

Notice seeking clearance for
the merger of Foodstuffs North Island
Limited and Foodstuffs South Island
Limited

PUBLIC VERSION

14 December 2023

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

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SECTION 66 COMMERCE ACT 1986: NOTICE SEEKING CLEARANCE FOR BUSINESS ACQUISITION

14 December 2023

The Registrar
 Competition Branch
 Commerce Commission, PO Box 2351
 Wellington, New Zealand

Pursuant to section 66(1) of the Commerce Act 1986, notice is hereby given seeking clearance of a proposed transaction in which Foodstuffs North Island Limited (**FSNI**) and Foodstuffs South Island Limited (**FSSI**, together the **Parties**) will merge (**Proposed Transaction**).

EXECUTIVE SUMMARY

- 1 This clearance application concerns the proposed merger of FSNI and FSSI.
- 2 FSNI and FSSI together present a single national bricks-and-mortar and online retail grocery offering through common brands. The co-operatives are together owned by their 532 members, being grocers who operate their own individual local stores under the New World, PAK'nSAVE and Four Square brands (and, in the case of FSSI, Raeward Fresh and On the Spot). In addition, each co-operative operates a commercial wholesale business: FSNI operates Gilmours Wholesale Limited (**Gilmours**) in the North Island, and FSSI operates Trents Wholesale Limited (**Trents**) in the South Island.
- 3 There is no existing competition between the two co-operatives at the retail level (whether the supply of groceries to customers, or the acquisition of groceries from suppliers) or wholesale level. Each co-operative focuses on competing within the island in which it is based.
- 4 The Parties provide support and assistance to each other as required in order to optimise their overall competitive proposition. The co-operatives share brands and heritage, and work together in a range of ways including in relation to marketing, product range, brand alignment and initiatives, as well as shared ownership of trading and non-trading entities. Nevertheless, each co-operative operates its own support centre (with supporting supply chain infrastructure) to serve members' stores in the island the co-operative serves.
- 5 The purpose and practical effect of the Proposed Transaction would be to merge the management and operation functions of the support centres, which as above already have a close relationship. The Proposed Transaction would not affect local store ownership, which would remain in individual co-operative members' hands as the owner-operators.
- 6 The operation of a single national support centre structure would lead to cost reductions (including overhead costs and product costs), efficiency gains, increased agility and innovation and a more cohesive national offering, which would ultimately deliver better value for customers at the checkout, as well for wholesale customers under the new quasi-regulated wholesale supply regime, and thus enhance competition.
- 7 In particular, the pro-competitive changes introduced under the Grocery Industry Competition Act 2023 (**GICA**) (particularly the wholesale supply regime), increasing

retail competition more generally and the Commerce Commission's (**Commission**) ongoing role in monitoring and promoting competition in the sector, should be expected to ensure significant competitive (and regulatory) pressure to pass through the benefit of savings and efficiencies to customers.

- 8 The Proposed Transaction will not have the likely effect of substantially lessening competition in any market. The key reasons are:
- 8.1 in relation to the *retail supply of groceries*: there is no existing or potential competition between the two co-operatives,
 - 8.2 in relation to the *acquisition of grocery products*: the Proposed Transaction would not result in any change in the volume of grocery products acquired from suppliers by the Parties, whether overall or in any geography. The co-operatives operate in different territories with different physical distribution infrastructure, and they do not meaningfully compete to acquire groceries from suppliers. Following the Proposed Transaction, buying is likely to remain a mix of national, island-wide and local, reflecting supplier capacity, product constraints and consumer preference,
 - 8.3 in relation to the *commercial wholesale supply of groceries*: there is no existing competition between the two co-operatives. [

] and

- 8.4 in relation to *regulated wholesale supply*: there is no actual or potential competition between the Parties in relation to wholesale supply under the GICA. In the counterfactual, the Parties would focus on competing in the island they serve, and would consider partnering to supply national customers.
- 9 The Proposed Transaction would not give rise to a substantial lessening of competition in any market and the Commission should grant clearance.

PART 1: APPLICANTS AND OTHER PARTY DETAILS

Applicants for clearance

- 10 This notice seeking clearance is given by the Parties. The applicants can be contacted through the details set out below.

Chris Quin
Chief Executive Officer
Foodstuffs North Island Limited
[

Mary Devine
Chief Executive Officer
Foodstuffs South Island Limited
[

]

]

- 11 All correspondence and notices in respect of this application should be directed in the first instance to:

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PART 2: TRANSACTION DETAILS

The Proposed Transaction

- 12 The Parties propose to carry out the Proposed Transaction by way of amalgamation.¹ The amalgamation would be effected by Court approval under Part XV of the Companies Act 1993.
- 13 Pursuant to the amalgamation, FSNI and FSSI would amalgamate, or merge, and then continue together as a single company (the **Merged Entity**). Further:
- 13.1 the continuing legal entity []. In any event, the Merged Entity will in law be a continuation of both FSNI and FSSI so this point is not material to the substantive analysis,² and
- 13.2 Foodstuffs (N.Z.) Limited (**Foodstuffs NZ**) may be included in the amalgamation (i.e. so that the amalgamation is of three companies, FSNI, FSSI and Foodstuffs NZ). This has not yet been determined but is not material to the substantive analysis given, if it is not included, Foodstuffs NZ will continue as a wholly owned subsidiary (interconnected body corporate) of the continuing entity. For more information on Foodstuffs NZ, see below from paragraph 40.
- 14 On amalgamation, the Merged Entity company will succeed to all the property, contracts, rights, powers, privileges, liabilities and obligations of both FSNI and FSSI. As a result of the amalgamation, subsidiaries of FSNI and FSSI will automatically become subsidiaries of the post-amalgamation Merged Entity company. The Merged Entity would be renamed and reorganised, particularly as to its governance, so that it properly reflects a national co-operative, and the operating and governance principles agreed. A diagram of how the structure of ownership and affiliated companies will change is set out at **Appendix 2**.

Proposed Transaction process

- 15 The Parties intend to:
- 15.1 file an initial application to the High Court in March 2024, for preliminary procedural orders under section 236(2) in Part XV of the Companies Act 1993 in respect of the amalgamation proposal,
- 15.2 in accordance with the Court's procedural orders, engage in member consultation in April-May 2024, followed by convening meetings of FSNI and FSSI for a member vote in June 2024, and

¹ We consider that the amalgamation of FSNI and FSSI would constitute an "acquisition" of shares or assets of a business in terms of section 47 of the Commerce Act 1986. As the amalgamation between FSNI and FSSI would result in a company succeeding to at least one of the amalgamating companies' property and other assets and liabilities, that company will "acquire" the assets of the amalgamating companies (or at least the other of them) for the purpose of section 47 of the Act. This interpretation is consistent with the Commission's previous treatment of amalgamations (Commerce Commission, *Decision No. 331: Eastbay Health Limited and Western Bay Health Limited*, 19 November 1998 at [33] to [39]).

² The Supreme Court in *Elders v PGG Wrightson* [2008] NZSC 104 held that the principle of 'fusion and continuance' applies to amalgamations approved under Part XV of the Companies Act 1993. The Supreme Court further held at paragraph 29 that "continuance through a process of fusion...extends to assets and liabilities and carries forward contractual rights and obligations into the amalgamated company".

15.3 apply to the High Court for final approval of the merger by formal court order in June 2024.

16 The documents relating to the Proposed Transaction are attached at **Appendix 1**. At this stage, the transaction documents include the [

].³ [

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17 The Parties anticipate that the merger will take effect on 1 July 2024, following receipt of all regulatory approvals (including clearance from the Commission) and subject to completion of the Court approval process.

18 As noted above, a diagram of how the structure of ownership and affiliated companies will change is set out at **Appendix 2**.

Commercial rationale for the Proposed Transaction

19 The rationale for the Proposed Transaction is to create a world-class, customer-driven national food and grocery retailer and wholesaler.

20 While there is already a close relationship between the co-operatives, the Parties consider there are additional gains to be made. By combining the best aspects of both co-operatives, a single, fully integrated national support centre structure (with supporting supply chain infrastructure) would reduce the complexity, duplication and cost of running two co-operatives. As a result, the Proposed Transaction will:

20.1 lead to cost reductions (including overhead costs and product costs), efficiency gains, increased agility and innovation,

20.2 result in a Merged Entity that is leaner and more resilient, more efficient, and faster at adapting to customers' changing needs, and

20.3 ultimately deliver better value for customers at the checkout and thus enhance competition.

