

PACT / FLIGHT

20 NOVEMBER 2020

RESPONSE TO STATEMENT OF ISSUES DATED 30 OCTOBER 2020

INTRODUCTION

1. Pact Group Holdings Limited ("**Pact**") and Flight Plastics Limited ("**Flight**") refer to the Commission's Statement of Issues ("**Sol**") in relation to Pact's proposed acquisition of Flight ("**Acquisition**").
2. Pact and Flight are grateful for the opportunity to respond to the Sol, and to provide the further information in this response to assist the Commission to test the propositions raised in the Sol.
3. Neither Pact nor Flight consider that any of the propositions raised in the Sol give rise to any realistic concerns of a substantial lessening of competition arising in any market as a result of the Acquisition, and trust that this further information will assist the Commission in satisfying itself of the same.
4. To further assist the Commission, **enclosed** with this response is:
 - (a) A paper by NERA providing economic analysis on certain of the propositions being tested in the Sol; and
 - (b) An opinion by Matthew Dunning QC providing an overview of the relevant legal framework to the propositions being tested in the Sol.
5. This response should also be read by the Commission in conjunction with the 19 October 2020 submission provided by Pact and Flight, which provided information on a number of the propositions being tested in the Sol (but may not have been received in sufficient time for that information to be reflected in the Commission's drafting of the Sol).
6. As before, Pact and Flight remain available to discuss further with the Commission as required.

EXECUTIVE SUMMARY

7. Neither Pact nor Flight consider that any of the propositions raised in the Sol give rise to any realistic concerns of a substantial lessening of competition arising in any market as a result of the Acquisition, for the following reasons:
 - (a) **Significant and growing competition from imports:** The over-arching theme of competition in the supply of E&T / rigid packaging is the ever-increasing competitive constraint from imports. Imports already comprise at least [] of E&T volumes in NZ, and this increasing competitive constraint is leading to the exit of domestic manufacturers [], Huhtamaki has exited NZ manufacturing. The Sol itself acknowledges that imports are lower cost than domestically manufactured product, and users of imports span the entirety of the market – from the very large [], to the very small []. By any measure, the supply of E&T / rigid packaging is a market characterised by significant and effective import constraint. It is essential the Commission's analysis properly takes this into account.

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- (b) **No class of customer vulnerable to price increases (or quality reductions):**
The statements in the Sol also make clear that there is no class of customer that could be said to be vulnerable to a price increase (or reduction in quality) in E&T packaging in the factual – namely:
- (i) the Sol identifies that larger customers have countervailing power, and that imports are cheaper for larger volumes (demonstrating that larger customers could readily achieve lower prices by purchasing from overseas suppliers); and
 - (ii) the Sol identifies that there are many other E&T suppliers with capacity to supply smaller customers, and that entry at small scale can be achieved for low cost and in a short amount of time.
- This means that both large and small customers have multiple alternative options, and that the threat of new entry/expansion is real. Furthermore, irrespective of the size of customers, Pact and Flight are not each other's closest competitors in any different end-use segment. Accordingly, there is not any class of customer that could be said to be vulnerable to a price increase (or quality reduction) as a result of the Acquisition.
- (c) **Pact and Flight are not uniquely placed as "close" competitors:** It is not correct to suggest that Pact and Flight are uniquely placed as each other's closest competitors simply because of a static view of size or capacity. The Court of Appeal has specifically cautioned against such an approach, reinforcing that the key consideration is whether there are any barriers to entry/expansion.¹ There are no such barriers. [], []. Accordingly, Pact and Flight face competition (and the threat of competition) from numerous alternative suppliers – both domestic manufacturers and importers.
- (d) **There are multiple different ways to compete in E&T:** There are many alternative business models for competing in the supply of E&T / rigid packaging, from investing in recycling and E&T capabilities, through to operating a distribution-only business. This means that there are many different ways for competitors to compete in the supply of E&T, with very little (if any) upfront investment required for many of these business models. This further exacerbates the extent of competition.
- (e) **There is significant and growing competition from other substrates:** The competition to E&T packaging from alternative substrates is significant, and growing. It is essential that this constraint is taken into account. Furthermore, contrary to the suggestion in the Sol, the increasing desire for sustainable packaging options is, if anything, broadening the range of packaging alternatives that compete against E&T products (not narrowing it).
- (f) **Adopting a correct approach to market definition, there is no separate market for RPET or NZ RPET packaging:** Pact's and Flight's in-market experience is that customers do readily switch between NZ RPET and other packaging substrates (including imported RPET, virgin PET, and non-plastic substrates), with there being a chain of substitution between all such products, and accordingly those products need to be competitive with one another across the package of "price-product-service", ([]). As such, the theory being tested in the Sol that there may be a

¹ *Commerce Commission v Southern Cross Medical Care Society* (2001) 10 TCLR 269.

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separate narrow market for RPET packaging, or even a more separate narrow market for NZ RPET packaging, is incorrect as a matter of fact, law and economics. It is contrary to court precedent and long standing principles of market definition. It is also contrary to "fact and commercial common sense" (as required under the Commerce Act), because if there were a separate market for NZ RPET, then Flight would have a monopoly, would price accordingly and never lose sales to competitors (because it would not have any). []. Plainly, it is incorrect to suggest NZ RPET, or even RPET, is a separate market – and does not come close to a commercial common sense threshold. []

- (g) []: []
- (h) **No lessening of competition in the acquisition of PET bales:** The suggestion that there could be any lessening of competition in the acquisition of PET bales lacks credibility. First, []. Second ([]), the acquisition of PET bales occurs in the context of a globally traded commodity market where there is [], and where [] waste companies already sell numerous bales to off-shore users ([]). Any suggestion that a NZ purchaser could force waste companies to accept prices below competitive export levels, let alone pay customers to take PET waste off their hands, is divorced from the commercial realities of the global industry.
- (i) **No lessening of competition in the acquisition of PET scraps:** The suggestion that there could be any lessening of competition in the acquisition of PET scraps lacks credibility. First, []. Second ([]), there is an active market for the acquisition of scrap, with a number of other traders, and prices are innately linked to global commodity prices. Any suggestion that the merged entity could force prices below competitive levels is divorced from reality.
- (j) **No competition concerns in the supply of RPET roll-stock:** There is no credible way in which the Acquisition could affect competition in the supply of RPET roll-stock. First, neither of the parties supply RPET roll-stock so there is no horizontal overlap. Second, that is not likely to change in the counterfactual:
- (i) []
- (aa) [] or
- (bb) []
- (ii) [] and
- (iii) []

(1) SIGNIFICANT AND GROWING COMPETITION FROM IMPORTS

8. As participants in an industry that faces significant and consistently increasing competition from imports, both Pact and Flight were concerned that the Sol appeared to give only cursory attention to the dynamic of competition from imports.
9. While Pact and Flight expect that the Commission itself is properly taking that dynamic into account, they want to ensure that is the case. Specifically, Pact and Flight wish to emphasise to the Commission that it is critical to it developing an informed and complete understanding of competition in the supply of rigid packaging that it properly reflects the significant competitive constraint from imports.

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10. Indeed, section 3(3) of the Commerce Act specifically obliges the Commission to take competition from imports into account in assessing the competitive effect of an acquisition:

For the purposes of this Act, the effect on competition in a market shall be determined by reference to all factors that affect competition in that market including competition from goods or services supplied or likely to be supplied by persons not resident or not carrying on business in New Zealand.

11. To assist the Commission in taking this into account, Pact and Flight set out the following:

- (a) There is already a significant quantity of imports. Pact estimates that at least [] of all E&T packaging currently supplied in NZ is imported, with this proportion growing year-on-year []. The import competition in NZ includes very large importers, such as Linpac and Huhtamaki, and a diverse range of other importers including Plantic, Punchbowl Packaging, Jenkins Freshpac Systems, Oppenheimer, Contour International, Ikonpack, Seeka, LeesPac, Benxon, Multisteps Pty Ltd, and many others.
- (b) These importers can grow their E&T segment share rapidly. For example, Linpac has achieved significant share in NZ ([]) in the 5 years since its commenced its Australasian E&T business. Linpac's customers include very large businesses, such as []. Another good example from the Australian context, is []
- (c) Imports are significant, and growing rapidly, across all product uses. For example, imports are estimated to have an approximate:
- (i) [] share in the supply of E&T meat trays (whereas five years ago, there was very little import presence in this end-use segment); and
- (ii) [] share in the supply of E&T kiwifruit, bakery and horticulture packaging (whereas ten years ago, there was very little import presence in this end-use segment).
- (d) The significant and growing constraint from importers is increasingly out-competing domestic manufacturers, resulting in them closing domestic manufacturing sites. This demonstrates the revealed preferences of customers that they will readily switch to imported product. For example:
- (i) In 2018 Huhtamaki closed its Henderson E&T manufacturing facility, noting "We need to look at off-shore options to remain competitive in the market".²
- (ii) []. To reiterate (as it was not reflected in the Sol), media on this dynamic has included:

Pact Group has conceded it may be forced to close more Australian manufacturing plants in preference of imports as costs pile pressure on its ability to remain competitive.³

We made meaningful steps in the transformation of our packaging network with the closure of two facilities in the

² <https://www.stuff.co.nz/business/industries/107606208/huhtamaki-factory-to-make-128-workers-redundant-in-restructure-union-says>

³ (15 August 2019). Pact Group may be forced to close factories. The Australian.

