

Foodstuffs North Island Limited and
Foodstuffs South Island Limited
Cross-submission on Statement of Issues

PUBLIC VERSION

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

6 May 2024

CONFIDENTIALITY

- 1 Confidentiality is sought in respect of the highlighted information in this document. Release of this information would be likely to unreasonably prejudice the commercial position of 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.

PRELIMINARY COMMENTS

- 2 The Parties provide this cross submission to address key points raised in other submissions on the statement of issues (**SOI**).
- 3 The main focus of the submissions is the effect on markets for the acquisition of grocery products. The Parties consider the Proposed Transaction would not increase their buyer power such that a substantial lessening of competition could arise.
- 4 For a theory of harm to be made out, a merger-specific change must be identified. That change, in turn, must have a “real chance” of giving rise to a substantial lessening of competition relative to a realistic counterfactual.
- 5 For example, submissions identify perceived differences between the Parties in terms of bargaining styles and outcomes. Differences in bargaining styles and outcomes can occur for many reasons, and different styles and outcomes occur even between the same counterparties where they bargain with each other at different times. Reasons this can occur might include changes in the grocery retailer and supplier’s commercial priorities and strategies (e.g. the supplier being in a hurry, or preferring to focus on its export channels, or the retailer considering a broader, or a narrower, range is desired by its customers), or the negotiating tactics of particular individuals (e.g. the negotiating style of the grocery retailer’s current head of merchandising).
- 6 For such a change to be merger-specific, it would need to be enabled by the merger, or incentivised by the changes associated with the merger (it would then also need to represent a substantial lessening of competition compared with a relevant counterfactual). In the examples above, the differences are not merger-specific i.e. they occur due to ordinary changes in competitive strategy or personnel.¹ As such, the presence of differences in bargaining styles or outcomes are not, *without more*, evidence of a potential lessening of competition brought about by a merger. Bargaining styles and outcomes are subject to change and evolution in any factual and any counterfactual.²
- 7 Applying this to the present case: a perception on the part of some suppliers that FSSI is currently easier to deal with than FSNI³ does not mean the Proposed

¹ The Parties note, for completeness, that they now operate subject to the Grocery Supply Code.

² Houston Kemp, *Economic effects of proposed merger of FSNI and FSSI*, 7 March 2024, 26ff.

³ See, for example, Part 6 of FGC’s submission.

Transaction would be likely to result in a substantial lessening of competition. For it to constitute a lessening of competition:

- 7.1 *the perceived difference must be based on something intrinsic to each Party's position, structure or incentives (not simply current strategy or personnel).* In the case of FSSI, ranging strategy is in the process of changing, which means it would also be changing in the counterfactual. Suppliers may alter their perception based on changes in FSSI's strategy (and/or FSNI's strategy) in the counterfactual. (It is also worth noting that the changes to FSSI's strategy absent the Proposed Transaction would align it more to FSNI's strategy, meaning any differences between the Parties would unlikely be present, at least to the same degree, in the counterfactual),
- 7.2 *the perceived difference must be likely to change as a result of the Proposed Transaction* e.g. the procurement incentives associated with the merged structure would be different to those associated with the previous structure. As above, the FSSI strategy is changing regardless. In addition:
- (a) the incentives associated with procurement are determined by retail competition. The Proposed Transaction would not result in any material change to competition in retail grocery markets, and it is competition in retail grocery markets that is the purpose of the Parties (and the Merged Entity) acquiring grocery products. There would be no consolidation or change, as the Parties do not compete with each other and there is not a real chance they would do so in any counterfactual. So, as the Merged Entity, the Parties can be expected to seek to compete *as they do currently*. There would be no changes downstream that could drive different incentives in relation to procurement upstream, and
- (b) more generally, the Parties rely on competitive supplier markets to compete effectively in retail markets⁴ – this would not change as a result of the Proposed Transaction. As well as there being no change in downstream incentives, and there being absolutely no reason why the Parties would want to cut across their own commercial self-interest by lessening competition in acquisition markets, the Proposed Transaction would not materially improve the Parties' bargaining position i.e. their *ability* to lessen competition in acquisition markets, and
- 7.3 *the change must be likely to result in a substantial lessening of competition.* In this regard:
- (a) the Parties appreciate the Commission is considering the types of consequence that could comprise a substantial lessening of competition. The Parties do not consider it necessary to reach a firm view on what types of consequence could comprise a lessening of competition, given the anticipated changes arising from the Proposed Transaction would not meet the thresholds set out at 7.1 and 7.2 above. In other words, the Parties are anticipating that, following the Proposed Transaction, they would operate more effectively at lower cost with a similar amount of buyer power,

⁴ In some cases, the Parties face considerable supplier market power and proactively seek to generate more competitive outcomes – see for example the 26 April submission at 13.1 and 129.