³ [

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Figure 1: Merged Entity's combined future

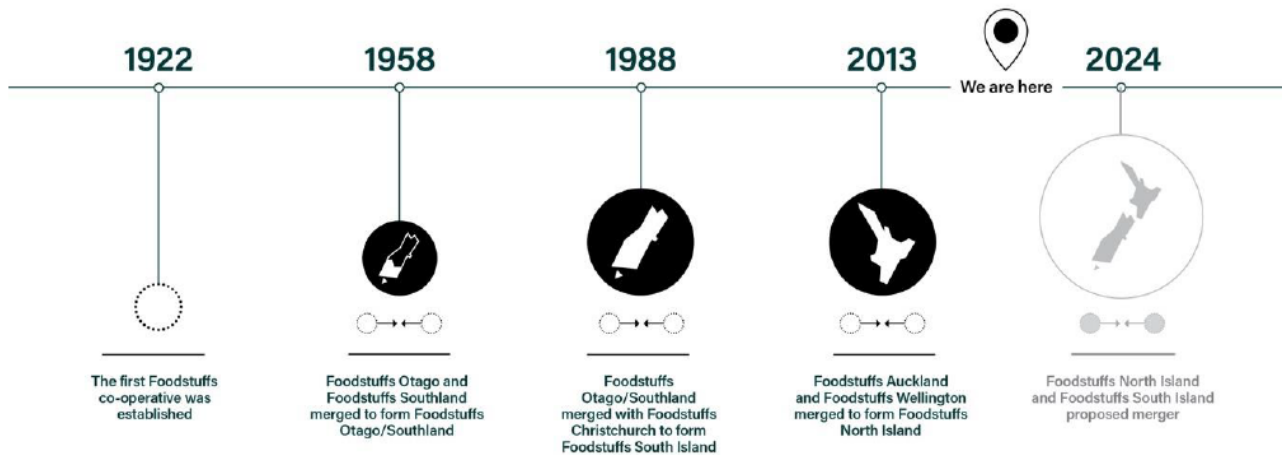


PART 3: THE PARTIES' BUSINESS ACTIVITIES

History

- 21 FSNI and FSSI were both initially created as co-operative regional buying groups, slowly merging into larger grocery retailers and wholesalers over time.
- 22 Most recently, this included the merger of Foodstuffs (Auckland) Ltd and Foodstuffs (Wellington) Ltd in 2013.⁴

Figure 2: FSNI and FSSI history



- 23 The Parties consider the single store owner-operator model ensures high levels of service and a unique agility in responding to store-specific events. Each co-operative operates independently with its own Board of Directors, Chief Executive Officer and management structure.

The Parties' supply chain footprint

- 24 FSNI and FSSI focus on serving the island in which they are located. Together the Parties present a single national bricks-and-mortar and online retail grocery offering through common brands. Each co-operative's store and supply chain footprint is set out in the map in Figure 3 below.

⁴ For further information, see: <https://www.foodstuffs.co.nz/who-we-are/our-story>.

Figure 3: Illustrative map of FSNI and FSSI operations (as at FY23)

Foodstuffs Operations 530 Stores Nationwide



FSNI

FSNI's retail footprint

- 25 FSNI services the North Island, providing its retail offering through 325 PAK'nSAVE, New World and Four Square stores, as well as through its online retail offering. FSNI is 100% owned by its 332 members (which includes Gilmours wholesale members).
- 26 FSNI stores are serviced by five distribution centres across Auckland and Palmerston North, and four transport depots in Whangārei, Hastings, New Plymouth, and Wellington (with an additional outsourced depot in Gisborne). FSNI's support centre, which is based in Auckland with ancillary offices in Wellington and Palmerston North, manages everything from property, supply chain and commercial operations, to new business ventures, merchandising and technology matters. FSNI has 2,295 employees.
- 27 FSNI owns no physical assets in the South Island.
- 28 Further information about FSNI is available on its website at www.foodstuffs.co.nz/ and in its annual report.⁵

FSNI's commercial wholesaler: Gilmours

- 29 In addition to its retail grocery offering, FSNI operates a North Island-wide foodservice wholesale business, Gilmours, out of eight locations, under a local independent owner/operator model. Gilmours focuses on hospitality, catering and

⁵ See: <https://annualreports.foodstuffs.co.nz/>.

other foodservice customers (referred to collectively as “foodservice” customers), with a particular emphasis on its bulk and fresh food range.⁶

- 30 Most products come directly from suppliers to Gilmours.⁷ However, approximately [] of products by value are distributed to Gilmours’ locations from FSNI’s distribution facilities, where []. FSNI also has a 25% share of Fresh Connection Limited (**Fresh Connection**), a produce wholesaler specialising in foodservice.⁸ Gilmours acts as Fresh Connection’s agent to sell fresh produce to foodservice customers.⁹

FSNI’s other business activities

- 31 FSNI owns Leigh Fisheries Limited (**Lee Fish**), which owns certain fishing quota and supplies fish to FSNI stores and export customers.¹⁰ No change to Lee Fish is expected to arise as a result of the Proposed Transaction.

FSSI

FSSI’s retail footprint

- 32 FSSI services the South Island. Its retail offering is provided through 195 PAK’nSAVE, New World, Four Square, Raeward Fresh and On the Spot stores,¹¹ as well as its online retail offering. It is 100% owned by its 198 members.¹²
- 33 FSSI’s stores are serviced by its two Distribution Centres in Christchurch and Dunedin, and three transport depots in Nelson, Alexandra and Invercargill. FSSI’s support centre is based in Christchurch and like FSNI’s support centre, manages a range of matters including property, supply chain and commercial operations, new business ventures, merchandising and technology matters. FSSI has approximately 2,000 employees in New Zealand.
- 34 FSSI owns no physical assets in the North Island.
- 35 Further information about FSSI is available on its website at www.foodstuffs-si.co.nz/ and in its annual report.¹³

FSSI’s commercial wholesaler: Trents

- 36 FSSI’s commercial wholesale business, Trents, is owned and operated under the FSSI support centre corporate model, and has five locations in the South Island.¹⁴ Trents supplies traditional (dairies and other grocery resellers) and foodservice

⁶ Further information on Gilmours is available here: <https://www.gilmours.co.nz/>.

⁷ FSNI and Gilmours have one shared facility, a cross dock in Northland.

⁸ Further information on Fresh Connection is available here: <https://freshconnection.co.nz/> Fresh Connection exclusively supplies fresh produce.

⁹ Via a Sales Agency Agreement between FSNI and Fresh Connection. FSNI discharges these obligations by procuring Gilmours and Trents stores to perform the relevant obligations. Note that a Deed of Amendment and Restatement has been agreed between FSNI and Fresh Connection to include Trents stores but this has not yet been fully executed.

¹⁰ FSNI purchased Leigh Fisheries Ltd in 2019. Further information about Lee Fish is available here: <https://www.leighfish.co.nz/our-story>.

¹¹ Note that On the Spot operates under a franchise model rather than an owner/operator model.

¹² FSSI also has a number of non-branded members, which are small resellers that purchase grocery products from the co-operative (but will not vote on the merger).

¹³ See: <https://www.foodstuffs-si.co.nz/who-we-are/performance-and-reports>.

¹⁴ Located in Hornby (Christchurch), Nelson, Alexandra, Dunedin and Invercargill.

customers. However, in contrast to Gilmours, Trents' product offering is more focused on ambient goods and liquor,¹⁵ rather than fresh food.

- 37 As above, Trents is run under a corporate model at present, as a separate business division that sits within FSSI with its own management team. However, FSSI is in a process of separating the two so that Trents stands alone. Trents' Hornby and Dunedin presences are co-located with FSSI's distribution centres and [

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- 38 For completeness, FSSI understands that two Raeward Fresh stores, in Richmond/Tasman and Harewood, participate in some wholesale supply to commercial wholesale customers in their local area.

FSSI's other business activities

- 39 FSSI owns Murdoch Manufacturing Limited (**Murdoch**), which manufactures and bottles certain private label products. Murdoch largely supplies the co-operatives, with only approximately []% of its sales being made to third parties, and no change is expected to arise from the Proposed Transaction.

FSNI and FSSI's shared business activities

Jointly owned entities

- 40 FSNI and FSSI share ownership of Foodstuffs NZ, a non-trading entity which represents the two co-operatives' interests on issues of national or grocery-specific importance.¹⁶

- 41 [

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- 42 Foodstuffs NZ also provides other shared services to both co-operatives. These services include:

- 42.1 retail strategy co-ordination between the co-operatives,
- 42.2 sharing of banner and brand initiatives,
- 42.3 development and execution of national marketing campaigns and content,
- 42.4 co-operative PR and external relations, and
- 42.5 customer surveys and insights.

- 43 The Parties also have a national buying entity, Foodstuffs Own Brands Limited, owned 50% by each of the co-operatives, whose function is to negotiate trading

¹⁵ Further information on Trents is available here: <https://www.trents.co.nz/>.

¹⁶ For further information see: <https://www.foodstuffs.co.nz/who-we-are>.

terms and pricing with national suppliers in respect of products purchased and marketed under Foodstuffs' private label brands.¹⁷

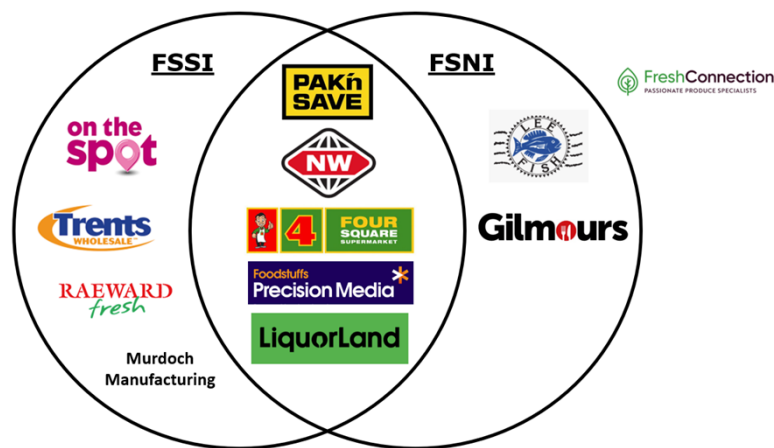
44 For completeness, the Parties also:

44.1 share ownership (approximately 2/3 FSNI and 1/3 FSSI) (and therefore no substantive change could arise from the Proposed Transaction) of:

- (a) Liquorland Limited,¹⁸ through Foodstuffs Liquor New Zealand Limited, and
- (b) Foodstuffs Precision Media Limited, which provides media and advertising services for suppliers and agency partners, and

44.2 hold approximately a 25% stake in Loyalty NZ Limited (a loyalty operator).¹⁹ The Proposed Transaction will not have any effect on these arrangements.

