. Much of the "regulation" was established by the competitive tender rules, ownership arrangements, and contracts entered by successful bidders. Legislation was also enacted to establish non-discrimination, open access and other obligations for service providers.

30.5.3.2.3. The Government objectives for the regulatory regime to carefully balance incentives to invest and promotion of competition is clearly illustrated by the following statement:[310] "*This package of proposals is intended to make the UFB model more attractive to potential investors so as to increase the likelihood of achieving the Government's broadband objectives, while at the same time ensuring long-term competitive objectives are met.*"

30.5.3.2.4. A key rule was that owners of the monopoly fibre networks were not allowed to be involved in retail services that used those networks.

30.5.3.2.5. Telecom wished to participate in the process, and a bid was therefore made on that basis that if it was a successful bidder, it would seek shareholder agreement to structurally separate.

30.5.3.2.6. The Government identified that it was important to have Telecom participate, because it had the scale to supply regions that were likely to be unattractive to new entrants.

30.5.3.2.7. The Government and Telecom therefore worked together on legislation that would facilitate Telecom's structural separation and participation in the fibre roll out (in the event it was a successful bidder)

30.5.4. All legislative materials made it clear that it was for Telecom to decide whether to structurally separate. The Supplementary Order Paper that introduced the provisions facilitating separation explained that it contained:[311]

> "*amendments to enable the structural separation of Telecom NZ in the event that Telecom is selected as a preferred supplier under the UFB Initiative and that **it accordingly decides** to proceed with a demerger of its access network business.*" *[Emphasis added]*

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[310] Ministry of Economic Development, Regulatory Impact Statement, *Ultra-Fast Broadband Initiative: Amendment to Model*, 29 July 2010, at para 15.
[311] Supplementary Order Paper No 204. Retrieved from: https://legislation.govt.nz/sop/government/2011/0204/5.0/DLM3551855.html

30.5.5. In short, it was Telecom's choice whether to participate in the UFB Initiative on the same basis as other bidders, and it chose to do so, and with its new separated wholesale business underpinned by a commitment of more than $1 billion investment from the Government. Structural separation was not enforced by the Government in the manner suggested by submitters in this process, and certainly there is no parallel to the commitment of more than $1 billion investment from the Government. The context and approach to Telecom's demerger therefore provides no support for a proposal to enforce structural separation on existing operators in competitive markets.

30.5.6. Chorus investors also understood that it would be regulated as a monopoly infrastructure provider in due course (along with other local fibre companies). As the Commission is well aware, even though the regulation was anticipated, there is some criticism that the rules being set now for fibre regulation are inconsistent with investor expectations at the time of entering the UFB bid process, and undermine incentives to invest in New Zealand.[312] Clearly, such investor concerns would be exacerbated if the Commission were to recommend forced divestment and regulation of non-monopoly businesses, where investors reasonably had no expectation of arbitrary regulatory intervention that could undermine the value of their investment.

30.5.7. For these reasons, and the fact we cannot see any practical or workable way in which our business could be separated without destroying our end-to-end operations and efficiencies (see paragraphs 29.8 to 29.12 above, and the enclosed Herny Ergas AO paper), there is no valid comparison between telecommunications and grocery retailing. For submitters to suggest otherwise demonstrates a fundamental misunderstanding of utilities regulation (and the circumstances it is deployed internationally), Telecom’s history, and our business.

[312] See, for example, New Street Research, *Chorus and New Zealand Broadband Policy: Grasping Failure from the Brink of Success*, 18 June 2021.

Part 7: Issues and considerations relating to more extreme and interventionist options

30.6. WWNZ has engaged constructively throughout the Market Study. That is because, like the Commission, we want to see a thriving grocery sector across New Zealand that provides great value for Kiwis and contributes meaningfully to the communities we serve.

30.7. It is on this basis that we have committed our support to a number of significant reforms that will enhance competition, that have been "tried and tested" overseas, that appear to be supported by broad industry consensus, and that will deliver benefits for New Zealand consumers and suppliers.

30.8. However, we believe we have an obligation to draw the Commission's attention to the fact that there are aspects of the Commission's process, findings, and overly interventionist reform options that we are deeply concerned about.

30.9. We also note that in the Conference the Commission asked "in what circumstances might it be appropriate for the Commission to recommend [any of the more drastic options] in the context of a market study?",[313] and indicated that it would be interested in receiving further submissions on that as part of this submission process.

30.10. It is in the context of that request from the Commission, and our desire to see the best outcomes for New Zealand from this Market Study, that we provide this section.

31. Response to the Commission's request for submissions on relevant factors in considering the more interventionist options

31.1. The Commission's Draft Report did not contain any specific draft recommendations that the Commission intended to make as an outcome of its Market Study. Rather it included a "spectrum of options for recommendations",[314] and invited "suggestions of other options for recommendations that could improve competition".[315] Those options, in effect, covered the full "gamut of measures applied in the standard 'toolkit' of utilities regulation."[316]

31.2. The Draft Report also noted that "cost-benefit analysis falls outside the scope of our study" and, therefore, noted that "[p]olicy makers may undertake that analysis while developing or giving effect to any government decision about recommendations".[317] The Conference similarly did not indicate that the Commission had conducted any cost benefit analysis on any of the options outlined.

