

## Statement of Preliminary Issues

### Foodstuffs North Island and Foodstuffs South Island

18 January 2024

#### Introduction

1. On 15 December 2023, the Commerce Commission registered an application (the Application) from Foodstuffs North Island Limited (FSNI) and Foodstuffs South Island Limited (FSSI) (together, the Parties) seeking clearance to merge into a single national grocery entity, together with potentially also the existing Foodstuffs (N.Z.) Limited entity (the Proposed Merger).<sup>1</sup>
2. As required by the Commerce Act 1986<sup>2</sup> (the Act), we assess mergers and acquisitions using the substantial lessening of competition test, which we describe further below.
3. The Commission will give clearance if it is satisfied that the Proposed Merger will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.
4. This statement of preliminary issues sets out the competition issues that we have identified to date and will consider during our investigation and that we currently consider to be important in deciding whether or not to grant clearance.<sup>3</sup> Our investigation of the Proposed Merger is at an early stage and this statement of preliminary issues is based primarily on the material provided by the Parties in connection with the Application. Other issues may become apparent as we progress our investigation.
5. Through publishing this statement of preliminary issues, we aim to:<sup>4</sup>
  - 5.1 increase the transparency of our process;
  - 5.2 provide interested parties with an opportunity to identify any further competition issues which they consider we should investigate and also to consider and submit on the matters identified; and

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<sup>1</sup> A public version of the Application is available on our website at: <http://www.comcom.govt.nz/business-competition/mergers-and-acquisitions/clearances/clearances-register/>. As noted in the Application at [12], FSNI and FSSI propose to carry out the Proposed Merger by way of amalgamation under Part XV of the Companies Act 1993.

<sup>2</sup> Commerce Act 1986, s 66(3).

<sup>3</sup> The issues set out in this statement are based on the information available when it was published and may change as our investigation progresses. The issues in this statement are not binding on us.

<sup>4</sup> Commerce Commission, Mergers and Acquisitions Guidelines (May 2022) at [6.105]. Available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz).

- 5.3 gather further information which might assist our investigation.
6. We invite interested parties to identify any additional competition issues they consider deserve investigation and to provide comments on the likely competitive effects of the Proposed Merger. We request that parties who wish to make a submission do so by **1 February 2024**.
7. If you would like to make a submission but face difficulties in doing so within the timeframe, please ensure that you register your interest with the Commission at [registrar@comcom.govt.nz](mailto:registrar@comcom.govt.nz) so that we can work with you to accommodate your needs where possible.

## The Parties

8. The Parties comprise two separate co-operatives presenting a single national bricks-and-mortar and online retail grocery offering through common brands.<sup>5</sup> The Parties have a close relationship, have shared ownership of some trading and non-trading entities (eg, Foodstuffs (N.Z.) Limited and Foodstuffs Own Brands Limited) and work together in a range of ways (including in relation to marketing, product range, brand alignment, private label products and other initiatives).<sup>6</sup> Despite the interrelationship between the Parties, FSNI and FSSI are separate legal entities and are not currently interconnected body corporates.<sup>7</sup>
9. FSNI is owned by 332<sup>8</sup> co-operative members all based in the North Island and FSSI is owned by 198<sup>9</sup> members all based in the South Island. The members operate individual retail and wholesale grocery stores.
10. FSNI members operate under the following retail grocery brands:<sup>10</sup>
- 10.1 New World;
- 10.2 PAK'nSAVE; and
- 10.3 Four Square.
11. FSSI members operate under the following retail grocery brands:<sup>11</sup>
- 11.1 New World;
- 11.2 PAK'nSAVE;

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<sup>5</sup> The Application at [2] and [24].

<sup>6</sup> The Application at [4] and [20].

<sup>7</sup> The Application at footnote 21.

<sup>8</sup> 45 PAK'nSAVE, 108 New World, 172 Four Square and 7 Gilmours wholesale members.

<sup>9</sup> 12 PAK'nSAVE, 43 New World, 60 Four Square, 72 On The Spot, 5 Raeward Fresh and 6 Trents wholesale members. FSSI also has a number of additional non-branded members of its co-operative. The Application at footnote 12.