Figure 4: FSNI and FSSI's shared and respective banners



Existing relationship between the Parties

45 As the Commission will be aware, and based on the description above, there is a significant amount of existing communication and cooperation between the two co-operatives on a range of matters. Given that the co-operatives present as a single set of brands (each with a consistent brand proposition) and a national retail grocery offering, there is extensive communication between them, [

¹⁷ For further information see: <https://supplierhelp.foodstuffs.co.nz/en/article/foodstuffs-own-brands-limited-fobl-explained>. The Foodstuffs Own Brands are Pam's, Pam's Finest and Value.

¹⁸ Note that Liquorland operates under a true franchise model rather than under a co-operative owner/operator model.

¹⁹ The stake is held by Foodstuffs Ventures (New Zealand) Limited, which is owned 66.6% by FSNI and 33.3% by FSSI. [

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- 46 Many of the features described above are relevant to the question of whether the two co-operatives are “associated”.²⁰ While the Parties may be associated,²¹ the Commission will nevertheless consider any impacts on competition of the change brought about by the Proposed Transaction, which is the shift from the status quo (close relationship) to full merger. For that purpose, the key point is that the existing close relationship between the Parties materially limits the potential effect of the Proposed Transaction, as described in more detail in the following sections.

²⁰ Commerce Commission, Mergers and Acquisitions Guidelines, May 2022, at 2.8.

²¹ For completeness, the Parties are not interconnected bodies corporate (Commerce Act 1986, section 2(7)) because:

- one is not a subsidiary of the other,
- they are not both subsidiaries of a parent, and
- they are not themselves interconnected with Foodstuffs NZ and/or Foodstuffs Own Brands Limited, such that they would both be interconnected with companies that are interconnected. They each hold a 50% interest in each of the two companies and therefore do not meet the control requirements in s 5(1)(a) of the Companies Act 1993 (e.g. more than one half of shares).

PART 4: BACKGROUND

47 The Commission has an extensive and in-depth understanding of grocery markets in New Zealand, following its market study into the factors that affect competition for the supply of retail groceries in New Zealand (**Market Study**), culminating in a [final report](#) published by the Commission in March 2022.

48 Given the Market Study final report is publicly available, the Parties have not set out in this clearance application an in-depth description of the retail grocery sector. Rather, the Parties set out below an overview of the key relevant changes to the retail grocery industry in New Zealand since the conclusion of the Market Study in March 2022, many of which the Commission will already be familiar with through its role under the GICA. The Parties also provide further information on the supply of wholesale groceries in New Zealand to supplement the information and understanding the Commission obtained during the Market Study (noting that the focus of the study was on retail grocery).

Industry changes since the Market Study
The Grocery Industry Competition Act 2023

49 As the Commission is aware, the GICA was enacted in June 2023 as part of the Government’s response to the Commission’s final report on the Market Study. The purpose of the GICA is to “promote competition and efficiency in the grocery industry for the long-term benefit of consumers in New Zealand”.²²

50 The GICA:

- 50.1 establishes a new wholesale supply regime that requires “regulated grocery retailers” (which includes the Parties, along with Woolworths New Zealand (**Woolworths**)) to provide wholesale offerings to other grocery retailers (further information on this regime is provided below at paragraph 51),
- 50.2 provides for the development of a Grocery Supply Code (**Code**) that sets out rules of engagement between regulated grocery retailers and suppliers (further information on this regime is provided below at paragraph 54),
- 50.3 established the Grocery Commissioner and empowers the Commission to monitor and report on competition and efficiency in the grocery sector, including producing an annual report on the state of competition. The Parties expect the Grocery Commissioner and Commission to continue to play an important role in monitoring and promoting competition in the industry,
- 50.4 enables the development of a new dispute resolution scheme to address disputes between regulated grocery retailers and suppliers or wholesale customers,
- 50.5 extends the Fair Trading Act 1986’s protections against unfair contract terms to larger contracts between grocery suppliers and retailers, and
- 50.6 provides for regulations to be made to allow suppliers to bargain collectively.

²² GICA, section 3.

The wholesale supply regime

- 51 The wholesale regime came into force in September 2023. It imposes requirements on regulated grocery retailers to facilitate their entering into commercial agreements with wholesale customers for the wholesale supply of groceries. Pursuant to the regime, a "wholesale customer" is essentially a grocery retailer i.e. a customer that wishes to obtain wholesale supply for the purpose of supplying at retail to consumers.²³
- 52 The GICA sets out a range of largely procedural requirements with the possibility of further, substantive regulation being imposed in particular circumstances (including where the Commission determines that further regulation is necessary to promote the statutory purpose of the wholesale regime). Under the regime, regulated grocery retailers are required, amongst other things, to:
- 52.1 establish and implement standard terms and conditions for wholesale supply,
 - 52.2 ensure pricing under a wholesale agreement is transparent, by specifying a method by which prices are to be calculated, and
 - 52.3 consider requests for wholesale supply in good faith, including negotiating in good faith.
- 53 The application of the procedural requirements in the GICA is coloured and informed by principles that underlie the wholesale regime. The main principle is "the importance of wholesale offerings to wholesale customers being consistent with wholesale offerings provided in a competitive wholesale market".²⁴ Other principles include the desirability that:²⁵
- 53.1 wholesale prices reflect efficient costs,
 - 53.2 wholesale customers have reasonable access to discounts, payments and rebates made available to a regulated grocery retailer in connection with operational scale and efficiency, and
 - 53.3 wholesale offerings provide reliable and cost-effective access to a range of wholesale groceries at the quantity and frequency likely to be demanded by customers.

The Grocery Supply Code

- 54 The Code came into force on 28 September 2023, following consultation undertaken by the Ministry of Business, Innovation and Employment. Regulated grocery retailers have until 28 March 2024 to make any necessary variations to existing agreements with suppliers, to bring agreements in line with the requirements of the Code.

²³ Section 25(1). As noted below at paragraph 66.2, as a result of the GICA, supply to traditional wholesale customers is also offered by FSNI and FSSI. This change may continue the trend of commercial wholesalers no longer supplying traditional customers, to the extent those customers prefer to seek wholesale supply under the regime.

²⁴ Section 23.

²⁵ Section 24.

- 55 The Code's purposes include:²⁶
- 55.1 promoting fair conduct (and prohibiting unfair conduct) between suppliers and regulated grocery retailers,
 - 55.2 promoting transparency and certainty regarding the terms of suppliers and regulated grocery retailers' agreements, and
 - 55.3 contributing to a trading environment that includes a diverse range of suppliers, in which businesses compete effectively and that consumers and business have confidence in.
- 56 The Code itself imposes a range of obligations on regulated grocery retailers, including broader requirements such as the obligation to act in good faith when dealing with suppliers and for payment to be made within a reasonable time, and more specific requirements of which the following are a few examples:²⁷
- 56.1 *delisting*: retailers can only delist products under the terms agreed by the parties and must provide reasonable notice and genuine commercial reasons for delisting a product,
 - 56.2 *fresh produce*: fresh produce standards must be set out clearly in writing and a retailer's decision to accept or reject produce must be made within 24 hours of delivery, with the rejection reasons documented,
 - 56.3 *promotions*: where suppliers have agreed to provide funding towards a promotion, retailers must give those suppliers reasonable notice that they are holding that promotion, and
 - 56.4 *range*: retailers must make their product ranging and shelf space allocation principles available to suppliers and follow those principles. Retailers cannot discriminate in favour of their private labels when applying those principles. Retailers are also required to inform suppliers that are, or might be, affected by a range review.

Other regulatory changes

- 57 There have also been other regulatory changes made following and in response to the final report of the Market Study, including:
- 57.1 prohibiting the use of restrictive and exclusive covenants over land and leases that restrict the development and/or operation of grocery retailers or other competitors.²⁸ By the time the prohibition was passed, both FSNI and FSSI were undertaking a programme of work to identify and remove such covenants, and

²⁶ GICA, section 16.

²⁷ See Schedule 2 of the Grocery Industry Competition Regulations 2023.

²⁸ See Commerce (Grocery Sector Covenants) Amendment Act 2022.

57.2 new unit pricing regulations that require certain retailers to display per unit pricing of grocery products in a clear and consistent way to facilitate consumers' comparison of products.²⁹

Other key market developments

58 Key market developments since the final report of the Market Study have included increased retail competition, as well as wholesale supply (which is expected in turn to lead to increased retail competition) under the quasi-regulated wholesale supply regime.

Strong and evolving retail competition

59 The competitive landscape in New Zealand's retail grocery industry continues to be strong, with key players and recent entrants continuing to invest in growing their physical and online presence. For example:

59.1 *Woolworths Group:* Woolworths Group (**Woolworths**) have continued to invest significantly in New Zealand. In July 2023 Woolworths announced a significant transformation programme, including a commitment to invest \$400m in New Zealand stores over the next three years. The Parties understand that in addition to rebranding all Countdown stores as Woolworths, the programme includes introducing a number of successful Woolworths Australia initiatives into New Zealand, including a new loyalty programme called Everyday Rewards (due to launch in February 2024).³⁰ In July 2023 Woolworths launched Milkrun, a service that delivers over 10,000 grocery products within the hour.³¹ Outside of this programme, Woolworths continues to invest and focus on fresh grocery products, with a distribution centre for fruit and vegetables opening in Auckland in June 2022 and a new distribution centre to be opened in Christchurch in 2024.³² Woolworths has also recently announced that it intends to expand its FreshChoice supermarket chain to 200 stores by 2034.³³

59.2 *The Warehouse Group:* grocery has become a core focus for The Warehouse Group, with the category growing 26.1% in FY23 and further in Q1 of FY24, contributing to 22.8% of The Warehouse stores' sales in FY24 Q1.³⁴ Within this category The Warehouse Group experienced 91.8% growth in pantry and chilled, 26.6% growth in household cleaning items and 23.8% growth in pet care in FY23. The Warehouse Group's private label grocery offering (Market Kitchen, offering butter, coffee, sauces and other products) continues to grow with over 64 products now in range. 22 stores now offer fresh fruit and vegetables,³⁵ with a total of 26 stores offering grocery products. The Warehouse Group notes, "our strides in grocery [in FY23] at The Warehouse

²⁹ See Consumer Information Standards (Unit Pricing for Grocery Products) Regulations 2023.