[313] Page 13. Day 6 - Retail Grocery Market Study Conference.
[314] Commerce Commission "Market Study into the retail grocery sector – Draft Report" (29 July 2021) at [1.19].
[315] Commerce Commission "Market Study into the retail grocery sector – Draft Report" (29 July 2021) at [9.3] and [9.168].
[316] Henry Ergas AO "Comments on the Recommendations for Third Party Access by the Commerce Commission New Zealand (November 2021) at [9].
[317] Commerce Commission "Market Study into the retail grocery sector – Draft Report" (29 July 2021) at [9.4].

31.3. This means that the Commission has publicly raised a number of potential interventions without:

31.3.1. Forming a view of relevant considerations in doing so, and any analysis of whether those options would be in the long-term interests of consumers; or

31.3.2. Any specific indication of which of those options the Commission is actually minded to propose.

31.4. We acknowledge that the Commission should consider all submissions it receives, and consider all options with an open mind. In that sense, the canvassing of a range of options in a discussion paper would be understandable, and we appreciate that the Commission did not indicate that it was intending to include any of those more interventionist options as recommendations.

31.5. However, from our perspective it means that the Commission is not able to include recommendations on such interventionist options in its Final Report. That is because, in our view, particularly in relation to the more extreme interventionist options:

31.5.1. The Commission has not properly consulted as it has not yet met the obligation, in section 51C, to make a draft report available (including any recommendations which are proposed for the final report) and allow time for comments. Specifically:

31.5.1.1. Section 51C requires the Commission to include any proposed recommendations, that it would in fact be minded to recommend in a draft report for consultation.

31.5.1.2. However, in this case the Commission has not done that, rather it has just presented a spectrum of “options for recommendations”. The Commission has provided no information on whether it is considering such options as recommendations, nor any specificity on how such options could be implemented in practice.

31.5.1.3. The Draft Report is, in essence, therefore a discussion paper, not a true draft report (as required by section 51C). It did not enable us to understand the views of the decision-maker.

31.5.1.4. That approach, in addition to not meeting those consultation thresholds, has prejudiced our ability to respond. Between the release of the Commission’s Draft Report (on 29 July 2021) and when submissions were due (10 September 2021), we had just 31 working days to respond to, in effect, every possible permutation of potential intervention in the regulatory toolkit - without any certainty on which option the Commission was in fact considering, or any clarity on how any such options may be framed (and while at the same time dealing with continuing the grocery supply chains running for New Zealanders during COVID-19 Alert Level 4 lockdowns from 17 August).

31.5.1.5. Even at this late stage of the process, we still do not know what views the Commission holds in relation to the options canvassed in the Draft Report.

31.5.2. The Commission has not yet met the obligations under the Commerce Act to consider whether any recommendations it might make are likely to be in the long-term benefit of consumers (s 1A) or “in the public interest” (s 51(1)).

31.6. Our perspective on this is reinforced by the fact that:

31.6.1. as the Commission will be aware, the more drastic the recommendation, the higher the expectations of a clear analytical and evidenced basis, across the identification of the problem, the feasibility of the solution, the trial of less invasive options first, and the need for full cost benefit analysis before making such a recommendation;

31.6.2. the Commission is expressly not required to make recommendations (section 51B(2)), which demonstrates that if it chooses to make recommendations, then those recommendations need to be underpinned by appropriately rigorous and objective analysis and an opportunity for public consultation;

31.6.3. the more interventionist options canvassed by the Commission are not even of the *type* contemplated by overseas jurisdictions for an industry such as grocery retailing (which further emphasises the need for any interventions to be based on probative[318] evidence, public consultation, and cost benefit analysis);

31.6.4. a key expectation in the Government Expectations for Good Regulatory Practice is robust analysis and implementation support for changes to regulatory systems; [319]

31.6.5. policy makers have asked the Commission to use its considerable expertise and resources to assess the market and make recommendations;[320] and

31.6.6. if the Commission makes a recommendation, there will inevitably be an expectation and perception from the public and media that the Commission has arrived at that recommendation based on detailed consideration of what would be in the interests of consumers (when the reality is that to date no such analysis has been performed).

31.7. It would be inconsistent with those expectations for the Commission to suggest that policy makers should undertake a critical part of the assessment (that is, the cost benefit analysis) after the Commission has made a recommendation. There are also many other bases on which the Commission is required to undertake a thorough, robust analysis - including, as noted, to discharge the obligations to ensure that any recommendations that are made are in the long-term interests of New Zealand consumers, are workable and likely to be effective, and to ensure the Commission's process itself does not cause harm. These issues are explored further in the views expressed by Henry Ergas AO, Peter Harris AO, Sapere, and NERA. In particular, those papers cite the importance of the Commission:

[318] Refer to the probative evidence rule applicable to investigative bodies.