<sup>10</sup> The Application at [25].

<sup>11</sup> The Application at [32].

- 11.3 Four Square;
- 11.4 Raeward Fresh; and
- 11.5 On the Spot.
12. In addition, each co-operative operates a commercial wholesale business:
- 12.1 FSNI operates Gilmours Wholesale Limited (Gilmours)<sup>12</sup> in the North Island;<sup>13</sup> and
- 12.2 FSSI operates Trents Wholesale Limited (Trents)<sup>14</sup> in the South Island.<sup>15</sup>
13. Furthermore, both FSNI and FSSI are subject to legal obligations to sell wholesale groceries to other retailers, as required by the Grocery Industry Competition Act 2023 (GICA).<sup>16</sup>
14. The Parties are seeking clearance for the Proposed Merger which would see FSNI and FSSI merge by way of a Court-approved amalgamation under Part XV of the Companies Act 1993. With the Proposed Merger, the Parties would consolidate within and under the management of a single national grocery entity.
15. There is potential for Foodstuffs (N.Z.) Limited, a non-trading entity that represents the Parties' interests on issues of national or grocery-specific importance and that also provides shared services to the Parties (eg, in terms of retail strategy, brand initiatives, national marketing campaigns, customer surveys and public relations), to be included in the amalgamation. Foodstuffs (N.Z.) Limited is currently jointly owned by the Parties. The Parties submit that if Foodstuffs (N.Z.) Limited is not included in the amalgamation, it would continue to be a wholly owned subsidiary of the continuing (or merged) entity.<sup>17</sup> For the purposes of our investigation and competition analysis of the Proposed Merger, we will therefore treat Foodstuffs (N.Z.) Limited as being part of the amalgamation.

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<sup>12</sup> Gilmours is owned by individual operators.

<sup>13</sup> FSNI also has a 25% share of Fresh Connection Limited (Fresh Connection), a produce wholesaler specialising in foodservice. Gilmours acts as Fresh Connection's agent to sell fresh produce to foodservice customers. The Application at [29]-[30].

<sup>14</sup> Trents operates under a corporate model.

<sup>15</sup> Two Raeward Fresh stores (in Richmond/Tasman and Harewood) also wholesale supply to commercial customers in their local areas. The Application at [2] and [36]-[38].

<sup>16</sup> According to the Application, the GICA requires the Parties and Woolworths New Zealand Limited (Woolworths), as regulated grocery retailers, to provide wholesale offerings to other grocery retailers; provides for the development of a grocery supply code setting out the rules of engagement between regulated grocery retailers and suppliers; enables the development of a dispute resolution scheme to address disputes between regulated grocery retailers and suppliers or wholesale customers; extends the Fair Trading Act 1986's protections against unfair contract terms to larger contracts between grocery suppliers and retailers; provides for regulations to be made to allow suppliers to bargain collectively; and empowers the Commission to monitor and report on competition and efficiency in the grocery sector. The Application at [50].

<sup>17</sup> The Application at [12]-[13], [40] and [42].