³⁰ For further information, see: <https://www.woolworthsgroup.com.au/au/en/media/latest-news/2023/countdown-to-woolworths.html>.

³¹ For further information, see: <https://www.milkrun.com/nz>.

³² For further information, see Woolworths Group's FY23 full year and FY24 Q1 results, available at: <https://www.woolworthsgroup.com.au/content/wwg/au/en/investors/our-performance/results-and-presentations.html>.

³³ See: <https://supermarketnews.co.nz/news/enhancing-customers-shopping-experience/>.

³⁴ The Warehouse Group *FY24 First Quarter Sales Update*, 14 November 2023. See: <https://www.nzx.com/announcements/421567>.

³⁵ The Warehouse Group *FY24 Q1 trading update*, 14 November 2023 at p 2. See: <http://nzx-prod-s7fsd7f98s.s3-website-ap-southeast-2.amazonaws.com/attachments/WHS/421567/407074.pdf>.

have been significant³⁶ and, more recently, “category strength in grocery sales continued [in FY24 Q1]”.³⁷

59.3 *Costco*: in October 2022 Costco opened its first New Zealand store in Westgate, Auckland. Costco’s managing director commented in the media on 6 November 2023 that Costco has provided strong competition in the grocery market and that Costco is “definitely interested” in expanding around the country, and is considering locations in areas including Wellington, Christchurch and greater Auckland.³⁸

60 Since the Market Study, key consumer trends have continued. Over the last few years a key trend in consumer shopping habits is that increasingly consumers are carrying out more frequent, smaller shopping missions rather than a full shop. Customers undertaking these smaller missions have a large range of alternative grocery retailers from which to choose (certainly extending beyond those retailers specialising in the “one-stop shop”), including meal kit subscriptions, online providers, health stores, independent grocery stores, convenience stores, ethnic stores and others.

Wholesale customers under the quasi-regulated wholesale supply regime

61 While it remains at an early stage, the quasi-regulated wholesale supply regime has already resulted in changes to the competitive landscape. That is:

61.1 FSNI []³⁹ [],

61.2 FSSI [],
and

61.3 Woolworths has secured a number of wholesale customers. The Parties understand that Woolworths has at least 8 wholesale customers, including Circle K, Mad Butcher, Reduced to Clear and Huckleberry.⁴⁰

62 The Parties and Commission expect the quasi-regulated wholesale supply regime to drive more competitive retail supply.

Commercial wholesale supply

63 Wholesale suppliers offer products to a variety of business customers including caterers, foodservices operators, hospitality operators⁴¹ (known as “foodservice”

³⁶ For further information, see The Warehouse Group’s FY23 Annual Report, available at: <http://nzx-prod-s7fsd7f98s.s3-website-ap-southeast-2.amazonaws.com/attachments/WHS/419007/403924.pdf>.

³⁷ The Warehouse Group *FY24 Q1 trading update*, 14 November 2023 at p 1. See: <http://nzx-prod-s7fsd7f98s.s3-website-ap-southeast-2.amazonaws.com/attachments/WHS/421567/407074.pdf>.

³⁸ See for example: <https://www.stuff.co.nz/business/133231951/costco-definitely-interested-in-opening-more-nz-warehouses>.

³⁹ [].

⁴⁰ See for example: <https://www.stuff.co.nz/business/131674643/global-retail-chain-circle-k-expands-into-new-zealand-signs-deal-with-woolworths-grocery-wholesale-arm>.

⁴¹ Hospitality customers include restaurants, bars and cafes. Sales are often a mix of online and cash-and-carry and are more likely to be ad hoc than on a contracted basis.

customers) and to a small extent other resellers such as convenience stores and dairies (known as “traditional” customers).⁴²

64 The demand profile of traditional compared with foodservice customers varies, with traditional wholesale customers requiring a range of fresh, chilled and ambient grocery products for retail sale, and foodservice customers tending to demand bulk grocery, chilled, frozen and fresh products, which they turn into a more finished product for consumption.

65 While some wholesale suppliers may have particular focuses (e.g. the supply of particular product categories or to particular customer groups), wholesale suppliers tend to have the capabilities to service all types of customer. All primarily target foodservice customers for the reasons set out below. Wholesale grocery suppliers use multiple channels as a route to market, including delivery and self-service.

66 In addition to specialist commercial wholesale suppliers:

66.1 suppliers with direct business represent an important part of commercial wholesale supply. For example, in 2015 Gilmours refocused its business away from traditional wholesaling towards foodservice. This change was materially supplier-driven, as key suppliers such as [] chose to bypass Gilmours and supply directly to traditional customers. More generally, traditional wholesaling has declined as suppliers have sought to disintermediate wholesalers and develop direct relationships with customers, although some such activity remains.⁴³ Due to low levels of transparency in commercial wholesale supply, the Parties have been unable to estimate with any reliability the proportion of sales made by suppliers directly to wholesale customers, compared with sales made by wholesalers. []

].

[

].⁴⁴ [

]. While such a dynamic is also at play for foodservice customers, it has been less prevalent due to the often-smaller size of the customers, the different nature of the product requirements [],

⁴² Catering and other foodservice customers use bulk ingredients to prepare food for a range of facilities (including aged care, hospitals, government departments, navy, etc) and often put out tenders for long-term contracts.

⁴³ Note that many traditional wholesale customers are also foodservice customers e.g. dairies that are also fish and chip shops, or offer milkshakes.

⁴⁴ While wholesale customers may shop at retail grocery outlets, it is not possible for traditional retail outlets to target wholesale customers given the nature of pricing (a single transparent price list) and the nature of shopping (open to the public, no ability to price discriminate based on customer type),

- 66.2 as a result of the GICA, supply to traditional wholesale customers is offered by FSNI and FSSI. This change is expected to continue the trend of commercial wholesalers no longer supplying traditional customers, to the extent those customers prefer to seek wholesale supply under the regime where there is likely to be more regulatory pressure on pricing. For the reasons set out in more detail in the market definition section, the Parties anticipate little overlap between the offerings of commercial wholesalers and regulated wholesale supply, and
- 66.3 buying groups are also a feature. Buying group memberships can consist of:
- (a) wholesale foodservice suppliers, or
 - (b) businesses/organisations who purchase from wholesale foodservice suppliers.⁴⁵
- 67 Commercial wholesale suppliers tend to offer ancillary services alongside grocery products. These may include:
- 67.1 centrally managed account management,
 - 67.2 consolidated invoicing,
 - 67.3 managed price lists,
 - 67.4 integrated order solutions,
 - 67.5 ranging exclusive (and/or private label) lines and developing bespoke products, and
 - 67.6 ad hoc services such as Christmas hams for staff and wine tastings.
- 68 The Parties note that Gilmours offers the services above (with managed price lists available to all customers, and the other services to larger regional and national customers), while Trents does so to a much lesser extent. Trents' customers receive more generic support including account management, ordering assistance, new product offering and seasonal activity.
- 69 A key exception to the lack of focus on traditional wholesale customers is large (nationwide or multi-region) resellers, which for Gilmours and Trents comprise []. For these customers, it is possible for wholesalers to secure terms that are competitive with retail sites, because the customers are large enough to attract

⁴⁵ For example, CSC Buying Group allows businesses and organisations to sign up to become members of the Group, allowing members to purchase from wholesale foodservice suppliers such as Bidfood.

“trade spend” from suppliers.⁴⁶ Gilmours and Trents provide a service to these customers of negotiating trade spend on their behalf, which is then passed through in the product price.⁴⁷

70 National and regional customers are typically won through a central competitive tender process, which involves submitting a managed price list for a set period (typically 3 months). [

].

71 [

].

72 Further information on commercial wholesale suppliers is provided at paragraph 153 below.⁴⁸

⁴⁶ Trade spend is a component of the product price representing product positioning. It is suppliers’ contribution to discounts and other price and non-price promotional activity offered on their products – see the Market Study final report at 2.47, 5.130, 5.131 and 9.91.

Specifically, in the Market Study final report the Commission described trade spend as follows (paragraph 2.47): “promotions can be funded by suppliers, when a supplier will contribute to discounts offered on their products (referred to as promotional funding or trade and marketing spend). We understand that discounts or rebates associated with supplier promotional funding can lead to a material reduction in the effective price retailers pay their suppliers for goods.”

Because it relates to product positioning at the retail level, suppliers invest trade spend in specific *brands*, rather than *suppliers* (e.g. New World secures different trade spend from suppliers than PAK’nSAVE).

⁴⁷ [].

⁴⁸ The commercial wholesale suppliers discussed at paragraph 153 are a sample of Trents’ key competitors in the South Island wholesale market (noting that some operate nationally). There are a number of commercial wholesale suppliers that compete in the North Island, including those listed in **Appendix 10**.

PART 5: RELEVANT MARKETS

73 Given the Parties operate in separate geographies and accordingly do not compete in relation to either the retail supply of groceries, commercial wholesale supply of grocery products, or regulated wholesale supply of grocery products, the Parties consider that it is not necessary to conclusively define the relevant markets.

74 In the Parties' view, the effects of the Proposed Transaction can be analysed by reference to the:

74.1 retail supply of groceries,

74.2 acquisition of grocery products,

74.3 commercial wholesale supply of grocery products, and

74.4 regulated wholesale supply of grocery products.