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second half, the rationalisation of another and the establishment of an import channel to support supply in several product categories.⁴

- (e) Imports are highly price competitive. Indeed, the Sol records that the Commission has received feedback that "imported PET packaging can be cheaper per-unit for customers than locally-produced PET packaging." This is because:
 - (i) E&T packaging is nestable by design, and so is efficient to transport and/or store; and
 - (ii) imports, particularly from Asia, have a significant cost advantage in the supply of E&T packaging when contrasted with NZ-manufactured packaging, given:
 - (aa) the lower labour costs in Asia compared to NZ; and
 - (bb) the economies of scale available to overseas manufacturers that are serving a far larger customer base than NZ-based manufacturers including their ability to procure cheaper raw materials due to that scale.
- (f) Both Pact and Flight's experience is that customers do not consider that there is any difference in quality between imported and domestically manufactured packaging, even for food-grade products. Overseas manufacturers invariably have the necessary food-safety certificates that enable them to sell food-grade products into the NZ market.
- (g) There are no material downsides to customers from purchasing imported E&T that cannot be readily overcome:
 - (i) It is not the case that there is a need to order in bulk from importers that is different to purchasing from local manufacturers – any larger customer needs to order in bulk to fulfil its forward requirements, regardless of whether it is dealing with a domestic or overseas supplier.
 - (ii) The only potential difference in dealing with imported product is the lead-time, [] (and is no different for imports of any product). As the Commission will be aware, imported products are prevalent throughout NZ's economy – and so if this were relevant, the Commission would need to exclude competition from imports in every case and in every market (which plainly would not be credible). E&T packaging is highly efficient to store. Indeed, []. []
 - (iii) The risk of supply interruption can also readily be managed through the use of storage facilities, or using a third party logistics provider ("**3PL**"). Again, the storage requirements for rigid packaging are no different to those for any other imported product, and, as set out above, imported products are prevalent throughout NZ's economy. []
- (h) It is relatively easy for an importer to create the equivalent to having an "on the ground" presence in NZ, either through appointing a 3PL provider or having its own

⁴ <https://www.packagingnews.com.au/latest/pact-group-reports-290m-loss-after-challenging-year>

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warehousing in NZ to manage receipt and delivery of product (as noted, E&T packaging is highly nestable, and efficient to store). Furthermore, the cost of providing warehousing is not a cost that is unique to importers – any domestic manufacturer also needs to have warehousing in order to hold stock. For example, Pact has [] warehouse facilities to house E&T inventory prior to shipment to customers, of which [] are in NZ and [] are in Australia (including []). In this respect, Pact's presence in the South Island is identical to the presence that any importer could readily establish in NZ (i.e. establishing an "on the ground" warehouse facility without need to make any capital investment, as 3PL services can be accessed on a variable cost for service basis).

- (i) There are many examples of importers that can readily offer the equivalent to an "on the ground" presence:
- (i) With respect to E&T products, Huhtamaki has made the business decision to transition from supplying its customers with NZ-manufactured products, to supplying them via an import-model. Despite that, Huhtamaki continues to market itself as "Kiwi", "out of our backyard", and "made in New Zealand" given it retains other manufacturing assets in NZ.⁵
 - (ii) [] already has a significant on-the-ground manufacturing presence in NZ in the supply of other packaging products [] it could readily choose to expand its E&T presence in NZ directly using its own on-the-ground presence – in particular if a customer such as [] wished to facilitate its further expansion in NZ). []
 - (iii) Infia is one of the largest fruit and vegetable packaging suppliers in the world, despite only having manufacturing facilities in Italy and Spain. From those manufacturing plants, it has "an organised sales network on all five continents and consolidated partnerships worldwide"⁶ – including by working with Jenkins Freshpac in NZ (understood to have warehousing facilities in Tauranga). Jenkins Freshpac markets its access to a global supplier as a competitive advantage:⁷

Manufactured in PET, (Polyethylene) RPET (Recycled Polyethylene) or PP (Polypropylene) these highly rated products are manufactured by industry leader Infia and are imported from Italy ensuring the latest international packaging technology is available to the New Zealand fresh produce industry.
 - (iv) Contour International imports packaging sourced from Quinn Packaging ("one of the largest food packaging manufacturing operations in Ireland and Britain"), and is understood to have warehousing facilities in Tauranga.⁸

⁵ <https://www.huhtamaki.com/en-nz/foodservice-new-zealand/>

⁶ <https://www.infia.it/Azienda-Infia-Group.aspx>

⁷ <https://www.jenkinsfps.co.nz/punnets>

⁸ <https://www.irishtimes.com/business/manufacturing/quinn-packaging-invests-3m-at-cavan-facility-1.2493782>

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- (v) Oppenheimer New Zealand Ltd is an importer of innovative E&T packaging products into NZ, and has warehousing facilities in Wellington, Auckland, and Christchurch.⁹
- (vi) Ikonpack is said to be "a key supplier to the meat industry (including red meats, poultry and seafood)",¹⁰ with Ikonpack's packaging materials distributed in NZ by NZ distributor Dunninghams (which has locations in Auckland, Wellington, and Christchurch):¹¹

Dunninghams is pleased to announce the launch of its new iKON food service packaging range which is set to shake things up in the NZ packaging arena! Already famous as a supplier of trays and vacuum bags for the meat and fish industries, (and a sponsor of Meatstock), Dunninghams now has a full range of food service packaging for retail and food service channels which offers something different from other players in the market.



The new range includes its unique and exclusive i-Cubes : a square alternative to the usual round sho bowls, plus Complete Seal: leak resistant containers with excellent clarity, foam clams, cake domes, round deli containers, bakery containers, portion cups, sandwich wedges and food wraps.

- (j) Exchange rate is not a relevant disadvantage for imports. As the majority of the cost of finished goods packaging in PET consists of the imported resin, foreign exchange rates have only an immaterial impact on the competitiveness of imports. Furthermore, any exchange rate risks can be readily managed by customers with forward cover in the normal way.
- (k) There are multiple importers, including importers that sell imported products marketed as sustainable options (e.g. imported RPET offerings), for example:
 - (i) Jenkins Freshpac supplies imported RPET packaging to NZ customers:¹²

⁹ <https://oppenheimer.co.nz/company-profile/>

¹⁰ <https://ikonpack.com/aboutus>

¹¹ <https://www.hospitalitybusiness.co.nz/dunninghams-shake-things/>

¹² <https://www.jenkinsfps.co.nz/punnets>

Punnets provide:

- Clear all around view from PET or RPET
- Vents for air circulation
- Industry leading de-nesting capability for automation
- Punnets are recyclable and contain recycled content
- Protects produce during transit, storage and display
- Rigidity provides better efficiency during wrapping, netting and lidding
- 'Kit' options available (with a hinged lid)



(ii) Punchbowl Packaging supplies imported RPET packaging to NZ customers (along with packaging made of many other substrates):¹³

Plastic Punnets

We supply a range of standard and customised plastic punnets made from RPET.

A range of sizes available from 125gm to 1kg

We can also custom design a punnet to what ever size and shape you might need.

[Enquire now](#)



(iii) Contour International supplies imported RPET packaging to NZ customers (which it sources from Quinn Packaging in Ireland):¹⁴

Contour International is proud to announce a packaging breakthrough for New Zealand. DETECTA®: an advanced black RPET food tray that is made from up to 100% recycled material and is detectable by the Near-Infrared sorting equipment in NZ recycling facilities, making it 100% recyclable.



Lead the way

DETECTA® is a breakthrough plastic that makes truly recyclable black food trays a commercial reality for smart FMCG brands. The brands that lead the charge will gain an immediate competitive advantage.

DETECTA® RPET food trays are made of up to **100% recycled PET**, detectable and recyclable in NZ recycling plants.

DETECTA® is commercially viable, food-grade certified and immediately available for New Zealand businesses exclusively through Contour International.

Get your packaging ahead for 2020, talk to Contour today on **0800 576 997** or sales@contoursales.co.nz

Quinn Packaging in turn, markets that its packaging products are exported globally from Ireland, including to NZ:¹⁵

¹³ <https://www.punchbowlpackaging.co.nz/category/punnet/> and <https://www.punchbowlpackaging.co.nz/sustainability/>

¹⁴ <https://www.contoursales.co.nz/Recyclable-Packaging-Food-Trays>

¹⁵ <https://www.linkedin.com/company/quinn-packaging/?originalSubdomain=ng> Screen shot of animation.



- (l) This demonstrates that there is already significant import competition, and the threat of further / increasing imports is also significant. The High Court has said that even the threat of import competition is sufficient to constrain domestic manufacturers from pricing above potential import prices (*Fletcher Metals Ltd v Commerce Commission*).¹⁶ []
- (m) Large customers could sponsor new entry. The entry of Linpac into the supply of E&T in NZ [], demonstrates the ease with which [] large customer could also facilitate the entry of a new importer in NZ – including any one of the large E&T suppliers in Australia that are not currently materially active in E&T supermarket supply in NZ (such as [])

12. In this respect it is instructive to cross-check the role of imports in the New Zealand E&T packaging industry against the framework in the ACCC's Merger Guidelines for when "imports are most likely to provide an effective and direct competitive constraint", as set out in Table 1 below.

