

Grocery Action Group Incorporated

Submission to the Commerce Commission statement of preliminary issues on the Foodstuffs' North Island/South Island application

9 February 2024

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1 Key Recommendations

- A. The proposal should be declined. Consumers need supermarket prices to come down. This can best be achieved by encouraging more competition, not less. Allowing the Foodstuffs North and South Islands merger (**FSNI/FSSI**) would further concentrate power in an already densely concentrated market. The merger would effectively decrease competition while strengthening the barriers to entry for any potential new market entrant.
- B. If our submission is not accepted the application should be put on hold until the Commission reports back on the first year of its new grocery regulatory regime.
- C. Decline the application but invite the parties to come back with a plan to split into the two separate co-operatives of New World and Pak'N Save and then reapply for the FSNI/FSSI merger.

Our submission deals with these recommendations in more detail below.

2 Introducing the Grocery Action Group

The Grocery Action Group (**GAG**) was conceived in the last quarter of 2023. It stemmed from a concern that market failure in the grocery distribution industry has become a serious social and economic issue. There are other groups providing advocacy in this space, notably Consumer NZ on behalf of consumers, the Food and Grocery Council in respect of suppliers, and Monopoly Watch concerned over the detriment to consumers and businesses of such concentrated market arrangements. These groups have oversight across a vast range of issues. Our founders believe the extraordinary market concentration and lack of competition in the grocery sector has a sufficiently serious impact on consumers to require a dedicated, outspoken group focused primarily on consumer welfare.

Our founders and board have a wide range of advocacy backgrounds representing consumers, businesses, and Māori interests. We have a breadth of experience across a wide range of industries. Collectively, we have walked this road before.

We have met informally with senior commission staff during our set up phase. We look forward to a positive relationship now we are formalised.

We strongly believe the application from Foodstuffs to merge its North and South Island operations will not bring down prices. What it will do if allowed, is consolidate market power for Foodstuffs, provide for less competition and not more, and reduce the range of products available to consumers. There is no evidence prices will come down. It should therefore be rejected.

In the alternative, if our submission is rejected, we suggest the Commission declines the application but invites the parties to come back with a plan to split the two major brands of New World and Pak’N Save stores as proposed by food and beverage value chain experts Coriolis.¹

¹ Tim Morris, managing director Coriolis, submission to the Commerce Commission Market Study into the Retail Grocery Sector, 18 November 2021 chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://comcom.govt.nz/__data/assets/pdf_file/0035/273779/Coriolis-Ltd-Post-conference-submission-on-Market-study-into-grocery-sector-18-November-2021.pdf, downloaded 7 February 2024.

3 The Market

Consumer groups have complained for years about the high price they pay at the supermarket and the confusing, often misleading, pricing practices of our two large supermarket chains, Woolworths and Foodstuffs. The Commerce Commission’s own recent supermarket study, completed in 2022, found a concentrated market, high prices and unfair competition. Its key findings include that the intensity of competition between the major grocery retailers is muted and does not reflect workable competition.² It noted if competition were more effective, the major grocery retailers would face stronger pressures to deliver the right prices, quality and range to satisfy a diverse range of consumer preferences.³ And it said the profitability of the major grocery retailers appeared higher than expected under workable competition.⁴ More recently following a Consumer NZ complaint the commission launched a further inquiry into the pricing practices of Foodstuffs North and South Islands for false and misleading shelf pricing.⁵

Business publication NBR late last year released a special investigation into the pricing practices of the duopoly using grocery price data. It found “opaque pricing and baked-in margins for the duopoly is more of the uncompetitive status quo for the consumer”.⁶

It has not always been this way. As our colleague Ernie Newman noted in his amended submission to the Commerce Commission on the proposal to merge FSNI/FSSI operations, our grocery distribution sector at one time was highly competitive. In the 1980s, there were six retail groups competing for the main consumer shop – Foodtown, Woolworths, four regional Foodstuffs co-operatives, Three Guys and Shoprite.⁷ The

² Commerce Commission supermarket study into the retail grocery sector Final report – Executive summary, p? <https://comcom.govt.nz> downloaded 6 February 2024.

³ As above at p2.

⁴ Above at p5.

⁵ Consumer NZ media release 24 January 2024, Commerce Commission investigates problematic supermarket pricing following Consumer NZ complaint, <https://www.consumer.org.nz/articles/commerce-commission-investigates-problematic-supermarket-pricing-following-consumer-nz-complaint>, downloaded 6 February 2024.