Retail supply of groceries***Geographic dimension***

75 In the Market Study, the Commission analysed competitive dynamics in relation to the retail supply of groceries at the local, regional and national levels, stating that "grocery retailers typically compete for consumers within small local areas but there are some regional and national dimensions to competition".⁴⁹

76 The Parties consider this perspective can be adopted for the purposes of analysing the Proposed Transaction, and it is not necessary to define geographic markets more precisely. At the local and regional level, the Parties do not compete with each other. At the national level, the Parties do not compete with each other and, to a large extent, have in effect a single combined offering.

Product dimension

77 The Parties consider they compete with a wide range of market participants, across many product categories, including:

77.1 Woolworths (which the Parties each consider to be their closest competitor), Costco and, since early 2023 The Warehouse (which previously had a non-food grocery offering and has now expanded into food), Farro Fresh, Moore Wilson, Bin Inn and Huckleberry,

77.2 specialist grocery retailers e.g. butchers, fish mongers, liquor stores, greengrocers and farmers' markets and bakeries,

77.3 petrol stations with a convenience offering,

77.4 non-food grocery retailers such as Chemist Warehouse and Kmart,

77.5 Briscoes, Mitre 10, health stores, pet stores and others (noting that the Parties supply a wide range of non-grocery products),

77.6 suppliers operating direct to consumer platforms such Ecostore and Caffé L'Affare,

⁴⁹ Commerce Commission, [Market study into the retail grocery sector: final report](#), 8 March 2022.

- 77.7 e-commerce only competitors, such as meal kit providers, pet.co.nz and nappies.co.nz, and
- 77.8 out of home consumption i.e. restaurants, cafes and takeaway, including UberEats.
- 78 In the Market Study, the Commission acknowledged a range of grocery retailers, but distinguished between the closeness of competition between Foodstuffs and Woolworths, and the lesser constraint imposed by other retailers.⁵⁰
- 79 In this case, it is not necessary to precisely define the boundaries of relevant markets, by concluding as to which competitors are within the product market and which constrain the Parties from outside the product market, since there is no competition between the Parties and so no competition can be lost as a result of the Proposed Transaction.
- Acquisition of grocery products**
- 80 A key input to the Parties' retail offering is grocery products, many of which are purchased from third party suppliers. The Parties offer a brand positioning that is consistent across the country (which inevitably results in a high level of consistency in range), and suppliers treat them as a single national channel to market.
- 81 To the extent suppliers are geographically constrained, whether their products are targeted to (or demanded by) specific geographic areas or because the products have a short shelf life, such as fresh produce or milk, relevant markets may be smaller e.g. island-wide, regional or even local. In these cases, given the Parties do not have any geographic overlap, only one of the Parties will be a customer and it is not necessary to define the markets with more precision.
- Commercial wholesale supply of grocery products**
- 82 The Australian Competition and Consumer Commission (**ACCC**) recently considered Woolworths Group Limited's acquisition of a 65% shareholding in PFD Food Services Pty Limited, a wholesale food distribution business in Australia.⁵¹ In that decision, the ACCC considered the effect of the acquisition on:
- 82.1 national, regional and local markets for the wholesale supply and distribution of food products to foodservice customers, and
- 82.2 markets for the acquisition of food products from manufacturers and suppliers.
- 83 The Competition & Markets Authority (**CMA**) in the United Kingdom has also considered markets for wholesale supply and distribution of food products on at least

⁵⁰ [Market study into the retail grocery sector: final report](#), 8 March 2022, at 2.24. 5.31, 5.116.

⁵¹ *Woolworths Group Limited / PFD Food Services Pty Limited*, Australian Competition and Consumer Commission, 23 September 2020. See: <https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/woolworths-group-limited-pfd-food-services-pty-limited>.

three occasions.⁵² In those decisions the CMA has also generally considered wide markets for the wholesale delivery of grocery and related non-grocery products.

Geographic dimension

84 On the demand side, there are small local customers (e.g. cafes, takeaways, restaurants, small catering companies), regional customers (e.g. healthcare and larger caterers) and national customers (e.g. national retirement village brands and national caterers). These customer groups are considered separately in the analysis below. For completeness, as set out in further detail below, on the supply side key competitors are either national or island-wide.

85 Gilmours classifies its customers as follows:

85.1 []
[],⁵³

85.2 []
[], and

85.3 []
[].

86 Gilmours estimates that [] of its customers by value of sales are []. For comparison, Gilmours estimates all sales through commercial wholesalers are worth approximately [], with [] worth approximately [], including direct sales from suppliers.

87 Trents estimates that approximately [] of its customers by value of sales are [], and approximately [] of sales are [] customers. The remaining customers' sales would be customers [].

Further customer segmentation

88 As described above, traditional and foodservice customers tend to have different needs and, while most suppliers are capable of supplying both types, wholesalers predominantly target foodservice customers.

89 In general, commercial wholesalers do not tend to be price competitive with smaller, traditional wholesale customers' alternatives (specifically, a mix of direct supply and "shopping around" at supermarkets and other retail outlets), except in limited instances for certain products. These customers tend to seek price competitiveness above all, rather than the higher service offering commercial wholesale suppliers tend to provide. These customers have limited spend with commercial wholesalers,

⁵² For example, *Sysco Corporation / Kent Frozen Foods Limited*, Competition & Markets Authority, 16 March 2018. See: <https://assets.publishing.service.gov.uk/media/5aba561aed915d78bc234905/cucina-kent-frozen-foods-decision.pdf>. Also *Booker Group PLC / Makro Holding Limited*, Competition Commission, 19 April 2013. See: https://assets.publishing.service.gov.uk/media/55194c78ed915d142400038c/final_report.pdf. Also *Brakes Bros Limited / Woodward Foodservice Limited*, Office of Fair Trading, 22 August 2008. See: <https://assets.publishing.service.gov.uk/media/555de395ed915d7ae50000a8/Brakes.pdf>.

⁵³ []
[].

but may be attracted to the regulated wholesale offering described in the following section.

- 90 The exception, [] (large national traditional customers), which may value the additional services wholesalers offer, particularly wholesalers' ability to negotiate trade spend on their behalf, for their brand, which is a service they may choose to outsource rather than carry out in-house. However, FSNI anticipates such customers may nevertheless be able to obtain better terms through the regulated wholesale channel – see [].
- 91 Accordingly, while the analysis below considers all customers that are served by commercial wholesalers (referred to as **CW Customers**), in practice this group is largely comprised of foodservice customers and this is likely to be increasingly the case given the presence of the regulated wholesale alternative for traditional customers (with or without the Proposed Transaction). For example, Gilmours estimates that its supply to traditional wholesale customers comprises approximately [] of its sales.
- 92 In addition, the CMA has noted that most wholesale customers multi-source with:⁵⁴
- 92.1 multiple combinations of different types of wholesalers, including “broadline” wholesalers (i.e. wholesalers offering a broad range of food products) and specialist wholesalers (i.e. those more narrowly focused on specific products, such as meat, fresh produce etc), and
- 92.2 both wholesalers with a national network and those with a local/regional focus.
- 93 As noted above, wholesalers are also materially constrained by direct supply. Given Trents and Gilmours both offer a broad range of grocery products, this application principally focuses on “broadline” wholesalers that offer a broad range of grocery products.

Regulated wholesale supply of grocery products

- 94 As noted above, the GICA defines a “wholesale customer” as any person that receives the wholesale supply, or wants to obtain the wholesale supply, of groceries from a regulated grocery retailer for the purpose of supplying groceries, directly or indirectly, at retail to consumers. Accordingly, wholesale customers are expected to be a similar group to traditional wholesale customers as defined above.
- 95 The Parties expect the regulated wholesale supply of grocery products to take place to local, regional and national customers, and each customer group is considered separately below. On the supply side, the regulated grocery retailers are national (in the case of Woolworths) or, in the Parties' case, island-wide but with the potential to jointly present a national offering in competition with Woolworths.⁵⁵

⁵⁴ *Sysco Corporation / Kent Frozen Foods Limited*, Competition & Markets Authority, 16 March 2018 at [7].

⁵⁵ [].

96 As set out above, there is likely to be limited overlap with commercial wholesale supply.⁵⁶ That is:

96.1 there is no overlap with commercial wholesale’s primary customer target group, foodservice customers. Such customers are not eligible for supply under the GICA and, as noted above, seek additional services that grocery retailers are not currently equipped to provide to wholesale customers, and

96.2 commercial wholesalers have few traditional customers. The Parties consider the key reason is that commercial wholesalers are unable to obtain terms that are competitive for traditional wholesale customers, compared with the terms that are available on retail grocery products through a combination of “shopping around” at retail grocery brands, securing direct relationships with suppliers and to a limited extent using commercial wholesalers. By contrast, FSNI considers regulated grocery retailers benefit from downward regulatory pressure on pricing, and regulatory scrutiny more generally, such that they hope to be in a position to supply traditional customers on terms that are competitive with those customers’ alternatives.⁵⁷ As such, customers of regulated wholesale supply are not likely to be “won” from existing commercial wholesale suppliers (although in a few cases that may occur – as above, traditional customers may use wholesalers at some times and for some products). Instead, they are likely to be won from a mixture of shopping at retail, holding direct relationships with suppliers and, to a lesser extent, use of commercial wholesalers. The exception is large national traditional wholesale customers, which in some cases have preferred to utilise the additional services offered by commercial wholesalers rather than provide these in-house. However, the Parties anticipate that even these customers may be able to obtain better terms through regulated wholesale rather than commercial. This view is supported by the Parties’ experience to date. An early example is []. [

96.3

].

⁵⁶ [].

⁵⁷ [].

PART 6: COUNTERFACTUAL

97 The Parties consider that the only realistic counterfactual is that the co-operatives continue to operate independently of each other, each in its island, with a continued relationship to manage the fact that they are trading under the same brands and present as a single national offering. [

].

