Foodstuffs North Island Limited and Foodstuffs South Island Limited

Response to Statement of Issues

PUBLIC VERSION

26 April 2024

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

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CONFIDENTIALITY

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

INTRODUCTION

2 The Parties welcome the opportunity to provide feedback on the Commission's statement of issues (**SOI**).

3 Before addressing the SOI and merger clearance considerations in detail, the Parties wish to be clear that the proposal to merge the co-operatives is in no way intended to hinder or undermine the ongoing efforts to strengthen grocery competition, nor is it capable of having that effect. In fact, the opposite.

4 The Parties are fully committed to supporting the findings in the market study, and to working constructively with the Commission, Government and other stakeholders to foster and strengthen retail grocery competition. The Parties have cooperated and complied with all recommendations, legislative requirements and investigations arising out of the market study, and FSNI publishes a public "Grocery Market Regulation Dashboard" to keep itself accountable directly to customers and other stakeholders.[1]

5 The Proposed Transaction would allow the Parties to make their offering more organised and efficient, and it would lower their cost of doing business (savings which would be shared with consumers),[2] which is aligned with what is expected of them by the Commission, Government and other stakeholders. The Proposed Transaction is only, in effect, a change in the structure through which the Parties present their single national offering. The Proposed Transaction can in no way hinder the Commission or Minister from "escalating" the regulation of the sector under the Grocery Industry Competition Act (**GICA**) (or through developing new policy or legislation) should the regulated grocery retailers fail to comply with that Act, or the existing regulation be found not to be delivering benefits. The Proposed Transaction would not cut across the objectives, or the power, of these tools.[3]

6 Regulatory threat is real and proximate, and the Proposed Transaction would not alter that. Scrutiny from Government, the Commission, suppliers and customers is

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1 See: https://www.foodstuffs.co.nz/Grocery-Market-Regulation-Dashboard. The Grocery Market Regulation Dashboard outlines all the changes the co-operative has made since the Commission published its market study into the grocery sector in March 2022, and the enactment of the Grocery Industry Competition Act in July 2023.

2 As the Parties have previously indicated, the rationale for the Proposed Transaction is to achieve cost reductions (including overhead costs and product costs), efficiency gains, increased agility and innovation and a more cohesive national offering, which would ultimately deliver better value for customers at the checkout.

3 Further, the Parties' ability to present a truly national regulated wholesale offering will be practically materially easier following the Proposed Transaction, meaning the Proposed Transaction would be beneficial to the measures under the Grocery Industry Competition Act, as well as pro-competitive. In addition, it would be easier to administer.

also intense – these are the Parties' stakeholders and the Parties are driven by them – ultimately, they stop listening at their business peril.

7 The Parties are mindful of the importance of the grocery sector to the lives and wellbeing of New Zealanders, and welcome feedback and changes that would improve competition. But preventing the Proposed Transaction would not increase competition, it will only mean continued higher costs for the Parties, a co-operative structure that is no longer fit for purpose and, ultimately, less ability to offer lower grocery prices and provide a competitive offering.

8 Against that background, in terms of the specific legal question the Commission is tasked to consider in the merger clearance context, in the Parties' view the Commission can be satisfied the Proposed Transaction would not be likely to result in a substantial lessening of competition in any market. The concerns raised in the SOI are addressed in detail in later sections of this submission. The key points can be summarised as follows.

The acquisition of groceries from suppliers

9 The Proposed Transaction would not result in any lessening of competition in markets to acquire grocery products for retail sale. That is because the Proposed Transaction would not increase the Merged Entity's buyer power such that it would have the ability to anti-competitively depress prices or stifle innovation. The Merged Entity would also have no incentive to engage in such conduct – the Parties do not have such an incentive now and their incentives would not change as a result of the Proposed Transaction.

The Proposed Transaction would not change <u>incentives</u> such that the Merged Entity would have the incentive to anti-competitively reduce price

10 It is important to bear in mind that any theory of harm involving the Merged Entity decreasing competition to supply groceries would ultimately harm the Merged Entity. Even assuming the intensity of competition is muted (which the Parties do not agree is the case), the fact is that the Parties do face competition. If they do not compete on price and non-price terms they will lose sales to Woolworths, The Warehouse, Costco and several others. This means the Merged Entity has an incentive to ensure competitive supply – its ability to obtain competitively-priced, and new and innovative, grocery products for retail sale, and maintain and improve its competitive positioning, depends on it.

11 The Merged Entity's incentives will not be different from the Parties' incentives today. The key reason is that the Proposed Transaction will not alter their incentives as far as retail competition is concerned. Grocery retailers buy groceries to sell in their stores, which compete in downstream markets – not for any other purpose. So, their incentives when they buy grocery products are to best compete to supply them at the retail level. Competitive conditions in retail markets will not change as a result of the Proposed Transaction, so incentives cannot change in terms of the acquisition of groceries.

12 Put another way:

12.1 in the counterfactual, where the Parties do not merge, they will continue to try and meet the demands of customers in the geographies they serve, which includes some national collaboration, and

12.2 in the factual, where the Parties merge, they will also be carrying out that exercise, but practically more cohesively, through one entity rather than two.

13 In order to achieve their goal of best meeting customer demand, the Parties' incentive is to ensure healthy competition in supplier markets. The manifestation of that incentive can be seen from the outcomes of the range reviews, and it can be seen in the Parties' efforts to improve competition in concentrated supplier markets, where prices and the diversity of offering are considered uncompetitive. For example:

13.1 the supply of nappies was, for a long period, effectively dominated by two brands, Huggies and Treasures. In [REDACTED], to support the emergence of competition. The introduction of a better value product led to increased competition and resulted in better pricing for customers, and

13.2 [REDACTED].

14 The current strategy for acquiring groceries, which has been adopted by both Parties (albeit FSSI is less progressed in implementation), is to focus on meeting customer demand with a more customer-insight-driven streamlined range. This is a process and model that is used by other retailers around the world. The Commission is familiar with it through its market study into the retail grocery sector, and it is one of many possible ways for competition to supply products to grocery retailers to play out. To the extent the centralised buying model is considered to continue to best meet customer demand, the Merged Entity proposes to adopt a similar strategy. But regardless, as above there will be no change to the Parties' incentives arising from the Proposed Transaction.

The Proposed Transaction would not change <u>incentives</u> such that the Merged Entity would have the incentive to suppress innovation

15 Similarly, if suppliers are not able to innovate, then the Parties are unable to present innovative products that customers want in their stores, such as Snackachangi chips. The Parties currently place a high degree of focus on new product development – they consider it a key competitive advantage. The Proposed Transaction can have no effect on this incentive, as it will not affect retail competition, including suppliers' ability to deal with individual stores. Put more broadly, unless Woolworths, The Warehouse, Costco, online direct-from-supplier alternatives, meal kit providers, Chemist Warehouse, Farro, Moore Wilson and others cease offering innovative products and ways of doing business, if the Parties reduce their support for innovation they will lose sales. Loss of sales is directly contrary to their interests.

The Proposed Transaction would not increase the <u>ability</u> to anti-competitively reduce price or innovation

16 The Proposed Transaction would not have a material impact on the Parties' buyer power. It is not expected to materially alter bargaining outcomes, and would not result in any ability to anti-competitively depress the prices the Merged Entity pays for groceries. Therefore, regardless whether the Commission accepts the Parties' incentives as described above, the Proposed Transaction would not be likely to substantially lessen competition in any market to acquire products for sale in retail stores.

17 The savings the Merged Entity anticipates it can achieve in the acquisition of groceries do not represent an anti-competitive price change arising from buyer power. [REDACTED].

18 To demonstrate that the Proposed Transaction will not materially increase the Parties' buyer power, the potential effect of the Proposed Transaction must be considered by reference to particular suppliers rather than "suppliers" as a single

group. That is because the markets suppliers participate in, and the way they interact with the Parties, vary widely. Put another way, multiple "markets" must be analysed.

19 For example, Kraft Heinz is a large supplier of a large range of food products, which supplies products nationally in New Zealand, as well as in many countries around the world. Kraft Heinz is in a different position to a small local supplier of a perishable fresh product such as lettuce. For neither of these suppliers is it in any way accurate to characterise the Proposed Transaction as a reduction in channels to market from "three to two":

19.1 Kraft Heinz would have countless alternatives to the Parties from a global perspective, supplies "must have" products and could easily credibly threaten to stop supplying them altogether. There cannot be a structural or systematic difference in bargaining outcomes where the Parties are merged compared with where they bargain separately, and

19.2 the small local supplier would not experience any reduction in its options, since only one of the Parties would currently form one of its options, and that would not change as a result of the Proposed Transaction. As an example [REDACTED]. An example for FSSI would be [REDACTED].

20 Although it may be possible to argue that sales of each product could be considered as a separate market, to avoid complexity suppliers can be appropriately categorised according to similarity of their circumstances, and thus the change (or lack of change) they would experience in their bargaining position as a result of the Proposed Transaction. Houston Kemp has assisted with this categorisation exercise. In summary:

20.1 *large national suppliers, including global and multi-nationals* have significant countervailing power, because of the large range of alternative channels to market they have, and/or because they supply "must-have" products. Regardless of any slight increase in bargaining power which, based on Houston Kemp's analysis, may arise from the Merged Entity's ability to assess its business nationally, the Merged Entity will have no ability to materially alter bargaining outcomes, let alone in a way that could anti-competitively suppress price or reduce innovation. Examples of suppliers in this category include Kraft Heinz (as above), Unilever, Nestlé, Fonterra, Coca-Cola, Frucor, PepsiCo, Mars, Mondelez Kellogg's, and Kimberly Clark,

20.2 any supplier *with the ability to supply in a limited geographic area*, whether due to its distribution capacity, the perishability of its product or some other reason cannot be affected by the merger. Currently, the supplier can supply one but not the other co-operative. Post-merger, the supplier will continue to be able to supply in the relevant geographic area. Currently, the supplier deals with one Foodstuffs entity (or one or several individual stores), along with any other customers it supplies. Following the Proposed Transaction it will also deal with one Foodstuffs entity (or one or several individual stores) and all the same alternative buyers. No merger-specific change to bargaining outcomes can arise,

20.3 the remaining suppliers include *smaller national suppliers*, and possibly some *regional suppliers*. In relation to these suppliers, Houston Kemp has made the conservative assumption that the co-operatives, now and in any counterfactual, comprise two completely separate channels to market. In reality, this is not accurate. But even on the basis of this assumption, it is inaccurate to characterise the Proposed Transaction as reducing channels to market from three to two, when suppliers typically appear to have realistic options beyond major grocery retailers. Such suppliers' alternative sales channels, as set out in more detail below and in Houston Kemp's analysis, include exporting, as well as sales to other domestic buyers such as Woolworths, other grocery buyers, foodservice buyers and food manufacturers.[4] Any hypothetical reduction in their options by one (i.e. FSNI and FSSI becoming a single entity) cannot give rise to a difference in bargaining outcomes that could result in a substantial lessening of competition.

21 Finally, the Parties note that if it is correct that the Proposed Transaction would increase the Merged Entity's buyer power such that it could anti-competitively reduce prices and/or innovation, then as the only national (and Australasian) buyer Woolworths should currently be achieving lower product prices than each of FSNI and FSSI. Woolworths should be the clear market leader. If this were the case, preventing the Proposed Transaction would also prevent FSNI and FSSI competing more effectively with their closest competitor, Woolworths. However, the Parties suspect it is more likely that Woolworths' product prices are not, in aggregate, materially or systematically lower than the Parties'.[5] This scenario would suggest the Proposed Transaction, by converting the two co-operatives into a single national entity[6] (where Woolworths is also a single national buying entity), would not materially alter the status quo in terms of buyer power.

No change to retail competition

22 As noted above, the Proposed Transaction would not alter concentration in any retail market. The Parties' retail networks do not overlap so local competition cannot be affected. To the extent competition has a national overlay, the Parties already present as a single offering through their shared brands, New World, PAK'nSAVE and Four Square. As such, incentives and ability to compete would not alter – the only change would be an increased *practical* ability to be cohesive in arranging and presenting its national offering in competition with national competitors.

23 Finally, the Proposed Transaction would not give rise to any loss of potential retail competition. [REDACTED].

24 [REDACTED].

25 [REDACTED].

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[4] In addition, if a particular product is important this is also a relevant factor because it reflects an overseas supplier selling into New Zealand that could presumably sell elsewhere, or because that supplier already faces significant competition from imports and so the effect of the transaction must be small. For further detail refer to **Appendix 1**.

[5] For the avoidance of doubt, the Parties have no real insight into the product prices Woolworths achieves.

[6] Noting there would remain a number of structural differences between the Merged Entity and Woolworths including that, unlike Woolworths, supplying to individual Foodstuffs stores would continue.

PART 1: THE ACQUISITION OF GROCERIES

MARKET DEFINITION

26 The Commission acknowledges that the channels available to suppliers could differ between product categories or by type of supplier,[7] however the Commission states that at this stage it has not defined the dimensions of any market more precisely, noting that it may not be practical to do so given the large number of products available at supermarkets.[8]

27 In Houston Kemp's 7 March 2024 report "Economics effects of Proposed Transaction of FSNI and FSSI", Houston Kemp explains that the assessment of the effects of the Proposed Transaction need to be undertaken in the context of the market in which each supplier operates, i.e. by reference to the degree of power held by that supplier and its other options for selling grocery products (i.e. to other grocery retailers and to other buyers). The Parties and Houston Kemp have assessed the Proposed Transaction by reference to this framework, the results of which are set out in the following section and in the Houston Kemp report at **Appendix 1**.

UNILATERAL EFFECTS

Suppliers already treat the Parties as a single national channel to market

28 In the SOI, the Commission states:[9]

> Some suppliers we have spoken with view FSNI and FSSI as separate entities and/or channels to market. In this respect, each of the Parties and Woolworths offers a separate opportunity to have a product listed, obtain terms, and negotiate contract renewals.

29 For the reasons set out in subsequent sections, it is not necessary to conclude on this point in order to be satisfied that the Proposed Transaction would not result in a lessening of competition.