[319] (April 2017). The Treasury. Government Expectations for Good Regulatory Practice. Retrieved from: https://www.treasury.govt.nz/sites/default/files/2015-09/good-reg-practice.pdf

[320] In his annual letter of expectations to the Commission earlier this year, the Minister of Commerce noted his expectation that the Commission would provide "practical guidance on the workability and resource requirements of any proposed legislative amendments or regulatory changes" including in relation to any policy recommendations coming out of the retail groceries market study. In response the Commission noted that "we understand the importance of delivering high quality market studies". See:

- Letter from the Minister of Commerce and Consumer Affairs to the Chair of the Commission, dated 11 March 2021.
- Letter from Chair of the Commission to Minister of Commerce, dated 30 March 2021, at paragraph 8.

31.7.1. Committing itself to rigorous, credible, evaluation methods.

31.7.2. Identifying any potential issues with competition using appropriate analysis to produce probative evidence.

31.7.3. Identifying the options that could resolve those issues by applying the regulatory hierarchy, which is that a regulator / policy maker should adopt the least interventionist step first.

31.7.4. Considering the legal implications of any recommendation (both domestic and international laws).[321]

31.7.5. Conducting a cost benefit analysis of any proposed recommendations, which requires in this instance to consider impacts on investment incentives by industry participants; risks to investment in New Zealand more generally as a result of policy uncertainty and sovereign risk;[322] impacts on the cost of capital in New Zealand; undermining the structures, efficiencies, and economies of an existing business (both horizontal and vertical); risks to New Zealand productivity; risks to supply chain resilience and food security (which is always important to New Zealand's national security, but is demonstrably so in the current COVID-19 environment - see Exhibit 18 below); risks to the incentives of the regulated business; higher risk of financial failure of the regulated business; costs to the access seekers; impacts on international relations if a recommendation is implemented that is inconsistent with international treaties; regulatory costs (in particular, of an internationally novel and complex regime); and costs of rent seeking.

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[321] For example:

- There are legal considerations in relation to "regulatory takings" in light of both the common law and the Legislation Design and Advisory Committee (**Legislation Committee**).
- The legal considerations go beyond just domestic laws. For example, Article 14 of New Zealand's Closer Economic Relations (**CER**) Treaty with Australia reflects international customary law that a state may only nationalise or otherwise expropriate property held by an Australian investor provided that certain conditions are met. This means that before the Commission could contemplate a recommendation that would amount to regulatory taking there would need to be a clear and compelling cost benefit analysis of the competition and economic case to justify such appropriation, and the analysis would need to be based on robust grounds in order to demonstrate it is a proportionate response - particularly so in this case given the types of interventions canvassed are unprecedented in an industry such as grocery retailing and, therefore, would be contrary to any reasonable investor expectations. The CER Treaty also sets out that any compensation would need to be paid immediately and reflect fair market value.
- Tex Edwards' comments at the Conference suggesting that divestments should be forced with assets sold through a "contestable process [limited to] NZ based, NZ owned capital", would also be inconsistent with the purpose, scheme, and scope of the Commerce Act's market study regime. The Commerce Act's market study regime is to "study factors that may affect competition for the supply or acquisition of goods or services". A restriction that only certain nationalities could own certain assets would be anti-competitive, not only in relation to any contestable process if there were any forced divestment, but also would potentially result in a less than optimally efficient owner of assets going forward, which would itself lessen competition and not be in the long-term interests of consumers. It would also, by limiting the pool of potential purchasers, reduce the price obtainable and therefore be a form of confiscation by the Government, and may place the Government in breach of international legal obligations, such as CER. To take into account other, non-competition factors, such as nationality of shareholders would be inconsistent with both the Commerce Act and the terms of reference of the Market Study.

[322] "Sovereign risk" has been defined as: "… the risk that the government may unexpectedly change significant aspects of its policy and investment regime and the legal rights applying to investors to the detriment of investors" (The Petroleum Programme 2013). In the context of the Commerce Act 1986, given its overarching purpose of promoting "the long-term benefit of consumers", we consider that sovereign risk is a mandatory relevant consideration that the Commission must properly factor into its deliberations and recommendations.

31.7.6. Publishing any recommendation that is proposed to be made in a draft report to enable adequate consultation.

31.7.7. Once that consultation has occurred, updating the cost benefit analysis in light of that consultation (and if that consultation identifies an alternative recommendation, enable meaningful consultation on that recommendation).

31.8. It is our view that to date that the Commission has not conducted these steps to the required level of detail, or in the appropriate sequence, for any recommendations on the more interventionist options to be included in the Final Report.

Exhibit 18: Risks to supply chain resilience and food security

Risks to supply chain resilience and food security:

We do not consider that the Commission has considered the significant risks to New Zealand's food and grocery supply chain of seeking to introduce unprecedented and significant structural intervention into the vertical integration of New Zealand's supply chain - an intervention that would make New Zealand an outlier compared to any other modern developed market economy.