98 Certain nuances are discussed below in relation to the retail supply of groceries and the commercial supply of grocery products.

Retail supply of groceries

99 The Parties consider that the only realistic counterfactual in relation to the retail supply of groceries is that the retail businesses of FSNI and FSSI would continue to operate each in its island, and not in competition with each other and with a relationship. In particular:

99.1 the co-operatives do not have any existing distribution infrastructure or land and store ownership in the other island. In this respect, each would be in the position of any new entrant. Each would need to incur significant costs to become a meaningful competitor in the other island (including supply chain and distribution infrastructure, new land and buildings, and replacement services for current shared services). In FSNI's opinion, []]. The same considerations would apply if FSSI were to enter the North Island. As FSSI has previously discussed with the Commission, [

],⁵⁸ and

99.2 [

].

100 [

].⁵⁹

101 [

⁵⁸ []].

⁵⁹ []].

].⁶⁰

102 [

].

Commercial wholesale supply of grocery products

103 The Parties consider that the only realistic counterfactual in relation to the commercial supply of grocery products is that [

] [

].

[]

104 As set out in further detail at paragraphs 143 to 145 below, [

].

105 [

].

106 [

].

107 [

]:

107.1 [], and

107.2 []

(a) [],

⁶⁰ [

].

(b) []⁶¹ or

(c) []⁶¹.

108 []⁶¹. In particular, []

[]⁶¹.

[], [], and []

[]⁶¹.

109 []⁶¹

[]⁶¹. As a result, although []

[]⁶¹

⁶¹ []

[]⁶¹.

PART 7: COMPETITION ANALYSIS

110 The Parties consider the Proposed Transaction will not have the likely effect of substantially lessening competition in any market. The key reasons are:

110.1 in relation to **retail supply**: there is no existing or potential competition between the two co-operatives so the Proposed Transaction is not capable of having an adverse effect on competition,

110.2 in relation to **retail supply**: there is no existing or potential competition between the two co-operatives so the Proposed Transaction is not capable of having an adverse effect on competition,

110.3 in relation to the **acquisition of grocery products from suppliers** for the purpose of retail supply: the co-operatives operate in different territories with different physical distribution infrastructure, and they do not meaningfully compete to acquire groceries from suppliers. The Proposed Transaction will have no effect on the volume of groceries the Parties acquire, either overall or in any geography. Buying practices are described in more detail below from paragraph 128,

110.4 in relation to the **commercial wholesale supply of groceries**: there is no existing competition between the two co-operatives. [

] and

110.5 in relation to **regulated wholesale supply**: there is no actual or potential competition between the Parties in relation to wholesale supply under the GICA.

The Proposed Transaction will not lessen competition in the retail supply of groceries

111 For the reasons set out in the following sections there is no actual or potential competition between the two co-operatives at the retail level in any realistic counterfactual. As a result, the Proposed Transaction is not capable of lessening competition in any market for the retail supply of groceries.

No existing retail competition between the co-operatives

112 As the Commission is aware, there is no existing 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.

113 The Commission has considered the Foodstuffs co-operative structure on several occasions, and has acknowledged that the co-operatives do not compete in relation to the retail supply of groceries due to their different geographies. For example:

113.1 in 2001 as part of its consideration of the proposed acquisition of Woolworths (NZ) Limited by Progressive Enterprises Limited, the Commission noted that the Foodstuffs co-operatives did not compete given they operated in separate regions:⁶²

[103] Companies that are part of the same corporate grouping, or that have similar strong relationships, cannot be relied upon to provide an effective competitive constraint to one another. Other less formal relationships between companies may also give rise to limitations on the extent of rivalry between them...At the retail level, the three [Foodstuffs co-operatives] do not compete as they each operate in quite separate regions. Each Foodstuffs company holds the rights to the banner names in their respective areas. This precludes (say) Foodstuffs (Wellington) opening a Pak'N Save in Auckland.

113.2 more recently, in the Market Study the Commission noted that "the two Foodstuffs co-operatives do not compete in the same geographic market," and noted the ties between them.⁶³

114 Accordingly, given each co-operative focuses on competing within the island in which it is based, the Proposed Transaction is not capable of lessening competition in any market for the retail supply of groceries. Further, the owner/operator co-operative model means that individual members have pricing discretion (to sell for less than Recommended Retail Prices, but not more) over the prices and some promotions at the store they own. As a result, currently prices differ (to some degree) between individual stores based on the individual pricing and promotions decisions of each member. The Proposed Transaction would not affect local store ownership, which would remain in individual co-operative members' hands as the owner-operators, and accordingly would not change the individual members' pricing discretion at a local level.

No potential retail competition between the co-operatives

115 As explained above, the Parties consider that the only realistic counterfactual is that the retail businesses would continue to operate each in its island, and not in competition with each other. On this basis, there is no potential retail competition between the two co-operatives. As a result, the Proposed Transaction is not capable of lessening competition in any market for the retail supply of groceries.

The Proposed Transaction will not lessen competition to acquire groceries from suppliers

116 For the reasons set out in the following sections, the Proposed Transaction is not capable of lessening competition in any market to acquire grocery products from suppliers. The co-operatives operate in different territories with different physical distribution infrastructure, and they do not meaningfully compete to acquire groceries from suppliers. The Proposed Transaction will have no effect on the volume of groceries the Parties acquire, either overall or in any geography.

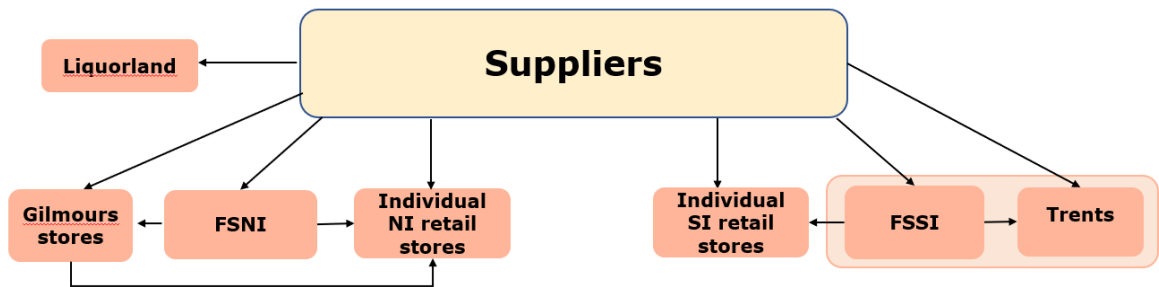
⁶² Commerce Commission, *Progressive Enterprises Limited and Woolworths (NZ) Limited*, Decision No. 448, 14 December 2001.

⁶³ Commerce Commission, [Market study into the retail grocery sector: final report](#), 8 March 2022, 2.11 and 2.17ff.

Acquisition of grocery products for retail supply

117 The acquisition of groceries before and after the Proposed Transaction is shown at a high level in Figures 5 and 6.

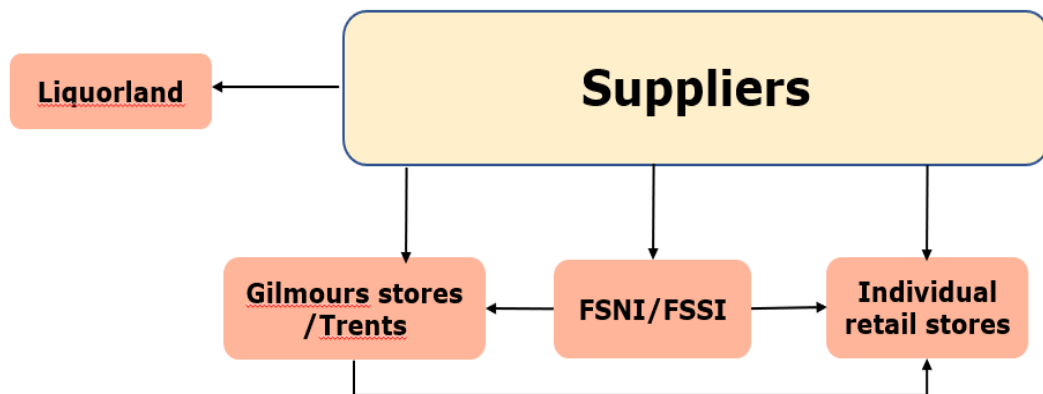
Figure 5: acquisition of grocery products – current



Notes:

- [].
- [].
- [].
- Gilmoors/Trents supply foodservice lines to Foodstuffs retail stores (e.g. 20kg flour).

Figure 6: acquisition of grocery products – following the Proposed Transaction



118 The acquisition of grocery products takes place pursuant to, and in combination with, decisions regarding retail ranging, and for the purpose of retail supply.⁶⁴ As the Parties are not in competition with each other in relation to retail supply, the same is true of the acquisition of groceries. The Proposed Transaction will not give rise to any negative change in the quantities of grocery products acquired by the Parties, whether overall or in any geography.

⁶⁴ In future, the purpose of fulfilling the requirements of regulated wholesale supply will also be relevant. This type of supply is dealt with separately below.