- (b) there is no evidence to suggest FSSI's bargaining style (which is subject to change and is, in fact, in the process of changing) is better or worse for competition than FSNI's, and vice versa, and
- (c) irrespective of the specific outcomes that constitute a lessening of competition, more is required than the changes in price and style that would arise in the ordinary course of repeated bargaining. There does not appear to be any evidence that would suggest price or term changes arising from the Proposed Transaction (i.e. of a nature that could be anticipated or expected to occur as a result of the Proposed Transaction) could reduce innovation or new product development, cause suppliers to drop out of the market such that competition would lessen, or otherwise affect competition in a way that is different or worse than currently occurs. Range reviews and other procurement practices the Parties engage in are processes by which competition plays out among suppliers, and similar processes would continue following the Proposed Transaction.
- 8 An illustration of the impact of the Proposed Transaction is that, if the Proposed Transaction could materially or systematically alter bargaining outcomes the Parties would expect to be currently at a systematic cost disadvantage to Woolworths. That is because Woolworths is a grocery retailer with a national (in fact, trans-Tasman) presence and, given its corporate structure the Parties assume it largely procures products at a national (or Australasian) rather than regional or local level. As such, if it is operating effectively it should be taking advantage of a national or trans-Tasman bargaining position to obtain the best possible bargaining outcomes. (The Parties would nevertheless be surprised if Woolworths were, by its bargaining conduct, seeking to lessen competition among suppliers, given that would ultimately weaken its ability to compete in retail markets).
- 9 In fact, the Parties do not currently perceive a systematic or material cost disadvantage compared with Woolworths, because they are able to compete effectively with Woolworths in retail markets. The Commission will be best placed to test this perception. If correct, the Parties' perception suggests that product cost savings arising from the Proposed Transaction are more likely to be in the nature of practical gains arising from a better organised structure (and, potentially in respect of national suppliers, from being in a position to assess its business nationally, which is especially relevant for major, "must-have" suppliers⁵).
- 10 That is, the Proposed Transaction would not be capable of giving rise to a systematic or material change in bargaining power that would be capable of giving rise to a lessening of competition.
- 11 Houston Kemp and the Parties have considered the effect of the Proposed Transaction on bargaining. Procurement takes place from real suppliers;⁶ it is inaccurate to regard these as a single group. Suppliers are in varied positions – from small local suppliers dealing with individual stores through to large multinational suppliers dealing with both parties and a variety of channels to market

⁵ Houston Kemp, *Economic effects of proposed merger of FSNI and FSSI*, 7 March 2024, [59].

⁶ FGC at [4.11].

in many countries.⁷ While in the Parties' view grocery retailers consider their business as a whole, interrelationships between product categories and their overall offering, they also bargain with suppliers individually. Houston Kemp has found that for:⁸

- 11.1 major national suppliers and small national suppliers, the relative bargaining position of the Merged Entity would be likely to improve slightly, relative to FSNI and FSSI individually,
 - 11.2 regional suppliers, being those suppliers that presently negotiate with and supply to only one of FSNI and FSSI, the relative bargaining position of the Merged Entity would not be likely to change, relative to FSNI and FSSI individually, because in practice these suppliers would only change from negotiating with one co-operative to negotiating with the Merged Entity, and
 - 11.3 in respect of small local suppliers, the Merged Entity would not change its relative bargaining position, because procurement in respect of individual stores would be unaffected by the Proposed Transaction.
- 12 The only systematic improvement in bargaining position expected by Houston Kemp is a slight improvement relative to national suppliers.
 - 13 For major national suppliers, the Proposed Transaction could not have an adverse impact – major national suppliers (some with global reach) would continue to have significant countervailing power.⁹ Small local suppliers would also be unaffected by the Proposed Transaction as they would continue to deal with individual stores, whose ownership would not be affected by the Proposed Transaction.¹⁰
 - 14 Many smaller national suppliers also have countervailing power e.g. due to the desirability of their products.¹¹ However, even setting that aside, and assuming suppliers consider FSNI and FSSI as separate channels to market,¹² the Proposed Transaction would not compromise their options such that a material change would

⁷ The FGC has raised a concern that the Houston Kemp work has not been applied to the real world and is subject to assumptions. In fact, the Houston Kemp work is applied at Part 3 of the earlier report and in a more detailed way at Part 2 of its 26 April report.

⁸ See Houston Kemp, *Economic effects of proposed merger of FSNI and FSSI*, 7 March 2024, part 3; Houston Kemp, *Economic effects of proposed merger of FSNI and FSSI – review of statement of issues*, 26 April 2024, part 2. Note the Houston Kemp assumes the Parties are treated as separate channels to market by suppliers. In reality, this is likely to be a conservative assumption.

⁹ See also the 26 April submission, paragraph [45]ff; Houston Kemp, *Economic effects of proposed merger of FSNI and FSSI*, 7 March 2024, [34].

¹⁰ Given it would not alter retail competition, there is no basis for the view that the Proposed Transaction would result in less local buying.

¹¹ See the 26 April submission at [53].

¹² As above, this is likely to be a conservative assumption, see for example *Market study into the retail grocery sector: Preliminary issues paper – Submission by the New Zealand Food & Grocery Council* (4 February 2021) at [19]. FGC has also 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”.

be likely. To demonstrate this feature,¹³ FSNI considered [REDACTED]¹⁴ of its “middle” suppliers. Of these, only [REDACTED] were identified as not having one or more material options outside of the major grocery retailers i.e. Foodstuffs and Woolworths. Of these [REDACTED] suppliers, [REDACTED] mostly or exclusively supply private label products to FSNI. The single remaining supplier, [REDACTED], is [REDACTED].¹⁵ This result supports Houston Kemp’s view that a “three-to-two” merger of buyers is a “substantial mischaracterisation of the circumstances faced by essentially all suppliers”.¹⁶

- 15 Against that background, the Parties’ responses to key points made in submissions are set out in the Appendix.

¹³ Houston Kemp, *Economic effects of proposed merger of FSNI and FSSI – review of statement of issues*, 26 April 2024, part 2.

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ Houston Kemp, *Economic effects of proposed merger of FSNI and FSSI – review of statement of issues*, 26 April 2024, paragraph [42].