30 Nevertheless, it is worth noting that statements from suppliers suggest that at least some already consider FSNI and FSSI to be a single channel to market. For example, in submissions to the Commission in the context of the market study, suppliers referred to the supermarket "duopsony" (being the Foodstuffs co-operatives and Woolworths) as being their key supermarket channels to market and did not distinguish between FSNI and FSSI. For example, the NZ Food and Grocery Council (**FGC**) submitted in 2021 that:[10]

> While Foodstuffs North Island and Foodstuffs South Island are separate cooperatives due to the fact that the cooperatives do not conduct business in each other's territory (there is no overlap in terms of competition or market activity), throughout New Zealand *from the*

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7 SOI at [70].

8 SOI at [72].

9 SOI at [89].

10 New Zealand Food & Grocery Council "Market study into the retail grocery sector: Preliminary issues paper – Submission by the New Zealand Food & Grocery Council" (4 February 2021) at [19]. FGC have made similar comments elsewhere. For example, FGC has stated:

- in its submission on the retail grocery market study draft report, "for suppliers, the grocery market dominated by two major retailers is the key route for supplier products on the domestic market", and
- in the FGC business magazine, "in economic terms, the market for grocery suppliers is a duopsony – two buyers".

perspective of consumers and suppliers, there remains a duopoly/duopsony. [emphasis added]

31 At no point in the 16 month-long and wide-ranging market study did suppliers suggest that they considered FSNI and FSSI to be separate channels to market, or that they could somehow play one co-operative against the other to obtain better trading terms. The basis on which suppliers now suggest that they consider the Parties to be separate channels to market is not presented in the SOI nor in public submissions on the Proposed Transaction. Nor does anything in the final report on the market study suggest the Commission disagreed with suppliers in this respect.

32 The Parties' view is:

32.1 for *suppliers with the ability to supply in a limited geographic area*, whether due to their distribution capacity, the perishability of products or some other reason, it would not be relevant whether the Parties are two or a single channel to market as they would only deal with one of them, before and following the Proposed Transaction,

32.2 for *large national suppliers, including multi-nationals*, the Parties expect they are perceived as a single national offering, albeit one which suppliers need to negotiate with twice, and

32.3 for *smaller national suppliers*, and possibly some *regional suppliers*, at the very least these suppliers would perceive the close relationship between the two co-operatives and that they present a single national retail offering.

There is no material competitive tension between the co-operatives that would be lost as a result of the Proposed Transaction

33 In the SOI, the Commission states "*FSNI and FSSI…form part of the 'outside option' available to suppliers in their dealings with each buyer individually*".[11]

34 First, and importantly, there would be no material difference between the factual and counterfactual, and accordingly the Proposed Transaction can have no meaningful effect on bargaining outcomes. Downstream, the Parties operate in separate geographies and they do not meaningfully compete to acquire groceries from suppliers. The Commission has acknowledged that in practice, in terms of the way in which the Parties acquire groceries, "*there is limited competitive tension between the two co-operatives, including no mechanism with which they can play the Parties off against each other, or leverage their position with one in order to obtain better trading terms with the other*."[12] The Commission cited five separate interviews with suppliers in support of this proposition,[13] noting that only one industry participant it spoke to indicated that there were some instances where suppliers might play off the co-operatives against each other, and that this was more in respect of wholesale than retail.[14]

35 Second, the spectrum of options for suppliers will not be affected by the Proposed Transaction such that there could be the potential for an adverse impact on competition. Consistent with Houston Kemp's report on the Statement of

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[11] SOI at [82.1].

[12] SOI at [87].

[13] SOI at footnote 71.

[14] SOI at footnote 71.

Preliminary Issues,[15] the key question is what are a particular supplier's options, and how would they be affected by the Proposed Transaction? For a discrete number of suppliers the other co-operative could technically be regarded as one of the "outside options". However, suppliers' other outside options (as set out in further detail from paragraph 43 below), and the fact that the parties appear not to be considered as fully separate "heads in the market" (as discussed above at paragraphs 30 to 32) suggests the aggregation of the Parties can have no anti-competitive effect on bargaining outcomes.

36 It is important to note that the Houston Kemp analysis proceeds from the assumption that FSNI and FSSI can be regarded, for the purposes of the acquisition of groceries, as entirely separate heads in the market. As set out above at 34, and elsewhere in the Parties' submissions, this assumption is not correct. For example, the Parties cannot viably diverge in their ranging in the way they could diverge from competitors – this is illustrated by the figures set out in the clearance application i.e. a [REDACTED]% overlap between the co-operatives in stockkeeping units, with [REDACTED].[16] As such, the Houston Kemp analysis can be regarded as conservative in this respect.

There is no risk of a lessening of competition in respect of fresh products

37 The Commission suggests that any existing competition between the Parties e.g. for fresh produce in periods of short supply, would be lost as a result of the Proposed Transaction.[17]

38 A product shortage would not generally give rise to more direct competition between the Parties than would occur at any other time, and accordingly there would be no material difference between the factual and the counterfactual. In the passage the Commission cites from the Houston Kemp report in relation to the Statement of Preliminary Issues, Houston Kemp was seeking to illustrate that the concepts and application of the bargaining framework would not alter when considering times of shortage, not to show that greater competition can be expected between the Parties during times of shortage.[18]

39 As set out in further detail in section 4 of Houston Kemp's report on the Statement of Preliminary Issues:

39.1 a product shortage does not, in general, affect the buyers with which a supplier may deal, and accordingly the position would not be different in these circumstances, and

39.2 while the price may move in response to product availability, the options affecting how that occurs would not typically alter. Suppliers' other options (including exporting, selling to other key retailers, foodservice, food manufacture or meal kit providers) remain a key factor in their willingness to accept particular terms when negotiating with FSNI or FSSI (or any other buyer).

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15 Houston Kemp, *Economic effects of proposed merger of FSNI and FSSI: A report for Chapman Tripp,* 7 March 2024.

16 [REDACTED].

17 SOI at [82.2].

18 Houston Kemp, *Economic effects of proposed merger of FSNI and FSSI: A report for Chapman Tripp,* 7 March 2024, at [92].

40 Accordingly, the Proposed Transaction would be unlikely to materially affect the relative bargaining positions of Foodstuffs and suppliers of such fresh produce i.e. Houston Kemp's framework applies for these suppliers as for all others.

The Proposed Transaction is not appropriately characterised as a "three to two" merger of buyers

41 The SOI characterises the Proposed Transaction as a "reduction from three to two major acquirers of groceries in New Zealand".[19] However, this characterisation does not account for the varied positions of different suppliers and their other options for selling their products. Further, as shown in Houston Kemp's analysis, a "three to two" is not an appropriate characterisation for any of the categories of suppliers considered.

42 In particular, the difference between the factual and counterfactual would not be material from a competition perspective. Removal of one buyer (and the one that can least appropriately be characterised as a genuinely separate channel, as discussed above) would not be likely to materially impact bargaining outcomes.

Suppliers have a spectrum of channels to market

43 The Commission states that alternative supply channels outside of grocery retailers would provide little constraint on the Merged Entity and that it "has not seen any evidence that suggests that those alternatives are a realistic alternative for most suppliers".[20] The Commission does not cite evidence in support of this concern.

44 The Commission's assertion is inconsistent with Houston Kemp's analysis, which illustrates that:

44.1 there will be no change for large suppliers (which are likely to have significant countervailing power, and may supply "must have" products) or small suppliers (which are likely to continue to negotiate with one or a small number of stores directly), and

44.2 the medium or "middle" suppliers appear typically to have realistic options outside of the major grocery retailers. Houston Kemp's analysis shows that of the [REDACTED] suppliers analysed, only [REDACTED] have been identified as not having one or more realistic options outside of grocery retailers. These suppliers represent [REDACTED], or less than 1 per cent of FSNI's sales. Of these [REDACTED] suppliers, [REDACTED] supply mostly or exclusively supply private label products to FSNI. The single remaining supplier, [REDACTED], represents less than [REDACTED] FSNI's sales, and is [REDACTED][21].

Suppliers exercise countervailing market power

45 The Commission states a preliminary view that "in general, suppliers may not have countervailing power, but if they do, they are not likely to be able to exercise it to the extent that they would meaningfully constrain an exercise of buyer power by the Merged Entity."[22]

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19 SOI at [48.2].

20 SOI at [98].

21 [REDACTED].

22 SOI at [92].

46 As set out in further detail above, there will be no material difference in buyer power between the factual and the counterfactual. As such, the level of countervailing power will not materially alter, and competition cannot be lessened.

47 Further, suppliers have material countervailing power. First, the vast majority of groceries sold by FSNI and FSSI on a regular basis are purchased from a small group of (generally multinational) suppliers who enjoy a high degree of countervailing market power. For example, in the 13 weeks ending 7 April 2024:

47.1 25% of FSNI's sales (excluding fresh products) were attributable to [REDACTED] of FSNI's biggest suppliers. These suppliers were [REDACTED], and

47.2 90% of FSNI's sales (excluding fresh products) came from [REDACTED] suppliers,

47.3 25% of FSSI's sales (including fresh products) were attributable to [REDACTED] of FSSI's biggest suppliers. These were [REDACTED], and

47.4 approximately 60% of FSSI's sales (including fresh products) came from [REDACTED] suppliers.

48 These large, multinational suppliers (which make up a significant percentage of the Parties' total sales) generally have parent companies many times larger than the Parties and, in many cases sell "must-have" items. The Parties are obliged to accept price terms (or cost price increases) from these suppliers or face an inability to supply their customers with well-known brands. This would severely compromise the competitiveness of the Parties' offering. The significant bargaining position of these multinational suppliers is a topic gaining significant attention internationally. For example:

48.1 multinational suppliers such as Nestlé, Coca-Cola, Mars and PepsiCo are being urged to appear at the Australian Senate inquiry into supermarket prices, with the inquiry's terms of reference including a mandate to "examine the role of multinational food companies in price inflation",[23] and

48.2 analysis from McKinsey & Company in April 2024 compared the margin performance between nine European grocery retailers[24] and the top seven consumer packaged goods companies (being Nestle, P&G, PepsiCo, the Coca-Cola Company, Kraft-Heinz, Mondelez and Kellogg). The graph below illustrates that the large multi-national suppliers achieved margins that were more than twice as high as those achieved by the grocery retailers. In this respect it is worth noting the Commission's analysis of New Zealand grocery retailers' margins compared with overseas grocery retailers, which indicated that, for the period analysed, "with the exception of one data point, the [New

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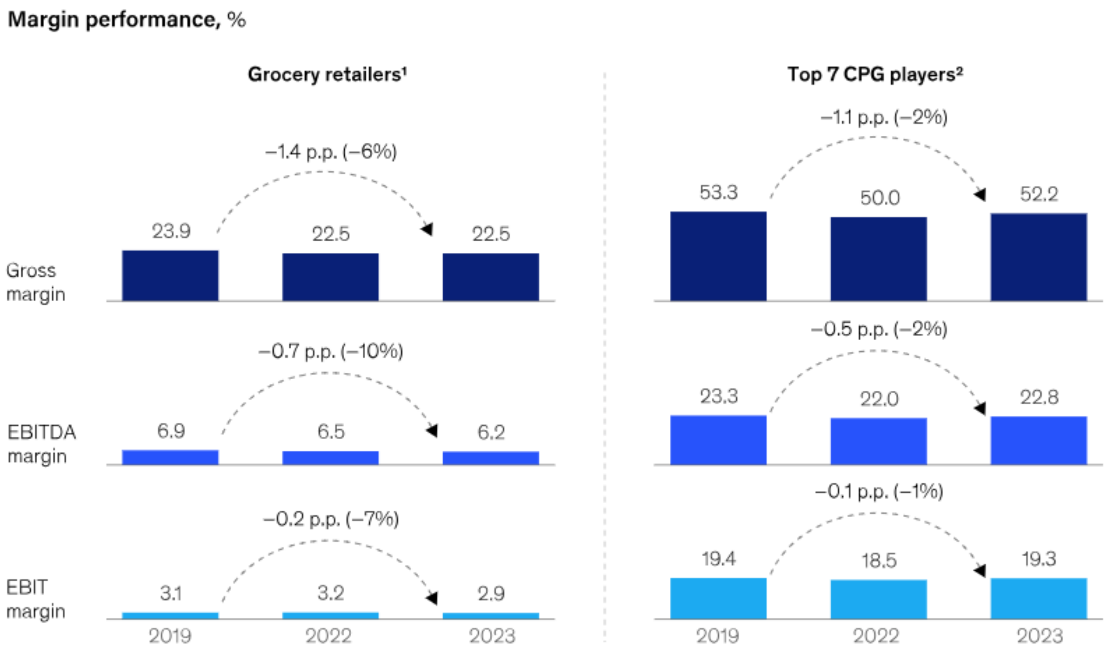
23 See: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Supermarket_Prices/SupermarketPrices/Terms_of_Reference

24 The sample of nine European grocery retailers included Ahold Delhaize, Carrefour, ICA, Axfood, ELO S.A, Kesko, DIA, Jeronimo Martins, and Sonae Retail.

Zealand] major grocery retailers' EBITDAR margins fall within the interquartile range of the overseas sample".[25]

Figure 1: Comparison of margins achieved by multi-national suppliers and European grocery retailers



49 In the Parties' view, given the scale and relative size of large multinational suppliers compared to grocery retailers in New Zealand, large multinational suppliers may be able to charge even higher cost prices (and enjoy higher margins) in New Zealand than elsewhere. For example, Coca Cola European Partners' 2023 revenue per unit grew 16.2% in the Asia Pacific region (compared to 8.2% in Europe), and Kelloggs' 2023 revenue grew 12.8% in the AMEA region[26] (compared to 0.2% in Europe, -3.5% in Latin America and 8.7% in North America).[27]

50 Secondly, there is a high supplier concentration across many key product categories in New Zealand, which gives suppliers in those categories material countervailing power. This is illustrated in the table below.[28]

Figure 2: Supplier concentration in key product categories (FSNI data)

Product category	**Total number of suppliers in category**	**Number of major suppliers in this product**	**Name/s of major supplier/s**	**Percentage of sales generated by major suppliers of this product**
Butter	18	3	[REDACTED]	[REDACTED]%
Block cheese	4	2	[REDACTED]	[REDACTED]%

25 Commerce Commission, *Market study into the retail grocery sector: final report*, 8 March 2022 at [3.79] and Figure 3.5 (Figure 3.5 from the market study final report is replicated below at Figure 13).