Table 1 - Assessment of the Acquisition by reference to the ACCC's matrix for assessing the effectiveness of import constraint

Factor in ACCC framework	Application in this case
"independent imports (that is, imports distributed by parties that are independent of the merger parties) represent at least 10 per cent of total sales in each of the previous three years"	✓ Threshold significantly exceeded (by a factor of [] times). Pact estimates that currently at least [] of all E&T packaging supplied in NZ is imported and this is increasing year-on-year.
"there are no barriers to the quantity of independent imports rapidly increasing that would prevent suppliers of the imported product from competing effectively against the merged firm within a period of one to two years (for example, government regulations, the likelihood and impact of anti-dumping applications on imports, customer-switching costs or the need to establish or expand distribution networks)"	✓ There are no barriers whatsoever to the quantity of independent imports rapidly increasing. E&T packaging products are already imported into NZ in significant quantities, and any number of importers, sourcing product from manufacturing facilities in Australia, Asia, or elsewhere, could rapidly increase volumes of imports into NZ.
"the (actual or potential) imported product is a strong substitute in all respects (that is, quality, range, price, etc.) for the relevant product of the merged firm, taking into account factors including the need to meet any relevant [NZ] or industry standards, any increase in the complexity of customers' logistical arrangements, increased transport times and costs, and the risk of adverse currency exchange rate fluctuations"	✓ Pact does not consider there are: <ul style="list-style-type: none"> ▪ any differences in quality between imported and domestically acquired RPET or roll stock (and overseas manufacturers invariably have the necessary food-safety certificates that enable them to sell food-grade products into the NZ market);

¹⁶ (1986) 6 NZAR 33.

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	<ul style="list-style-type: none"> ▪ any prohibitive costs associated with freight from overseas and warehousing, in particular given that E&T packaging is nestable by design and lightweight, and so is efficient to transport and/or store; and ▪ any costs arising from potential fluctuations in the foreign exchange rate (including because local manufacturers import raw materials (plastic resin), and so can also be subject to exchange rate variations). As the cost of raw material is a substantive component of the cost of the finished product, foreign exchange fluctuations are not materially influential on the competitiveness of imports.
<p><i>"the price of actual or potential landed imports, including any tariffs or other import specific taxes and charges, (that is, the import parity price) is close to the domestic price of the relevant product that would prevail in the absence of the merger"</i></p>	<p style="text-align: center;">✓</p> <p>Threshold significantly exceeded - not only are only imports "close to the domestic price", they are in fact "cheaper per-unit" (as set out in the Sol).</p>
<p><i>"importers are able to readily increase the supply volume of the product they import with minimal or no increase in the price paid"</i></p>	<p style="text-align: center;">✓</p> <p>In the context of the international manufacture and trade of E&T packaging, there is no way in which increasing volumes of imports into NZ could necessitate an increase in the price of imports. Indeed, imports, particular from Asia, have a significant cost advantage in the supply of E&T packaging when contrasted with Australian-manufactured packaging, given:</p> <ul style="list-style-type: none"> ▪ the lower labour costs in Asia compared to Australia; and ▪ the economies of scale available to overseas manufacturers that are serving a far larger customer base than Australian-based manufacturers including their ability to procure cheaper raw materials due to that scale.
<p><i>"the merged firm and other major domestic suppliers do not have a direct interest in, are not controlled by, and do not otherwise interact with, actual or potential import suppliers"</i></p>	<p style="text-align: center;">✓</p> <p>There are numerous independent import suppliers in NZ, including Linpac, Plantic, Huhtamaki, Punchbowl Packaging, Jenkins Freshpac Systems, Seeka, Oppenheimer, LeesPac, Benxon, Contour International, Multisteps Pty Ltd, Ikonpack, Bonson.</p>

(2) NO VULNERABLE CLASS OF CUSTOMERS

13. Even if one were to set aside competition from other substrates (which for the reasons discussed in this response would be incorrect), the statements in the Sol make clear there is not any class of customer that could be said to be vulnerable to a price increase (or reduction in quality) in E&T packaging in the factual.
14. Specifically, it is apparent from the Sol that the merged entity would continue to face significant competition in supplying E&T packaging to both larger and smaller customers:
 - (a) In relation to larger customers, the Sol says that:

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- (i) "some [larger] customers may be able to resist a price increase (or drop in quality) through their procurement methods or through supporting smaller suppliers in order to increase competition";¹⁷
 - (ii) there are other NZ manufacturers "often" quoting for larger customers";¹⁸ and
 - (iii) "imported PET packaging can be cheaper per-unit for customers than locally-produced PET packaging, if sufficient quantities are ordered".¹⁹
- (b) In relation to smaller customers, the Sol says that:
- (i) "there are many other suppliers with thermoforming capacity" that "have spare capacity available to service other customers .. at a smaller scale than the Parties";²⁰ and
 - (i) "entry at a small scale is possible"²¹ ... "relatively quickly (e.g. within one or two years) and at relatively low cost."²²
15. Accordingly, even taking the Sol on its face, it states that:
- (a) Larger customers already have alternative NZ-based options, could readily switch to purchasing lower priced imports (given their "sufficient volumes"), or could credibly threaten to sponsor the entry or expansion of alternative suppliers []; and
 - (b) Smaller customers already have "many" alternative NZ-based options with spare capacity that they could readily switch to (e.g. Custom-Pak, Progressive Plastics, Formrite Plastics, Aztec Packaging, Plus Pac Packaging, and Berica), and that new entry/expansion could readily occur within one or two years.
16. This demonstrates that both larger and smaller customers already have numerous alternative options that they could credibly threaten to switch to in short order. As the Commission will be aware, the legal and economic literature is clear that where customers can "credibly threaten" to switch alternative suppliers, then a firm's ability to increase prices (or reduce quality) is constrained. For example:
- (a) the Commission's M&A Guidelines where it states that a customer "can discipline the merged firm by switching or credibly threatening to switch" to alternatives.²³
 - (b) Roman Inderst and Greg Shaffer state that:²⁴

[w]hat constrains the pricing power of upstream firms is the buyers' threat to substitute among suppliers or, where feasible, to create alternative sources of supply.

¹⁷ 65.

¹⁸ 55.2.2.

¹⁹ 59.

²⁰ 58.1.

²¹ 61.1.

²² 61.

²³ 3.115.

²⁴ Roman Inderst and Greg Shaffer (2007), "Buyer Power in Merger Control", in W.D. Collins (ed.), *ABA Antitrust Section Handbook: Issues in Competition Law and Policy*, American Bar Association, Chicago, 1611-1635.

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17. This demonstrates that neither larger or smaller customers could be vulnerable to a price increase (or quality reduction), and that therefore it is not necessary for the Commission to consider whether larger customers could "protect smaller customers"²⁵ – all customers would already have multiple competitive options they could credibly threaten to switch to.
18. In addition, there are three further points in the Sol in relation to larger and smaller customers that Pact and Flight consider it important to address:
- (a) The statement in the Sol that smaller customers may be prevented from importing E&T packaging due to the requirement to "order in bulk (both to get lower costs and because lead times are longer)" is not consistent with in-market experience and the revealed preferences of customers – for example:
- (i) [];
 - (ii) Even if ordering in bulk is necessary, smaller customers have achieved that "ordering in bulk" by purchasing via an import distributor (such as Jenkins Freshpac, Oppenheimer, Ikonpack, etc), which are distributors acting as aggregators of volumes on behalf of smaller customers (see further at paragraph 33 below);
 - (iii) [];
 - (iv) [];
 - (v) [];
 - (vi) [];²⁶ and
 - (vii) [].
- []
- (b) The Sol states that the Commission is still considering whether larger customers would face any costs in exercising countervailing buyer power. Again the market realities demonstrate that larger customers [] readily can, and do, exercise countervailing buyer power. For example:
- (i) Large customers extract competitive pricing and quality through conducting rigorous RFP processes, that pit competing suppliers (both domestic manufacturers and importers) against each other across multiple indices of competition (price, quality, product differentiation / innovation, service, etc). There will be no increase in costs to larger customers in conducting such RFP processes in the factual compared to the counterfactual, and they will continue to conduct such processes to extract competitive outcomes. The entry of Linpac into the supply of E&T in NZ [] demonstrates the ease with which [] large customer could also facilitate the entry of a new importer in NZ. []:
 - (aa) [];²⁷ and

²⁵ 65.2.

²⁶ <https://www.freshberrycompany.co.nz/new-index>

²⁷ For example: Fonterra Co-Operative Group Limited / National Foods Limited Decision 542 (10 December 2004) at [222].

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- (bb) []²⁸ []. .
- (ii) It is not the case that a larger customer would have to incur material costs to sponsor new entry in order to exercise countervailing power. Indeed, there are already multiple options aside from Pact and Flight that could fulfil the requirements of large customers. For example:
- (aa) Lincac already supplies the [] customer in New Zealand – Countdown;
- (bb) []. [];
- (cc) [];
- (dd) [];
- (ee) [];
- (ff) any of the significantly larger manufacturers in Australia and Asia would not face any barriers in participating in NZ RFP processes;
- (gg) imports could readily fulfil the requirements of large customers (for example, Lincac in the case of Woolworths), and [] These overseas manufacturers have scale and economies significantly in excess of those available in NZ, and so could readily fulfil the requirements of any of NZ's larger customers; and
- (hh) even if the customer had a preference for some of the manufacturing process to occur in New Zealand (noting that in Pact's experience price and quality will override any preference in relation to the location of the manufacturer), thermoforming equipment is not expensive and is readily available. For example, [] [] [] [].
19. Reinforcing this (irrespective of the size of customers), is the fact that Pact and Flight are not each other's closest competitors in any different end-use segment, with each facing numerous alternative competitors in each of the segments that they focus on - cross refer to Table 2 of the clearance application.
20. This demonstrates that neither larger or smaller customers in any end-customer segment could be said to be vulnerable to a price increase (or quality reduction) post-Acquisition.
- (3) PACT AND FLIGHT ARE NOT UNIQUELY PLACED AS "CLOSE" COMPETITORS**
21. The Sol states that the Commission is testing whether Pact and Flight could be considered uniquely close competitors to one another.²⁹ The apparent basis for that concern is that:
- (a) Pact and Flight have a larger share of capacity than other market participants;³⁰

²⁸ At [142].