⁶ NBR, Price Check: Dazed and confused at the supermarket, 11 December 2023, <https://www.nbr.co.nz/business/dazed-and-confused/> downloaded 6 February 2024

⁷ Ernie Newman, Amended Submission to the Commerce Commission Statement of Preliminary Issues on the Foodstuffs North Island/South Island application, 5 February 2024, p2, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://comcom.govt.nz/__data/assets/pdf_file/0024/342384/Ernie-Newman-submission-on-SoPI-revised-5-February-2024.pdf, downloaded 9 February 2024.

supermarket retailers were also more independent than from their wholesalers. “It was a vibrant and effective example of the free market at work, with a healthy power balance between the manufacturing, wholesale and retail arms of the industry, to the benefit of the consumer.”⁸

But consolidation of both the retail and wholesale arms and the commission’s approval in 2002 of the Woolworths acquisition of Foodtown, has left New Zealand with just two major operators. It is now in the invidious position of consumers paying some of the highest prices by international standards for basic food items.⁹ Lower costs therefore lower prices at the till were promoted in 2002 as a benefit for consumers of the merger and again in 2013 with the merger of Foodstuffs’ upper and lower North Island co-operatives. But as the commission points out and NBR confirms in its investigation, prices have continued to rise for consumers.¹⁰

4 Commission’s response to uncompetitive market

GAG believes the commission’s tepid response to its own market study has likely emboldened the duopoly. The commission’s suite of actions as a result of the market study include:

- Establishment of a grocery commissioner with broad powers to demand documents relating to contracts, arrangements and covenants, and to have general oversight of the industry
- Banning land covenants which restrict competing supermarkets setting up
- Setting up a mandatory code of conduct requiring supermarkets to act in good faith with suppliers
- Improving consumers’ ability to make informed decisions including mandating unit pricing.

The commission will decide in its annual reporting this year if these measures are having any impact and what further actions it might need to take, but so far none seem to have

⁸ As above at p2.

⁹ Commerce Commission supermarket study into the retail grocery sector Final report – Executive summary, p2 <https://comcom.govt.nz> downloaded 6 February 2024.

¹⁰ NBR, Price Check: Dazed and confused at the supermarket, 11 December 2023, <https://www.nbr.co.nz/business/dazed-and-confused/> downloaded 6 February 2024

prevented the \$1 million a day in excessive profits the commission found the supermarkets were making.¹¹

Under these circumstances, it is untenable the proposed merger proceeds. GAG urges the Government and the commission to hold any further consideration of a merger application from FSNI/FSSI until at least its first report this year under the new regulatory regime is complete.

5. Merger application should be rejected

This merger application from FSNI/FSSI flies in the face of what the supermarket study results set out to achieve – lower prices for consumers and fair access for suppliers.

The commission is obliged to look at the FSNI/FSSI application on the basis of a substantial lessening in competition test.¹² GAG sympathises with the view expressed by Habilis consulting firm, that for the commission to assess competition in this market assumes there is a functioning market in the supermarket sector.¹³ However, the commission's own supermarket study has found a lack of competition and a duopoly structure.

Putting that to one side, in submissions already received some suppliers have said they will be shut out, particularly in the South Island, if the merger is agreed to.¹⁴ One supplier notes a more decentralised approach in the South Island allows small or new manufacturers to directly contact local stores to get their products ranged – an avenue that is a lifeline for new entrants to get established and thrive.¹⁵ That is backed up by the NBR investigation that said a proposed merger would result in standardised products on supermarkets shelves across the country – leading to fewer options for suppliers,

¹¹ Commerce Commission supermarket study into the retail grocery sector Final report – Executive summary, p2 <https://comcom.govt.nz> downloaded 6 February 2024.

¹² Commerce Commission Foodstuffs North Island and Foodstuffs South Island seek clearance to merge, 18 December 2023 media release, downloaded 6 February 2024.

¹³ Habilis submission to the Commerce Commission FSNI-FSSI Merger, 31 January 2024, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://comcom.govt.nz/__data/assets/pdf_file/0023/342383/Habilis-NZ-submission-in-response-to-Statement-of-Preliminary-Issues-1-February-2024.pdf, downloaded 7 February 2024.

¹⁴ Anonymous C submission to the Commerce Commission Preliminary Issues paper, 25 January 2024, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://comcom.govt.nz/__data/assets/pdf_file/0022/342382/Anonymous-C-submission-in-response-to-Statement-of-Preliminary-Issues-25-January-2024.pdf, downloaded 7 February 2024.

¹⁵ As above.

particularly the smaller ones already vulnerable to category managers deciding what the nation needs as groceries.¹⁶

Our colleague Ernie Newman has also noted in his submission on this issue there may be cartel-like issues to be investigated in the merger proposal, if by Foodstuffs' own admission, its co-operatives do not meaningfully compete to acquire groceries from suppliers.¹⁷

6. Splitting and Divestment

Any agreement to merge FSNI/FSSI would have the twofold effect of reducing competition by making it harder for potential new entrants, and making it difficult to force divestment or splitting of the existing duopoly brands if the current measures to force competition fail. GAG agrees with the strawman suggestion put up by Coriolis in its submission on the supermarket study, that to create competition Foodstuffs separate its New World and Pak'N Save brands. Therefore we recommend this be given further consideration and suggest this be a condition on the merger application. Separately Woolworths (and admittedly not part of this application) should be forced to divest some stores thereby creating a fourth player.¹⁸ This would leave New Zealand with four competitive stores, all of similar size.