26 Asia Pacific, Middle East and Africa.

27 See: https://www.bloomberg.com/profile/company/CCEP:US; https://www.bloomberg.com/profile/company/0194431D:US.

28 Statistics based on FSNI's total grocery sales in the 13 weeks ending on 14 April 2024.

Product category	Total number of suppliers in category	Number of major suppliers in this product	Name/s of major supplier/s	Percentage of sales generated by major suppliers of this product
Loaf bread	15	2	[REDACTED]	[REDACTED]%
Yoghurt	26	3	[REDACTED]	[REDACTED]%
Canned fish	19	2	[REDACTED]	[REDACTED]%
Canned fruit	27	2	[REDACTED]	[REDACTED]%
Canned vegetables	35	2	[REDACTED]	[REDACTED]%
Baked beans and spaghetti	5	1	[REDACTED]	[REDACTED]%
Sugar	20	1	[REDACTED]	[REDACTED]%
Biscuits	70	4	[REDACTED]	[REDACTED]%
Frozen fish	4	2	[REDACTED]	[REDACTED]%
Frozen poultry	8	2	[REDACTED]	[REDACTED]%
Frozen vegetable	17	2	[REDACTED]	[REDACTED]%
Frozen potatoes	12	4	[REDACTED]	[REDACTED]%
Ice cream (Standard tubs)	6	3	[REDACTED]	[REDACTED]%
Ice cream – Convenience / premium	27	2	[REDACTED]	[REDACTED]%
Chips	41	2	[REDACTED]	[REDACTED]%
Chocolate blocks	25	2	[REDACTED]	[REDACTED]%
Carbonated beverages	59	2	[REDACTED]	[REDACTED]%
Nappies	9	2	[REDACTED]	[REDACTED]%
Pet food	28	3	[REDACTED]	[REDACTED]%
Laundry	35	4	[REDACTED]	[REDACTED]%
Beer	103	3	[REDACTED]	[REDACTED]%

51 A further illustration of the countervailing power of suppliers that are large and/or operate in concentrated markets is that, prior to 2015 Gilmours was primarily a traditional wholesaler, selling a range of chilled and ambient grocery products for retail sale, with a strong focus on tobacco, carbonated beverages and confectionary. In 2015 Gilmours' key suppliers (including [REDACTED]) decided to bypass Gilmours and supply directly to traditional customers. As a result, [REDACTED] and Gilmours was forced to refocus its business away from traditional wholesaling towards foodservice. Reflecting this trend, [REDACTED].

52 Thirdly, even outside the categories where there is high supplier concentration, suppliers have other sources of countervailing power available to them, including the availability of alternative sales channels, such as other grocery retailers, an export

alternative or the other channels discussed at paragraph 39.2 above – see the Houston Kemp report at **Appendix 1**.

53 In addition to the factors considered by Houston Kemp, smaller suppliers (and suppliers that account for a small share of FSNI and/or FSSI's sales) can have high brand-value, and even "must-have" products. For example, the Parties both consider that their offering would be very detrimentally affected if they were unable to stock products with high brand value, whose suppliers are smaller in size. For example:

53.1 FSNI considers [REDACTED], [REDACTED] and [REDACTED] to be examples of "must have" products that are supplied by smaller suppliers. [REDACTED], and

53.2 FSSI considers [REDACTED], [REDACTED] and [REDACTED] products to be "must have" products in the South Island. [REDACTED] and [REDACTED] products are supplied by small, regional based suppliers.

54 Finally, there would continue to be intense scrutiny of grocery retailers' conduct towards suppliers, in both the factual and counterfactual, which would buttress suppliers' countervailing power. This scrutiny includes, in particular, the Commission's monitoring, enforcing, reviewing and reporting on the Grocery Supply Code, whose purpose is to promote competition and efficiency in the grocery market by:

54.1 promoting fair conduct, and prohibiting unfair conduct,

54.2 promoting transparency and certainty about the agreements, and

54.3 contributing to a trading environment that supports competition, confident participants and a diverse range of suppliers in the grocery industry.

Merger will not impact the ability for suppliers to negotiate at the store level, or the viability of suppliers that cannot range nationally

55 The Commission states that "*a considerable degree of concern has been raised [with the Proposed Transaction] around the viability of suppliers who might not be able to range nationally*" and the removal of a "*potential pathway for entry into the grocery market*".[29] The Commission also suggests that if the Proposed Transaction accelerated the process of centralisation, this could result in the loss of the opportunity to enter or flexibility to negotiate at the store level.[30]

56 There is no merger-specific basis to conclude that the ability for suppliers to negotiate at the store level, or regionally, would lessen. Refer to paragraph 118 below regarding the impact of the Proposed Transaction on innovation.

57 There would be no change to retail competition, so each store's incentives would be unchanged between the factual and counterfactual. The Merged Entity's downstream incentives would also remain the same as the Parties'. By way of example, if FSSI is successfully selling a Christchurch-specific product now, then the Merged Entity would also have the same incentives in relation to that product.

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[29] SOI at [89].

[30] SOI at [115] and [116].

58 The Proposed Transaction would not change the ability for suppliers to supply to a single store (or a small number of stores) or for a product to be tested in a smaller operation to prove its viability. This opportunity to supply locally means that smaller suppliers are given the opportunity to grow without needing to match the sales or agency resources held or accessible by larger or multinational suppliers. There is no plan, and no incentive, for this feature to alter as a result of the Proposed Transaction. The Proposed Transaction would open, rather than close, doors for suppliers. There may be opportunities for local range, and the potential for ranging opportunities by region or cluster (i.e. several stores in different geographic regions), as well as island- and nation-wide.

59 Both co-operatives regard local supply as an important competitive advantage over their (corporate) competitors, which is facilitated by the presence in local communities of store owner-operators (who themselves have an interest in supporting local suppliers for their own competitive advantage). Corporate competitors do not have a local ownership presence and, in the Parties' view, are much less well placed to identify and "get in on the ground floor" of the best new products.

60 The one possible practical difference would be a more streamlined ability to meet smaller suppliers' ranging potential. For example, a new product might suit particular demographics (e.g. higher-income areas) but not be commercially viable nationally. Currently, the supplier would need to deal with each of FSNI and FSSI about supplying in specific areas (or talk to individual stores – this option would not be affected by the Proposed Transaction). Following the Proposed Transaction, the Merged Entity would be in a position to offer ranging in a group of stores that encompasses some North Island and some South Island stores (referred to above as a cluster).

61 In summary:

61.1 there would be no change to local store ownership, and therefore no fewer opportunities for suppliers to engage locally in the factual (and in the Parties' view it should ultimately be easier to engage with the Merged Entity than with the existing co-operatives, for the reasons set out at paragraphs 107 to 108 below). Even for smaller suppliers that engage at the co-operative rather than store level, the same consumer demand will exist post-merger and therefore rationally the same amount of opportunity should exist to be ranged,

61.2 supply to a single store, and a small number of stores, is an important feature of both FSNI and FSSI's business currently, and that would continue in the factual. For both co-operatives, it is a highly valued way in which to foster new suppliers and the supply of new products, by allowing suppliers to test the viability of new products and expand their capability and capacity to supply over time. This is illustrated in the case studies set out below, and

61.3 centralised buying is a feature of both the factual and counterfactual (noting that buying strategies change over time as consumer preferences and competitive strategies change). But in any event, as set out in further detail at paragraphs 22 to 28 of the Parties' cross-submission on the Statement of Preliminary Issues, centralised buying does not eliminate the ability of suppliers to supply a single island, or a single store. Local stores retain the ability to carry out local ranging, and are encouraged to do so e.g. [REDACTED].[31]

Case study 1: [REDACTED]

FSNI consider [REDACTED] to be a significant success story for both FSNI and the supplier. [REDACTED] started supplying a small number of stores locally in Wellington pre-2010. FSNI supported [REDACTED] to test its product in Wellington and then gradually expand its capacity over time by supplying more and more stores, subsequently supplying throughout the North Island and then, by being ranged by FSSI, becoming a significant national supplier of [REDACTED]. [REDACTED] was recently acquired by [REDACTED]. By 2014, sales of [REDACTED] products to FSNI had reached 1.0 million units, with sales now reaching 3.0 million units annually. The same pathway could and would apply post-merger. In particular, there is no merger-specific difference in the considerations that would apply to any of the ranging decisions that occurred during this pathway (store-level and co-operative-level). The practical difference is that the same team would be involved in any negotiation to expand the range into the South Island as a whole as would have been involved in ranging in the North Island as a whole (and, in fact, potentially the entire expansion could have been part of the original plan e.g. start supplying in Wellington, then expand to Auckland *and* Christchurch, and so on), whereas currently those two decisions would be made by separate teams.

Case study 2: [REDACTED]

[REDACTED] started supplying locally to New World Victoria Park in 2015 with 4 SKUs, and expanded to supplying 6 stores by the end of that year. FSNI supported [REDACTED] to expand its capacity over time. Today, [REDACTED] supplies 175 FSNI stores across the North Island. Over the last quarter (to 24 March 2024), [REDACTED] has grown sales 70% (as compared to the same period last year) and is now the top supplier of [REDACTED] for FSNI.

Any existing perceived differences between the Parties in negotiation style are unlikely to be present in the counterfactual

62 In the SOI the Commission suggests the Parties operate differently to one another in relation to negotiations with suppliers, stating:[32]

> …many suppliers have noted the difference in their negotiations with each. For instance, we have heard that FSSI can be easier to deal with, including where suppliers can negotiate with owner/operators at the store level, and it is easier to get a foot in the door for a new product. In contrast, FSNI is more centralised in its operations and all decisions tend to come under the relevant category manager".

63 FSSI considers that this impression may have been formed by the fact that FSSI is less far along in rolling out its centralised buying, known as better buying, practices and there is a mistaken perception that this practice can make it more challenging to get a foot in the door for a new product. However, as the Commission is aware, FSSI is progressing its rollout of an improved buying model, which it would continue to do in any counterfactual. Accordingly, the advent of better buying is not a merger effect for FSSI and any material differences between the Parties in terms of negotiation style are not expected to be present in the counterfactual.

[31] [REDACTED].

[32] SOI at [87.1].

64 It is also not clear how this concern is considered to have the potential to give rise to a lessening of competition. That could only be the case if a meaningful loss in competition could arise from removing the "difference" in negotiations between the Parties. The Parties do not consider it to be the case that:

64.1 suppliers finding a party "easier" to negotiate with is inherently a more competitive outcome. This would only be the case if the upshot of negotiating with FSSI resulted in more competitive supplier markets than negotiating with FSNI (and other buyers), and FSSI were such a significant buyer that removing it as an independent negotiator would result in a lessening of competition to acquire groceries. No evidence has been presented that this is the case. As above, the existing FSSI buying model is in the process of changing anyway, but elements of both Parties' approaches can be considered likely to emerge through the Merged Entity. So, there is not a meaningful change in buying model arising from the Proposed Transaction. There is no basis to adopt the view that a particular buying model, which a rational market participant adopts to best compete at a particular point in time, inherently lessens competition compared to another adopted for the same reasons. For example, the Commission understood and, appropriately, did not raise concerns about the competitiveness of the centralised buying model during the market study. As to the merger of FSNI and FSSI as buyers, the analysis by Houston Kemp demonstrates that this should not give rise to any lessening of competition, and

64.2 for the same reasons, having a higher proportion of decisions made at store level compared with centrally is an inherently more competitive outcome. The amount of centrally- compared with locally-negotiated deals has varied in both co-operatives over time, as consumer demand and competitive strategy change. At present (as set out above), FSSI is itself moving to a more centralised model. There is no merger-specific change in the buying model, and a range of buying models can be considered competitive.

65 In any event, FSNI disagrees with the implication that it is harder for a new supplier to start selling to FSNI and considers that FSNI's small supplier programme is structured and advanced and it has invested heavily in new initiatives to support new suppliers and supplier innovation. For example:

65.1 FSNI has an Emerging Supplier team that is solely focused on making the path to selling in store in the North Island easier for small and emerging suppliers, and

65.2 FSNI operates Emerging Supplier forums for small suppliers in both the North and South Islands. In 2023 this programme delivered 16 forums from Kaikohe down to Dunedin to more than 250 emerging suppliers. As a result of this programme, FSNI started working with, or ranged, [REDACTED] emerging suppliers. FSNI has also updated a dedicated section on its website for emerging suppliers which has resulted in working with [REDACTED] new suppliers on various stages on their journey, with [REDACTED] local suppliers now on FSNI shelves as a result. FSNI is repeating the same programme this year and is [REDACTED],

65.3 in 2018/2019 FSSI partnered with the Ministry of Awesome to help start-up food businesses access New World in the South Island. This programme subsequently evolved to become a national programme and now both FSNI and FSSI run the annual Foodstuffs Emerge competition, which is a national initiative targeted at identifying the best new innovation from small suppliers and providing them with a prize package that enables their entry into the Parties' national New World network, and

65.4 FSNI is frequently invited to participate in various events for small suppliers led by external parties, such as ANZ Producer Marketplace.

To the extent that the Merged Entity seeks the "better" terms as between FSNI and FSSI, this represents the process of rivalry taking place

66 In the clearance application, the Parties explain that [REDACTED].[33] The Commission characterises [REDACTED] as "cherry pick[ing]" the more favourable supply terms of the two co-operatives, or negotiating more "punitive" terms for suppliers, following the Proposed Transaction.[34]

67 The Commission's characterisation of the anticipated buying benefits arising from the Proposed Transaction is incorrect and overlooks the natural outworking of the competitive process occurring and its associated benefit for consumers.

68 Product cost savings would only be a competition problem if they resulted in a reduction in competition (as required by section 66 of the Commerce Act). The level and rationale for the cost savings in this case do not suggest a competition problem is possible. In particular, [REDACTED].

A mere transfer of surplus is not a lessening of competition

69 The Commission has noted that it is considering the extent to which it is necessary to apply or modify Chapter 4 of the Commission's Merger and Acquisition Guidelines (**Guidelines**), "How we assess mergers between competing buyers" for the purposes of the Proposed Transaction.[35] In particular, the Commission has stated that it is interested in whether a substantial lessening of competition may be likely if the Proposed Transaction results in a transfer of surplus from grocery suppliers to the Merged Entity.[36] The Commission has also said that it is considering the extent to which a substantial lessening of competition may occur whether or not there is a reduction in volume or output.[37]

70 The SOI does not provide any detail as to the connection between better terms for the Merged Entity and a substantial lessening of competition. As explained in further detail in **Appendix 1**, a buyer's ability to achieve lower prices is not in and of itself a lessening of competition – it is either neutral (a transfer) or, to the extent it results in cheaper products (and/or greater output) to consumers, pro-competitive.