²⁹ [55].

³⁰ [55.1]

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- (b) even though Pact and Flight "may focus on different customers" they may see each other as a threat by having the ability to switch into different customer segments;³¹ and
- (c) "there may be some barriers to supplying certain customers who have more customised products".³²

22. In relation to the first point, it is important that the Commission take into account that current size/capacity of the merging parties is only one of a number of factors to be considered in the assessment of competition in a market. This has been affirmed in numerous decisions, including the Court of Appeal in *Commerce Commission v Southern Cross Medical Care Society*.³³

[69] This analysis of the relationship between market share, barriers to entry and expansion, and market power has a long and respectable pedigree, both judicially and academically... In [*Magic Millions*] **the Judge [now Supreme Court Justice Tipping] observed that a substantial market share without barriers to entry would seldom, if ever, be indicative of dominance.** Next is the decision of this Court, broadly to the same effect, in *Telecom Corporation of New Zealand Ltd v Commerce Commission* (the AMPS-A case) [1992] 3 NZLR 429, and then the decisions of the High Court and this Court in the Port Nelson case decided in 1996 and noted above.

[86] **Whatever the size of the merged entity's market share, it is elementary that its market power will not be insufficiently constrained unless there are barriers to entry or expansion which protect it from effective rivalrous reaction to the exercise of its market power.**

[87] **The key question therefore concerns the nature and quality of barriers to expansion and whether they are at a level which likewise provides practical and effective constraint on the merged entity, deterring it from supra-competitive pricing.** [Emphasis added]

23. Accordingly, adopting the proper legal and economic approach, the existing size/capacity of the merging parties is relatively insignificant in the context of a market with low barriers to entry and expansion (as specifically noted elsewhere in the Sol, namely that "there are many other suppliers with thermoforming capacity"³⁴ and "a basic thermoforming operation can be set up relatively quickly (eg, within one or two years) and at relatively low cost").³⁵
24. Furthermore, any notion that Pact and Flight's existing size/capacity means they are uniquely placed to supply larger customers is incorrect – see the factors outlined at paragraph 18 above.
25. In relation to the second point, the Sol adopts an inconsistent approach to the ability of E&T suppliers switching between different product categories:

³¹ [55.3]

³² [61.3]

³³ (2001) 10 TCLR 269 at [68], [69], [86], [87].

³⁴ [58.1].

³⁵ At [61].

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- (a) stating that "moulds" (tools) could be a barrier to other competitors switching/expanding into additional product categories ("they must incur fixed costs to make new moulds");³⁶ but at the same time
 - (b) stating that Pact and Flight could see each other as a threat due to "the ability to switch their manufacturing to compete in different product categories".³⁷
26. The correct approach is that there are no barriers to E&T suppliers (both importers and domestic manufacturers) switching between different product categories – namely:
- (a) an importer could readily source, say, produce packaging from one source (e.g. Infia, "a leading packaging supplier in the fresh produce sector"),³⁸ while at the same time sourcing, say, meat packaging from another source (e.g. Contour International sources meat trays from Quinn Packaging); and
 - (b) a domestic manufacturer can readily switch between producing different product applications:
 - (i) the fixed costs of installing new tooling to switch between sectors are by no means significant for a supplier. Pact estimates that the cost of a new tool to produce, for example, a bakery container could be purchased and installed for as little at [];
 - (ii) continued investment in tooling is an established, inevitable ongoing cost for any E&T manufacturer (regardless of whether or not they are switching between customer segments). The suggestion that E&T suppliers use the same tooling for years on end to simply make the same, say, bakery container (without changing moulds or customer segments) is incorrect. For example, if a customer wishes to change the design and shape of its E&T container (to make it deeper and narrower, or to install a new "lip" which allows for a top to be secured to it, etc) then the supplier will install new tooling to meet those customer requirements. Pact estimates that, even for its longstanding customers, it would install a new tool every [] years, and often []. [];
 - (iii) []; and
 - (iv) even if / when an E&T manufacture incurs the cost of new tooling initially, the manufacturer will generally amortise those new costs over a certain supply volume by including a recovery amount in the per unit pricing (and, therefore, it is not a prohibitive upfront capital expenditure).
27. Accordingly, any suggestion that Pact and Flight are uniquely placed to threaten to switch/expand into additional product categories, in circumstances where others cannot, is incorrect due to the low costs of tooling. Any E&T supplier (both importers and domestic manufacturers) could readily switch/expand into additional product categories if they identified an opportunity.
28. Pact reiterates the information provided in paragraphs [26] - [43] of its 19 October submission in relation to the closeness of competition between Pact and Flight, namely that:

³⁶ [35.2].

³⁷ [55.3].

³⁸ https://www.jenkinsfps.co.nz/INFIA_produces_recycled_polyethylene_products

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- (a) both Pact and Flight face closer competition from other third parties in the end-customer segments where they each focus (per Table 2 of the clearance application). In particular:
 - (i) Flight reiterates that []; and similarly
 - (ii) Pact [];³⁹
- (b) the supply of rigid packaging in NZ is characterised by a significant number of other NZ-based manufacturers and several examples of recent entry and expansion;
- (c) the Commission's analysis fails to acknowledge the competitive constraint that both Pact and Flight are experiencing from the significant and increasing presence of imports (as set out at paragraphs 8 to 12 above);
- (d) the threat of new entry in NZ is very real, including from [], Sealed Air (the largest Australian supplier of E&T that already has non-E&T manufacturing facilities in NZ) and Tacca ([]). This threat is heightened by the fact that:
 - (i) the NZ market is characterised by a lack of long terms contracts;
 - (ii) []; and
 - (iii) large customers can and do sponsor expansion of existing competitors.

29. In relation to the third point, it is not correct that "innovation in the design of trays" represents a barrier to switching/expansion between different customer segments. Innovation in the design of packaging is simply a function of differentiation between suppliers, which has previously been considered by NZ Courts as insufficient grounds to assert a separate market definition.⁴⁰ Furthermore, Flight's experience is that:

- (a) []
 - []
 - []
 - []
- [];
- (b) []

30. The Commission's analysis also (incorrectly) relies on an assumption that suppliers have to make a sunk investment into a tool, or even a thermoformer, before participating in a RFP process, such that their prospects of succeeding in that tender directly affect their investment decisions. This is not the case. Potential suppliers can:

- (a) participate in an RFP process without yet having installed the tooling required to service that contract, including by offering a generic container with no innovation or intellectual property dimension. This approach is often successful, given that price is invariably the key consideration of customers in the course of RFP processes (and generic packaging is commonly cheaper);

³⁹ []

⁴⁰ *Brambles New Zealand Ltd v Commerce Commission* (2003) 10 TCLR 868 (HC) at [130].

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- (b) only invest in the tooling if they are successful in that tender. []; and
- (c) participate in an RFP process without even having the thermoformer capacity installed []

(4) MULTIPLE DIFFERENT WAYS TO COMPETE IN E&T

31. As reflected at paragraph 17 of the Commission's Sol, there are multiple different business models that E&T suppliers can choose to compete. For example, an E&T competitor could choose to offer a:
- (a) Recycle, decontamination, extrusion, thermoforming, and distribution service: where an entity purchases waste material (usually in bale format either collected domestically or imported), washes, grinds, decontaminates, extrudes and then turns into finished goods packaging;
 - (b) Extrusion, thermoforming, and distribution service: where an entity purchases either virgin pellet or hot wash RPET flake and then extrudes into finished goods packaging (if using hot wash RPET flake, the business will also need either a decontamination line or an "ABA" extruder);
 - (c) Thermoform and distribution service: where an entity purchases virgin, recycled or food grade recycled roll stock (either domestically manufactured or imported) and turns it into finished goods packaging through a thermoforming process; or a
 - (d) Distribution service: where an entity purchases finished product (whether virgin or recycled) to distribute to end customers. The finished product could be domestically manufactured or imported.
32. This means that there are many different ways for competitors to compete in the supply of E&T, with modest (if any) upfront investment required for many of these business models, which further exacerbates the extent of competition.
33. Furthermore, because E&T packaging products are commoditised, homogeneous products, there is no impediment to anyone buying from suppliers overseas and reselling those packaging products to customers in NZ as distributors (indeed, many competitors in NZ have business models that rest on this ability – for example, Jenkins Freshpac, Seeka, Oppenheimer, Contour International, Ikonpack, any many others). This means that distributors can "aggregate" purchases on behalf of smaller customers, and then resell to those customers (giving them the ability to "piggy-back" on the economies of scale / buyer power of distributors). This dynamic has been noted by competition regulators (for example, the UK Competition Commission) as providing indirect countervailing power for all size of customers:⁴¹

These customers could, if they do not do so already, purchase via distributors, which are in turn large customers with a degree of buying power.

(5) SIGNIFICANT AND GROWING COMPETITION FROM OTHER SUBSTRATES

34. The Sol outlines that the NZCC has received feedback from several customers regarding the different properties of PET and other substrates, suggesting that they may not be interchangeable from a demand-side perspective – including with specific reference to meat and fresh fruit packaging.

⁴¹Competition Commission. *Universal Foods Corporation / Pointings Holdings Ltd* (December 1999) para 1.14.