APPENDIX – RESPONSES TO SUBMISSIONS

Ref	Topic	Key points from submission	FSNI and FSSI comments
Food and Grocery Council			
Pages 1 - 7	General comments	<ul style="list-style-type: none"> The evidential burden and onus are on the applicants, suppliers may not come forth with information out of fear of being recognised. The absence of evidence should not be taken to mean that evidence does not exist. 	<p>While the Commission will make a determination based on the evidence before it, it may be helpful to know that the Parties have not been told the identity of any person or entity that has commented on the Proposed Transaction (and do not ask to be told), except where an identity has been published in submissions (in which case presumably the submitter has consented).</p> <p>For completeness, the Parties disagree with the implied contention that they make ranging decisions by reference to considerations that extend beyond their interest in offering retail grocery products that customers value most, secured on the best available commercial terms.</p>
[3.1] – [3.6]	Context, market structure and impact of the proposal	<ul style="list-style-type: none"> The Commission has not investigated whether intragroup arrangements are creating artificial barriers to exit/switch or potential cartel conduct. 	<p>It is not clear what “intragroup” arrangements are being referred to or how they might be affected by the Proposed Transaction. But:</p> <ul style="list-style-type: none"> the Parties’ current business model is lawful (see the Parties’ cross submission on the Statement of Preliminary Issues, 7 March 2024 from paragraph [43], and elsewhere), the Proposed Transaction would not cause the Parties’ business model to become a cartel, or entail any cartel conduct, and

Ref	Topic	Key points from submission	FSNI and FSSI comments
			<ul style="list-style-type: none"> there are no plans to alter the ability for members to exit as a result of the Proposed Transaction.
		<ul style="list-style-type: none"> The Commission should consider current market developments which may make market entry less likely or otherwise adversely impact competition/consumers. For example: <ul style="list-style-type: none"> Countdown rebranding to WWNZ seems consistent with a push to increase private label (also means increased offshore supply), FSNI's category review which has an aim of reducing SKUs, and concerns raised about the Grocery Supply Code. 	<p>No merger effect is identified in relation to these points.</p> <p>For the avoidance of doubt, the aim of FSNI's category reviews is to better align its offering with its perception of customer demand (as shown in the evidence presented in the 26 April submission¹⁷ from paragraph [95]).</p>
		<ul style="list-style-type: none"> Post-merger, head office will have greater bargaining power relative to individual co-op members, and we can expect further centralisation to take place. While this may lead to some efficiencies/cost savings, its likely to reduce new entrants, reduce innovation and lessen consumer choice. 	<p>It is not clear what "bargains" this point affects, nor the basis on which bargaining power could be said to be affected.</p> <p>This point appears to be based on an assumption that co-operative members do not want the support centre to procure grocery products, and instead would prefer to procure them individually, but the support centre is coercing them to allow it to carry out procurement. This point does not reflect the reality of the relationship between co-operative members and their support centre.</p> <p>The point also assumes that centralisation would reduce competition. The degree of centralisation</p>

¹⁷ Foodstuffs North Island Limited and Foodstuffs South Island Limited Response to Statement of Issues, 26 April 2024.

Ref	Topic	Key points from submission	FSNI and FSSI comments
			merely reflects the co-operatives' view of how to best optimise their competitiveness at a given time, and is subject to change (in the factual and the counterfactual). Increased centralisation does not reduce competition. Ranging decisions simply reflect competition taking place – see the 26 April submission from [77] – and that would be the case in the factual and the counterfactual.
[4.1] – [4.20]	SLC / increased market power in the acquisition of groceries	<ul style="list-style-type: none"> Centralised head office procurement leaves less ability and incentives for local stores to depart from head office directives. 	See the row above.
		<ul style="list-style-type: none"> The merger is predicated on cost savings/efficiencies – some of these will come from the parties' increased buyer power and ability to negotiate with suppliers. 	See the preliminary comments above.
		<ul style="list-style-type: none"> The parties will have the ability and incentive to expand private label (coordinated effects). 	<p>The Proposed Transaction would not change the Parties' incentive or ability to expand private label, as it would not change incentives or the Parties' competitive position in any retail markets. See the 26 April submission from paragraph [124].</p> <p>Private label is treated as any other supplier (a topic that is covered by the Grocery Supply Code). FOBL is customer driven and develops private label products in line with customer needs, trends and demand (see the 26 April submission at paragraph [134]).</p>
		<ul style="list-style-type: none"> The RGRs will obtain a further monopoly in relation to data and for media services – they will be able to bundle these services for many suppliers, as they can be essential inputs. 	Unclear what is meant by a monopoly in this concern (e.g. the Parties have data only on their own customers, not those of their competitors).

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			<p>But the relevance of data is set out in the 26 April submission at paragraph [168.2].</p> <p>It is not clear what data would be bundled with. However, it is not an essential input e.g. some successful suppliers purchase data from the Parties and others do not. Further, suppliers can already access the Parties' data on a national basis, and would be able to do so in both the factual and counterfactual.</p>
		<ul style="list-style-type: none"> The Parties' approach to grocery supply agreements and compliance with the grocery supply code show an imbalance of power remains. The regulatory regime is in its early stages and the desired effects will take time to come through. 	<p>No merger effect is identified.¹⁸</p> <p>For completeness, the Parties are committed to complying with the Grocery Supply Code. This is demonstrated by the fact that both willingly incorporated Commission feedback on their contracts when received (it is not surprising that there would be Commission feedback on the Parties' first-ever attempt to comply with the Code – the existence of such feedback cannot be taken as an unwillingness by the Parties to comply).</p>
		<ul style="list-style-type: none"> Note Houston Kemp's submission on the bargaining model. Theoretical models are helpful but can be divorced from the real world and are reliant on assumptions (including rationality). Highlights the ACCC's comments about the bargaining model, the "absolute size of the buyer" and private labels to support a finding that in New Zealand, the merger will 	<p>Houston Kemp applies the model to the Proposed Transaction in its 7 March report in Parts 3 and 4, and in its 26 April report at section [2.2].</p> <p>As such, the Proposed Transaction would not materially affect the ability to "unilaterally extract favourable terms from suppliers".</p>

¹⁸ See also the first Houston Kemp report at paragraph [28]: the economics literature does not recognise the existence of an "imbalance", or "balance" of bargaining power.