71 For lower supply prices to be detrimental to competition, more is required. The Commission itself has acknowledged this in a previous decision concerning grocery

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33 Refer to clearance application at [132].

34 SOI at [89].

35 SOI at [34]. Chapter 4 of the Guidelines describes buyer market power as, "…the ability to profitably depress prices paid to suppliers to a level below the competitive price for a significant period of time such that the amount of input sold is reduced. That is, the price of the product is depressed so low that (some) suppliers no longer cover their supply costs and so withdraw supply (or related services) from the market. Such an outcome reduces the amount of product being supplied damaging the economy" [emphasis added] (Commerce Commission, Mergers and Acquisitions Guidelines (May 2022) at [4.2].)

36 SOI at [39].

37 SOI at [40]. Relatedly, the Commission has also suggested at [81] that if the Merged Entity had the ability to lower prices paid to consumers, this may cause immediate harm to suppliers regardless of whether the Merged Entity purchases less product from them.

retailers, stating "*it is far from certain that any increased ability for purchasers to negotiate lower prices from suppliers would be harmful to competition, especially if these lower prices are passed on to consumers*".[38]

72 The Competition & Markets Authority has made similar comments, stating:

72.1 in its report on the Proposed Transaction between J Sainsbury PLC and Asda Group Ltd, "*For the purposes of our competitive assessment, we would only be concerned by an increase in the buyer power of the Merged Entity to the extent that it may distort competition in the retail supply of groceries and result in adverse effects on end consumers. In and of itself, a reduction in the profitability of suppliers does not give rise to an SLC*",[39] and

72.2 in its report on the proposed acquisition by Tesco PLC of Booker Group plc, "*Generally, we consider the possibility that the Merged Entity could obtain lower prices as an efficiency that could arise from the Merger. If the Parties are able to achieve better supply terms so that some prices are reduced, this is likely to be rivalry-enhancing.*"[40]

73 The statutory test is focused on a substantial lessening of competition. Whether it is a reduction in volume or output, or some other factor, more is required than a mere cost saving. A buyer's ability to achieve cost savings is neutral, or pro-competitive if it results in lower retail prices than would otherwise prevail. If that were not the case, significant pro-competitive and benign conduct would be impugned – any input cost savings arising from a merger could be considered a lessening of competition with respect to the relevant input markets.

The effect of the Proposed Transaction on ranging decisions would be neutral or pro-competitive

74 The Commission states a preliminary view that "*some suppliers that are currently only supplying either FSNI or FSSI could be forced out of the market if the Merged Entity elects not to stock their product(s*)".[41]

75 First, as described elsewhere any merger effect on ranging decisions is inherently limited. For suppliers that sell to a restricted geographic area, no change is possible – there is no merger-specific change to local ranging opportunities. For large national suppliers, no change should occur, because they already deal with both co-operatives and participate in existing category review processes (which is covered by the Grocery Supply Code).

76 Thus the concern raised above can only relate to smaller suppliers that supply to one island but not the other, but which are not inherently limited to supplying a single island (e.g. by capacity constraints or perishable products). For any such suppliers, if customer demand is present in one island and not the other, then no change to ranging decisions would be expected, because the Merged Entity would have the same downstream incentives (i.e. there would be no change to retail competition). The Merged Entity would only be likely to prefer a national supplier

[38] Commerce Commission, *Decision Nos 606 & 607,* (8 June 2007) at [363].

[39] Competition & Markets Authority, *Anticipated merger between J Sainsbury PLC and Asda Group Ltd: Final report,* (25 April 2019) at [15.1].

[40] Competition & Markets Authority, *Tesco and Booker*: *A report on the anticipated acquisition by Tesco PLC of Booker Group plc* at [8.10].

[41] SOI at [62.1.3].

over two island-specific suppliers where the national supplier were considered to best meet customer demand based on price and non-price competitiveness.

77 Put another way, ranging processes simply reflect competition taking place. There would be no change to this dynamic as a result of the Proposed Transaction. Specifically, in a category review process, FSNI and FSSI seek to ensure that the products they sell are those that are most sought after by customers. As a result, suppliers that are less efficient or that sell products that are less preferred by customers are *replaced* by products that offer a better price/quality/range combination. This outcome is pro-competitive and good for consumers (as well as providing opportunities for suppliers).

78 [REDACTED]. The impact of the current form of range review processes on price is illustrated in the graphs below. [REDACTED].

Figure 3: [REDACTED][42]

[REDACTED]

Figure 4: [REDACTED][43]

[REDACTED]

79 Further examples of category review processes are set out below, illustrating the impact of the category review process on suppliers and consumers.

Case study 3: [REDACTED]

In 2023 FSNI carried out a category review process for [REDACTED]. As a result, the majority of [REDACTED] range was removed from FSNI's "compulsory ranged" [REDACTED] category on the basis that it was offering a product with the same quality as the product offered by other suppliers, but at a higher price point. [REDACTED] had previously been a significant supplier of [REDACTED] products. Two other suppliers (being [REDACTED] (in New World stores) and [REDACTED] (a new supplier, in PAK'nSAVE stores) won the additional volume. In other words, FSNI was not seeking to reduce its purchasing, and one supplier's loss of volumes was other suppliers' gain. There is no basis to adopt a view that [REDACTED] loss of volumes was "harm" in a competitive sense.

The graph below sets out the RRP for [REDACTED] brands in FSNI PAK'nSAVE stores. The graph illustrates that the [REDACTED]. Not only did prices for consumers reduce, [REDACTED].

Figure 5: PAK'nSAVE RRP for [REDACTED] brands in FSNI PAK'nSAVE stores

[REDACTED]

Case study 4: [REDACTED]

In 2021 FSNI carried out a category review process for [REDACTED]. As a result of that range review process, [REDACTED] lost some ranging to [REDACTED] and [REDACTED] because it was not aligned to FSNI's strategy. In June 2023 FSNI implemented a further range review for

42 [REDACTED].

43 [REDACTED].

[REDACTED] where [REDACTED] range was re-introduced, driven by a competitive offer from [REDACTED] that allowed for a lower price to customers compared with competing offers. This is an example of two larger suppliers competing hard on price to win the business, with the result that [REDACTED] were ultimately cheaper for consumers.

The graph below sets out [REDACTED].

Figure 6: [REDACTED] [44]

[REDACTED]

80 The case studies and price charts above illustrate that while a range review process may result in some suppliers "losing" (at least for a period until the next category review), this is in favour of other, more competitive suppliers "winning" through the opportunity to increase sales of a competing grocery product. This can also result in lower prices for consumers. This process is consistent with competition i.e. the process of rivalry between suppliers which are competing with each other to offer compelling products to buyers of grocery products. Further detail is provided at **Appendix 1**.

81 Importantly, in all cases where the Parties conduct range reviews, they are not looking to limit the total volume of grocery products they purchase. Typically, if a supplier is de-ranged, then another supplier or suppliers are given an equal opportunity. Even if the total size of a category is reduced, that will be because FSNI and/or FSSI considers it is not in such high demand and, given the available shelf space, competition would be better maximised by growing another category or categories. Losing volume in a range review, while it can be difficult for suppliers to experience, does *not* in and of itself limit competition or cause "harm" in a competition sense. It represents a process by which competition plays out.

To the extent that the Merged Entity is able to achieve better buying terms, this will not reflect material additional buyer power

82 The anticipated potential savings from the Proposed Transaction are based on [REDACTED].

83 [REDACTED].

84 [REDACTED]:

84.1 [REDACTED], and

84.2 more generally, suppliers may not agree to any changes. As set out in further detail above at paragraphs 45 to 54, suppliers have countervailing power and alternative options. Further, as illustrated in **Appendix 1**, many factors are likely to influence the ultimate bargaining outcome. Accordingly, [REDACTED].

Better buying terms would lead to lower prices at the checkout

85 The Commission has suggested that it is not clear whether any cost savings arising from the Proposed Transaction would be passed through to consumers.[45] At

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[44] [REDACTED].

[45] SOI at [111] – [113].

paragraph 156 of the SOI the Commission acknowledges that better buying terms may result in lower prices:[46]

> …the Proposed Transaction would change the bargaining position of the Merged Entity relative to its suppliers. This could increase the Merged Entity's ability to achieve better terms relative to rival acquirers of grocery products and may allow the Merged Entity to offer lower prices. While lower prices could benefit consumers, it may also raise the minimum required scale for rival acquirers of groceries to enter and effectively compete in the market.

86 That paragraph describes a scenario where the merger is pro-competitive, not anti-competitive. That is, the Merged Entity would be competing more vigorously, and offering lower prices. If that conduct deterred entry, it would be because prices were too competitive for there to be a commercial opportunity to enter, not because barriers to entry were raised in an anti-competitive sense. And, of course, the Commerce Act protects the process of competition, not particular competitors.

87 In the Parties' view, it is not necessary for the Commission to conclude that any buying benefits would be passed on to consumers because, regardless, the Proposed Transaction would not be likely to result in a substantial lessening of competition. However, the Parties also consider there is no question that any better buying terms would be shared with consumers. In particular:

87.1 in competitive markets, efficiency gains are likely to be passed through to consumers,

87.2 the Merged Entity would face significant competitive and regulatory pressure to pass on cost savings, and

87.3 the Parties have a strong track record of passing through cost savings to consumers and [REDACTED]. The Parties succeed by earning the loyalty of customers who are highly mobile between competing retailers.

The Proposed Transaction would not result in any adverse effect on competition

88 The Parties consider the efficiencies that are expected to arise pursuant to the Proposed Transaction are of a nature that the Commission can take into account.[47]

89 However, even if that is wrong, and none of any buying benefits were passed through to consumers, the Proposed Transaction would not result in a lessening of competition. At most, it would be a mere transfer of surplus and not an exercise of buyer power that would result in a lessening of competition.

90 For the reasons set out in paragraphs 82 to 84, the Proposed Transaction would not have a material impact on the Parties' buyer power. The Proposed Transaction is not expected to materially alter bargaining outcomes, and would not result in any ability to anti-competitively depress the prices the Merged Entity pays for groceries. Therefore, regardless of whether the Commission accepts the Parties' incentives to pass on cost savings as described above, the Proposed Transaction would not be likely to substantially lessen competition in any market to acquire grocery products.

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[46] SOI at [156].

[47] Commerce Commission, *Mergers and Acquisitions Guidelines,* May 2022, at 3.118ff.

Efficiency gains are likely to be passed through to consumers

91 The Commission has previously acknowledged that in competitive markets, efficiency gains are likely to be passed through to customers. For example:

91.1 in its determination of Foodstuffs' and Woolworths' proposed acquisition of The Warehouse Group, the Commission stated, *"it is far from certain that any increased ability for purchasers to negotiate lower prices from suppliers would be harmful to competition, especially if these lower prices are passed on to consumers"* and *"lower wholesale prices could also be passed on to customers in lower retail prices, if retail competition were effective",*[48] and

91.2 in the Commission's August 2023 report on Retail Payment Systems, the Commission stated, "*we currently estimate that interchange fee regulation will provide over $130 million in annual savings to acquirers [i.e. banks]. Of this $130 million, we estimate that $105 million will be passed through to businesses in the form of lower merchant service fees."*[49]

92 The above is consistent with the Competition Markets Authority's commentary in its report on the proposed acquisition by Tesco PLC of Booker Group plc. In that decision the CMA considered the potential for the merging grocery buyers to achieve cost savings by way of harmonisation of procurement terms, and the likelihood of these being passed on to consumers, stating:[50]

> We have found that the Merged Entity would likely benefit from better terms from some suppliers with regard to some products in grocery wholesaling through a degree of harmonisation of supply terms, where one of the Parties currently receives better terms than the other … to the extent that the Merged Entity receives more favourable terms, it is likely that a proportion of these better terms would be passed on to customers, making the Merged Entity a more effective competitor.

The Merged Entity would face significant competitive and regulatory pressure to pass on cost savings

93 As explained above, strictly speaking, it is not necessary for the Commission to conclude that cost savings would be passed on to consumers given the Parties consider the Proposed Transaction would not give rise to a substantial lessening of competition. Nevertheless, the Parties consider there is good reason to conclude the Merged Entity would face competitive and regulatory pressure to pass on cost savings. For example:

93.1 the market has become increasingly competitive in recent years. Along with the continued competitive pressure from the Parties' closest competitor, Woolworths[51], there a number of market developments such as the entry of Costco, and the development of The Warehouse Group's grocery offering. In

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48 Commerce Commission, *Decision Nos 606 & 607,* (8 June 2007) at [363].

49 Commerce Commission, *Retail Payment System: Observations on the impact of interchange regulation, (*8 August 2023) at [26].

50 Competition & Markets Authority, *Tesco and Booker*: *A report on the anticipated acquisition by Tesco PLC of Booker Group plc* at [26].

51 Evidence about the ongoing efforts to improve competitive positioning relative to Woolworths has been previously provided, [REDACTED].

fact, there have been a number of updates since the clearance application, including:

(a) on 10 April 2024 the Warehouse Group announced that it was expanding its fresh range to ten more stores, taking the total number of stores that offer fresh fruit and vegetables to 32 stores, or a third of all Warehouse stores.[52] The Warehouse continues to compete hard on essential grocery items, offering "$4.30 butter, $3 milk, $1.25 bread, $8 cheese and now $5 eggs".[53] In FY24 H1, the Warehouse reported that grocery represented 20.2% of total Red Shed sales, a growth of 11.7% from FY23 H1, and

(b) Woolworths has continued to invest significantly in New Zealand and leverage its Australasian scale, with:

(i) new initiatives such as MILKRUN (which, as of its H1 results announcement was in 32 stores), Everyday Rewards and Everyday Rewards Plus,

(ii) opening a new distribution centre in Christchurch focusing on fresh produce, and

(iii) announcing in March 2024 proposed property expansion and growth aspirations for Fresh Choice,

93.2 even assuming the intensity of competition in retail grocery markets is muted (which the Parties do not agree is the case), the fact is that the Parties do face competition. If they do not compete on price and non-price terms they will lose sales to Woolworths, The Warehouse, Costco, Chemist Warehouse and others. The Merged Entity's success would therefore depend on maintaining and improving its competitive positioning, and

93.3 the pro-competitive changes introduced under the GICA, along with the Commission's ongoing role in monitoring and promoting competition, should be expected to ensure significant competitive (and regulatory) pressures to pass through the benefit of savings and efficiencies to customers.