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35. In-market experience demonstrates that such feedback does not reflect the realities of competition, and it is important that the Commission gives more weight to revealed preferences (i.e. evidence from actual behaviour) than to customers' stated preferences in response to questions from the Commission. Pact's in-market experience is that customers, across every customer segment, consider PET (including RPET) trays substitutable for packaging made from other substrates.
36. For example, it is worth reiterating to the Commission the numerous examples of alternative substrates being used for both meat and fresh fruit products. These examples are set out in **Appendix Two and Appendix Three**.
37. **Appendices Two and Three** demonstrate that switching away from PET packaging, including for meat and fruit applications, is a significant and increasing trend (and is reflective of the Commission's statements in the SOI that there is a "trend towards using sustainable products"⁴² and "that demand for sustainable packaging is increasing over time").
38. As has been noted in relation to produce packaging in NZ as early as 2017 (and has only continued to accelerate):⁴³

There are a couple of clear themes emerging in produce packaging globally and they are starting to turn up in New Zealand. The classic clamshell punnet has seemed unshakable as the staple of pack types for the smaller loose product like berries and tomatoes – but the ground is starting to shift.

By converting from a traditional punnet to a top sealed tray, packers and marketers are seeing up to a 50% reduction in weight of material used in packing their produce. "This goes a long way to reducing non-renewable inputs and when coupled with using a recycled PET or compostable plastics we start to see some really important shifts in the way we steward our products through the value chain," said Ann Cameron, Sales Manager Consumables for Jenkins Freshpac Systems.

Another shift bubbling away and gathering steam is in compostable fibre trays. Made from fully renewable and sustainably sourced fibre these trays not only scream sustainability to the consumer, they will break down in the home compost in 90 days. "the idea of supplying someone with a product that will make zero contribution to landfill is pretty cool and one we are excited to be leading the way within New Zealand and Australia," said Jamie Lunam, General Manager of Jenkins Freshpac.

39. This switching is significant across all product applications, for example:
- (a) in meat/protein, Pact estimates that flexible packaging and rigid card would make-up approximately [] of the protein packaging segment in NZ, and that proportion is only expected to increase further; and
 - (b) in fruit/produce, Pact estimates that non-E&T packaging would make-up approximately [] of the retail packaged fruit and produce packaging segment in NZ, and again that proportion is only expected to increase further. It is worthwhile noting that the majority of fruit and produce is retailed in bulk plastic bins, moulded fibre trays, or cardboard boxes with the consumer left to pack into bags or their

⁴² 18.

⁴³ <https://supermarketnews.co.nz/news/fad-or-paradigm-shift/>

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own packaging as brought to the supermarket. That proportion of packaging has been excluded from this summary. Moreover, fresh fruit/produce can be packaged and transported in a number of different ways, from use of no packaging at all, in film or bags (whether plastic or cloth), cardboard or a number of plastic alternatives.

40. Furthermore, as set out in Table 2 below, none of the "PET attributes" referred to at paragraph 31 of the Sol are material impediments to customers switching substrates in practice.

Table 2 - Pact responses to NZCC comments regarding PET attributes

PET attributes	Pact comments
<p>Protection/maintenance of products</p>	<p>There are numerous alternative substrates that can be used without compromising protection or maintenance of products.</p> <p>For example:</p> <ul style="list-style-type: none"> ▪ Caspak markets: <ul style="list-style-type: none"> ○ Its thermoforming film packaging as a cost effective way to package meat products and "still maintain shelf-life".⁴⁴ ○ Its vacuum pouches for "When your product needs an extended shelf life, vacuum pouches offer the least capital expensive means of packaging."⁴⁵ ▪ Silver Fern Farms (that has switched from PET to flexible plastic and cardboard sleeves) noted in their public announcement that they were able to make the change "without compromising product safety or shelf life".⁴⁶ ▪ In switching to cardboard meat trays, Aldi UK states that: "Both food and plastic waste are important issues, but this packaging delivers on both by potentially removing 240 tonnes of plastic a year without compromising food quality or longevity."⁴⁷ ▪ Organic Farm Butchery in NZ supplies meat in compostable "EconicClear" film packaging supplied by Convex,⁴⁸ which provides "good presentation and low losses." ▪ Convex has "successfully developed a functional compostable pack that works well for meat and other wet products with a shelf life of approximately 10 days."⁴⁹
<p>Transparency of PET</p>	<p>There are several other substrates that are also have this property, including, vacuum / shrink film packaging, flexible packaging (e.g. salad bags), IM plastic, bio plastic, glass, compostable netting and several other non-PET polymers, including PVC and LDPE.</p> <p>In addition, even those substrates that are innately opaque can be combined with transparent materials to ensure that customers are able to inspect the product. For example:</p> <ul style="list-style-type: none"> ▪ Fibre punnets with flexible plastic lids.

⁴⁴ <https://caspak.co.nz/markets/meat/>

⁴⁵ <https://caspak.co.nz/markets/meat/>

⁴⁶ <https://www.scoop.co.nz/stories/BU1911/S00409/silver-fern-farms-retail-packing-changes-for-good.htm>

⁴⁷ <https://www.packagingnews.co.uk/top-story/aldi-trial-cardboard-steak-packaging-12-08-2019>

⁴⁸ <https://www.econicpack.com/home-compostable-packs-ideal-for-organic-meat/>

⁴⁹ <https://www.econicpack.com/double-gold-medal-printing-win-for-innovative-compostable-pack/>

	<div data-bbox="778 192 1098 421" data-label="Image"> </div> <ul style="list-style-type: none"> ▪ Cardboard punnets with viewing holes. <div data-bbox="740 517 1134 775" data-label="Image"> </div> <ul style="list-style-type: none"> ▪ T&G and Silver Fern Farms cardboard containers are combined with flexible plastic viewing panels. <div data-bbox="584 904 1078 1093" data-label="Image"> </div> <ul style="list-style-type: none"> ▪ The latest Biopak innovative packaging products combine opaque sugarcane and cardboard packaging with transparent lids: <div data-bbox="517 1223 1337 1429" data-label="Image"> </div> <ul style="list-style-type: none"> ▪ EastPack, which has recently used both E&T packaging to cardboard for packaging kiwifruit, has included holes in its cardboard packaging to allow customers to inspect the product: <div data-bbox="485 1574 1225 1798" data-label="Image"> </div>
<p>Suitability to machinery</p>	<p>Whether a customer needs to change machinery will, of course, depend on the type of machinery and the nature of the packaging change. For example:</p> <ul style="list-style-type: none"> • Many packing companies do not use automated equipment and, therefore, do not face any machinery considerations in switching between packaging.

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	<ul style="list-style-type: none"> • Much of the commercial packing/sealing equipment would be able to handle a change from plastic trays to cardboard trays, for example, with some modifications. • Caspak (as noted above) specifically markets non-E&T packaging alternatives to customers on the basis that they would not necessitate any change to existing machinery. • Moving from meat packed in plastic trays to meat packed in cardboard with plastic seal may involve the need to purchase different sealing equipment. However, the costs to doing so would not be significant (estimated to be as low as []). • [] <p>Furthermore, a number of suppliers will lease their machines or even loan them provided a customer processes a certain amount of packaging materials (for example, Sealed Air),⁵⁰ and there would be no need to change equipment at all to change between PET and RPET (and vice versa).</p>
<p>Sustainability credentials</p>	<p>While PET is perceived to have better sustainability qualities than other plastic alternatives (EPS, PVC, for example), plastics as a whole (including PET) are not perceived as a sustainable substrate in comparison to alternatives such as cardboard, paper, cornstarch, etc, not least because of the time that they take to decompose in landfill facilities. Pact's in-market experience is that consumers largely do not distinguish between the sustainability properties of different plastics, and that the overwhelming sustainability trend is the emergence of multiple different substrates and options as alternatives to virgin plastics packaging. See further at paragraphs 50 to 56 below.</p>

(6) NO SEPARATE MARKET FOR RPET OR NZ RPET

41. The theory being tested in the Sol that there may be a separate narrow market for RPET packaging, or even a more separate narrow market for NZ RPET packaging, is incorrect as a matter of fact, law and economics – including being contrary to court precedent and long standing principles of market definition.
42. On this issue, the Pact and Flight refer to paragraphs [33] to [42] of the submission provided to the Commission on 19 October 2020 (not repeated here in the interests of brevity), and paragraphs [7] to [13] of the opinion by Matthew Dunning QC (**enclosed** with this response).
43. In summary, Pact's and Flight's in-market experience is that customers do readily switch between NZ RPET and other packaging substrates (including imported RPET, virgin PET, and non-plastic substrates), with there being a chain of substitution between all such products, and accordingly those products need to be competitive with one another across the package of "price-product-service". [] The fact that the characteristics of packaging products are differentiated from each other does not, in and of itself, evidence a separate market, and the Commission must fully consider the extent to which the development of new packaging products (e.g. cornstarch, cardboard, vacuum packaging) has "supplanted and extended" PET E&T packaging.
44. In addition to this, Pact and Flight provide the following information to assist the Commission as it tests the issues raised for consideration in the Sol.

⁵⁰ <https://www.sealedair.com/products/food-packaging/food-packaging-equipmentost>

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A separate market for NZ RPET does not meet the "commercial common sense" threshold

45. If the Commission were to define a separately (artificially narrow) market for NZ RPET packaging, then it would be the case that Flight would already have a monopoly (and be able to price accordingly) and would never lose sales to other competitors (such as imported RPET, PET, and other substrate packaging). Plainly that is not the case, and demonstrates that the narrow market being tested by the Sol is not credible as a matter of "fact and commercial common sense" (as required by s 3(1A) of the Commerce Act).