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		<p>increase buyer power which equates to an increase in market power (and is therefore a SLC).</p> <ul style="list-style-type: none"> Agree with the Commission's view that the merged entity may be able to unilaterally extract favourable terms from suppliers, as the parties currently present separate opportunities for suppliers. This issue is also the focus of Anonymous G's Submission. 	<p>Further, the Parties offer opportunities in different retail markets, rather than being separate opportunities to access the same retail markets.</p>
		<ul style="list-style-type: none"> In response to the Commission's consideration of whether there can be a SLC whether or not there is a reduction in volume or output, FGC submits that a reduction in quality and innovation will suffice as they are key components of competition. Anonymous G's submission also focuses on investment in innovation. 	<p>The Proposed Transaction would not be likely to result in any reduction in quality or innovation for the reasons set out from paragraph [110] of the 26 April submission.</p>
		<ul style="list-style-type: none"> Raise concerns about the use of the word "coordinate" between the two major retailers but agree that both parties would have increased market power in procurement, knowing that suppliers had fewer options. 	<p>In relation to market power in procurement, see the preliminary comments above.</p> <p>In relation to coordinated effects, see the 26 April submission from paragraph:</p> <ul style="list-style-type: none"> [148], in relation to the acquisition of groceries, and [170], in relation to retail coordination.
[5.1] – [5.4]	SLC / increased market power in the retail supply of groceries	<ul style="list-style-type: none"> Note the merged entity could engage in more national pricing. Will make it easier for a major competitor to "coordinate" pricing. 	<p>The Proposed Transaction's effect on national pricing is in the 26 April submission at paragraphs [184]-[185]. The potential for national pricing will not alter Woolworths' ability to monitor the Merged Entity's prices and detect changes. See also the second Houston Kemp report at paragraph [62].</p>

Ref	Topic	Key points from submission	FSNI and FSSI comments
[6.1] – [6.17]	Commercial dependencies between markets, platforms and private label	<ul style="list-style-type: none"> Reiterated their concerns about the market power of each RGR’s platform and private labels as raised during the market study. Namely, the conflict of interest that retailers get significant inside information from suppliers, price relativities at retail, retailers becoming competitors for vital shelf space and concerns about supplier IP/know-how being used. 	<p>As explained in the preliminary comments above, the “market power”, or market position, of the Parties is not expected to be enhanced by the Proposed Transaction.</p> <p>For the reasons explained from [124] of the 26 April submission, the Proposed Transaction would not alter competition in relation to private label.</p> <p>This issue is also covered by the Grocery Supply Code.</p>
		<ul style="list-style-type: none"> Provide examples of supplier comments about their lack of ability to negotiate with retailers (namely that negotiations are one-sided). Noting this issue is heightened for smaller suppliers with fewer resources. 	<p>The Proposed Transaction’s impact on suppliers is described above in the preliminary comments.</p>
		<ul style="list-style-type: none"> The Commission should also consider current market developments which may make market entry less likely e.g. FSNI’s category review with the aim of reducing SKUs and the rollout of additional Four Square stores. 	<p>No merger effect is identified.</p> <p>As above, the aim of FSNI’s category reviews is to better align its offering with its perception of customer demand (as shown in the evidence presented in the 26 April submission¹⁹ from paragraph [95]).</p> <p>The rollout of new stores does not alter barriers to entry (it typically comprises entry).</p>
		<ul style="list-style-type: none"> The merger would also allow head office to operate more like FSNI than FSSI. 	<p>It is not clear the reason the FGC considers this would have an adverse effect on competition. See</p>

¹⁹ Foodstuffs North Island Limited and Foodstuffs South Island Limited Response to Statement of Issues, 26 April 2024.

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			the preliminary comments above as to differences in "style".
[8.1] – [8.2]	Incorrect approach to the counterfactual	<ul style="list-style-type: none"> It is incorrect to automatically use the status quo as the counterfactual. 	<p>The Parties consider the only relevant counterfactual is effectively the status quo, as described in the 26 April submission at paragraph [156] and elsewhere, including the Parties' individual future plans such as the development of FSSI's "better buying", or centralised buying, practices.</p> <p>The Commission has tested the Parties' position rather than automatically adopting the status quo as the counterfactual.</p>
		<ul style="list-style-type: none"> The Commission should analyse whether co-operative arrangements create exit barriers and are therefore anti-competitive. As well as considering whether there is cartel conduct currently, as the Commission can not use a potentially illegal counterfactual as its benchmark. 	<p>The ability for members to exit would not be materially altered by the Proposed Transaction.</p> <p>The lawfulness of the Parties' business model is addressed in the 26 April submission at paragraph [159].</p>
[9.1] – [9.8]	Response to SOI questions from FGC survey data	<ul style="list-style-type: none"> There are mixed views from supplier members but the overwhelming majority showed real concerns that the merger would SLC in the grocery retail market for suppliers. 	No specific evidence is provided. The effect on retail competition is addressed in the preliminary comments above, and in more detail at Part 2 of the 26 April submission.
		<ul style="list-style-type: none"> Members have highlighted concerns with: differences in terms and negotiations, increased market power, impacts on other parts of the supply chain, no benefit to consumers and difficulties for new retail entry. 	<ul style="list-style-type: none"> <i>Differences in terms and negotiations:</i> see the preliminary comments, above. <i>Increased market power (in terms of acquisition of groceries):</i> see the preliminary comments above. <i>Impacts on other parts of the supply chain and/or greater costs being imposed on</i>