94 The public and political focus on the grocery sector has created an environment where there is a high degree of regulatory risk associated with making public statements and then failing to stick to them. The Parties are mindful of this risk. Accordingly, there would be acute competitive and regulatory pressure on the Merged Entity to share cost savings with consumers. This would in turn put competitive pressure on other grocery retailers to react by improving their own retail offer.

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52 See: https://www.thewarehousegroup.co.nz/news-updates/warehouse/Fresh-expansion

53 See: https://www.nzherald.co.nz/nz/the-warehouse-group-takes-another-step-to-rival-supermarket-duopoly-selling-popular-egg-brand-for-5/B6JSCGV6FJDKBJ72J5E56WNZTI/

The Parties have a strong track record of passing on cost savings to consumers

95 The Parties are committed to prioritising low prices for customers, particularly in an environment of increased inflationary pressures and new competitors. This is reflected in the Parties' internal documents. For example:

95.1 FSNI's FY23 budget states:[54]

[REDACTED].

95.2 the FSSI Merchandise division [REDACTED],

95.3 similarly, the Foodstuffs National Marketing Team [REDACTED]:[55]

(a) [REDACTED],

(b) [REDACTED], and

(c) [REDACTED].

96 Further, there are numerous examples where the co-operatives have reduced retail prices to consumers at the expense of FSNI/FSSI margin, in order to ensure that they are meeting their commitment to offer low prices to consumers. Given there would be no change to retail competition arising from the Proposed Transaction, the Merged Entity will have the same incentives and therefore priorities.

Example 1: 2022 Price Rollback programme

97 In 2022 the pace of food price inflation was at a near record level, with many New Zealand households facing significant cost pressures. In May 2022 FSNI and FSSI launched a national Price Rollback programme on 110 key value items [REDACTED] back to 2021 levels.[56] The items included fresh and frozen fruit and vegetables, meat, dairy products, tea, coffee, sugar, flour and personal items.[57]

98 As a result, all stores across the three banners reduced prices to consumers for these items by an average of 10%.

99 Notably, the Price Rollback programme was entirely funded by FSNI and FSSI, with no request for additional contribution from suppliers. As a result, FSNI and FSSI absorbed significant supplier price increases throughout the length of the year-long Price Rollback programme. For example, across FSNI in the four-month period leading up to the Price Rollback programme, the average number of products with supplier price increases each month was 3,300, a 357.2% increase compared to the monthly average for the same time period over the prior three years.

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[54] [REDACTED].

[55] [REDACTED].

[56] Products were "rolled back" to the average price over the period from 25 January to 25 April 2021. Further information about the Price Rollback programme is available at: https://www.foodstuffs.co.nz/news-room/Price-Rollback

[57] For example, at FSNI New World stores Value White Toast was reduced in price from $1.40 to $1.19, Pams Edam 1kg Cheese from $11.55 to $9.99, and 1kg Value Frozen Mixed Vegetables from $2.59 to $2.19.

100 Details of the total customer savings across all three banners in the North Island are set out in the table below. Note that the FSNI year-long programme was split into four reporting periods.

Figure 7: FSNI sales report for Price Rollback products

[REDACTED]

101 The table above illustrates that:

101.1 [REDACTED],

101.2 [REDACTED], and

101.3 customers enjoyed significant savings, totalling over $24 million in the North Island alone across all three banners.

102 Similarly, customers in the South Island enjoyed significant savings under the Rollback programme, totalling over $8.7m across the three banners (noting that the programme ran for 26 weeks at PAK'nSAVE stores and 13 weeks at New World and Four Square stores). FSSI's [REDACTED] for the Rollback programme is provided at **Appendix 3**. The data in Appendix 3 illustrates that:

102.1 [REDACTED], and

102.2 [REDACTED].

Example 2: FSNI PAK'nSAVE Iconic Programme

103 Following the successful Rollback programme, in May 2023 FSNI launched the Iconic programme in PAK'nSAVE stores. This programme identifies high performing key value items within the PAK'nSAVE banner and [REDACTED]. This programme is ongoing [REDACTED].[58]

104 The results of the Iconic Programme over the 39-week period to 4 February 2024 are set out in the table below. This table illustrates that:

104.1 [REDACTED], and

104.2 [REDACTED].

Figure 8: Results of FSNI Iconic Programme
(39 week period to 4 February 2024)

[REDACTED]

Example 3: FSSI category review for [REDACTED]

105 For example, in FSSI's recent category review for [REDACTED] sold under the Four Square banner, FSSI opted to reduce retail pricing for [REDACTED]. This illustrates FSSI providing significant value to consumers in circumstances where it was facing cost increases from suppliers.

Example 4: Absorbing purchase price increases from suppliers

106 Currently, both co-operatives are focused on absorbing purchase price increases from suppliers on key household items, in light of the high-inflation environment.

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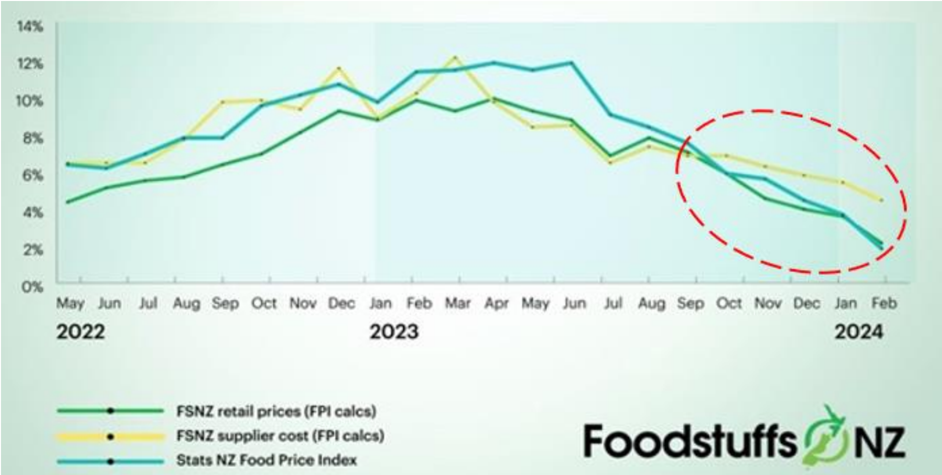
[58] The Parties note that [REDACTED].

For example, the following graph[59] illustrates that in the last 23 months FSNI and FSSI have been making a concerted effort not to pass on the full amount of increased supplier costs onto the consumer, to ensure that the Parties remain price competitive at the checkout.

Figure 9: Food price index – monthly YoY Growth %



The Proposed Transaction would generate efficiencies for some suppliers

107 Following the Proposed Transaction, in some instances suppliers would negotiate bilateral arrangements with Foodstuffs, instead of individually with FSNI and FSSI (i.e. suppliers that supply nationally, and contract with both FSNI and FSSI to do so). Under these arrangements, relevant suppliers would be likely to face lower costs in negotiating with one buyer (Foodstuffs), rather than FSNI and FSSI individually. Anticipated Merger benefits for suppliers include:[60]

107.1 improving the ease of doing business with one relationship,

107.2 ability to streamline operations and remove cost from customer service,

107.3 ensuring product plans agreed with suppliers can be executed consistently on a national basis, and

107.4 increasing the speed to market of product innovation (discussed below from paragraph 118).

108 For example, FSNI has received frequent feedback from suppliers over the course of 2014 to 2023 about particular challenges that they face dealing with two separate co-operatives. Particular pain points include:

108.1 *duplication of costs*: suppliers have commented that Foodstuffs is more complex and attracts a higher cost to serve (in terms of both human resource and time) than Woolworths and other grocery retailers. For example, most medium and large suppliers currently have a separate account manager (or account team) for each of FSSI, FSNI and Woolworths, and many smaller suppliers work with an agency to assist the supplier to sell into FSSI, FSNI and Woolworths (with separate agency fees for each co-operative). In addition, only the largest suppliers can justify having a full account team

59 See: https://www.foodstuffs-si.co.nz/news-room/2024/Foodstuffs-co-ops-record-another-slowdown-in-food-price-inflation. [REDACTED].

60 [REDACTED].

based in the South Island (for FSSI) and cite costs of servicing remote account management,

108.2 *misalignment between the frequency and timing of category reviews*: given category review processes require a time commitment from suppliers and are important to the amount of volume sold via each co-operative, suppliers have commented that they would like to have a clear, structured and aligned timetable that fits with their own planning cycles and only engage in one Foodstuffs review for each category,

108.3 *misalignment between New Product Development (*NPD*) cycles*: the misalignment between FSSI and FSNI's NPD calendars is a particular pain point for suppliers. Suppliers comment that it is challenging to conduct an effective national product launch programme within the national Foodstuffs banners (including national advertising, in-store media and promotional programmes), impacting the certainty of getting a return on the launch investment,

108.4 *inability to supply a "cluster" of stores across both islands*: currently, following a category review process, a supplier may supply a "cluster" of stores, but each cluster is limited to stores within the FSNI or FSSI networks. Suppliers have commented that they would like the ability to supply to a cluster of stores across both islands, and

108.5 *difficulty driving national brand initiatives:* suppliers comment on the complexities of dealing with two separate co-operatives (including dealing with two separate decision makers), including how this impacts their ability to drive national brand initiatives across the common national brands.

109 The Proposed Transaction would provide relevant suppliers with the opportunity to secure supply to Foodstuffs on a national and regional basis with one negotiation. In the Parties' view, this will provide these suppliers with immediate transparency and efficiencies within their business that they cannot achieve as easily and effectively through separate negotiations.

The Proposed Transaction would not reduce innovation

110 The Commission has stated that it is concerned that:[61]

110.1 any increase in buyer power could reduce suppliers' ability and incentives to invest in new and innovative products, due to reduced profitability, and

110.2 even if there was not a material increase in the Merged Entity's buying power the reduction in channels for suppliers may in and of itself adversely affect competition by removing one of the options for new and innovative products or new suppliers to be listed.

111 The Commission also states that it is considering the extent to which suppliers currently invest in innovation, and the extent to which the Proposed Transaction might increase or decrease the level of, or investment in, innovation for new suppliers and/or new products.[62]

[61] SOI at [102].

[62] SOI at [103].

112 For the reasons set out below, the Proposed Transaction would not reduce suppliers' ability or incentives to innovate or the Merged Entity's incentives to promote innovation. Rather, the Parties consider that the Proposed Transaction would have a positive impact on product innovation.

Proposed Transaction would not reduce suppliers' incentives to innovate

113 The Commission states that there is "broad consensus" that suppliers may be less inclined to innovate in response to having one fewer grocery retailer through which to sell its products to consumers.[63] The basis for the Commission's view that there is a broad consensus is unclear. It cites two interviews where suppliers consider that the Proposed Transaction would not be likely to result in any change or a reduction in suppliers' investment in innovation (with a few parties who consider that the Proposed Transaction will benefit innovation), and three interviews in support of the broad consensus.

114 In any event, the Parties disagree with this preliminary view and consider that suppliers' incentives to invest would not be harmed by the Proposed Transaction and may be enhanced.

115 First, the Merged Entity would have the same retail presence as the Parties do currently (and would in the counterfactual). As a result, the market opportunity for suppliers would not change, but only (to a limited extent) the method of accessing it.

116 As explained in further detail at **Appendix 1**, suppliers facing reduced prices as a result of a changing bargaining outcome may well have *increased* incentives to innovate so as to improve their future bargaining position and improve their long term profit outcomes.

117 In the Parties' experience, there are two key supplier groups that drive NPD in grocery products, being larger, multi-national suppliers, and smaller suppliers. To a lesser extent, medium suppliers "in the middle" also engage in NPD. In relation to:

117.1 *large national suppliers, including multi-nationals*: these suppliers are active across many countries and channels and often have a sophisticated global NPD rollout programme which is driven by offshore teams (and is generally not tailored to the New Zealand market). The Parties are not significant purchasers for these suppliers on a global scale and therefore these suppliers' innovation incentives are in no way dependent on sales to the Parties. Accordingly the Proposed Transaction would not impact these suppliers, which would continue to have significant investment incentives and to spread any innovation costs/risks across a large number of other sales channels,

117.2 *small suppliers*: these suppliers are considered to bring the most "pure" form of innovation given they need to offer something different in order to get a foot in the door. Given these suppliers generally only supply to a small

[63] SOI at [106].

number of stores, these suppliers would not be impacted by the Proposed Transaction, and

117.3 *medium suppliers:* the Proposed Transaction would allow an easier growth trajectory than dealing with each co-operative separately (as illustrated by case study 1 above.

118 The Parties consider that the Proposed Transaction would be likely to make it easier for suppliers to innovate. In particular:

118.1 the Merged Entity would likely offer one NPD cycle, rather than two separate NPD cycles, which would make it considerably easier for suppliers to launch a new product nationally across the Foodstuffs banners. As described above at paragraph 108.3, the misalignment between the Parties' NPD cycles is a particular pain point for suppliers, and

118.2 the Merged Entity's national footprint would mean that, if desired, suppliers would have the potential for an easier growth path from supplying a single store to national supply (i.e. from 1 store to 525 stores), suggesting suppliers would be incentivised to work with the Merged Entity to launch new products.

The Proposed Transaction would not reduce the Merged Entity's incentives to support innovation

119 The Proposed Transaction would not give rise to any change in competitive conditions downstream and so there would be no change in the Merged Entity's incentive to support innovation.

120 In particular, the Parties' relationships with suppliers are driven by the need to offer products that customers want to buy (with the right mix of quality and price points), together with the logistics and supply chain capability and capacity to deliver them through the supply chain to the customer. This is a virtuous cycle: when suppliers are successfully producing quality products and developing new products, the Parties benefit through greater sales; when the Parties perform well, their suppliers benefit through greater volumes and economies of scale. As a result:

120.1 the Parties benefit from suppliers' innovation, as this can expand sales for both the supplier and the co-operative so that both share incentives to bring better value to the customer, and

120.2 the Parties have no incentive to harm innovation (or their supplier base more generally).

121 Further, the Parties are already not entirely separate heads in the market and work together in certain scenarios, limiting the potential change that can arise.

122 Examples of the Parties and suppliers (and ultimately, consumers) all benefitting from investment in product innovation are set out below.