[]

46. []:

(a) []; and

(b) []

47. Accordingly, [].

The revealed preferences of customers demonstrate there is no separate market for NZ RPET

48. The in-market conduct of customers demonstrates that there is no separate narrow market for NZ RPET. Namely:

(a) []. [] and Pact's experience is that customers would substitute between any, and all, of PET, RPET, NZ REPT, and other substrates depending on which supply best met their expectations on price / quality / service.

(b) []:

(i) [];

(ii) []; and

(iii) []

[]

(c) [].

(d) []

(i) []; and

(ii) []

(e) []

(i) []




(aa) [];

(bb) [];

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- (cc) [];
- (dd) []; and
- (ii) []

Table 3 - Examples of businesses citing their recycling credentials with no reference to packaging source

Example	Details
[] ⁵¹	[]: []
Colgate Palmolive Detergent	
NZ Drinks ⁵²	<p>In respect of these bottles, NZ Drinks notes:</p> <p><i>"NZDrinks has the largest production capacity of any dedicated PET water plant in New Zealand with the ability to produce and supply more than 200 million bottles per year. With this capacity comes a large responsibility to sustainability and the environment."</i></p> <p><i>"The Pure NZ still water bottles we produce are all manufactured from 100% recycled plastic (RPET – Recycled Polyethylene Terephthalate). Plastic is not environmentally friendly and with most beverage bottles in New Zealand using virgin PET this only increases the problem. We are proud to offer our Pure NZ Still water bottled in a bottle made from 100% recycled material, so we are not adding to the problem."</i></p>  <p>Despite its New Zealand centric brand, NZ Drinks is silent regarding the geographic source of its RPET.</p>
The Collective yoghurt	 <p>The Collective made this change in February 2020, with its announcement touting its achievement as <i>"the first yoghurt company in New Zealand to use recycled plastic (rPET) in its packaging."</i> No mention of the source of the packaging is included in the announcement or on the packaging.</p>

⁵¹ [].

⁵² <https://www.nzdrinks.co.nz/sustainability/>

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49. []
- (a) [];
- (b) [];
- (c) [];
- (d) []; and
- (e) []

Any future market trends will broaden the market, not narrow it

50. The Sol states that "there is trend towards using sustainable products"⁵³ and that the Commission has "heard consistently that demand for sustainable packaging is increasing over time".⁵⁴ It is on the basis of these trends that the Sol states that the Commission is testing whether there could be a separate narrow market for RPET / NZ RPET products.
51. The reality is that this trend towards sustainability is not narrowing the market, but increasingly broadening it as customers increasingly seek non-plastic packaging alternatives – for example, the numerous examples set out at **Appendix Two** and **Three**.
52. The statement in the Sol that "PET has better sustainability credentials [than] many other materials"⁵⁵ does not reflect the revealed preferences and statements of customers – other substrates are considered by customers and consumers to have better sustainability credentials.
53. Indeed, plastics generally (including PET) are not perceived as a sustainable substrate due to the long time that it takes for them to decompose, and the saturation of media messaging regarding "bad" plastics. Alternate substrates, such as board, paper, corn starch, etc are perceived as having better sustainability credentials than PET. For these reasons, many companies have made statements about aiming to reduce use of plastic (including PET) packaging, which will continue to lead to them switching to alternative substrates. For example:
- (a) Countdown: "We are determined to find more ways to **reduce our plastic packaging** either by not using it at all, finding better alternatives, or by using packaging that is made from recycled materials"⁵⁶ ([]); and
- (b) T&G: "We're saying **goodbye to plastic** tomato punnets";⁵⁷
- (c) Rockit (apple supplier): "Like so many Kiwis, members of the Rockit Global team recognise that **there is enough plastic in the world already and if there is an alternative material that can fulfil the purpose of packaging, which is to reduce food wastage, we should embrace it**";⁵⁸

⁵³ At [18].

⁵⁴ At [31.4]

⁵⁵ At [31.4].

⁵⁶ <https://www.countdown.co.nz/media/1555558/countdown-nz-csr-2020.pdf>

⁵⁷ <https://tandg.global/theres-a-new-buzz-on-the-vine-were-saying-goodbye-to-plastic-tomato-punnets/>

⁵⁸ <http://www.fruitnet.com/asiafruit/article/178108/rockit-shows-sustainable-side>

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- (d) Silver Fern Farms: announced that it was changing its retail packaging by adopting a "recyclable cardboard sleeve, which will **reduce plastic** in our supply chain... We have removed up to 50% of the plastic used to protect our retail range";⁵⁹
- (e) Kaituna Blueberries: switching to fibre punnets to use "**95% less plastic than regular blueberry packaging**".⁶⁰



54. Furthermore:

- (a) [] and
- (b) []

55. This demonstrates that there are, of course, different sustainability claims that can be made in favour of other substrates vis-à-vis RPET (and vice versa), and so the products all exist together on a continuous price/quality/service spectrum.

56. Accordingly, if anything, the trend towards sustainability referred to in the SOI is increasing the competitive constraint on E&T packaging from other substrates.

[]

57. []

58. []

59. [].

60. []

61. []

⁵⁹ <https://www.scoop.co.nz/stories/BU1911/S00409/silver-fern-farms-retail-packing-changes-for-good.htm>

⁶⁰ <https://www.linkedin.com/pulse/kaitunablue-featuring-forward-mission-control-mechanism-carlo-magni/>

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[]

62. []

[]

63. []⁶¹

64. []⁶² []:

(a) []; and

(b) [].

65. []

[]

66. []⁶³

67. []

(a) []

(b) [].

(c) [].

(d) []

(i) []

(ii) []

(iii) []⁶⁴

68. []

[]

69. []

70. []

(a) []

(b) [] and

(c) []

⁶¹ []

⁶² []

▪ []; and

▪ [].

⁶³ []

⁶⁴ []

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71. []⁶⁵

72. []

(a) []

(b) []

(c) []

(d) []

73. []

74. []

(a) [] and

(b) []

(i) []

(ii) []

(iii) []

(iv) []

(v) []

(vi) []

(vii) []

(viii) []

75. [].

76. []

[]

77. []

78. []

(a) []

(b) []

79. []

(a) []

⁶⁵ []

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- (b) []⁶⁶
- 80. []
 - (a) []:
 - (i) [];
 - (ii) []; and
 - (iii) [];
 - (b) [];
 - (c) [];
 - (d) [].
- 81. []
 - (a) [].
 - (b) []
 - (c) []
 - (d) []
 - (e) [].
 - (f) []
 - (g) []

[]
- 82. []
[]
- 83. []
- 84. []
 - (a) [] and
 - (b) [].
- 85. []

⁶⁶ []

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(8) NO LESSENING OF COMPETITION IN THE BUYING MARKET FOR PET BALES

86. The Sol states that the Commission is testing whether the Acquisition could substantially lessen competition in any market for the acquisition of PET bales.
87. That is not a credible concern, and is divorced from the commercial realities of the industry. In response, the Parties reiterates the information provided in paragraphs [44] - [49] of their 19 October submission (summarised in the interest of brevity), namely that:
- (a) []; and
 - (b) Even setting this fundamental point aside:
 - (i) [] [];
 - (ii) PET bales are a widely traded commodity globally, and the demand for export of PET bales from NZ is only expected to get stronger as more recycling capacity is built overseas and demand increases worldwide;
 - (iii) there are a number of other actual or potential purchasers of PET bales aside from Flight, including locally-based traders that purchase bales to sell into the international market; and
 - (iv) PET bales are a waste by-product, and the Commission previously has said it would not be possible for there to be a substantial lessening of competition in a buying market for waste by-products, as suppliers would not decrease the quantity of material supplied in response to a decrease in the price paid.⁶⁷
88. In addition to that information, Pact and Flight also provide the following further information to assist the Commission in understanding why a lessening of competition in the acquisition of PET bales is not a credible possibility:
- (a) prior to the establishment of Flight's wash plant in 2018, all PET bales were exported overseas. All waste companies in New Zealand have that existing capability to export bales and, would do so if prices offered by domestic purchasers were below competitive / export party levels. In this respect, it is relevant to re-emphasise the statements of the Waste Management and Resource Recovery Association of Australia (as it was not reflected in the Sol):⁶⁸

There are strong local and export markets for clean PET bales that are collected and sorted to specification... The price of recycled resin is linked to the price for virgin resin.... There is minimal difficulty in finding a destination for collected and sorted PET packaging;

Indeed, PET bales are currently exported from NZ. Of the [] of waste PET available in NZ each year, Pact estimates that only about [] of that is acquired by domestic processors. The rest is sold or disposed of through alternate channels, including exports.
 - (b) the depth and breadth of the global market for PET bales is described in a 3 December 2019 submission by Container Exchange (QLD) Limited ("COAX") to the

⁶⁷ Tuakau Proteins Limited and Graeme Lowe Protein Limited [2014] NZCC 26.

⁶⁸ In its Recovered Resources Market Bulletin (March 2019).

Council of Australian Governments showing the destinations clear PET bale exports via its operations in Australia:⁶⁹

PET Clear Destinations:

PET Clear	Weight	Percentage
Australia	1819.80	39.44%
Malaysia	96.02	2.08%
Northern Ireland	112.90	2.45%
Portugal	222.82	4.83%
Romania	729.66	15.81%
Taiwan	350.92	7.61%
Turkey	1144.23	24.80%
Unknown Export	137.74	2.99%
Grand Total	4614.10	100%

As can be seen in the above table the market for this material is deep and the global demand is quite broad. The percentage declared to remain within Australia would be accurate as the product has been despatched to NSW-based PET plants.