There are numerous different risks to New Zealand that are mitigated via a robust, agile, and vertically integrated supply chain delivering food security for New Zealanders. Those risks include pandemics (as currently being seen), earthquake (for example, Christchurch in 2010/11 and Wellington/Kaikoura in 2016), flooding (for example in Canterbury in 2021),[323] and volcanoes (with an eruption in Auckland estimated to require the displacement of 320,000 people).[324]

We have significant concerns regarding how a vertically separated supply chain, or one dominated by contracted or regulated wholesale supply models, would hold up in the face of a crisis, such as COVID-19.[325] WWNZ's vertical integration has been at the heart of how we have kept New Zealand's food supply chain operating over the past two years. For example, through our ability to:

- Respond and pull levers in an all-of-system way;
- Adjust allocation of product to different stores (for example, priority communities);
- Smooth demand to reduce shortfalls (for example, product limits in stores);
- Optimise stock levels and deliveries across our network - including pushing stock to create capacity;
- Alter store opening hours (to allow team time to replenish shelves);
- Move team from one store to another - even closing stores - to maximise capacity while more than 1,000 team were being stood down into self-isolation at home;

[323] (1 June 2021). Canterbury flooding: Residents urged not to panic-buy after Ashburton Bridge shuts. RNZ. Retrieved from: https://www.rnz.co.nz/news/national/443807/canterbury-flooding-residents-urged-not-to-panic-buy-after-ashburton-bridge-shuts

[324] (27 May 2021). 320k Aucklanders would need to evacuate if volcano erupted, study finds. Stuff. Retrieved from: https://www.stuff.co.nz/environment/300318052/320k-aucklanders-would-need-to-evacuate-if-volcano-erupted-study-finds

[325] That COVID-19 remains an ongoing risk to supply chain resilience is reflected in the risk disclosure statements of many of the largest supermarket chains around the world, with the ability to pivot to alternative supply sources and channels identified as a key way to mitigate such risks (see Appendix Three).

- Partner with suppliers to convert products from DC supplied into DSD (to free up DC capacity);
- Have business continuity plans involving rapid redistribution of products across our DCs;
- Quickly open online-only fulfilment centres and stand-up Priority Assistance services for the elderly and vulnerable; and
- Work with suppliers to consolidate production into higher volume lines (for example, mince).

It is not just COVID-19 that the supply chain must be sufficiently resilient to handle, and it is not just vertical integration that provides that supply chain with resilience. It is also the fact that, as a nationwide vertically integrated retailer of scale, WWNZ has multiple distribution centres enabling it to pivot its supply chain as required to ensure the continued supply of foods to New Zealanders. For example, the November 2016 earthquakes required the closure of our Palmerston North distribution centre, however, we were able to ensure that our supermarkets in the lower North Island continued to be stocked (and despite "heavy buying by quake-worried shoppers") by diverting deliveries from our distribution centre in Auckland.[326] Similarly, following the Canterbury floods of June 2021, which closed the key delivery routes through Canterbury, we worked closely with our suppliers, transport partners and our stores to help minimise any impacted to customers.[327]

WWNZ considers that a number of the more extreme interventions outlined in the Draft Report would risk significant impacts to the resilience of food supply.

31.9. Other concerns we have with the more interventionist options canvassed in the Draft Report include:

31.9.1. Contrary to the approach of most regulators, the Commission currently appears to have preference for more interventionist wholesale regulation, rather than giving consideration to voluntary commercial wholesale if ultimately that was considered necessary over time. In particular, the suggestions in the Draft Report that WWNZ may not have an incentive to engage in commercial wholesale supply,[328] or that it could not preserve confidentiality of its retailer customers,[329] if it were to develop wholesale operations are not in our view credible. Indeed, in Australia, Woolworths has already recently developed a commercial wholesale business (AGW), which demonstrates it is a business that Woolworths is considering [ ].

31.9.2. The Commission's more interventionist options for recommendations do not take into account that the definition of "competition" in the Commerce Act is "workable or effective competition" and, therefore, the Commission's options for recommendations must be guided by that. However, the operational or structural separation options canvassed by the Commission, would not in our view:

[326] (17 November 2016). Earthquake: Supermarkets keep stocked despite distribution centre's closure. Stuff. Retrieved from: https://www.stuff.co.nz/business/86566392/earthquake-supermarkets-keep-stocked-despite-distribution-centres-closure
[327] (1 June 2021). Canterbury flooding: Residents urged not to panic-buy after Ashburton Bridge shuts. RNZ. Retrieved from: https://www.rnz.co.nz/news/national/443807/canterbury-flooding-residents-urged-not-to-panic-buy-after-ashburton-bridge-shuts
[328] Commerce Commission "Market Study into the retail grocery sector – Draft Report" (29 July 2021) at [9.41].
[329] Commerce Commission "Market Study into the retail grocery sector – Draft Report" (29 July 2021) at [9.3] and [9.2.3].