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			<p><i>suppliers</i>: the nature of this concern is not clear. But the Parties submit there should not be material impacts on the supply chain, since each island will effectively continue to have its own physical supply chain. Given the geography of New Zealand, and consistent with the evidence the Parties have provided to the Commission, it would not be commercially rational to service the North Island out of a South Island supply chain or vice versa, so the Parties would not do so. Accordingly, supply chain costs should not increase and so the merger should not result in greater supply chain costs being imposed on suppliers.</p> <ul style="list-style-type: none"> • <i>No consumer benefit</i>: no evidence is presented to support the concern that merger-specific cost savings are not expected to be passed on to consumers. The Parties consider they would continue to face competitive and regulatory pressure to share benefits with customers, and they are committed to doing so. That commitment is shown by their recent conduct in relation to pricing (noting their incentives in relation to retail competition would not change as a result of the Proposed Transaction – 26 April submission from paragraph [95]), and [REDACTED]. In any event, in the Parties’ view, it is not necessary for the Commission to determine whether cost savings would be shared with customers given, regardless, the Proposed Transaction would not be likely to substantially lessen competition in any market. • <i>Difficulties for new retail entry</i>: difficulties for new retail entry would arise only if there were

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			<p>changes in downstream competition arising from the Proposed Transaction (which would not be the case) or changes in procurement that could result in a lessening of competition downstream (which would not be the case – see the preliminary comments above).</p>
		<ul style="list-style-type: none"> • Suppliers share the view that the merger will reduce their options for supply, resulting in decreased bargaining power and innovation/differentiation. • Suppliers share the view that the merger will combine market share and power into one entity, which could deter competition and innovation in the long-term. • Suppliers experience concerns that market-dominant negotiation tactics used by FSNI will worsen, despite the code. Concerns about pressure for additional investment and unfavourable terms leading to decreased profitability and viability for suppliers. • Suppliers have concerns about the potential for major variations at the supplier level (e.g. supplier profitability reduction, product deletions and increased costs of doing business). • Suppliers have concerns about adverse effects on innovation and new product development. 	<ul style="list-style-type: none"> • See the preliminary comments above in relation to bargaining power, innovation, market share/power on the acquisition side and new product development. • <i>Reduced profitability and viability:</i> it is not clear reduced profitability would arise from the Proposed Transaction for any particular supplier – see the preliminary comments above as to the effect of the Proposed Transaction on bargaining. But more importantly, it is far from clear (no evidence is presented) that any price or profitability impact would have the likely effect of lessening competition (as opposed to merely reducing returns below a prior level). Importantly, there would be no impact on the size or nature of the opportunity for suppliers to sell to Foodstuffs for retail sale, as there would be no impact on retail competition. • <i>Product deletions:</i> product “deletions” (of the kind the Parties assume are being referred to here) occur as a result of a process of competition. There is (and is anticipated to be) no overall reduction in the quantity of groceries acquired arising from the Proposed Transaction, and there would be no change in incentives at the retail level.

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[10.1] – [10.6]	Countervailing power of suppliers	<ul style="list-style-type: none"> Suppliers perceive themselves as having less negotiating power relative to the parties and fear this may increase with mergers or consolidation in the sector. Increased negotiating power could lead to higher costs of doing business for suppliers and potentially increased prices for consumers. Suppliers have concerns about the potential for margin pressure, reduced profitability and the possibility of being marginalised within the market. FGC’s survey provided evidence that there is strong potential for the merged entity’s buyer power to manifest in unilateral and coordinated effects in upstream markets for acquiring groceries. There is potential for exit by suppliers driven by concerns over profitability and increased costs of doing business. 	<p>The impact of the Proposed Transaction on bargaining outcomes is summarised above in the preliminary comments.</p> <p>Coordinated effects in relation to the acquisition of groceries are dealt with in the 26 April submission from paragraph [148]. No additional evidence appears to be presented here.</p>
[11.1] – [11.3]	Merger impacts	<ul style="list-style-type: none"> Suppliers express concerns about the current and further consolidation of power within the grocery retail sector, indicating a scenario where an even smaller number of buyers would wield significant influence over negotiations and market dynamics. Suppliers are concerned they will become increasingly dependent on the merged entity for access to the retail market. A transfer of surplus to the merged entity may result in reduced innovation and product development. Possibility of suppliers exiting the acquisition market if the merger results in unfavourable terms or reduced profitability. 	Addressed above in the preliminary comments.

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		<ul style="list-style-type: none"> There are concerns about price squeeze strategies where margins are reduced but retail prices remain or increase. This would further erode supplier profitability and create barriers to entry for new competitors, exacerbating the lessening of competition in the market. 	<p>The impact on bargaining outcomes is addressed above in the preliminary comments.</p> <p>The Parties consider they would face competitive and regulatory pressure to share savings with customers, [REDACTED].</p> <p>It is not clear whether barriers to entry here refer to barriers to entry into wholesale supply of grocery products, or barriers to retail grocery entry. If the former, then see above in the preliminary comments. If the latter, retail barriers would not be altered by the Proposed Transaction as the Proposed Transaction would result in no material change to retail competition (see the 26 April submission, Part 2).</p> <p>The commercial opportunity for entry would be greater if the Parties kept retail prices high, and lesser if the Parties shared cost savings such that retail prices reduced relative to the counterfactual (but for the reason that retail competition would have increased).</p>
[12.1] – [12.2]	Entity comparison	<ul style="list-style-type: none"> Suppliers have concerns about the impact on trading practices e.g. ability to trade at store level is removed which would impact ability to offer discounts. While long-term efficiencies are expected, the short-term risks are cost, price and ranging difference between the parties. Concerns about cutting range, increasing demands for funding and more control over individual stores. Concerns about the risk of cherry-picking by FSNI, given the difference in trading practices between the parties. 	<p>The ability for suppliers to deal with individual stores would not be affected by the Proposed Transaction (see for example the 26 April submission at [44]). The Proposed Transaction would also not affect store ownership or the competitive position of individual stores, as there would be no aggregation in any retail market.</p> <p>The impact on bargaining outcomes is described above in the preliminary comments.</p>