Although there is some Australian capacity to accept this product, we have noticed that the export product tends to achieve a higher realisable value. Again, underpinning the high value of this processed CRS PET in a global commodity market.

- (c) by way of an NZ specific example, [], []. []. Accordingly, [] and, therefore, it is not credible to suggest that [] (or any other waste company) could be vulnerable to a depression of bale prices below competitive levels, it (just like any other waste company) would readily respond by exporting a larger quantity off-shore using existing its export capabilities;
- (d) the proposition being tested in the Sol that "the merged entity could even force sellers to pay for [PET bales] to be collected" is not credible.⁷⁰ [];
- (e) while, a [] increase in the availability of NZ recycled plastic material is possible if the Government implements a CDS or other waste-management reforms, waste companies will continue to be willing and able to export these bales overseas. The price of PET bales will therefore continue to be set by reference to the export parity / global commodity price;
- (f) the proposition being tested in the Sol that in the counterfactual competition between Pact and Flight could drive the price for NZ bales above export parity is also not credible. [] []

89. In light of the above, in the context of a globally traded international commodity market for waste by-product, [] [], [], it is not credible that the Acquisition could have any material impact on competition in the acquisition of PET bales in NZ.

(9) NO LESSENING OF COMPETITION IN THE BUYING MARKET FOR PET SCRAPS

90. The Sol states that the Commission is testing whether the Acquisition could substantially lessen competition in any market for the acquisition of PET scraps.

91. This is not a credible concern and Pact and Flight reiterate the information provided in paragraphs [50] - [51] of their 19 October submission, namely that:

- (g) there will simply not be any loss of competition between Pact and Flight in the acquisition of scrap plastics in NZ, as:

⁶⁹ <https://www.aph.gov.au/DocumentStore.ashx?id=8109a2dd-0572-48f6-bad5-829e09f7773f&subId=691744>. The unit for weight in the table is tonnes.

⁷⁰ [69.2]

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- (i) []; and
 - (ii) [];
 - (h) there is an active global market for PET scrap, including numerous traders of plastic scraps in NZ that will continue to purchase such scraps;
 - (i) the price of scraps needs to be competitive with other sources of inputs (such as virgin resin⁷¹ and RPET flake);
 - (j) if plastic manufacturers are not satisfied with the prices offered for their scraps, they have the option to:
 - (i) invest in an extrusion line to deal with those scraps (extruders can readily be purchased second-hand);
 - (ii) re-use those scraps themselves in-house; and/or
 - (iii) send the scraps back to their suppliers (as is common practice); and
 - (k) PET scrap is a waste by-product, and the Commission previously has said it would not be possible for there to be a substantial lessening of competition in a buying market for waste by-products, as suppliers would not decrease the quantity of material supplied in response to a decrease in the price paid.⁷²
92. In addition to that information, Flight also notes that [].
93. Accordingly, in circumstances of an active market with a number of other traders, where prices are innately linked to global commodity prices and [], the Parties cannot see any way in which the Acquisition could potentially have a material effect on competition in the acquisition of PET scraps.
- (10) NO COMPETITION CONCERNS IN RELATION TO THE SUPPLY OF RPET ROLL-STOCK**
94. The SoI states that the Commission is testing whether the Acquisition could substantially lessen competition in the supply of RPET roll-stock.
95. There is no credible way in which the Acquisition could impact competition in the supply of RPET roll-stock for the reasons set out in paragraphs [52] and [53] of the Parties 19 October 2020 submission (not repeated in full, in the interests of brevity). Those reasons include because:
- (a) Flight does not sell, and never has sold, its RPET roll-stock to third party E&T packaging competitors ([];⁷³ and
 - (b) Pact does not supply (and has not supplied) RPET roll-stock to third party E&T packaging competitors in NZ.

⁷¹ As a point of correction on paragraphs 14 and 15 of the SOI – virgin PET comes in 'resin' form, not 'flake'. The equivalent correction would need to be made to Attachment A.

⁷² Tuakau Proteins Limited and Graeme Lowe Protein Limited [2014] NZCC 26.

⁷³ []

APPENDIX ONE

CustomPak statements regarding intention to build an NZ-based wash plant

Date	Development
November 2018	Callaghan Innovation gives a \$12,200 grant to explore the "Feasibility of Wash and recycling Plant in the South Island" by Custom-Pak. ⁷⁴
August 2019	Custom-Pak presents to Christchurch City Council regarding "installing a PET wash plant to recover locally recycled PET bottles/packageging and convert it back into reusable food-grade packaging". ⁷⁵
2019	Christchurch City Council provides Custom-Pak with a NZ\$75,000 grant to "Build a PET plastic washing and recycling facility in Christchurch to support a circular economy for packaging". ⁷⁶
September 2019	Custom-Pak is quoted in the media as saying: "121 tonnes of PET waste was generated in the South Island every month. But a move to 100 percent recyclable PET packaging could reduce growers' environment footprint by 80 percent. The company was now able to wash these containers, with any labels floating to the top, and sort them optically, with the recovered plastic extruded against as the last step in a circular economy." ⁷⁷
October 2019	In a submission to the New Plastic Economy Initiative, Custom-Pak says that the "first stage of our wash plant has arrived and is being installed, this enables us to wash naked PET". ⁷⁸
2019	Perrys Berrys (a customer of Custom-Pak) includes material on its website stating that in 2019 "Custom-Pak Christchurch installs a dedicated post-consumer RPET chipper and washing plant". ⁷⁹
January 2020	Custom-Pak markets itself to customers and other stakeholders as "operating" a PET wash plant Christchurch. ⁸⁰

⁷⁴ <https://www.callaghaninnovation.govt.nz/grants/feasibility-wash-and-recycling-plant-south-island>

⁷⁵ https://christchurch.infocouncil.biz/Open/2019/08/ISDC_20190826_AGN_3421_AT.htm

⁷⁶ <https://ccc.govt.nz/culture-and-community/community-funding/sustainability-fund/innovation-and-sustainability-fund-projects>

⁷⁷ <https://www.pressreader.com/new-zealand/nz-grower/20190901/282295321906510>




⁷⁸ <https://www.newplasticseconomy.org/assets/doc/Global-Commitment-2019-Progress-Report.pdf>

⁷⁹ <http://www.perrysberrys.co.nz/packaging.html>

⁸⁰ <http://sustainable.org.nz/wp-content/uploads/2020/02/Plastics-Masterclass-123-Report.pdf>

APPENDIX TWO

Examples of alternative substrates used in meat packaging

Example	Picture
<p>In 2019, Silver Fern Farms ("SFF") switched to packaging its meat products in recyclable cardboard sleeves. SFF's release announcing this move (here) noted that SFF considered the switch to be "the right thing for the environment". SFF's 2019 Sustainability Report noted (here):</p> <p><i>"The starting point for Silver Fern Farms is reducing the amount of plastic we need to use, rather than focusing on the type of plastic we use. In 2019 we developed a cardboard sleeve, which replaces the outer plastic packaging on our New Zealand retail packs. The move to our new packaging shows that we are actively listening and responding to our consumers; the outer cardboard sleeve is sourced from sustainably managed forests and is kerbside recyclable. This is one of a number of steps toward reducing the amount of plastic we need to use."</i></p> <p>SFF noted its ability to make this change "without compromising product food safety or shelf life".</p>	
<p>In September 2020, Woolworths announced it would begin using recyclable paper meat trays in substitution for E&T containers.⁸¹</p> <p>This announcement is said to be the first element of Woolworths' long-term plan to "make all of its own brand red meat trays recyclable over the coming months". Woolworths is the parent company of Countdown in NZ, so Pact expects similar initiatives to be launched in NZ.</p>	
<p>Similar to Woolworths' announcement, in 2019, Aldi (one of the largest supermarket chains in the UK) switched its steak packaging to cardboard trays across its 380 stores.⁸²</p>	

⁸¹ <https://www.news.com.au/finance/business/retail/woolworths-launches-new-recyclable-paper-meat-trays-in-sustainability-move/news-story/dab34169b3ef65a3094d45f280184a24#.m9b9q>

⁸² <https://www.thegrocer.co.uk/aldi/aldi-to-swap-plastic-for-cardboard-trays-on-steaks/596466.article>

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Likewise, in September 2019 UK supermarket Asda announced the transition of its entire Aberdeen Angus Steak range into fully recyclable cardboard trays, with the target of saving an additional 50 metric tons of plastic annually.⁸³



Waitrose in the UK has switched from using trays for many meat products sold in its stores, instead using 'snip and slide' flexible "flow pack" packaging.⁸⁴ This has been said to cut " packaging by 38 tonnes a year, a saving of 70 per cent."⁸⁵



Moreover, Kaufland, a leading German supermarket chain, has commenced selling minced meat in a packaging container made with a cardboard exterior and lined with a thin plastic foil.⁸⁶



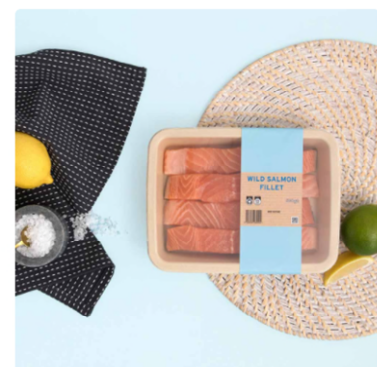
Caspak, a NZ-based packaging supplier, manufactures and supplies vacuum packaging for meat, including shrink films, thermoforming films, vacuum pouches and skin films (see [here](#)). Vacuum packaging and thermoformed films are ready alternatives to E&T packaging.