## Our framework

16. Our approach to analysing the competition effects of the Proposed Merger is based on the principles set out in our Mergers and Acquisitions Guidelines.<sup>18</sup> We summarise the key points of these Guidelines below where relevant. As required by the Act, we assess mergers and acquisitions using the substantial lessening of competition test.
17. We determine whether a merger or acquisition is likely to substantially lessen competition in a market by considering what would change with a merger. We do so by comparing the likely state of competition if a merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if a merger does not proceed (the scenario without the merger, often referred to as the counterfactual).<sup>19</sup> This allows us to assess the degree by which the Proposed Merger might lessen competition.
18. Unless we are satisfied that any lessening of competition as a result of the Proposed Merger is not likely to be substantial, we will not give clearance. When making that assessment, we will consider, among other matters:
  - 18.1 how much actual or potential competition between the Parties could be lost as a result of the Proposed Merger – in other words, the extent to which the Parties compete with each other today, or might be likely to compete with each other in the future in the absence of the Proposed Merger;
  - 18.2 constraint from existing competitors – the extent to which current competitors compete and the degree to which they would expand their sales if prices increased;
  - 18.3 constraint from potential new entry – the extent to which new competitors would enter the market and compete if prices increased, quality reduced, innovation declined or other elements of service or competition reduced (eg, worse or less frequent promotions);
  - 18.4 the countervailing power of customers in markets in which the Parties wholesale supply grocery products – the potential constraint on the merged business from a wholesale customer’s ability to exert substantial influence on negotiations and whether any countervailing power of wholesale customers might increase or decrease with the Proposed Merger; and
  - 18.5 the countervailing power of suppliers of grocery products to the Parties in markets in which the Parties acquire grocery products, compared to any buyer power of the Parties themselves – the potential constraint on the merged business from a supplier’s ability to exert substantial influence on negotiations and whether any supplier power might increase or decrease with the Proposed Merger, or whether the Proposed Merger would strengthen the buyer power of the Parties.

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<sup>18</sup> Mergers and Acquisitions Guidelines above n4.

<sup>19</sup> *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

19. We will consider the Proposed Merger in accordance with the Act and our Mergers and Acquisitions Guidelines. In considering the Application and assessing whether the Proposed Merger is likely to substantially lessen competition, our focus will be on what would change with the Proposed Merger. In assessing the Proposed Merger, we are not investigating the current state of competition in the grocery sector (including pricing and supply terms). The Commission completed a market study into the retail grocery sector in March 2022, and the GICA was passed in 2023 empowering the Commission to monitor and report on competition and efficiency in the grocery sector for the long-term benefit of consumers. The market study and GICA form part of the background for our consideration of the Proposed Merger.

### Market definition

20. We define markets in the way that we consider best isolates the key competition issues that arise from a merger. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Act, as a matter of fact and commercial common sense.<sup>20</sup>
21. The Parties submit that they operate in separate geographic markets and therefore do not compete at either the retail or wholesale level. As a result, the Parties do not consider it necessary to conclusively define the relevant markets.<sup>21</sup>
22. Having said that, the Parties submit that the effects of the Proposed Merger can be analysed by reference to local, regional and national markets for the:<sup>22</sup>
- 22.1 retail supply of groceries (in which retailers sell groceries to consumers);
  - 22.2 acquisition of grocery products (in which grocery wholesalers and retailers buy grocery products from food manufacturers and other grocery suppliers);
  - 22.3 commercial wholesale supply of grocery products (which the Parties submit is the market in which Gilmours, Trents, Fresh Connection and Raeward Fresh wholesale grocery products to foodservice and other wholesale customers on commercially negotiated terms); and
  - 22.4 regulated wholesale supply of grocery products (which the Parties submit is the market in which FSNI and FSSI, as regulated grocery retailers under the GICA, wholesale grocery products to convenience stores and other grocery retailers, on terms that are subject to regulatory oversight).
23. We will consider whether these markets are the most appropriate markets for assessing the competition effects of the Proposed Merger, or whether its impact is better assessed with reference to alternative markets.

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<sup>20</sup> Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

<sup>21</sup> The Application at [73].

<sup>22</sup> The Application at [74].

24. Specifically in terms of wholesale markets, we will consider:
- 24.1 whether there are separate commercial and regulated wholesale markets, or a single wholesale market in which some supply arrangements may be subject to regulation; and
  - 24.2 whether there might be discrete markets at the wholesale level for different types of groceries and/or different types of wholesale customers.

### **Without the merger**

25. We will consider what the Parties would do if the Proposed Merger did not go ahead. We will consider the evidence on whether the without-the-merger scenario is best characterised by the status quo, or some other arrangement.