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[13] – [13.8]	Impact on supply terms and alternatives	<ul style="list-style-type: none"> Suppliers agree the overall volume of groceries acquired by the parties may not change but have concerns about supplier profitability reduction, product deletion and increased business costs. Non-regulated retailers like The Warehouse Group and Costco are too small to provide a viable alternative to the major retailers. Suppliers currently have a mix of agreements for supply, with the parties having variations in their terms, promotions and day to day operations. 	The impact on bargaining outcomes, including the presence of other options, is described above in the preliminary comments – see also the two Houston Kemp reports.
[14.1] – [14.4]	Impact on investment in innovation	<ul style="list-style-type: none"> Potential adverse effects on supply, ranging, quality, and innovation due to tighter margins and reduced pricing flexibility. There may be a chilling effect on innovation and the ability to take risks, given risk of decreased profitability. Increased cost of business could reduce attractiveness of investment into the market. 	The impact on bargaining outcomes, including the presence of other options, is described above in the preliminary comments.
[15.1] – [15.8]	Previous merger experience	<ul style="list-style-type: none"> The 2013 Foodstuffs merger showed a shift towards centralised decision-making, with the new entity exerting dominance in negotiating better terms. Suppliers expect FSNI’s business model will prevail post-merger. Despite promises of increased efficiencies/cost savings, the previous merger failed to deliver tangible benefits to consumers, with price increasing and ranging opportunities decreasing. The 2013 merger resulted in increased prices, reduced choice, supplier margin compression and negative impact on local suppliers. 	<p>FSNI disagrees that it exerted “dominance” following the 2013 merger.</p> <p>Regardless, FSNI has seen no evidence that the merger resulted in a lessening of competition in any market involving the acquisition of groceries.</p> <p>If the Merged Entity adopted FSNI’s business model following the Proposed Transaction, that would not represent a lessening of competition relative to the counterfactual. It could only be a lessening of competition if adopting the FSNI business model were linked to or enabled by the Proposed Transaction and were a model that lessened competition – see the preliminary comments above</p>

Ref	Topic	Key points from submission	FSNI and FSSI comments
			<p>in relation to differences in “style”. Further, FSSI’s business model is in the process of aligning more closely with FSNI’s, which would continue in the counterfactual (and more generally, changes in business model can be expected in any factual and counterfactual over time). See also the preliminary comments above.</p> <p>FSNI considers prices decreased as a result of the 2013 merger and presented evidence to that effect in the 26 April submission – see from paragraph [141]. FSNI disagrees that customer choice decreased – FSNI has continued to seek to optimise its offer to customer demand.</p>
[16.1] – [16.6]	Centralisation impacts on negotiation	<ul style="list-style-type: none"> • Further centralisation and concentration would present upward challenges for suppliers. The concentration of decision-making power at the national level and the potential homogenisation of terms could further restrict supplier autonomy and diversity within the market. • Many suppliers noted centralisation efforts already underway, impacting pricing negotiations and leading to downward pressure on prices. This trend, coupled with the potential merger, poses challenges for smaller suppliers, raising barriers to entry and reducing consumer choice. • Direct dealings with stores are becoming increasingly difficult and harder to do, particularly in regions where centralisation is already occurring, and this challenge is expected to intensify post-merger. 	<p>The impact of the Proposed Transaction on bargaining outcomes is set out above in the preliminary comments.</p> <p>As above, there would be no merger impact on direct dealings with stores.</p>
[17.1] – [17.6]	Increase of buyer power and private label	<ul style="list-style-type: none"> • Suppliers anticipate the merged entity will pivot towards private label offerings, shifting away from traditional suppliers and reducing consumer choice in the process. 	<p>The Proposed Transaction is not capable of giving rise to change to competition with respect to</p>

Ref	Topic	Key points from submission	FSNI and FSSI comments
		<ul style="list-style-type: none"> Highlighted the increased marketing of Pam's recently. The merged entity may favour national contracts. 	private label, as set out in the 26 April submission – see from paragraph 124.
[18.1] – [18.7]	New market entry or expansion	<ul style="list-style-type: none"> 74% of survey respondents consider the merger will make it harder for new grocery retailers to entry. 87% did not believe the merger would lead to any increased competition. Consider it is unlikely international retailers will invest in New Zealand, given its size. 	The Proposed Transaction would not result in any change in retail competition, so would not make retail entry more difficult. See Part 2 of the 26 April submission. (The Parties further note that international retailers do appear to be investing e.g. Costco and Circle K.)
Grocery Action Group			
Pages 1 - 2	General comments	<ul style="list-style-type: none"> Opposes the merger. It will result in a SLC and make it more difficult for any potential new market entrants. It will increase prices to consumers and defeat the purpose of the GICA and grocery supply code. 	<p>For the reasons set out above, the Parties consider the Proposed Transaction would not be likely to result in a substantial lessening of competition.</p> <p>The Proposed Transaction would not increase prices to consumers relative to the counterfactual. There would be no change to retail competition so no change in incentives to compete, relative to the counterfactual. In the Parties' view, the Proposed Transaction would be likely to decrease prices to consumers relative to the counterfactual.</p> <p>The Proposed Transaction would not defeat the purpose of the GICA and the Grocery Supply Code. As set out in the 26 April submission (see paragraph [5]), those tools would continue to apply as intended.</p>
[2.1] – [2.5]	Consumer interests lacking	<ul style="list-style-type: none"> The SOI focuses on suppliers and the supply chain but does not give enough attention to the impact on consumers. 	No merger effect is identified. See above in the response to the FGC submission.