From 2021 Caspak will offer bamboo trays.⁸⁷

"Designed to use the same top web, which can be purchased separately, to seamlessly integrate into your current tray sealing and denesting systems. Our bamboo tray offers a shelf life for up to one month – more than a match for conventional packaging options."

Bamboo Tray



- ✓ Coming Q2 2021
- ✓ Recycle in the domestic recycling bin at home
- ✓ Bamboo is an unrivalled eco-superstar
- ✓ Industry leading shelf-life
- ✓ Helps reduce plastic waste

⁸³ <https://www.packaginginsights.com/news/recycle-ready-asda-transitions-ready-meal-range-to-faerch-evolve-trays-in-uk-first.html>

⁸⁴ <https://www.bakeryandsnacks.com/Article/2010/09/14/UK-supermarket-eliminates-trays-from-meat-packaging>

⁸⁵ https://resource.co/article/Retailers/Waitrose_half_food_packaging_2016-3054

⁸⁶ <https://www.packaging-360.com/en/image-en/minced-meat-in-carton/>

⁸⁷ <https://caspak.co.nz/sustainable/>

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Earthpac, a NZ-based packaging supplier, offers meat trays produced out of potato starch that can be "frozen with the meat, and defrosted in the microwave without degrading", and then "broken up by hand and put in the home compost heap" once their useful life comes to an end. Fresh Choice supermarkets have trialled this packaging for meat applications, and they have been supplied to Washcreek Organic Meats. Earthpac is said to be rapidly commercialising and expanding its operations, citing "future orders in excess of 200,000 trays per week".⁸⁸



Swisspack, with manufacturing in India and distributors in NZ (and elsewhere), offers a broad range of flexible packaging options for seafood products to customers in NZ.⁸⁹



Hamilton-based company, Convex, (established over 40 years ago) produces innovative packaging for a number of meat / protein customers, including:

- Bostock Brothers, an NZ-based organic chicken producer, which sells its products in "compostable meat packaging made from corn sources and wood pulp".⁹⁰ Bostock cite their compostable packaging as a point of differentiation compared to "big corporate chicken producers", and see this as a source of competitive advantage given the increasing numbers of "environmentally conscious consumers".
- Organic Farm Butchery in NZ supplies meat in compostable "EconicClear" film packaging supplied by Convex.⁹¹ Organic Farm Butchery said that they were adopting the packaging for environmental reasons, but also because they "*particularly like the strength, sealing quality, good print quality and really clear substrate provided by the packs*" which provides "*good presentation and low losses.*"
- Wide Open Agriculture in Australia.⁹² Wide Open Agriculture says that: "EconicClear vacuum bags are ideal for packing their fillet cuts, mince and diced meats and have been well received by consumers."



⁸⁸ <https://earthpac.co.nz/earthpacs-new-100-compostable-meat-trays/>

⁸⁹ <https://www.swisspack.co.nz/fish-packaging/>

⁹⁰ <https://supermarketnews.co.nz/news/nzs-first-compostable-meat-packaging/>

⁹¹ <https://www.econicpack.com/home-compostable-packs-ideal-for-organic-meat/>

⁹² <https://www.econicpack.com/compostable-bags-ideal-for-eco-friendly-australian-meat/>

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In addition to being the largest E&T packaging provider in Australia, Sealed Air is also an active competitor in NZ in the supply of meat / protein packaging. Specifically, Sealed Air offers meat / protein customers in NZ its Cryovac Darfresh vacuum skin technology:⁹³

“As the Australian and New Zealand food industries face added pressure to reduce costs, state-of-the-art packaging can serve as a differentiator that delivers value in a crowded meat case,” Sealed Air Food Care Market Manager, Ready Meals & Darfresh Paul McGuire said. “Our new Cryovac Darfresh on Tray package offers an unparalleled combination of freshness and retail presentation, enabling manufacturers, processors and retailers to offer customers the highest quality meat and poultry available.”

Sealed Air describe its vacuum packaging as increasingly popular among "Australia and New Zealand retailers and meat manufacturers".⁹⁴



In October 2019 Harrington's Smallgoods introduced "eco-friendly packaging. Made from recycled and plant-based materials";⁹⁵



In 2017 Neat Meat (in Gisborne) began working with Plantic Technologies (from Australia) to develop a meat tray that is made from a combination of corn-starch based substrates and recycled plastic water bottles.⁹⁶ This new packaging product won a Silver Sustainable Packaging Award at the 2019 Packaging Innovation & Design Awards ("PIDAs"),⁹⁷ and a WorldStar Packaging Award winner in May 2020.⁹⁸



⁹³ <https://www.foodtechnology.co.nz/content/packaging-with-a-focus-for-the-future/>

⁹⁴ <https://www.foodprocessing.com.au/content/processing/article/repackaging-efficiency-and-innovation-for-the-meat-industry-in-australia-and-new-zealand-1007796325>

⁹⁵ <https://harringtonsmallgoods.co.nz/2019/10/29/harringtons-smallgoods-introduces-sustainable-packaging/>

⁹⁶ <https://www.neatmeat.com/the-eriksen-brothers>

⁹⁷ <http://www.scoop.co.nz/stories/BU1905/S00107/winners-announced-for-packaging-innovation-design-awards.htm>

⁹⁸ <http://www.packaging.org.nz/page/310/2020-worldstar-packaging-award-winners-for-anz>

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NZ poultry producer Canter Valley uses vacuum packed packaging.⁹⁹



NZ sausage producer L'Authentique uses vacuum packed packaging.¹⁰⁰



NZ meat supplier, First Light, uses vacuum packed packaging.¹⁰¹



SunPork, which supplies NZ farmed pork to Countdown, uses cardboard packaging.¹⁰²



⁹⁹ <https://www.cantervalley.co.nz/About+Us.html>

¹⁰⁰ <https://www.lauthentique.co.nz/about-1>

¹⁰¹ <https://www.firstlight.farm/>

¹⁰² <https://sunporkfreshfoods.com.au/sunpork-new-zealand/>

APPENDIX THREE

Examples of alternative substrates used in fruit packaging

Example	Picture
<p>EastPack has recently switched its kiwifruit packaging from E&T packaging to cardboard. [].</p>	
<p>Turners and Growers recently switched from purchasing E&T plastic containers for their tomato punnet packaging to instead using cardboard containers, citing "the company's commitment to the environment" as the reason for the change</p>	
<p>In March 2019 Hawkes Bay apple supplier Rokit Global switched from RPET plastic tube packaging to cardboard packaging for supply to NZ supermarkets and other retailers – noting: "Like so many Kiwis, members of the Rokit Global team recognise that there is enough plastic in the world already and if there is an alternative material that can fulfil the purpose of packaging, which is to reduce food wastage, we should embrace it".¹⁰³</p>	
<p>Kaituna Blueberries has switched to fibre punnets, a development that won PunchBowl Packaging (a packaging supplier to horticultural customers in South Auckland) a Gold Sustainable Packaging Award at the 2019 PIDAs.</p> <p>Kaituna Berries cites describes its compostable berry punnet as:</p> <p><i>A simple resealable pack that offers all the functionality without the plastic footprint.</i></p> <ul style="list-style-type: none"> 85% less plastic than standard plastics packaging. 	

¹⁰³ <http://www.fruitnet.com/asiafruit/article/178108/rokit-shows-sustainable-side>

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<ul style="list-style-type: none"> • Renewable wheat straw base. • Compostable wheat straw base. • Recyclable PET closure. <p>The first punnet of its kind on New Zealand shelves, drawing on the latest sustainable trends in Europe. This product was tested by our own group of companies across a number of Auckland supermarkets, with excellent consumer feedback.</p>	
<p>Jenkins Freshpac¹⁰⁴ market a range of moulded fibre packaging products for produce packaging/punnets</p>	
<p>In October 2020, Aldi Australia announced that it would switch from plastic punnets to cardboard trays across produce, including apples, pears, truss tomatoes, roma tomatoes, zucchinis, capsicums.¹⁰⁵</p>	
<p>The Yummy Fruit Company packages its "Flatto Family" products in a cardboard tray with a transparent flexible packaging covering.¹⁰⁶</p>	

¹⁰⁴ <https://www.jenkinsfps.co.nz/enviro-pac>

¹⁰⁵ <https://www.aldiunpacked.com.au/aldi-publishes-its-inaugural-plastics-and-packaging-progress-report/>

¹⁰⁶ <https://www.yummyfruit.co.nz/fruit/flatto-family/>

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<p>Monavale Blueberries has commenced selling its 250g punnets of berries in cardboard packaging [].</p>	
<p>Punchbowl packaging, a Pukekohe-based packaging business, supplies several sustainable fruit packaging options, including:¹⁰⁷</p> <ul style="list-style-type: none"> ▪ fibre tray punnets; ▪ paper based punnets; and ▪ compostable netting. 	
<p>In October 2018, NZ Hot House (one of New Zealand's largest suppliers of tomatoes), transitioned to compostable cardboard for its truss tomato products:</p> <p><i>"We are pleased to say we have officially swapped out the black plastic trays (we used for our truss tomatoes) which is treated as single-use plastic. To a 100% compostable cardboard. By making this change, we save approximately 10.5 tons of plastic trays going into supermarkets per year!"</i></p>	

¹⁰⁷ <https://www.punchbowlpackaging.co.nz/news/20-08-2019/additions-to-our-sustainable-packaging-range/>