### **Preliminary issues**

26. We will investigate whether the Proposed Merger would be likely to substantially lessen competition in any relevant market by assessing the risk of competition being lessened as a consequence of horizontal (unilateral), coordinated or vertical effects that might result from the Proposed Merger. The questions that we will be focusing on are:
- 26.1 unilateral effects: would the loss of actual or potential competition enable the merged entity to profitably raise the prices at which it supplies goods or reduce quality or innovation or worsen an element of service or any other element of competition (ie, increase quality-adjusted prices) by itself where it is a supplier, or to lower prices paid to suppliers for goods or worsen any terms on which it acquires goods where it is a buyer; and
  - 26.2 coordinated effects: would the Proposed Merger change the conditions in the relevant markets so that coordination is more likely, more complete or more sustainable?
  - 26.3 vertical effects: would the Proposed Merger increase the merged entity's ability and/or incentive to harm competition in input markets or foreclose rivals?
27. We discuss each of these effects in turn in more detail below, setting out a summary of the Parties' submissions and what we will consider as part of our investigation of the Proposed Merger.

### **Unilateral effects**

28. Unilateral effects arise when a firm merges with an existing, potential or emerging competitor that would otherwise provide a significant competitive constraint (particularly relative to remaining competitors) such that a merged firm can exercise market power in supplying goods or in buying goods.

29. The Parties submit that the Proposed Merger would not be likely to substantially lessen competition in any relevant market due to unilateral effects.<sup>23</sup>

*Retail supply of groceries*

30. In the supply of goods, unilateral effects may arise where a merged firm can profitably increase its retail or wholesale price above the level that would prevail without the merger without the profitability of that increase being thwarted by consumers defecting, for example due to rival firms' competitive responses.<sup>24</sup> In addition to price rises, unilateral effects could also arise where a merged firm can profitably reduce quality or innovation or worsen an element of service or any other element of competition (eg, worse or less frequent promotions) below the level that would prevail without the merger – such changes leading to an increase in quality-adjusted prices.
31. Post-merger, the retail offerings (including brands and stores) of FSNI and FSSI would consolidate within and under the management of a single national retail grocery entity. At the retail level, the merged entity would operate, and input into the pricing and competitive strategies for, all New World, PAK'nSAVE, Four Square, Raeward Fresh and On the Spot stores.
32. In relation to retail supply, the Parties submit that the Proposed Merger is not capable of lessening competition in any market for the retail supply of groceries.<sup>25</sup> The Parties submit that:
- 32.1 there is no existing or potential competition between the two co-operatives at the retail level. Each co-operative focuses on competing within the island in which it is based. The Parties operate in separate geographies, and provide support and assistance to each other as required in order to optimise their overall competitive proposition;<sup>26</sup> and
- 32.2 the owner/operator co-operative model means that individual members have discretion as to pricing and some promotions which would not change as a result of the Proposed Merger.<sup>27</sup>
33. We will consider:
- 33.1 closeness of competition: the extent to which the Parties compete, or might be likely to compete with each other in the future absent the Proposed Merger, and impose a degree of constraint upon one another in the retail supply of groceries, and consequently the extent of any competitive constraint that would be lost if the Proposed Merger goes ahead. To the extent that any such constraint may be material, we will assess whether that lost competition is likely to be replaced by rival competitors;

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<sup>23</sup> The Application at [110].

<sup>24</sup> Mergers and Acquisitions Guidelines above n4 at [3.62]-[3.63].

<sup>25</sup> The Application at [111].

<sup>26</sup> The Application at [112].

<sup>27</sup> The Application at [114].

- 33.2 the extent to which the owner/operator co-operative model of the Parties means that individual members have discretion as to pricing and promotions, and the implications of this for our assessment of the competition that would be lost and remain with the Proposed Merger;
- 33.3 remaining competitive constraints: the degree of constraint that Woolworths and other existing retail competitors would impose on the merged entity; and
- 33.4 entry and expansion: how easily rivals could enter and/or expand at the retail level with and without the Proposed Merger.