31.9.2.1. be "workable" in practice, for all the reasons outlined by WWNZ to the Commission previously (including by destroying or significantly disrupting WWNZ's efficient vertical integration); or

31.9.2.2. result in "effective" competition, given the downstream access-seekers would not be proper independent competitors, but rather merely be differently branded "clones" of each other with the same product range and input costs. This is discussed in both the Peter Harris AO and Henry Ergas AO papers.

31.10. Accordingly, given the approach adopted to date, we do not consider that the Commission has properly consulted with us on a "draft report" as required by section 51C, and we do not consider that the Commission has conducted the necessary analysis, supported by the necessary probative evidence, to justify any of the more interventionist options canvassed in the Draft Report.

31.11. It appears that these problems may be a function of the limited time for this Market Study to be completed (originally slated for 12 months, compared to two years for the equivalent grocery market study in the UK) and potentially the levels of Commission resources available. But, these constraints cannot justify not applying the necessary rigour and process required to make recommendations that would cause a major interference with the business operations of the participants and which would introduce risks to the resilience of the supply chain of a sector of such importance to New Zealand. A time or resource constrained process must cause the Commission to err on the side of lower level interventions, rather than greater and internationally unprecedented interventions.

31.12. Our position on this is unequivocal: the interventionist options put forward by the Commission and which we have opposed, are not warranted based on the evidence, they have not been properly tested with us, and they almost certainly would lead to increased prices and poorer outcomes for consumers, without any proper problem definition or cost benefit analysis. We would regard any recommendation that any of those options be taken up, to be procedurally flawed, manifestly incorrect, and patently unwarranted.

32. Next steps

32.1. We consider the appropriate recommendations that the Commission might advance, and ones that will have benefit for New Zealand consumers, are the ones that have been "tried and tested" overseas, where there is consensus across the industry, and that we have committed our support to. Namely:

32.1.1. We support the introduction of a mandatory Grocery Code to enshrine a higher standard of practices across the sector and ensure small suppliers in particular get a fair go;

32.1.2. We support clearer guidance on the way specials and promotions are communicated, clearer terms and conditions for loyalty programmes, and the introduction of a mandatory Unit Pricing Code to make things clearer for shoppers;

32.1.3. We support a waiver / prohibition of "no supermarket" provisions in leases and land covenants (beyond an initial period to enable investment) as well as changes to overseas investment approvals and planning laws; and

32.1.4. We support oversight from a Grocery Ombudsman.

32.2. We are confident that the reforms we support represent meaningful change and will make a difference. We are committed to working with the Commission, the Government, and industry to support those changes and best ensure they are designed and implemented in ways that work for the benefit of New Zealders.

32.3. We would also support a further review in relation to the New Zealand retail grocery sector after an appropriate period of time, say 5 years, to observe and report back. The establishment of the Grocery Ombudsman during that time will also assist the Commission in gathering information on the sector to inform it on the impacts of those reforms and its understanding of the sector more broadly. We have also said that if, following the conclusion of the Market Study and sufficient passage of time to implement and assess the impact of the other options we support, there is a view that additional wholesale supply would also be of benefit, then we are open to exploring voluntary commercial wholesale supply.

APPENDIX ONE

Overseas Investment Office case study on Costco

OVERSEAS INVESTMENT OFFICE

Land Information New Zealand
Toitū te whenua

Costco
Case Study

Costco Wholesale New Zealand Limited (Costco) – was in March 2020 granted consent by the Office to acquire about 2.7 hectares of land in Westgate for approximately $23 million. It was also granted consent to establish a business in New Zealand where expenditure (before opening the business) is likely to exceed $100 million.

Costco is a global membership retail warehouse business, and this will be the first Costco in New Zealand. The company plans to build a large retail warehouse and parking for at least 750 cars, and will also develop a petrol station nearby. The land needed for the petrol station does not need consent under the Overseas Investment Act because it is not sensitive land.

> The Office granted consent because the benefits to New Zealand include new jobs for the construction and ongoing operation of the warehouse, car park, and fuel station.

Costco is a US$138 billion retailer that operates over 770 membership retail warehouses in 40 US States and other countries like Canada, the United Kingdom, Japan and Australia. It employs over 245,000 people and serves over 98 million members worldwide. It is the third largest retailer in the world.

98 million members worldwide

770 membership retail warehouses

245 thousand employees worldwide

The Office granted consent because the benefits to New Zealand include new jobs for the construction and ongoing operation of the warehouse, car park, and fuel station. There is also additional investment into New Zealand, as a new retail format in New Zealand adds increased market competition and options for consumers. This investment also provides an opportunity for the increased export of New Zealand products to other Costco stores worldwide.