- 119 Rather, the efficiencies that are expected to arise under the Proposed Transaction will be shared with customers in the form of lower prices at the checkout and lower prices to customers under the wholesale quasi-regulatory regime.⁶⁵
- 120 In particular, the pro-competitive changes introduced under the GICA (particularly the wholesale regime, which should in turn result in more retail competition), as well as the more general increase in retail competition (as discussed in paragraphs 58 to 60 above), along with the Commission’s ongoing role in monitoring and promoting competition, should be expected to ensure significant competitive (and regulatory) pressures to pass through the benefit of savings and efficiencies to customers. For example, where the Merged Entity passes through its cost savings to the customers of its quasi-regulated wholesale supply offering, the Merged Entity will face intense competitive pressure to pass such savings through to its retail customers.⁶⁶ The Code will also continue to support consistent fair engagement with suppliers.
- 121 The Parties consider these efficiencies are of a nature that the Commission can take into account in assessing whether the Proposed Transaction would be likely to result in a substantial lessening of competition.⁶⁷ However, it is not necessary at this stage for the Commission to do so given, regardless of such efficiencies, the Proposed Transaction would not result in any adverse effect on competition.
- 122 The Parties present a consistent national retail offering, including in particular national brands and consistent brand positioning (including marketing). As a result, there is a high degree of alignment in ranging as between the two co-operatives, with over []% overlap in stockkeeping units. []. For example, [

].⁶⁸ Examples of suppliers that sell grocery products to one, but do not sell in any material way to the other, co-operative include:⁶⁹

- 122.1 [
- (a) [],
- (b) [],

⁶⁵ Section 24 of the GICA sets out “other principles” that the Commission and Minister must take into account when deciding whether to perform or exercise their functions, powers or duties under the Act, and in performing or exercising them, to the extent that the Commission or Minister considers them relevant to the main principle in the Act. Relevantly, s 24(1)(b) refers to “the desirability that wholesale customers have reasonable access to any discounts, payments or rebates made available to a regulated grocery retailer directly or indirectly by, or on behalf of, a supplier in connection with either or both of the following: (i) the scale of operations of the regulated grocery retailer and its associated persons, and (ii) the efficiency of operations of the regulated grocery retailer and its associated persons”.

Section 46 of the GICA prevents a regulated grocery retailer from engaging in conduct that has the purpose or likely effect of preventing or restricting a wholesale customer from receiving the benefits of a range-, quantity-, or frequency-based discount, which includes such payments made available in connection with the scale and efficiency of operations of the regulated grocery retailer.

⁶⁶ Of course, to the extent lower prices to customers results in increased market share, the Proposed Transaction will likely increase the overall purchasing from suppliers relative to the counterfactual.

⁶⁷ Commerce Commission, Mergers and Acquisitions Guidelines, May 2022, 3.118ff.

⁶⁸ [].

⁶⁹ [].

- (c) [],
- (d) [], and
- (e) [], and

122.2 supply to FSNI and not to FSSI:

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

123 While ranging evolves all the time, it would undermine the identity and therefore value of the shared brands for any material divergence in range to occur in any counterfactual, and therefore such a scenario is not realistic.

124 In the limited scenarios where there are current differences in range, the Parties consider these are typically a result of:

124.1 perceived consumer preferences, or brand advantages, that arise in particular geographies (e.g. a higher Asian population in Auckland is perceived to drive specific grocery preferences, and South Island customers are perceived to be loyal to certain local brands). These perceptions arise on the part of ranging staff (reflected in their procurement choices) and on the part of suppliers (reflected in the trade spend terms they offer),

124.2 other local consumer preferences, as perceived by local co-operative members (which are separately owned businesses that make their own ranging decisions in some circumstances) and relevant suppliers,

124.3 constraints on supply that arise by geography e.g. for logistical reasons, due to supplier capacity (e.g. when a new supplier is being supported to grow, beginning with a small presence), or due to product perishability and the need to maximise the shelf life of the products for the customer,⁷⁰ and

124.4 a mix of perceptions about consumer preference with other factors e.g. category review processes, which the co-operatives conduct separately, can result in differences arising from features such as price or quality elements at the time of the review.

⁷⁰ For example:

- some fresh produce such as lettuce does not travel well,
- some products (such as milk and water) are generally produced locally where they are a low-value product with high transportation costs. For example, for branded milk, FSNI is currently supplied by Fonterra and FSSI is currently supplied by Goodman Fielder, and
- in some circumstances there are capacity constraints on a supplier's ability to supply both co-operatives beyond one island or local area.

- 125 The Proposed Transaction would not have any adverse effect on competition in relation to any of these features.
- 126 Other considerations in ranging include the co-operatives’ desire to maintain diverse sources of supply, to ensure the co-operatives achieve competitive terms and to safeguard security of supply. The issue of supplier diversity typically comes to the fore in concentrated markets with a small number of large suppliers.
- 127 Examples of current differences in range between the two co-operatives are set out in Table 1. These differences may have arisen from a mix of geographic consumer preference (see paragraph 124.1) and other factors (see paragraph 124.4). The Parties consider they are likely to be representative of the types of differences between the co-operatives’ range.

Table 1: current differences in range between FSNI and FSSI – examples⁷¹

Product	Difference between FSNI and FSSI
[]	[].
[]	[].
[]	[].
[]	[].
[]	[].
[]	[].
[]	[].
[]	[].
[]	[].
[]	[].

⁷¹ [].

Current arrangements with suppliers

128 Currently:⁷²

128.1 as noted above, the Parties have a national buying entity (Foodstuffs Own Brands Limited), owned 50% by each of the co-operatives, whose function is to negotiate trading terms and pricing with national and international suppliers in respect of products purchased under Foodstuffs' private label brands (and sold nationally through both co-operatives' stores),⁷³

128.2 FSNI and FSSI jointly procure in limited other instances. For example:

(a) [

],⁷⁴ and

(b) there are certain other suppliers with whom the co-operatives have a joint and exclusive arrangement, such as []. This scenario typically arises where the co-operatives are seeking to support (effectively, underwrite) the emergence of competition in a grocery category where there is concentrated supply, []

128.3 in other circumstances, FSNI and FSSI procure branded goods individually. That is, FSNI and FSSI individually negotiate prices with suppliers for island-wide supply of their range of products.⁷⁵ As noted above, there is a high degree of alignment in ranging, and [], reflecting the consistency of the co-operatives' retail offering. However, in some situations the Parties have different suppliers, or have differences in how they range the same products, and

⁷² [].

⁷³ For further information see: <https://supplierhelp.foodstuffs.co.nz/en/article/foodstuffs-own-brands-limited-fobl-explained>.

⁷⁴ [].

⁷⁵ [].

128.4 finally, there are circumstances where individual stores negotiate terms with suppliers. These include:⁷⁶

- (a) where the co-operative has agreed “headline” terms with a supplier, it is in many cases open to individual stores to negotiate individual arrangements,⁷⁷ and
- (b) outside of certain core parts of the range, individual stores have discretion to procure additional products e.g. from local suppliers. As above, this scenario arises due to the individual store owner’s perception of customer preference in the local area.

129 Both co-operatives often review their range [

].⁷⁸ [

].

130 For completeness, as noted above the Code has been in effect since 28 September 2023,⁷⁹ to govern relationships between grocery retailers and their suppliers. The Parties have consistently supported the creation of the Code, including the imposition of a duty to deal with suppliers in good faith which should enhance the likelihood of successful trading outcomes (which are in the long-term interests of consumers).

Change brought about by the Proposed Transaction

131 In chapter 8 of the Market Study final report the Commission considered the acquisition of groceries by retailers. The Parties do not agree with the view expressed by the Commission in the Market Study that competition is not working well for many suppliers to the major grocery retailers and that suppliers’ incentives to innovate and invest may be adversely impacted by the major grocery retailers’ strong negotiating position.⁸⁰ Nevertheless, none of the factors discussed in chapter 8 of the final report will change as a result of the Proposed Transaction. In particular, the Market Study proceeded on the basis that there are “only two major grocery retailers in each island”.⁸¹ There will be no change to the number of competitors at the national, regional or local level. As set out in greater detail in this section, the Merged Entity’s overall buyer power will not be increased given there would not be fewer market participants in any geography and the Parties do not currently compete with each other to procure a greater share of supply. Specific conduct issues the Commission identified are not capable of being worsened by the Proposed Transaction and, as noted above, the Code was introduced in September 2023 as a response to the Commission’s concerns.

⁷⁶ [

].

⁷⁷ [

].

⁷⁸ For example, see [
].

⁷⁹ Regulated grocery retailers have until 28 March 2024 to offer their suppliers any necessary variations to ensure existing agreements are consistent with the Code.

⁸⁰ Commerce Commission, [Market study into the retail grocery sector: final report](#) at Chapter 8.

⁸¹ [Market study into the retail grocery sector: final report](#) at p 324.

132 The Proposed Transaction is not capable of having any effect on the acquisition of groceries from suppliers. As noted above, the Proposed Transaction will not have any impact on the quantity of grocery products acquired by the Parties, overall or in any geography. There is not expected to be any merger-specific change in competitive strategy associated with the acquisition of groceries. For example, the current strategy of both co-operatives is [

] ⁸² [

]. Rather, merger-specific changes are limited to cost savings (for both the Merged Entity and suppliers) and simplification of engagement as well as more consistent marketing of products across the two islands. Specifically:

132.1 the Proposed Transaction cannot adversely affect competition in relation to the acquisition of groceries where the Parties already engage in *joint procurement* (for private label and in other circumstances). Self-evidently, the co-operatives already procure together and would effectively continue to do so following the Proposed Transaction,

132.2 the Proposed Transaction also cannot result in any change to procurement where supply takes place for the purpose of retailing in one island or in any other *specific geography* (e.g. one or two local stores), because the Proposed Transaction would not affect share of supply in a specific geography. The Proposed Transaction would not affect local store ownership, which would remain in individual co-operative members' hands as the owner-operators, and accordingly would not change the ability for small suppliers to supply directly to a handful of local stores,

132.3 in circumstances where the two co-operatives currently deal *separately with the same supplier for retail supply nation-wide*, the Proposed Transaction would be likely to result in a practical change, specifically, the Merged Entity may be more likely to procure using a single national contract. However, the Merged Entity's overall bargaining power will not be greater because the Parties do not compete with each other to procure a greater share of supply, i.e. the supply arrangements are already national even though they take place through two separate contracts. The Proposed Transaction would therefore result in no change to share of supply, or quantity supplied, in any geography and the products would continue to be supplied through separate physical supply chains. This is reflected in [

⁸² See, for example, [FSNI's post-conference submission on the grocery market study draft report](#) at 130; [Market study into the retail grocery sector: final report](#) at footnote 992.