Ref	Topic	Key points from submission	FSNI and FSSI comments
		<p>Consumers should be at the heart of the Commission’s consideration.</p> <ul style="list-style-type: none"> NZFGC has said the parties have not demonstrated any benefits from the merger that would accrue to consumers. 	<p>It bears repeating that the Parties consider they would continue to face competitive and regulatory pressure to share benefits with customers, and they are committed to doing so. That commitment is shown by their recent conduct in relation to pricing (noting their incentives in relation to retail competition would not change as a result of the Proposed Transaction – 26 April submission from paragraph [95]), and [REDACTED]. In any event, in the Parties’ view, it is not necessary for the Commission to determine whether cost savings would be shared with customers given, regardless, the Proposed Transaction would not be likely to alter competition in any retail grocery market.</p>
[3.1] – [3.12]	Events since the market study	<ul style="list-style-type: none"> Not much has changed since the release of the market study and ensuring legislative/regulatory changes. The changes have been on the supply side but consumer prices have continued to rise. Once the grace period for complying with the Grocery Supply Code were over, suppliers received numerous varying agreements from Foodstuffs. Certain stores (e.g. Flaxmere) have closed, food prices continue rising, Supie collapsed in October 2023 and the Commission is investigating shelf pricing following a complaint from Consumer NZ. The Commission took no action in The Warehouse and Weetbix incident. The Commission should review the threshold at which it might take action for a substantial lessening of competition. 	<p>No merger effect is identified.</p> <p>The substantial lessening of competition test is part of the statutory framework the Commission follows, so any change to the test would need to be at the legislative level and does not form part of this merger clearance investigation.</p> <p>The Parties note for completeness that they disagree with many of the points raised. In particular the Parties had no direct or indirect involvement with the Weetbix incident, and had and have no role in The Warehouse’s relationship with Sanitarium. The Parties further understand the Commission has looked closely at the incident.</p> <p>For completeness, the Parties note that there is no merger effect associated with store closures, including Flaxmere.</p>

Ref	Topic	Key points from submission	FSNI and FSSI comments
			See above in relation to the Parties' contracts complying with the Grocery Supply Code.
[4.1] – [4.6]	Lessening competition	<ul style="list-style-type: none"> • Submitters have highlighted the different approaches between FSNI and FSSI for product ranging and supplier negotiations. If a supplier's product is deranged from one island, there is still an opportunity to maintain supply with the other. Post-merger, suppliers might have to remove their product from New Zealand (ending their businesses or only export). • Some suppliers have said they will be shut out post-merger. One supplier noted a more decentralised approach in the South Island which allowed small/new manufacturers to get their products ranged. Post-merger, as identified by NBR, the merger will result in a standardisation of products on supermarket shelves leaving fewer options for suppliers. 	<p>The impact of the Proposed Transaction on bargaining outcomes is set out above in the preliminary comments. Further the downstream opportunity would not alter as a result of the Proposed Transaction, as there would be no material change to retail competition.</p> <p>The Proposed Transaction would not result in a standardisation of products on supermarket shelves leaving fewer options for suppliers. The Parties would continue to have the same incentives to meet customer demand that they have currently – breadth of range is a component of competitive strategy that changes over time in response to downstream incentives and that would not be affected by the Proposed Transaction.</p> <p>Further, ranging and deranging is the process of competition, in the context of which an unwelcome result for an <i>individual</i> supplier is not harm to the <i>process</i> of competition (the latter being the focus of the Commerce Act). See the second Houston Kemp report at paragraph [37].</p>
		<ul style="list-style-type: none"> • The proposed merger would remove any likelihood of competition between the two co-operatives. There are three counterfactuals that would be removed by the merger: <ul style="list-style-type: none"> ○ one banner group may detach marketing and procurement functions from Foodstuffs in its home 	There is not a real chance the Parties would compete absent the Proposed Transaction, or engage in any of the steps described by the GAG, as explained and evidenced at Part 2 of the 26 April submission.

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		<p>island attaching itself to Foodstuffs in the other island,</p> <ul style="list-style-type: none"> ○ Foodstuffs may respond to public pressure and voluntarily restructure to have more competitive brands, and/or • The regulator requires a mandatory restructuring. 	
[5.1] – [5.2]	Rise of home brands lessening competition	<ul style="list-style-type: none"> • There are concerns about the rise of home brands. Pam’s has become the country’s most popular grocery brand. • Home brands allow supermarkets to crowd shelves with their own products, reduce choices for consumers, keep prices high, keep profit margins that would otherwise be given to supplier and uses the innovation from suppliers for their own products. 	The Proposed Transaction is not capable of affecting the position of private label, based on the reasons and evidence presented in the 26 April submission from paragraph [124].
[6.1] – [6.8]	Overseas	<ul style="list-style-type: none"> • United Kingdom: In 2019, the CMA prevented the merger of the second and third largest supermarkets in the country. Parallels can be drawn from that case to this merger. The CMA rejected promises from the parties about holding prices and cementing in discounts, in favour of a full prohibition of the merger. • United States: the FTC has sued to prevent a merger of giant supermarket chains to prevent a monopoly. 	Each case is considered on its facts, according to the legal framework in the relevant jurisdiction. But a key difference between the CMA case and the FTC case on the one hand, and the Proposed Transaction on the other, is that the Proposed Transaction would not result in any retail market aggregation.
[7.1] – [7.4]	Divestment	<ul style="list-style-type: none"> • Allowing the merger would be inconsistent with international trends to not support or enable duopolies. 	As above, allowing the Proposed Transaction would not be supporting or enabling a duopoly – the Proposed Transaction would have no impact on concentration in retail grocery markets.
Lisa Asher			