Costco has been granted consent by the Overseas Investment Office to establish a business in New Zealand

For more information: Phone: 0800 665 463 (New Zealand only), Phone: +64 7 974 5595 (international callers), Email: oio@linz.govt.nz

APPENDIX TWO

Additional limitations with the Commission's consumer survey

1. Additional limitations with the Commission's consumer survey

   1.1. In addition to the limitations outlined in FSNI's submission,[330] the following identifies issues with the Commission's consumer survey, which means that from our perspective the results of that survey cannot be relied upon without significant qualification and caveats.

   1.2. We understand that the Commission's consumer survey was available to anyone with a link to the survey (which could have either been received as a result of the Commission's media release announcing the survey, by visiting the Commission's website, by responding to social media and third party advertising of the survey (for example, Consumer NZ), or found via direct sharing of the online link). This presents a significant risk to the robustness of survey insights, as it is unlikely that there was any controlled quota system used - where the respondent pool is managed in a way that ensures that the profile of respondents is statistically representative and robust (for example, with reference to possible demographic criteria such as age, income or location). Accordingly, it would be necessary to apply weightings to any responses to achieve any robustness in the responses. We understand that was not done (and, in any event, some experts are critical of the ability for weightings to adequately deliver representative insights).[331]

   1.3. Irrespective of attempted weightings, the nature of an online submission methodology in the context of a Market Study also presents a significant risk of respondent skew. For example, organisations that may have a particular viewpoint on the Commission's Market Study are able to promote the survey to their online communities of interest (for example, we saw Consumer NZ promote the survey under the byline "Are you paying too much for your groceries?" - further impacting the representative nature of any response). Any experienced survey expert would consider this to be a significant risk in terms of delivering a robust and representative response.

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[330] Foodstuffs North Island's submission on grocery market study draft report (10 September 2021). Public Version. Retrieved from: https://comcom.govt.nz/__data/assets/pdf_file/0034/265768/Foodstuffs-North-Island-Submission-on-Market-study-into-grocery-sector-draft-report-10-September-2021.pdf

[331] For a selection of some recent discussion on the challenges of using non-probability sampling (for example, online surveys) vs probability sampling see:

- Pew Research Centre: Internet Surveys. Available at https://www.pewresearch.org/politics/methodology/collecting-survey-data/internet-surveys/;
- (22 December 2015). 7 Deadly Sins of Online Surveys. Forbes. Available at: https://www.forbes.com/sites/paultalbot/2015/12/22/7-deadly-sins-of-online-surveys/?sh=2068fea05515
- (2017) The SAGE Handbook of Online Research Methods. Available at: https://methods.sagepub.com/Book/the-sage-handbook-of-online-research-methods-second-edition
- Chittaranjan Andrade. The Limitations of online surveys. Indian Journal of Psychological Medicine, Volume 42, Issue 6. (November 2020). Available at: https://journals.sagepub.com/doi/pdf/10.1177/0253717620957496; and
- The accuracy of measurements with the probability and nonprobability survey samples. Public Opinion Quarterly, Vol. 82, No. 4. Available at https://pprg.stanford.edu/wp-content/uploads/The-Accuracy-of-Measurements-with-Probability-and-Nonprobability-Survey-Samples.pdf

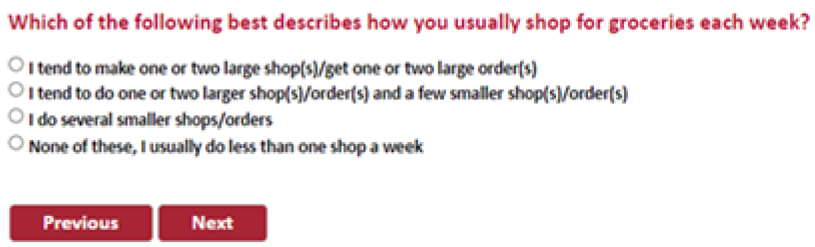
1.4. The Commission's consumer survey also contained a large number of multi-choice questions, and often with a large number of multiple choice options per question:

1.4.1. In the experience of our experts, the larger the number of multi-choice options that exist for a question, the less the attention given to the options. Given some questions have 15 or even 19 different options, our experts consider that this is likely to be an issue for insights gained from the survey.

1.4.2. Additionally, if the order of options is not randomised (and we are unclear whether this was the case in the Commission's survey), responses will tend to weigh substantially towards those options presented first (for example, the retailers listed first) rather than those options presented down the list.[332]

1.5. Good survey practice would also typically juxtapose opposing options first, before offering hybrid response options - to help ensure that options are clear to respondents. Figure A below outlines one example of a question that is worded in a way that is unclear or not consistent in grammar.