#### *Acquisition of grocery products*

- 34. In the buying of goods, unilateral effects may arise where a merged firm can profitably depress prices paid to suppliers to a level below the competitive price for a significant period of time. In addition to depressing prices, unilateral effects could also arise where a merged firm can profitably worsen any terms on which suppliers supply goods to it or reduce the incentives and/or the pace of development by suppliers (or potentially the sustainability of suppliers) with long term negative effects on consumers.<sup>28</sup>
- 35. Post-merger, the separate purchasing functions of FSNI and FSSI (for both their retail and wholesale businesses) would consolidate under the management of a single national entity. The merged entity would acquire from, and negotiate supply terms with, suppliers of grocery products for all New World, PAK'nSAVE, Four Square, Raeward Fresh and On the Spot stores, and also all Gilmours and Trents wholesale outlets. The merged entity would operate seven distribution centres and a further seven transport depots across New Zealand.
- 36. In relation to the acquisition of grocery products from suppliers, the Parties submit that the Proposed Merger is not capable of lessening competition in any market for the acquisition of grocery products.<sup>29</sup> The Parties submit that:<sup>30</sup>
  - 36.1 the co-operatives operate in different territories with different physical distribution infrastructure, and they do not meaningfully compete to acquire groceries from suppliers;
  - 36.2 the Proposed Merger would have no effect on the volume of groceries the Parties acquire, either overall or in any geography. The Parties note that there is joint procurement already occurring, and this would effectively continue following the Proposed Merger; and
  - 36.3 product cost savings and efficiencies are expected to arise from the Proposed Merger.

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<sup>28</sup> Mergers and Acquisitions Guidelines above n4 at [4.2].

<sup>29</sup> The Application at [116].

<sup>30</sup> The Application at [6], [118]-[119] and [132].



37. We will consider:
- 37.1 closeness of competition: the extent to which the Parties compete and the degree of constraint that the Parties impose upon one another in the acquisition of groceries (including the extent to which suppliers use the wholesale price or wholesale terms, or ranging decisions, of one co-operative in negotiations with the other). To the extent that any constraint is material, we will assess the impact of this competition and constraint being lost with the Proposed Merger;
  - 37.2 the degree of constraint that the merged entity would face from the ability of suppliers of groceries to switch to supplying other retailers or wholesalers;
  - 37.3 countervailing power: whether suppliers of groceries to the Parties have special characteristics that would enable them to resist a price reduction by the merged entity (for example, by selling their products direct to consumers or to wholesale customers) and whether any supplier power might increase or decrease with the Proposed Merger. We will consider this relative to any buyer power of the Parties in negotiations with suppliers of grocery products and whether the Proposed Merger would strengthen the buyer power of the Parties; and
  - 37.4 the extent of product cost savings or efficiencies that the Parties may achieve in the acquisition of groceries with the Proposed Merger.

*Wholesale supply of groceries*

38. Post-merger, the wholesale offerings of FSNI and FSSI would consolidate within and under the management of a single national wholesale grocery entity. The merged entity would operate, and input into the pricing and competitive strategies for, all Gilmours and Trents outlets, including in terms of any national wholesale customers that may utilise Gilmours or Trents. The merged entity would also operate a single regulated wholesale business under the GICA, rather than separate FSNI and FSSI regulated wholesale businesses.
39. The Parties submit that the Proposed Merger would not lessen competition in the wholesale supply of groceries.<sup>31</sup>
40. In relation to the commercial wholesale supply of grocery products, the Parties submit that:
- 40.1 there is no existing competition between Trents and Gilmours for:<sup>32</sup>
    - 40.1.1 local commercial wholesale customers;
    - 40.1.2 regional commercial wholesale customers; or

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<sup>31</sup> The Application at 41 and 48.

<sup>32</sup> The Application at [141]-[143].