Case study 5: [REDACTED]

In November 2021 FSNI carried out a category review process for [REDACTED]. One supplier which participated in this process was a new supplier, [REDACTED], which had previously supplied branded suppliers such as [REDACTED] but decided to launch its own brand. [REDACTED] offered a compelling price/quality point and accordingly won a significant amount of volume in the range review process, mainly at the expense of larger suppliers. [REDACTED] has gone from selling approximately [REDACTED] units per week across all FSNI stores to selling

> approximately [REDACTED] units per week in 2024. [REDACTED] success in the category review process provided it with the required volume and support to enable it to scale production and strategically enter into the retail sector. [REDACTED] is [REDACTED] and is bringing more innovation into the category than other brands. FSNI understands that [REDACTED] strong performance in FSNI has also opened up discussions for [REDACTED] to expand into the South Island and supply to FSSI.

> **Case study 6: [REDACTED]**
> [REDACTED] launched [REDACTED] into the retail market in 2021, however it was not until the category review process later that year (in November 2021) that its sales began to grow. Prior to the initial category review its 13-week average unit sales in FSNI stores were [REDACTED]. Following implementation of the category review, unit sales increased to [REDACTED], and in the most recent 13-week period (i.e. the week to 21 April 2024) [REDACTED] average unit sales were [REDACTED]. Accordingly, [REDACTED] is an example of a supplier that has grown considerably with FSNI's support through the category review process.

123 Both co-operatives regard NPD and supplier innovation as a key part of their business. For example, [REDACTED].[64] The co-operatives also consider that their ability to foster small supplier innovation is an important competitive advantage over their (corporate) competitors, as the co-operative model enables the Parties to assist a supplier to work initially with one or two stores (driven by suppliers' cashflow and production capabilities), with the ability to expand the supplier's reach to more stores in the co-operative network as its capabilities grow. They also already conduct certain activities together (see case study 7), which limits the potential change that could arise from the Proposed Transaction. The co-operatives have no incentive to cease a practice they perceive as a key competitive advantage, and where their downstream incentives would not change as a result of the Proposed Transaction.

> **Case study 7: Solid and Herbivore**
> Solid (which supplies sustainable, plastic-free toothpaste in a jar) and Herbivore (which supplies premium plant-based butter made from natural coconut) were the 2023 winners of the national Foodstuffs Emerge Emerging Supplier Competition. Since winning the competition, FSNI and FSSI have worked with the two suppliers to scale up their operations and product, including working with Foodstuffs category managers and will be given the opportunity for national ranging in New World as they scale up. Further information about the Foodstuffs Emerge programme is provided above at paragraph 65.

The Proposed Transaction would not impact the position of private label

124 The Commission has suggested that the Proposed Transaction could give the Merged Entity a greater ability or incentive to increase the penetration of private label products.[65] The Commission notes that an increase in private label penetration is a concern for suppliers which may supply both private label and their own branded products to the Parties and suggests that deranging to accommodate private label

64 [REDACTED].

65 SOI at [117].

would impact consumer choice.[66] For the reasons set out below, the position of private label would not differ between the factual and the counterfactual and accordingly the Proposed Transaction is not capable of lessening competition with respect to private label. In any event, the Parties disagree that replacement of a branded product with a private label product would be in and of itself adverse for competition.

There would be no change in private label practices that could give rise to a lessening of competition

125 The position of private label would be unaffected by the Proposed Transaction, since private label activities are already conducted by the Parties jointly as a shared national operation. The Parties' private label business is run separately to the co-operatives, through Foodstuffs Own Brands Limited (**FOBL**). That would continue in the factual (and counterfactual).

126 Each co-operative makes its own ranging decisions, including with respect to private label. However, it can be assumed that the private label strategy is already optimised nationally on the basis each Party is operating rationally in meeting the needs of consumers in retail markets it serves, and there would be no change in any retail market arising from the Proposed Transaction.

127 As a result, there is no basis to expect a material change in private label penetration arising from the Proposed Transaction, where the Proposed Transaction would not affect the development of private label products (by FOBL) or retail/downstream competition.

There will be no change for suppliers that supply both private label and branded products

128 Suppliers that supply both private label and branded product currently have separate discussions about those products with FOBL (in relation to private label products) and each co-operative (in relation to branded products). This would continue to be the case in the factual (except that, as noted elsewhere, in some cases the relationship with the co-operatives would be consolidated into one). In other words, there would be no merger-specific change to this dynamic.

Private label is pro-competitive

129 While there is no basis to conclude the penetration of private label would be affected by the Proposed Transaction, it is far from clear that an increase in the supply of private label products would have an adverse effect on competition. The development and supply of private products can (and does) enhance competition at the supplier level. For example, private label products are often introduced in markets where there is high supplier concentration, to increase competition, and are an important way in which the Parties respond to the market power (and corresponding high prices) of major global and domestic suppliers.[67] As an example, in April 2024 FSNI introduced a new range of Pam's dried pasta to provide customers with a "like for like" specification to the major brands (San Remo and Diamond) at a competitive entry-level price, to (i) help ensure prices were kept competitive for customers and, [REDACTED].

130 In addition, private label products provide valuable volumes which underpin and enhance local manufacturing capacity and promote the growth of smaller/medium

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66 SOI at [119] – [120].

67 See the Parties' comments in the market study final report at 3.179.

sized manufacturers. For example, approximately [REDACTED]% of private label products are locally manufactured.[68] Many New Zealand-based manufacturers seek to supply both private label and branded products to drive volume efficiencies. Supplying private label also allows manufacturers to continue to invest in business development and the modernisation of plant and equipment. In a small market such as New Zealand, efficiencies can be difficult to obtain with large multi-national suppliers consequently dominating some categories such as cereals, biscuits, snacks, ice cream and frozen vegetables.

131 The primary benefit of private label to a New Zealand-based manufacturer is the reduction of fixed cost overheads for both branded and private label products it produces. By utilising more capacity in production lines, private label allows manufacturers to be more efficient. Private label also provides valuable volumes to secure better raw material costs, benefiting both branded and private label. Accordingly, some manufacturers actively target maintaining a healthy private label share as part of their business planning to achieve these benefits. A theoretical example of the benefit of offering private label is set out in the table below.

Figure 10: Theoretical example illustrating the benefit to suppliers of offering private label

[REDACTED]

Private label promotes innovation

132 Private label can be an important source of innovation, including to provide value to customers through more choice and new product offerings. Using private label to drive innovation and meet emerging trends benefits suppliers by enabling suppliers to enter and trial a product without the significant investment required for niche branded equivalents. For example, FOBL identified a rapidly growing customer need for plant-based products and was able to quickly respond and develop products to trial with customers.

133 Private label innovation has also meant that customers with dietary requirements (such as gluten free) have access to a wider range of products, including products at significantly lower price points than branded equivalents. For example, branded gluten-free pasta retails for approximately $5.00 to $6.20, whereas a private label option may retail for as low as $4.00. Similarly, branded options for gluten-free biscuits retail for approximately $5.70 to $8.00, while private label options retail for $3.80 to $3.90.

Private label offers more choice for consumers

134 FOBL is customer driven and develops private label products in line with customer needs, trends and demand. Consequently, if FOBL considers that consumer needs are being met in a particular category, it does not seek to develop a private label option. Equally, the Parties have a history of choosing to remove private label goods from product categories and amending the ranging of private label products to be less favourable, in the same way they would branded products (and this issue is covered by the Grocery Supply Code).[69] For example, FSSI considers that [REDACTED].

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[68] To the extent that private label products are manufactured offshore, this is generally where there is no manufacturing base for the particular product in the local market, such as [REDACTED].

[69] For recent examples, refer to the Parties' cross-submission on the Statement of Preliminary Issues at [REDACTED].

135 For the consumer, private label products represent the choice and opportunity to purchase quality grocery products at a lower price than branded products. In December 2021 FOBL [REDACTED].

Figure 11: [REDACTED]

[REDACTED]

Private label products provide customer choice in times of financial hardship

136 In times of financial hardship, consumers often turn to private label goods in order to cut back on spending, a behaviour observed during the global financial crisis in 2008-2009. In the last couple of years consumers have become more careful with their spending and are looking for strategies to cope with the cost-of-living crisis. In this context, private label is becoming a more significant consideration for consumers.

137 Nielsen IQ data illustrates that food and grocery costs are the biggest concern for two-thirds of global consumers (closely followed by fuel prices and utility costs, which also rank as major sources of concern). This is giving rise to more cautious consumers who are watching their everyday spend. Consumers are choosing cheaper goods (including private label products), choosing products on promotions, and stopping/reducing purchases of non-essential premium products. This trend is supported by [REDACTED] consumers see the ability to switch to private label products as an important way of saving money.

Figure 12: [REDACTED]

[REDACTED]

Proposed Transaction would not reduce the amount of product acquired from suppliers

138 The Commission notes that a substantial lessening of competition could occur if the Merged Entity would have the ability to profitably depress price for a significant period of time such that the amount of product acquired is reduced.[70]

139 For the reasons set out at **Appendix 1**, the Proposed Transaction is not expected to materially alter bargaining outcomes, and would not result in any ability to anti-competitively depress the prices it pays for groceries. Consistent with the bargaining framework, provided that the bargaining parties have an option that is "collectively rational", although the price and other terms may change, both parties would want a bargain to be made and products to be sold.

140 In particular, the quantity of products sold from suppliers to buyers would not be expected to fall, because the Merged Entity would continue to compete to the same extent at the retail level and at the wholesale supply level. The Merged Entity would be at risk if it lost product volume. In other words, even if prices that Foodstuffs paid to suppliers were to fall, Foodstuffs would continue to be incentivised to procure and retail the same quantity of grocery products to compete effectively and so to offer lower prices at the retail level.

[70] SOI at [75.1].

The Auckland/Wellington merger was pro-competitive

141 The Commission notes it is considering the extent to which the merger between Foodstuffs Auckland and Foodstuffs Wellington in 2013 resulted in efficiencies and/or cost savings on the supply-side, that were passed through to consumers.[71]

142 A few suppliers the Commission has spoken with consider that the North Island merger did bring about efficiencies in terms of streamlining of processes, aligned strategy and simplification.

143 The Commission has also heard from industry participants who consider that the merger led to increased margin for the merging parties, a reduction of suppliers entering the market and did not result in the lower prices that were promised at the outset. The Commission cites interviews (but does not set out the evidence that was provided at the interviews) and two submissions in relation to this concern.

144 First, the Parties note that the concerns suppliers have raised about the inefficiencies associated with FSNI and FSSI's separate buying structures (see paragraph 108 above) were previously also raised with respect to the Auckland and Wellington co-operatives and subsequently alleviated by the completion of that merger.

145 Secondly, the Parties consider that the three concerns set out in the SOI are not supported, and the Auckland/Wellington merger was pro-competitive. In relation to lower prices, as set out in the Parties' cross submission on the Statement of Preliminary Issues:

145.1 Murray Jordan commented in a Stuff article released on the day of the merger that:[72]

> PAK'nSAVE prices were currently 10 per cent below its nearest competitor, Countdown… Foodstuffs North Island would be able to drop those prices further as a result of the merger.

145.2 following the merger, which occurred in September 2013, [REDACTED],

145.3 for New World, there was an immediate change following and, in FSNI's view, attributable to the merger. [REDACTED], and

145.4 [REDACTED].

146 The concern about margins does not appear to be borne out, based on the Commission's work in the market study. That is:

146.1 Figure 3.5 of the market study final report (replicated below at Figure 13) shows FSNI's EBITDAR margin consistently dropping over the period 2015-2018. The start date for the Commission's market study work is just over a year after the relevant merger, but FSNI is comfortable that the trend from FY2015 is representative. This work does not appear to be consistent with the concern that has been raised,

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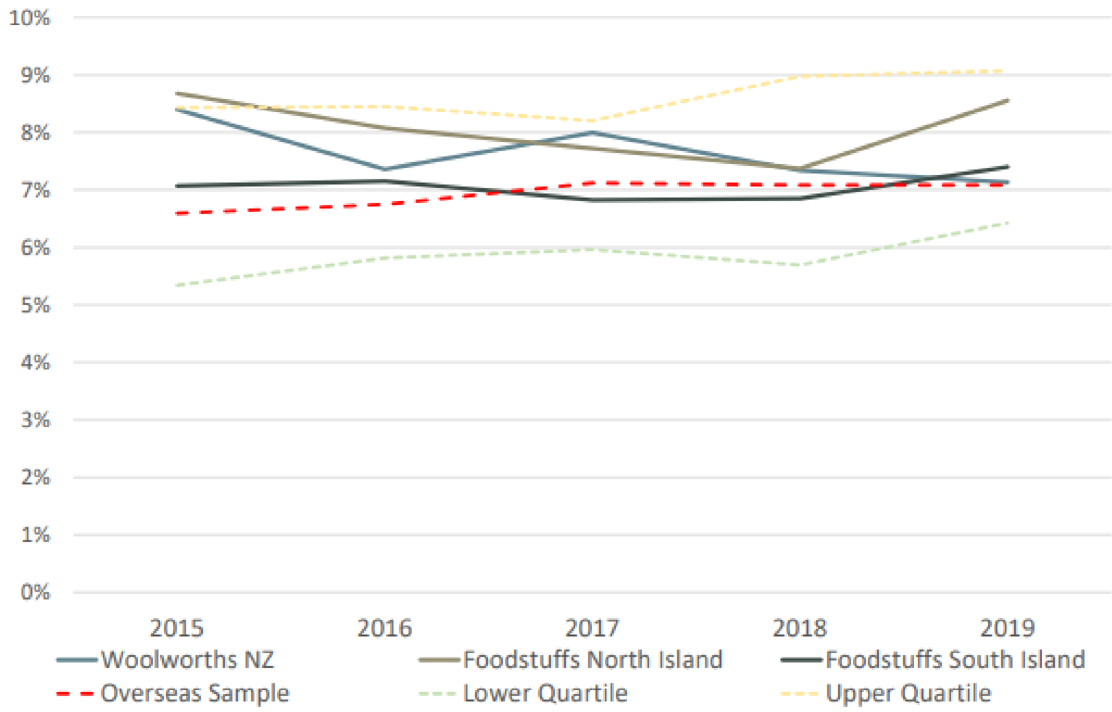
[71] SOI at [111] and [113].