Figure 1: Options may be unclear

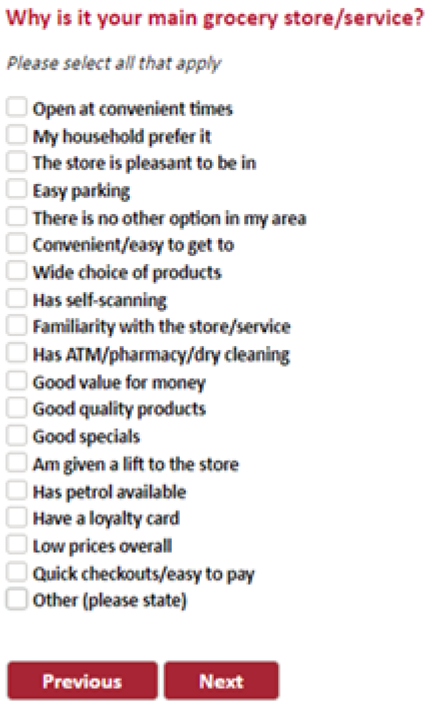


1.6. In our experience, using the word "groceries" in the context of the questions asked is also likely to have confused respondents and skewed insights. Specifically, while efforts were made to position this terminology early in the survey as not being specific to any one channel, our own research experience is that the term "groceries" is more likely to infer a traditional supermarket than for example a question asking about 'milk', 'bread', 'fresh food' or 'meals'. As such, we expect this terminology may have impacted upon consumer responses by limiting the respondents' mental frame of reference.

1.7. The survey also included a number of cognitively challenging or hypothetical questions where, in our own research experience, consumers are unlikely to be able to respond accurately, or provide a meaningful reply. For example, Figure B includes an example of a question that is long, complicated and grammatically varied (which impacts how easy it is to interpret).

[332] Order Bias is considered a significant contributor in survey interpretations. For example see:
- (31 July 2014). Order Bias Is a Larger Source of Error Than You Think. Insights Associations. Available at: https://www.insightsassociation.org/article/order-bias-larger-source-error-you-think
- J. Krosnick, D.F. Alwin. An Evaluation of a Cognitive Theory of Response-Order-Effects in Survery Measurement. Public Opinion Quarterly, Volume 51, Issue 2 (1 January 1987). Available at: https://academic.oup.com/poq/article-abstract/51/2/201/1847197

Figure 2: Long, complicated and incomplete list



1.8. We also note that Figure B did not include online shopping as an option (a significant omission), quality of service, friendliness of the team, or on-shelf product availability

1.9. The survey also included a number of questions asking customers to estimate their approximate weekly spend. Again, in our own research experience, respondents typically find it extremely difficult to provide an accurate response to this type of question - let alone if having to differentiate spend between different store types.

1.9.1. Adding claimed figures together will give neither an accurate number on the actual total spend, nor a meaningful perspective on the perception of spend - such is the limitation of customer recall on a question like this.

1.9.2. WWNZ would typically look to use Onecard insights to understand actual versus claimed customer spend behaviour.

1.10. Hypothetical questions such as the example included in Figure C below are even more likely to present cognitive challenges for respondents - particularly when concepts such as ‘foreseeable future’ are also incorporated.[333] Additionally, contradictory questions are being asked within a hypothetical scenario (the headline question refers to the closure of your main grocery store, while the subsequent question refers to the replacement of the main shop with ‘smaller ones’, a different scenario from the headline question).

[333] The use of hypothetical questions as part of consumer research should be treated with significant caution due to the potential for bias. For example, see: G.J. Fitzsimons ”Nonconscious and Contaminative Effects of Hypothetical Questions on Subsequent Decision Making” (2001) available at:https://faculty.fuqua.duke.edu/~gavan/bio/GJF_articles/hypothetical_questions_jcr_01.pdf

Figure 3: Hypothetical question difficult to get meaningful responses

If your main grocery store/service(s) closed for the foreseeable future, which store/service(s) would you use instead?

If you would replace your main shop(s) with many smaller ones, please select all stores you would visit

- ☐ I would go to the same store in a different location, or use the same type of store/service somewhere else.
- ☐ New World
- ☐ PAK'nSAVE
- ☐ Four Square
- ☐ FreshChoice
- ☐ SuperValue
- ☐ An ethnic supermarket (eg, Tai Ping, Japan Mart, Yogijis Food Mart)
- ☐ Another supermarket (eg, Farro Fresh, Moore Wilson's, Bin Inn)
- ☐ A single-category or specialist grocery store (eg, greengrocers, butchers, bakeries)
- ☐ A general merchandiser (eg, The Warehouse)
- ☐ A convenience store (eg, dairies, petrol stations, Night n Day)
- ☐ A meal kit provider (eg, Hello Fresh, My Food Bag)
- ☐ An online-only supermarket (eg, The Honest Grocer)
- ☐ Other (please state)

1.11. The loyalty section of the survey also had a number of significant limitations:

1.11.1. The way that the loyalty programmes were listed in the first loyalty question would have been confusing to respondents. The way that the options are presented seems to confuse the supermarket loyalty schemes with wider loyalty schemes that also have a supermarket relationship. Clubcard is New World's loyalty programme, Airpoints is not New World's programme, it is Air New Zealand's loyalty programme. Yet the question is asking about 'grocery loyalty cards'. Flybuys was also missing which would seem to be a notable omission - in particular given it is 25% owned by Foodstuffs, and is linked to the rewards available on New World's Clubcard (as are Airpoints).