- 40.1.3 national commercial wholesale customers;<sup>33</sup> and
- 40.2 a number of strong competitors (including but not limited to Bidfood) would continue to provide a material constraint on the merged entity.<sup>34</sup>
41. In relation to the regulated wholesale supply of grocery products, the Parties submit that there would be no lessening of competition in relation to the supply of groceries to wholesale customers under the GICA quasi-regulatory regime, as the regulated wholesale businesses of FSNI and FSSI would not compete with each other in any realistic counterfactual.<sup>35</sup>
42. For each of the relevant markets relating to the wholesale supply (including commercial and regulated supply) of groceries, we will consider:
- 42.1 closeness of competition: the extent to which the Parties compete, or might be likely to compete with each other in the future absent the Proposed Merger, and impose a degree of constraint upon one another in the wholesale supply of groceries, and consequently the extent of any competitive constraint that would be lost if the Proposed Merger goes ahead. To the extent that such constraint may be material, we will assess whether that lost competition could be replaced by rival competitors;
- 42.2 remaining competitive constraints: the degree of constraint that existing competitors would impose on the merged entity;
- 42.3 entry and expansion: how easily rivals could enter and/or expand at the wholesale level;
- 42.4 countervailing power: whether wholesale customers have special characteristics that would enable them to resist a price increase by the merged entity (for example, the ability to procure direct from suppliers of groceries) and whether any countervailing power of wholesale customers might increase or decrease with the Proposed Merger; and
- 42.5 the extent to which the GICA would constrain the merged entity in the wholesale supply of groceries.

### **Coordinated effects**

43. A merger can substantially lessen competition if it increases the potential for the merged entity and all or some of its remaining competitors to coordinate their behaviour and collectively exercise market power, such as by increasing retail prices directly or dividing up the market such that output reduces and/or prices increase. Unlike a substantial lessening of competition which can arise from the merged entity

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<sup>33</sup> Currently, Gilmours and Trents jointly tender for and service various national customers.

<sup>34</sup> The Application at [149.2] and [152].

<sup>35</sup> The Application at [157].

acting on its own, coordinated effects require some or all of the firms in the market to be acting in a coordinated way.<sup>36</sup>

44. Post-merger, the retail and wholesale offerings, and purchasing functions, of FSNI and FSSI would consolidate within and under the management of a single national grocery entity. The number of distinct major retail and wholesale suppliers of grocery products and buyers of grocery products would be reduced. Nationally, the merged entity may be of a more similar size and cost structure to Woolworths.
45. In the Application, the Parties submit that the Proposed Merger would not be likely to substantially lessen competition in any relevant market due to coordinated effects.<sup>37</sup>
46. In relation to retail supply, the Parties submit that:
  - 46.1 they disagree with the Commission's finding in the 2022 market study that some features of the retail supply of groceries make it vulnerable to coordination (in terms of tacit coordination or accommodating behaviour);<sup>38</sup>
  - 46.2 the high degree of product and brand differentiation, the large number of products and the presence of discounts and non-price promotions would continue to be a very material hindrance to any attempt at coordination. The Parties further submit that, regardless of the Proposed Merger, store owners would maintain the same level of freedom to price independently;<sup>39</sup> and
  - 46.3 the Proposed Merger would not change conditions such that coordination would be more likely, more complete or more sustainable.<sup>40</sup>
47. In relation to the acquisition of grocery products from suppliers, the Parties submit that:<sup>41</sup>
  - 47.1 the co-operatives have no visibility of their competitors' terms of supply, or interaction with competitors with respect to terms of supply, and the Proposed Merger would not change that; and
  - 47.2 suppliers would not gain increased visibility as a result of the Proposed Merger, and there would be no merger-specific change to competitive strategies or the merged entity's competitors' visibility of such strategies.

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<sup>36</sup> Mergers and Acquisitions Guidelines above n4 at [3.84].

<sup>37</sup> The Application at [162].

<sup>38</sup> The Application at [164]. See also Commerce Commission, Market study into the retail grocery sector: final report at [5.151].

<sup>39</sup> The Application at [169].

<sup>40</sup> The Application at [170].

<sup>41</sup> The Application at [171 - 172].