[72] Laura Walters for Stuff, Foodstuffs merger 'good for customers', 1 September 2013, https://www.stuff.co.nz/business/9107913/Foodstuffs-merger-good-for-customers

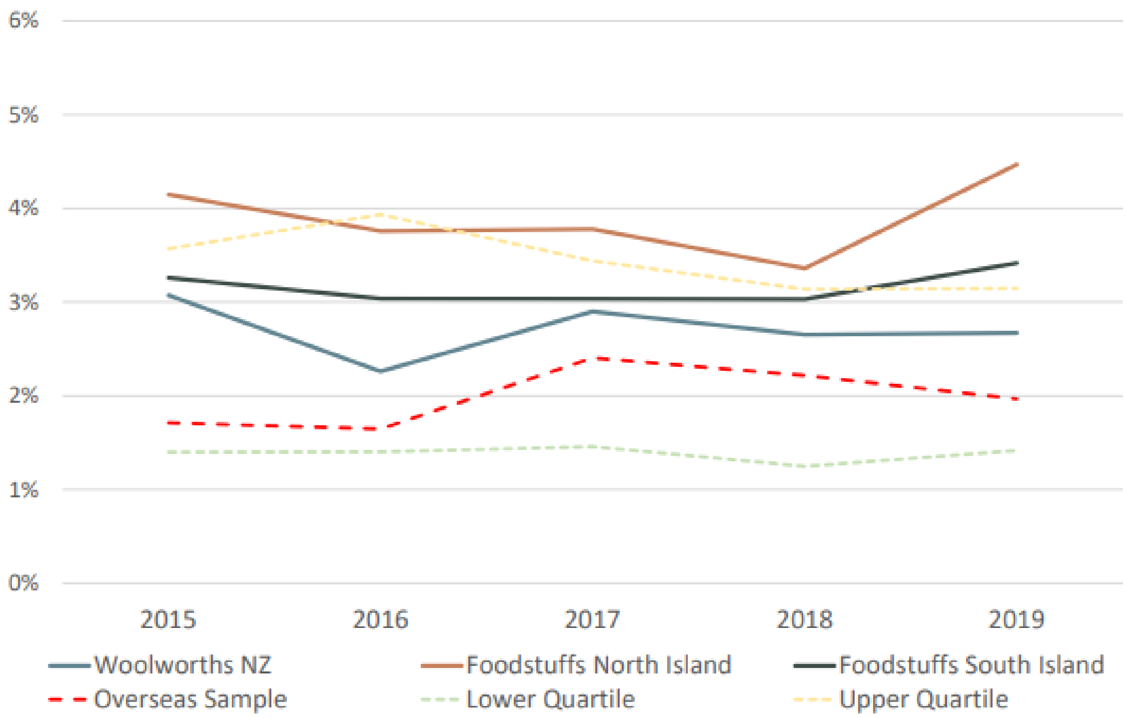
Figure 13: EBITDAR margin for the major grocery retailers relative to overseas grocery retailers (2015 to 2019) (Figure 3.5 of market study final report)



Source: Commerce Commission profitability analysis.[112]

146.2 similarly, Figure 3.6 of the market study final report (replicated below at Figure 14) shows FSNI's NPAT margin reducing in 2015-2016, flattening between 2016 and 2017 and reducing again between 2017 and 2018, and

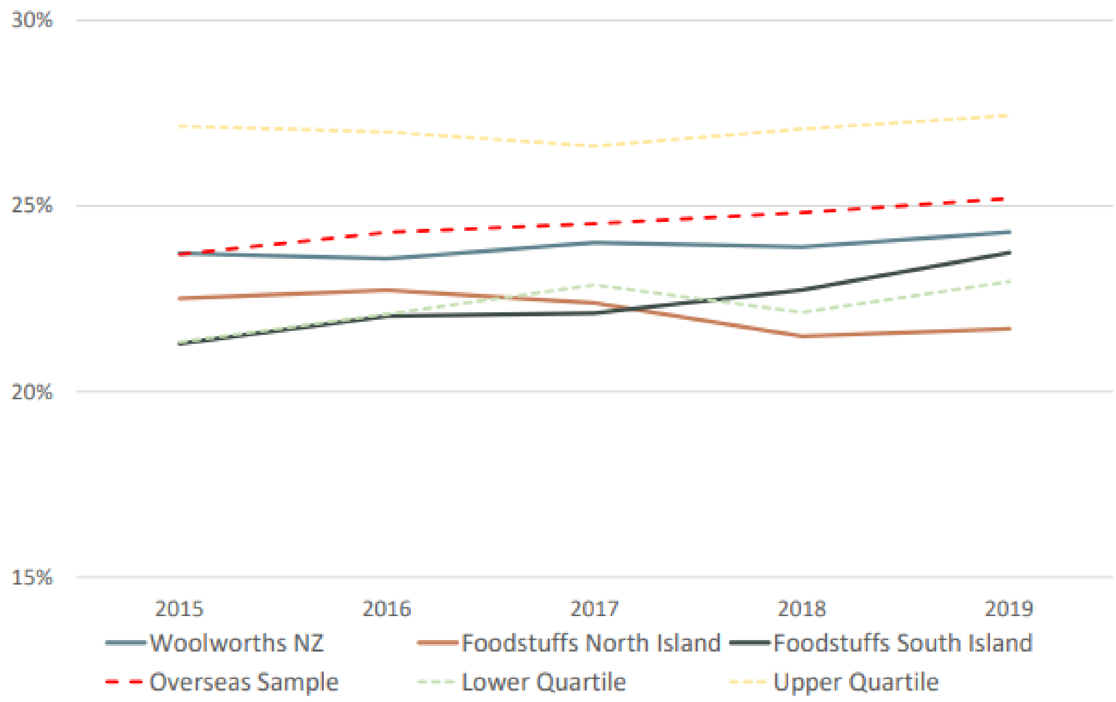
Figure 14: NPAT margin for the major grocery retailers relative to overseas grocery retailers (2015 to 2019) (Figure 3.6 of the market study final report)



Source: Commerce Commission profitability analysis.[113]

146.3 finally, the Commission's work shows FSNI's gross profit margin to be effectively flat (increasing very slightly) between 2015 and 2016, then dropping until 2018. See Figure 3.7 of the market study final report (replicated below at Figure 15).

Figure 15: GP margin for the major grocery retailers relative to overseas grocery retailers (2015 to 2019) (Figure 3.7 of the market study final report)



Source: Commerce Commission profitability analysis.[115]

147 In relation to the concern about fewer suppliers entering the market, FSNI does not know the basis for this concern but does not believe it is consistent with its experience following the merger. For example, [REDACTED].

Figure 16: [REDACTED]

[REDACTED]	**[REDACTED]**
[REDACTED][73]	**[REDACTED]**
[REDACTED]	**[REDACTED]**
[REDACTED]	**[REDACTED]**
[REDACTED]	**[REDACTED]**

COORDINATED EFFECTS

148 The Commission suggests that the Proposed Transaction could increase the ability and incentive for the Merged Entity to coordinate in the acquisition of grocery products, including because the Merged Entity would be a similar national operation

73 Data extracted from 1 September 2013.

to Woolworths and because the Proposed Transaction may accelerate centralisation, which would be more similar to the way that Woolworths makes buying decisions.[74]

149 The Parties disagree that the Proposed Transaction could increase the ability and incentive for the Merged Entity to coordinate with Woolworths in the acquisition of grocery products. There would be no material difference between the factual and counterfactual, and accordingly the Proposed Transaction could not impact on the Merged Entity's ability or incentive to coordinate. In response to the Commission's specific concerns:

149.1 while the Merged Entity would, like Woolworths, have a national offering, there are many differences between the two organisations, including the structure (i.e. corporate vs co-operative), number of banners, and Trans-Tasman vs New Zealand-only focus. For further detail, refer to paragraph 186 below and the Parties' cross submission on the Statement of Preliminary Issues at [33.4],

149.2 the Parties already present as a single offering through their shared brands. Merging the management and operational functions of the Parties' support centres would not perceptibly change the Merged Entity's ability or incentive to coordinate in the acquisition of grocery products, and

149.3 centralised buying is a feature of both the factual and counterfactual (noting that buying strategies change over time as consumer preferences and competitive strategies change).

150 The evidence that the Commission has received is not consistent with coordination, or any feature which could mean that the Proposed Transaction would give rise to an increased prospect of coordination. The Commission states, "*we have not received any direct evidence relating to coordinated effects either between FSNI, FSSI or with Woolworths*" and "*both suppliers and retailers we have spoken with have made it clear that they do not enter into discussions about their terms with other retailers or suppliers*".[75]

151 The Commission notes that it has identified some indirect ways in which a retailer may observe another retailer's terms of supply with other suppliers (such as by product positioning on store shelves or by monitoring retail prices). However, it is not clear that retailers monitoring the retail prices of its competitors in this way would be consistent with facilitating coordination. In particular:

151.1 first, the ability for a grocery retailer to observe retail pricing on a competitor's individual products and compare it to its own product cost price, does not provide any transparency about the competitor's terms of supply. The competitor's margin is not visible, and the product could even be a "loss leader". Observing a competitor's product positioning on shelves could provide only the vaguest sense of what that competitor is paying for the product,

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[74] SOI at [126].

[75] SOI at [127].

151.2 second, even then, the ability to coordinate would need to be established by somehow ensuring the same prices could be obtained from suppliers (over potentially thousands of SKUs), and

151.3 finally, these features would not change as a result of the Proposed Transaction. Accordingly, there can be no merger effect on coordination in the acquisition of grocery products.

152 For further detail, refer to paragraphs **Appendix 1**.

PART 2: RETAIL SUPPLY OF GROCERIES

MARKET DEFINITION

153 The Commission's current view is that:[76]

153.1 it does not need to define the exact geographic boundaries of competition and is considering competition effects locally and on broader geographic dimensions, and

153.2 the relevant market is likely to include all stores which offer the ability for consumers to do a one-stop grocery shop.

154 It is still considering whether it should consider narrower product markets including:[77]

154.1 whether online offerings should be considered separately, and

154.2 whether there are narrower markets by size of store.

155 The Parties consider that product markets are broader than "one-stop shop", or at least that the Parties are very materially constrained by retailers that have a narrower or more specialised offering. Nevertheless, as the Commission suggests it is not necessary to conclusively define relevant markets. There is no overlap or potential overlap between the Parties and therefore no possible lessening of competition.

UNILATERAL EFFECTS

The Proposed Transaction would not result in the loss of actual or potential competition at the retail level between FSNI and FSSI

156 In order for there to be a substantial lessening of competition, there must be a "real chance" of a scenario occurring that would represent a material lessening of competition relative to the factual (i.e. the scenario where the merger occurs). This

[76] SOI at [136] to [137].

[77] SOI at [137].

requires that there "is more than a possibility, but does not mean that the effect needs to be more likely than not to occur".[78]

The Commission's current views

157 The Commission acknowledges that the evidence it has considered to date supports the Parties' submission that there is no existing retail competition between them.[79] However, the Commission is still considering whether, absent the Proposed Transaction, there could be potential competition at the retail level between FSNI and FSSI.

158 More specifically:[80]

158.1 [REDACTED]:

(a) [REDACTED],

(b) [REDACTED], and/or

(c) [REDACTED].

158.2 [REDACTED].

[REDACTED]

159 [REDACTED].

160 [REDACTED].

161 [REDACTED]:[81]

161.1 [REDACTED],

161.2 [REDACTED], and

161.3 [REDACTED].

162 [REDACTED]:

162.1 [REDACTED].

[REDACTED].

162.2 [REDACTED].

162.3 [REDACTED].

[REDACTED].

[REDACTED].

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78 Commerce Commission, *Merger and Acquisition Guidelines May 2022*, at [2.27].

79 SOI at [146] to [147].

80 Discussed [REDACTED] and [REDACTED] of the SOI.

81 SOI at [REDACTED].

[REDACTED].

163 [REDACTED].[82] [REDACTED].

[REDACTED]

164 [REDACTED].[83]

The Proposed Transaction would not increase barriers to entry and/or expansion

165 Whether or not the Proposed Transaction would increase barriers to entry and/or expansion is determined by comparing the likely circumstances in the factual and counterfactual. The Commission's current view is that:[84]

165.1 further and broader entry or expansion in retail grocery markets would be likely to substantially improve outcomes in those markets, and

165.2 the Proposed Transaction may make it less likely for any third-party entry or expansion to occur by changing the incentives or ability of potential competitors.

Whether further entry or expansion would improve outcomes is not relevant to the assessment, unless the Proposed Transaction would alter the likelihood of such entry or expansion

166 The Commission's proposed line of enquiry, whether further and broader entry or expansion in retail grocery markets would be likely to substantially improve outcomes in those markets, is not in and of itself relevant to the merger clearance process. That is, the effects of new entry or expansion in the market do not go to the likely state of competition if the Proposed Transaction does or does not proceed (i.e. the factual and the counterfactual). The discussion from paragraph 153 of the SOI is relevant to the extent that it relates to the characterisation of the current state of the market, which is the backdrop for the factual and counterfactual.

167 In relation to the current state of the market, the Parties:

167.1 disagree with the Commission's view that there has been limited entry and expansion in retail grocery markets since the market study, given The Warehouse Group's continued expansion into grocery retail markets since FY23 and the entry of Costco in October 2022 (with further expansion expected). The significance of The Warehouse Group's activity in the retail market has also been recently acknowledged by the Grocery Commissioner,[85] and

167.2 agree with the Commission that there has been some reduction in barriers to entry since the market study. The evidence offered by the Commission does

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82 SOI at [REDACTED].

83 SOI at [REDACTED].

84 SOI at [152].

85 See Grocery Commissioner, Pierre van Heerden's comment:

> *It was very disappointing that Supie went under… but it was not the end of competition. And when I look at it, you know they were projecting $16m, $17m turnover [annualised revenue]. But they weren't close to that, the prior year they were about $6m odd.*

not support its view that there are still likely to be high barriers to entry and/or expansion. In particular, The Warehouse Group's submission that it "cannot exclude a real chance that conduct described in the market study will remain a barrier to entry and expansion" is not evidence of that proposition. Further, the finding of Supie's liquidators that the company's insolvency was primarily due to a lack of sales volumes and scale to operate the business profitably could be a result of a number of different factors, other than or additional to barriers to entry and expansion.