1.11.2. The loyalty data collection questions also asked if customers read loyalty card terms and conditions or understand how their data is used, but there was no question exploring if customers are comfortable with the way that their data is used, which would be relevant to interpretation. There is likely also a need to contextualise any responses with reference towards how consumers would answer survey questions relating to terms and conditions in general (not specific to grocery loyalty).

APPENDIX THREE

COVID-19 supply chain risk disclosures in annual reports of international grocery retailers

Supermarket	Risk description (from 2020/21 Annual Reports)
Woolworths Limited[334]	"The Group acknowledges that the COVID-19 pandemic is a contributory and/or causal factor to risks relating to, amongst others, lockdowns and trading impacts, customer and team member safety, mental health, economic conditions, consumer sentiment, and multiple operational and supply chain impacts. We are proud of our response to the pandemic and our ability to keep our team and customers safe while maintaining supply. However, we continue to be prepared for the rapidly evolving nature of the virus and emergence of new variants that make impacts difficult to predict and respond to"... "Failure to respond to pandemic events (large-scale outbreaks of infectious diseases) which can greatly impact health and wellbeing over a wide geographic area. Such events can cause significant economic, operational and social disruption which can adversely affect our businesses… Supply chain impacts, notably relating to vulnerable customers and provision of essential/basic consumer needs remains a key focus, with investment in improved demand forecasting and availability management, particularly following state or local lockdowns."
Coles Group[335]	"There continues to remain a high level of uncertainty with regard to how the COVID-19 pandemic will evolve both domestically and internationally, along with corresponding responses from governments, businesses, customers and the broader community over the short and long term. Key drivers of uncertainty include, but are not limited to: evolution of the virus, rates of infection, the treatment and vaccination rollout timeline, and government regulatory and policy response (including government responses to outbreaks, shutdowns of sectors of the economy, border closures, and variations in restrictions between states and countries)"... "Furthermore, the pandemic exposes us to the significant and/or prolonged disruptions in the supply chain, store and online operations which can impact on our ability to serve our customers and the community"... "Our COVID-19 response includes sourcing alternative supply arrangements, scaling up production and distribution of substitute goods (potentially simplifying range to aid production efficiency), rapid onboarding of new suppliers, management of the promotions calendar to support availability and where necessary (for example during COVID-19) the introduction of purchasing limits."
Tesco Plc[336]	"The continuing global COVID-19 pandemic may have a significant and prolonged impact on global economic conditions, disrupt our supply chain (including our supplier base, specifically regarding business closure and consolidation, labour shortage, raw material supply and cost inflation), increase employee absences and adversely impact our operations".
Morrisons[337]	"COVID-19 continues to have a significant and widespread impact on our business. Failure to appropriately respond to and manage the impacts of COVID-19 on our colleagues, customers and suppliers or to adapt our ways of working could adversely affect our business performance."
Costco[338]	"The COVID-19 pandemic created unprecedented supply constraints including disruptions and delays that have impacted and could continue to impact the flow and availability of certain products… The continuing impacts of the COVID-19 pandemic are highly unpredictable and volatile, and are affecting certain business operations, demand for our products and services, in-stock positions, costs of doing business, availability of labor, access to inventory, supply chain operations, our ability to predict future performance, exposure to litigation, and our financial performance, among other things."

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[334] Woolworths Limited Annual Report 2021. https://www.woolworthsgroup.com.au/icms_docs/195984_annual-report-2021.pdf
[335] Coles Group Annual Report 2021. https://www.colesgroup.com.au/FormBuilder/_Resource/_module/ir5sKeTxxEOndzdh00hWJw/file/Annual_Report.pdf
[336] Tesco Annual Report 2021. https://www.tescoplc.com/media/757589/tesco_annual_report_2021.pdf
[337] Morrisons Annual Report 2021.
[338] Costco Annual Report 2020. https://investor.costco.com/static-files/7ef7bed6-c48f-4687-9c82-eb104b4823a5

J Sainsbury Plc[339]	"COVID-19 has had a significant impact on the business over the past year, and the Committee has kept abreast of our key priorities to keep our customers and colleagues safe, help feed the nation and support our communities and the most vulnerable in society."
Marks and Spencer[340]	"The risk stemming from the complexity and fragility of global supply chains continues to be emphasised by the pandemic… there has also been disruption to supply chains caused by the pandemic and Brexit, but the Group has worked with suppliers to ensure an effective response and to minimise the impact."

[339] J Sainsbury Plc Annual Report 2021. https://about.sainsburys.co.uk/~/media/Files/S/Sainsburys/documents/reports-and-presentations/annual-reports/sainsburys-ar2021.pdf

[340] Marks and Spencer Annual Report 2021. https://corporate.marksandspencer.com/msar2021/m-and-s_ar21_full_210602.pdf