Ref	Topic	Key points from submission	FSNI and FSSI comments
1 and 9	General comments	<ul style="list-style-type: none"> The merger should not be approved – will increase barriers to entry for other retailers as suppliers will fear retaliation if they partner with new entrants. 	<p>The Parties strongly disagree with any suggestion they would, or do, “retaliate” against suppliers for partnering with new entrants. In any event, the Proposed Transaction would not alter the ability or incentive to engage in such conduct, given it would not have any material impact on retail competition.</p>
		<ul style="list-style-type: none"> There is evidence of abuse of market power already present. The merger will increase the parties bargaining power to a market share of 60%. 	<p>For the reasons set out in the preliminary comments, the “3 to 2” concern in relation to buying is not supported by the evidence. See also the 26 April submission from paragraph [41].</p> <p>The Parties note their share of supply would not change in any retail market as a result of the Proposed Transaction.</p>
		<ul style="list-style-type: none"> The merger will continue to reduce competition within stores through the coordination of conduct currently executed by FSNI within its categories as it tenders placement on shelves to the South Island. 	<p>The impact of the Proposed Transaction on bargaining outcomes is explained above in the preliminary comments. Downstream incentives and the Parties’ competitive position would not change.</p>
2	Framework of assessment	<ul style="list-style-type: none"> The merger will result in more barriers to entry for future competitors, including the power held over suppliers to not supply new entrants at risk of losing business with Foodstuffs. For example, The Warehouse Group and Weetbix incident demonstrates challenges for even established businesses to extend their grocery offering. 	<p>There would not be a material change to bargaining power that would give rise to a substantial lessening of competition – see the preliminary comments above.</p>
		<ul style="list-style-type: none"> At present, there is nothing stopping either party from becoming national companies and entering the island in which they do not currently compete. This assumes there is no agreement to not enter each other’s territories which 	<p>The Parties agree there is no agreement stopping them from entering the island in which they do not currently compete. But the evidence demonstrates there is not a real chance they would do so absent the Proposed Transaction.</p>

Ref	Topic	Key points from submission	FSNI and FSSI comments
		could be considered a condition of cartel conduct, if it does exist.	The Parties' business model is lawful.
2 - 3	Increase in Buyer Power – risk to loss of food sovereignty	<ul style="list-style-type: none"> The merger will create an increase in buyer power if it were to go ahead – buyers in the market will go from 3 to 2. 	For the reasons set out in the preliminary comments, the “3 to 2” concern in relation to buying is not supported by the evidence. See also the 26 April submission from paragraph [41].
		<ul style="list-style-type: none"> The merger is prioritising profits. This is evident in the Sealord negotiations in November 2021 where a 50% gross margin to Foodstuffs for New Zealand caught fish, but this fell short of Foodstuffs' expectations. Foodstuffs supported foreign over locally sourced and damaged Sealord's business operations as a result. Comparing the 50% gross margin to the US, where due to the increased competition, the highest margin offered would have been 30% at best. The retailer has a lot of power and it is willing to enforce its power if it does not receive the margins it demands. This will impact consumers through higher prices and reduce local business and competition as margin levels required will continue to increase. 	<p>First, FSNI disagrees with the characterisation of this scenario. For example:</p> <ul style="list-style-type: none"> the value of FSNI's of Sealord frozen fish products fell by [REDACTED] for the year ending March 2023 compared with the year ending March 2022, a reduction from [REDACTED] to [REDACTED] for the subsequent year to March 2024 [REDACTED]. In the year Sealord's sales dropped, [REDACTED]. For the year FSNI's sales of Sealord products dropped, the total value of FSNI's sales in the frozen fish category was approximately steady, [REDACTED]. The category grew [REDACTED] for FSNI in the year to March 2024, and [REDACTED] in the period April 2021-March 2024, FSNI's trading margin for the New World banner on Sealord Group Limited frozen fish products, for the 4 weeks to 28 April 2024 was [REDACTED], for the 13 weeks to 28 April 2024 was [REDACTED] and for the period from “go-live” of the relevant category (19 June 2023) until 28 April 2024 was [REDACTED], and

Ref	Topic	Key points from submission	FSNI and FSSI comments
			<ul style="list-style-type: none"> FSNI's trading margin for the PAK'nSAVE banner on Sealord Group Limited frozen fish products for the 4 weeks to 28 April 2024 was [REDACTED], for the 13 weeks to 28 April 2024 was [REDACTED] and for the period from "go-live" of the relevant category (19 June 2023) until 28 April 2024 was [REDACTED]. <p>Bargaining power would not materially alter as a result of the Proposed Transaction such that a substantial lessening of competition would be likely.</p> <p>The Parties strongly disagree that the Proposed Transaction would lead to higher prices – see further the 26 April submission at [95], as to the Parties' conduct and retail incentives, which would not alter as a result of the Proposed Transaction. They also disagree there would be a reduction in local business and competition (see further the clearance application at paragraph [5] (and elsewhere)).</p>
5 - 6	Monopsony power	<ul style="list-style-type: none"> The Houston Kemp report provides an economic perspective but lacks commercial understanding. Suppliers currently have 3 major options locally to sell their produce and other smaller alternatives within retail and foodservice wholesale. 	<p>The Houston Kemp reports contain expert economic evidence, into which the Parties have provided input based on their commercial experience, and are supplemented by the Parties' own submissions.</p> <p>For the reasons set out in the preliminary comments, the "3 to 2" concern in relation to buying is not supported by the evidence. See also the 26 April submission from paragraph [41].</p>

Ref	Topic	Key points from submission	FSNI and FSSI comments
		<ul style="list-style-type: none"><li data-bbox="562 284 1357 467">• The retailers have significant power in the downstream market, particularly in produce. Growers are impacted by weather and other inputs which makes them vulnerable at the bargaining table (see the Australian Senate Inquiry on price gouging). Growers are more often price takers, resulting in a lack of viability and exiting of growers.	No merger effect is identified (and the Parties disagree with this characterisation of the position of produce suppliers).