The Proposed Transaction would not make it less likely for entry or expansion to occur

168 There would not be an increase in barriers to entry or expansion as a result of the Proposed Transaction, for the following reasons:

168.1 *Commission concern*: the Merged Entity may be able to achieve better terms relative to rival acquirers and may as a result, be able to offer lower prices. These lower prices could raise the minimum required scale for rival acquirers of groceries to enter and effectively compete, which may in the long run lead to worse retail consumer outcomes.[86]

Response: if the Merged Entity achieves better terms and offers lower prices to consumers, that is pro-competitive (see above from 85 for further discussion). The offering of lower prices might make entry practically less likely because the commercial opportunity for entry does not present, but that is not the same as an anti-competitive increase to barriers to entry and expansion. It is pro-competitive for the Merged Entity to offer customers better outcomes. The Commerce Act and, in particular the substantial lessening of competition test, exists to protect the competitive process, not specific competitors (including potential competitors).[87]

168.2 *Commission concern*: the Merged Entity may have access to a larger set of data which a rival could not replicate. This could enable the Merged Entity to implement strategically targeted price cuts in locations where it faces entry, in the interests of driving out competitors (with the ability to increase prices once the competitor has exited). The risk of this might in and of itself be enough to deter new entrants and expansion.[88]

Response: this theory of harm assumes the Merged Entity would accumulate more retail data in relation to particular regions in the factual than the Parties would accumulate in the counterfactual, such that it would be easier for the Merged Entity to drive out competitors in particular regions using targeted price cuts (informed by the increased data) in the factual than in the counterfactual. However, the Merged Entity would have no more data in

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Then I look at what The Warehouse has done, and if you look at just the increase in their turnover in food for that same year, it was about $70m, just their increase was vastly more than Supie's total turnover.

in Kate MacNamara's New Zealand Herald article, "New Zealand's grocery commissioner Pierre van Heerden on the marathon feat of reviving competition", 14 April 2024. https://www.nzherald.co.nz/business/new-zealands-grocery-commissioner-pierre-van-heerden-on-the-marathon-feat-of-reviving-competition/BUV2BWAXWJCTHFWVUPSW6IXWOM/.

[86] SOI at [156].

[87] See Commerce Commission, *Merger and Acquisition Guidelines May 2022*, at 2.19 and *ANZCO Foods Waitara Ltd v AFFCO NZ Ltd* [2006] 3 NZLR 351 (CA) at [242].

[88] SOI at [156] to [157].

relation to any particular location in the factual compared to the counterfactual. This is because the Parties' retail presence would not change in any location, and the Parties do not compete in the same geographic areas. The Merged Entity would have the same amount of data for each local area it serves as each co-operative has currently.

To the extent a national view is required, for national competition, the Parties already seek to optimise their competitive positioning, and such data could theoretically be pooled now and in the counterfactual ([REDACTED]). At most, pooling data for national competition would assist the Merged Entity to have comparable customer insights to Woolworths, which would be pro-competitive in terms of the Merged Entity's ability to effectively position itself nationally.

Finally, there is no evidence that conduct of the kind described is currently a real risk. Given the Proposed Transaction would not alter incentives in relation to retail competition there is no reason to expect a real risk of such conduct to arise in future.

168.3 *Commission concern*: the Proposed Transaction could lead to a "waterbed effect" whereby, the increased buyer power of the Merged Entity could lead to suppliers raising prices or providing worse terms to competitors. This could result in other retailers raising their prices, which could weaken competition and enable the Merged Entity to raise prices. This "waterbed effect" could occur through two mechanisms:[89]

(a) the Proposed Transaction could lead to the consolidation of suppliers in response to the weakening of suppliers' bargaining position, and/or

(b) the potential for the Proposed Transaction to lead to a circular effect where rival grocery retailers could lose market share due to their worse terms, reducing their scale and leading to increasingly worse terms from suppliers.

Response: See Part 1 above regarding the acquisition of groceries for discussion of the reasons the Proposed Transaction would not have an adverse effect on suppliers.

See paragraphs 16 to 17 of the Houston Kemp report in **Appendix 1** regarding the "waterbed effect". In this part of the report, Houston Kemp comments that the extent to which the "waterbed effect" affects consumers is unclear (i.e. prices may still fall if the effect of reducing one buyer's costs outweighs pricing pressure in the downstream market for other firms). Further, economic literature recognises the "anti-waterbed effect" (where suppliers are incentivised to reduce a buyer's bargaining power by offering lower prices to that buyer's competitors) and is unclear on whether the waterbed or anti-waterbed effect is stronger.

169 The Commission notes that it has currently considered the likelihood of the Proposed Transaction increasing barriers to entry and/or expansion in light of the counterfactual where the Parties do not compete, instead of continuing to compete

[89] SOI at [159] to [160].

in the Island they respectively serve.[90] It questions whether it should also be considering this matter against a counterfactual where the Parties compete with one another. As discussed above from [REDACTED]. As such, the Commission should not consider the potential for the increase in barriers to entry and/or expansion against this as a further counterfactual.

COORDINATED EFFECTS

170 Coordination involves market participants recognising that they can reach a more profitable outcome if they accommodate each other's price increases. Successful coordination, as the Commission states in the Guidelines:[91]

> requires firms to reach at least an implicit agreement, and then to maintain that agreement by detecting and punishing any firm that deviates from the agreement.

Coordination can occur in relation to price or any other dimension of competition.

171 The Commission is considering whether the Proposed Transaction could increase the potential for the Merged Entity and all or some of its remaining competitors to coordinate their behaviour and collectively exercise market power such that output reduces and/or prices increase. The Commission is assessing whether:[92]

171.1 the market is vulnerable to coordination, and

171.2 the Proposed Transaction changes the conditions in the relevant markets so that coordination is more likely, more complete or more sustainable.

Retail grocery markets are not vulnerable to coordination
The Commission's current views

172 The Commission currently considers that retail grocery markets may be vulnerable to coordination. It is considering the Parties' submission that the differentiation and

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[90] SOI at [150].

[91] At [3.88].

[92] SOI at [164].

number of products hinders coordination as well as considering whether coordination could take place in relation to:[93]

172.1 prices for a certain group of products (e.g. key products that drive consumer supermarket choice or private label products), and

172.2 the timing of promotions.

173 The Commission has referred to the features it considered made the retail grocery market conducive to coordination, in the market study. These include the following:[94]

173.1 the major grocery retailers are each other's closest competitors and have similar competitive strategies which are well known,

173.2 the major grocery retailers closely monitor each other, and the high degree of transparency means they can quickly detect and respond to any changes in their closest rival's strategies, and

173.3 the market is relatively stable (including that the retail sector is highly concentrated, the major grocery retailer's markets shares are relatively high and stable over time, other retailers face difficulties entering and expanding, and the demand for groceries is relatively stable and predictable).

174 The Commission indicates that the evidence gathered in investigating the Proposed Transaction suggests conditions are similar to those identified in the market study.[95] For example, [REDACTED] and since the market study there has been limited new entry and some exit.

The Parties' responses

175 It is worth noting that the points referred to in the market study and reiterated in the SOI appear to proceed from an assumption that the Parties are a single head in the market, which suggests the separation or otherwise of the two co-operatives was not considered material. This in turn suggests there can be little change as a result of the Proposed Transaction.

176 The Parties disagree that the major grocery retailers have similar competitive strategies that are well known. The Parties' monitoring of its competitors, particularly Woolworths, is a reflection of the fact that their strategies are not well known. For example, [REDACTED].

177 Further, the ability to detect and respond to competitors' changes in strategies is not in and of itself indicative of or conducive to coordination. In fact, it points away from the existence of coordination as coordination requires a degree of stability in strategies and behaviour to enable competitors to know how each other will act and react in the market. It is procompetitive to respond to competitors' changes in strategy where the response requires market participants to adapt and improve their own offerings in order to compete. Detecting and responding to changes in strategy would only indicate coordination if market participants were responding to competitors' changes in strategy by "punishing" them for deviating from an existing

[93] SOI at [169].

[94] SOI at [170].

[95] SOI at [172].

arrangement. There is no evidence of such conduct, and the Parties consider they do not engage in it.

178 The Parties also disagree that the market has experienced particular stability since the market study. There has been material entry and expansion since the market study, with the expansion of The Warehouse Group's retail grocery offering and the entry of Costco (see above from 93.1 and 167.1). In addition, the Parties' have been competing hard on price.[96]

179 The Commission also points to [REDACTED] as evidence that conditions are similar to those identified during the market study (set out above at 173). [REDACTED].

180 As the Commission notes, in the Parties' view, the number and differentiation of products offered in retail grocery markets also acts as a material hindrance to coordination. Not only is there a large and differentiated range of products offered, but there are also many considerations relevant to price setting that further inhibit accommodation of competitors' pricing. These include the application of promotions, interrelations and interdependencies between products (e.g. pricing differentials within and across categories and between substitute and complementary products), and wider strategic priorities. In the Parties' view, these factors equally hinder coordination in relation to prices for subsets of products (e.g. key or private label products).[97]

181 The timing of Island-wide and/or national promotional campaigns, this is determined at the co-operative level [REDACTED].[98] [REDACTED]. The long-term nature of promotion planning, the importance of supplier negotiations in this planning and the

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[96] See the Parties' cross submission on the Statement of Preliminary Issues at [30] and [52.2].

[97] See also Competition & Markets Authority, *Anticipated merger between J Sainsbury PLC and Asda Group Ltd: Final report,* (25 April 2019) from [9.52].

[98] [REDACTED].

fact the Parties do not know their competitors' planned promotional campaigns in advance means accommodation in the market is not feasible.

The Proposed Transaction would not increase the likelihood, completeness and sustainability of coordination

The Commission's current views

182 The Commission is considering whether the Proposed Transaction could increase the likelihood, completeness and/or sustainability of coordination between the Merged Entity and Woolworths, including by:[99]

182.1 eliminating a potential disrupter of coordinated behaviour in the event that:

(a) FSNI or FSSI was a potential entrant into a retail market in the counterfactual, and/or

(b) the Proposed Transaction increased the barriers to entry for a new retailer,

182.2 the Merged Entity setting pricing at a more national level, which may make it easier for Woolworths to monitor the Merged Entity's prices and detect changes (and vice versa),

182.3 the Merged Entity having a similar national footprint to Woolworths, operating across the North and South Islands with a central head office. Firms being similar in size and structure can facilitate coordination. The Commission notes that it could also make the two firms more different in some respects, and

182.4 the Merged Entity could make information seeking from suppliers regarding prices, discounts and promotions easier, to the extent this is still a feature in the current market.

The Parties' responses

183 The Proposed Transaction cannot change the conditions for coordination. The level of transparency will not change as a result of the Proposed Transaction. As addressed elsewhere in this submission and the Houston Kemp report at **Appendix 1**:

183.1 [REDACTED], and

183.2 the Proposed Transaction would not increase barriers to entry and/or expansion (see above from 165),

such that the Proposed Transaction does not eliminate or affect a potential disrupter entering the market.

184 In relation to the potential for an increase in the prevalence of national pricing, the dynamics in retail grocery markets that drive national and regional pricing will be the same in the factual and counterfactual (noting the Parties are likely to have greater organisational or practical ability to implement national pricing if and when it is preferred, but some national campaigns already occur and the Parties could more closely align retail pricing today – see the Rollback example above). The Parties

99 SOI at [175].

note that [REDACTED]. But regardless of any increase in the prevalence of national pricing, the level of *transparency* of pricing would not change. That is, in practice, to the extent of any increase in the prevalence of national pricing competitors would theoretically be able to monitor one rather than two co-operatives' pricing. But the *conditions* for coordination will remain the same as they are currently, and in the counterfactual.

185 In any event, if the Proposed Transaction did cause an increase in the amount of national pricing (noting that could only be a practical change), it would be a pro-competitive feature of the Proposed Transaction. When entry occurs in only some local areas (e.g. Auckland), existing local market participants may face increased competitive pressure to respond with better prices and offerings. To the extent they engage in island-wide pricing, FSNI or FSSI's response to a local competitor benefits customers of all stores of the relevant banner. If the Proposed Transaction increased the prevalence of national pricing, customers all over the country would benefit from an increase in competition in a particular local area e.g. a competitive response driven by Costco in Auckland would benefit customers in Invercargill.

186 The Parties disagree that the Merged Entity and Woolworths would be of a similar size and have similar cost structures. For example:

186.1 *Corporate versus co-operative model*: the co-operative model is centred around its members. [REDACTED],

186.2 *Number of banners and store network*: Foodstuffs operates different banners while Woolworths' operations are mostly under the Countdown/Woolworths brand. Each banner has associated overhead costs. [REDACTED]. [REDACTED]. [REDACTED].

The difference in the number of banners is also reflected in a difference in the size of each business' network of physical stores. The Merged Entity would cater to 530 retail and wholesale stores across the country.[100] Woolworths' website indicates that it currently operates approximately 254 stores across New Zealand.[101] [REDACTED]. [REDACTED], and

186.3 *Trans-Tasman versus New Zealand only*: the Parties assume that at least some of Woolworths' head office functions are shared between the New Zealand and Australian businesses. For example, presumably the Woolworths New Zealand business is able to and does draw on aspects of the Australian business' operations such as pricing/promotions strategy, marketing, property, private brands, loyalty programmes, ecommerce and digital.

187 The Parties refute any suggestion that there is information sharing between retailers through suppliers, and that this would occur following the merger. Further, the Proposed Transaction would not change the conditions associated with such conduct (noting that any changes would also require Woolworths to do the same and there will be no changes to Woolworths as a result of the Proposed Transaction).

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[100] This includes PAK'nSAVE, New World, Four Square, Gilmours, Trents, On the Spot, Raeward Fresh and Liquorland stores.

[101] See https://www.countdown.co.nz/info/about-us/about-woolworths-nz which states that Woolworths' operates over 185 Countdown/Woolworths stores and 69 FreshChoice and SuperValue stores.

APPENDIX 1: HOUSTON KEMP REPORT

Attached separately.

APPENDIX 2: [REDACTED]

[REDACTED]

1 [REDACTED].

2 [REDACTED].

[REDACTED]

3 [REDACTED].

4 [REDACTED].

[REDACTED]

5 [REDACTED].

6 [REDACTED].

7 [REDACTED].

8 [REDACTED].

APPENDIX 3: FSSI [REDACTED] FOR THE 2022 ROLLBACK PROGRAMME

[REDACTED]