48. In relation to the commercial wholesale supply of groceries, the Parties submit that commercial wholesale supply is not conducive to coordination because:<sup>42</sup>
- 48.1 it involves supply of a large number and variety of differentiated products;
  - 48.2 suppliers have little interaction with one another;
  - 48.3 suppliers have little visibility over each other's terms of supply. For larger wholesale customers, where customer acquisition occurs by tender, suppliers receive feedback on reasons for winning or losing, but this is limited. In many cases, particularly for smaller customers, tenders do not take place and customers simply choose to shop around. List prices are only available to signed-up customers; and
  - 48.4 there is a variety of size and cost structure among suppliers. For example, there are broad and specialised wholesalers, with direct supply and purchasing from retailers also posing a direct constraint. As a result, there is little uniformity in offering that could provide a basis for coordination.
49. In relation to the regulated wholesale supply of grocery products from suppliers, the Parties submit that regulated wholesale supply is not conducive to coordination because:<sup>43</sup>
- 49.1 sales involve a large number and variety of differentiated products;
  - 49.2 prices and volumes are not readily observable. Prices are not publicly displayed and, where tenders exist, feedback is likely to be limited;
  - 49.3 regulated grocery retailers are likely to have limited interaction with each other;
  - 49.4 demand is likely to change over time as retail entrants emerge and develop; and
  - 49.5 regulated grocery retailers face close and ongoing regulatory scrutiny under the GICA, providing additional pressure to supply products and services in as competitive a manner as possible.
50. We will assess whether any of the relevant markets are vulnerable to coordination, and whether the Proposed Merger would change the conditions in the relevant markets so that coordination is more likely, more complete or more sustainable. For example, we will assess whether FSNI and FSSI merging would change market conditions and increase the likelihood of coordination between the merged entity and Woolworths.

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<sup>42</sup> The Application at [173].

<sup>43</sup> The Application at [175].

## Vertical effects

51. A merger between suppliers (or buyers) who are not competitors but who operate in related markets can result in a substantial lessening of competition due to vertical effects. This can occur where a merger gives the merged entity a greater ability or incentive to engage in conduct that prevents or hinders rivals from competing effectively.<sup>44</sup>
52. Post-merger, there would be vertical changes in the structure of the grocery sector, with different wholesale suppliers and retail brands consolidating within and under the management of a single entity. For example, Gilmours (currently owned by FSNI) would be consolidated within the same overall entity that would manage all New World, PAK'nSAVE, Four Square, Raeward Fresh and On the Spot stores in the South Island (currently under the umbrella of FSSI).
53. We will consider whether the merged entity could have the ability and/or incentive to foreclose its competitors (eg, by refusing to deal with competitors or by raising the prices charged to competitors), and the likely effect of any foreclosure on competition.

## Next steps in our investigation

54. The Commission is currently scheduled to make a decision on whether or not to give clearance to the Proposed Merger by **5 March 2024**. However, this date may change as our investigation progresses.<sup>45</sup> In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.
55. As part of our investigation, we will be identifying and contacting parties that we consider will be able to help us assess the preliminary issues identified above and further investigate any other issues which may be identified or arise in our investigation.

## Making a submission

56. If you wish to make a submission about the competition issues we should investigate or the competitive effects of the Proposed Merger, please send it to us at [registrar@comcom.govt.nz](mailto:registrar@comcom.govt.nz) with the reference "Foodstuffs merger" in the subject line of your email, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on **1 February 2024**.
57. If you would like to make a submission but face difficulties in doing so within the timeframe, please ensure that you register your interest with the Commission at [registrar@comcom.govt.nz](mailto:registrar@comcom.govt.nz) so that we can work with you to accommodate your needs where possible.

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<sup>44</sup> Mergers and Acquisitions Guidelines above n4 at [5.1]-[5.2].

<sup>45</sup> The Commission maintains a clearance register on our website at <http://www.comcom.govt.nz/clearances-register/> where we update any changes to our deadlines and provide relevant documents.

58. Please clearly identify any confidential information contained in your submission and provide both a confidential and a public version. We will be publishing the public versions of all submissions on the Commission's website. If you make a submission and we do not acknowledge receipt of that submission within two working days, you should resubmit your submission.
  
59. All information we receive is subject to the Official Information Act 1982 (OIA), under which there is a principle of availability. We recognise, however, that there may be good reason to withhold certain information contained in a submission under the OIA, for example in circumstances where disclosure would unreasonably prejudice the supplier or subject of the information. If your submission contains information which you consider there is good reason to withhold under the OIA, please identify specifically the information which you consider should be withheld and explain the reasons for that position (preferably with reference to the criteria for withholding information under the OIA).