GAG is a new organisation and as such has not had the time or resource to commission any further work in this area, but as part of its strategy it plans to look at modelling what a truly competitive market with "fair pricing" for consumers might look like.

7 Conclusion

GAG is a new group focused on achieving lower prices for consumers at the supermarket. The application to merge FSNI/FSSI flies in the face of what the Commerce Commission is trying to achieve in its new regulatory regime to force more competition

¹⁶ NBR, Price Check: Dazed and confused at the supermarket, 11 December 2023, <https://www.nbr.co.nz/business/dazed-and-confused/> downloaded 6 February 2024

¹⁷ Ernie Newman, Submission to the Commerce Commission's Statement of Preliminary Issues on the Foodstuffs North Island/South Island application, p3 The Commission's "Statement of Preliminary Issues" a. "Our framework" – paras 16-19.

¹⁸ Tim Morris, Managing Director Coriolis, Submission on the Commerce Commission Market Study Into the Retail Grocery Sector, November 2021, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://comcom.govt.nz/__data/assets/pdf_file/0035/273779/Coriolis-Ltd-Post-conference-submission-on-Market-study-into-grocery-sector-18-November-2021.pdf, downloaded 7 February 2024.

thereby lowering prices. GAG is highly sceptical about what results can be achieved by these regulatory measures but believes this application should at least be put on hold until the Commission has released its first report on the new regime. In any event GAG believes the application should be declined on the basis of a substantial lessening in competition. GAG also recommends further consideration be given to breaking up the duopoly into four separate entities, as recommended in submissions to the supermarket study. GAG, itself will be looking to commission further research into what a competitive market should look like in New Zealand.

8. Contact:

Suzanne Chetwin, chair GAG, suzannechetwin@xtra.co.nz, mob [REDACTED]

GAG Founding Board

Sue Chetwin LLB, CNZM

Sue Chetwin has more than 17 years' experience working for and on behalf of consumers. She is the former CEO of Consumer NZ, a position she held for 13 years. She chaired the Government's review into the drug buying agency Pharmac, and was a member of the Law Society Independent Steering Group Committee considering the terms of reference for the statutory framework for legal services. She chairs an independent consumer panel assisting Chorus prepare its investment proposals to present to the Commerce Commission. She is also a director of Food Standards Australia NZ. Her experience includes 25 years in journalism, including editing Sunday News, Sunday Star Times and the Herald on Sunday. She was awarded a CNZM in 2021 for services to consumers.

Deborah Hart

Deborah chairs the Consumer Advocacy Council which advocates for residential and small business electricity consumers, the Retirement Villages' Residents' Council, and the Holocaust Centre of New Zealand. She sits on the Human Rights Review Tribunal and has served as a lay member of the High Court. She advises on government relations and mentors executives. A solicitor by training, she is the former executive director at the Arbitrators' and Mediators' Institute of New Zealand. More recently Deborah chaired the independent review of Aotearoa New Zealand's electoral laws.

Ernie Newman (Interim Secretary)

Ernie is a semi-retired Digital Economy Consultant based in the Waikato. From 1999-2010 he was Chief Executive of the Telecommunications Users Association (TUANZ), through the period when it lobbied successfully and intensively for the breakup of Telecom's monopoly. His expertise includes digital economy issues, issues management, e-health, e-learning, privacy policy, and telecommunications policy, not-for-profit advocacy group management and governance.

Gilbert Peterson

Gilbert was for 15 years Communications Manager at the Employers & Manufacturers Association in Auckland. Prior to that he was for two years editor of TUANZ Topics magazine, 12 years at the NZ Manufacturers Federation in Wellington, and five years at the former DSIR. His experience includes feature writing, book and magazine publishing, editing and small business management

Mavis Mullins (Rangitāne, Te Atihaunui-a-Paparangi and Ngāti Ranginui) MNZM

Mavis is a recognised leader in Aotearoa's primary industry who has chaired a number of large Maori land based incorporations and is patron of Agri-Women's Development Trust (AWDT). Mavis is a passionate advocate for innovation and mentorship with a focus on equity, agribusiness and environmental issues. Her governance leadership within Hautaki Ltd and Te Huarahi Tika Trust saw the launch of 2degrees which busted the mobile phone duopoly of the day. She has received many honours and awards including Member of the New Zealand Order of Merit (NZMN), induction into the New Zealand Business Hall of Fame and Outstanding Māori Business Leader of the Year from the University of Auckland