].⁸³ [

]:

(a) [

], and

(b) more generally, suppliers may not agree to any changes. Most starkly, many suppliers have a strong negotiating position e.g. in relation to products in concentrated markets where there are limited alternative suppliers available, or where suppliers offer well-known brands, which consumers consider to be a “must have” item. In such cases any improvement in terms (even sharing in the supplier's cost savings resulting from the Proposed Transaction) is more uncertain, and

132.4 as above, there is also a small number of cases where the two co-operatives currently procure the *same product but from separate suppliers* as a result of choice (rather, or in addition to, supplier or product constraints and specific local preferences). As part of ongoing ranging decisions there may be some opportunities for two individual island-wide suppliers to be replaced by a single national supply contract. Any such decisions will continue to reflect the usual range of geography-specific considerations. For example, where separate suppliers are a reflection of different consumer preferences between the North Island and South Island, separate suppliers are likely to remain in place. Where that is not the case, the Merged Entity might use a single supplier. However, using a single supplier in these circumstances is as likely to occur under the status quo (albeit through two contracts). While the identity of the procurement staff may change (a single team rather than two), the considerations will not. A mix of local, island-wide and national supply is likely to feature, and continue to evolve, as it does now.

133 In short, buying is likely to remain a mix of national, island-wide, regional and local (including single store), reflecting supplier capacity, product constraints and consumer preference (as well as the Merged Entity’s incentive to ensure security of supply and avoid uncompetitive supplier markets leading to its own terms being

⁸³ [

•

•

].

degraded). The Proposed Transaction is not capable of resulting in any lessening of competition.

134 []

].

Acquisition of grocery products for wholesale supply

135 For completeness, the Proposed Transaction also will not lessen competition to acquire grocery products for wholesale supply. As with retail supply, the co-operatives operate in different territories with different physical distribution infrastructure, and they do not meaningfully compete to acquire groceries from suppliers. The description above regarding current arrangements with suppliers is broadly the same for wholesale supply, with a few nuances:

135.1 FSSI [], and

135.2 FSNI []

].

136 The Proposed Transaction is not capable of having any effect on the acquisition of groceries from suppliers for wholesale supply. As with retail supply, the Proposed Transaction will have no effect on the volume of groceries the Parties acquire for wholesale supply, either overall or in any geography.

The Proposed Transaction will not lessen competition in any commercial wholesale market

137 The Parties' participation in commercial and regulated wholesale supply is illustrated in Figures 7 and 8 below.

Figure 7: the Parties' current participation in commercial and regulated wholesale supply⁸⁴

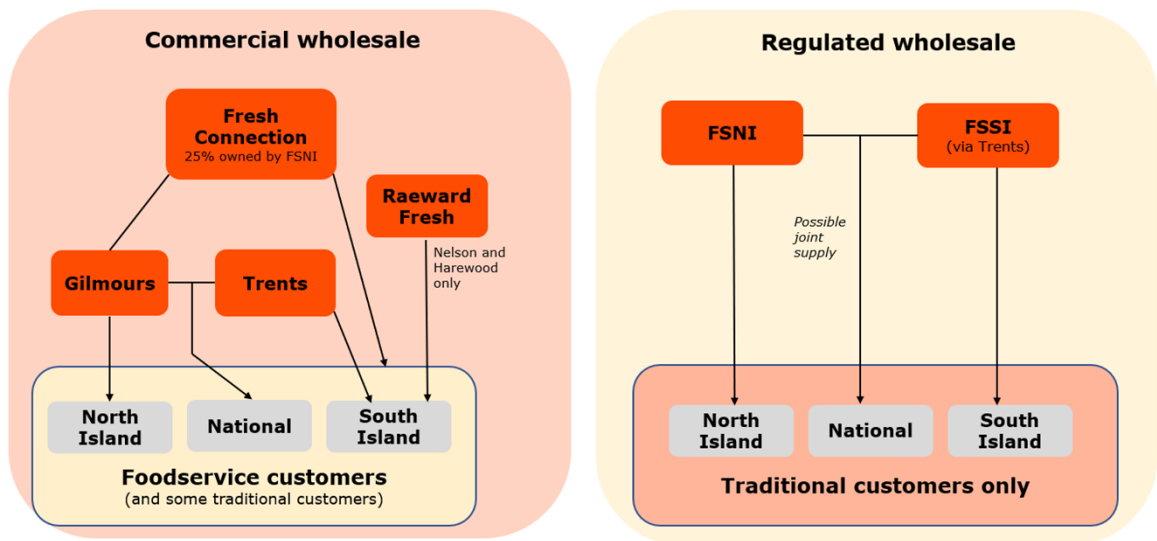
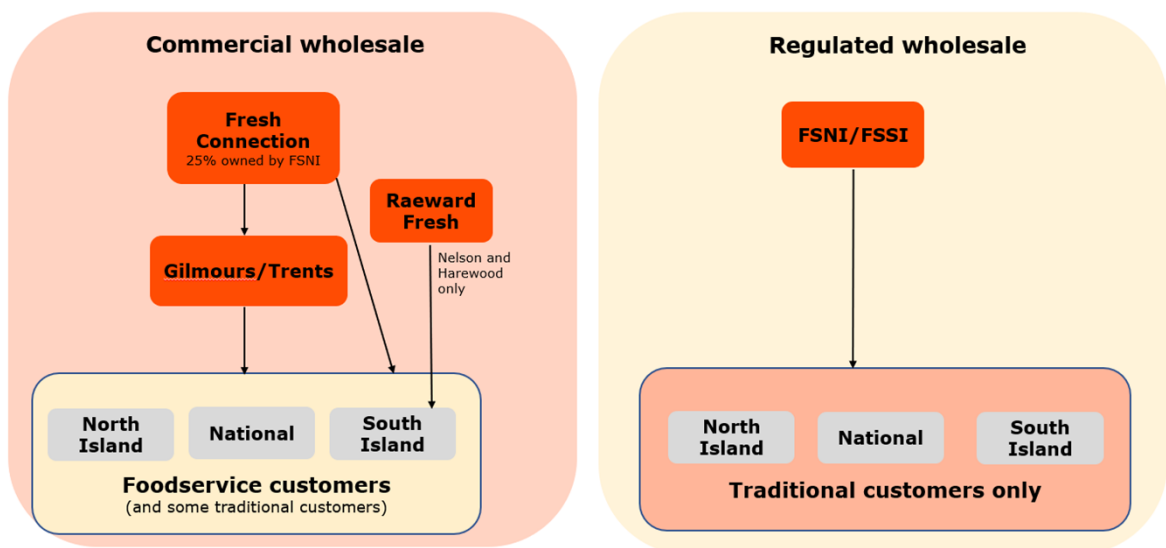


Figure 8: the Parties' participation in commercial and regulated wholesale supply following the Proposed Transaction



138 A summary of market participants in commercial wholesale supply is set out in the table at **Appendix 11**.

139 As explained above, each co-operative operates a wholesale business: FSNI operates Gilmoors in the North Island and FSSI operates Trents in the South Island. As set out in the following sections:

⁸⁴ FSNI and FSSI (using Trents' systems) take responsibility for providing regulated wholesale supply, regardless of where a wholesale request enters the relevant co-operative. Similarly, it is likely that the central co-operative would take responsibility for all regulated wholesale requests following the Proposed Transaction.

139.1 there is no actual competition between the two wholesalers, and

139.2 [

].

140 In the following sections the Parties analyse competition to supply local and regional CW Customers on the one hand, and national CW Customers on the other.

No existing competition to supply local or regional CW Customers

141 Each of Gilmours and Trents competes to supply local and regional CW Customers in the island it serves, and there is no competition between them due to their different geographies. Specifically, local and regional CW Customers are served by their closest store/s, whether through delivery, cash-and-carry or a combination. Neither wholesaler serves CW Customers in the other island.

142 We note for completeness that even if FSNI was considered to have a “substantial degree of influence” over Fresh Connection, there is no existing competition between Fresh Connection and Trents. FSNI understands that in addition to supplying fresh produce via an agency relationship with FSNI, Fresh Connection also supplies fresh produce directly to CW Customers, nationwide. However, to the extent that Fresh Connection supplies the same CW Customers as Trents in the South Island, Fresh Connection and Trents would be very unlikely to compete to supply the same *products* to those customers. This is because Trents and Fresh Connection’s product offering is complementary: Fresh Connection exclusively supplies fresh produce, whereas Trents’ product offering is largely limited to ambient goods and liquor.

No existing competition to supply national CW Customers

143 Neither Gilmours nor Trents is currently individually capable of competing to supply national CW Customers e.g. national caterers such as Spotless, or retirement villages such as Ryman. Gilmours and Trents partner to compete in tenders for such customers, and any resulting contract is held by Gilmours. Currently, Gilmours and Trents jointly serve the following national customers:

143.1 [],

143.2 [],

143.3 [],

143.4 [],

143.5 [],

143.6 [],

143.7 [],

143.8 [],

143.9 [],

- 143.10 [],
- 143.11 [],
- 143.12 [],
- 143.13 [],
- 143.14 [],
- 143.15 [],
- 143.16 [], and
- 143.17 [].

- 144 However, while Gilmours and Trents have a shared platform in Gilmours Wholesale Limited to support their national offer, they currently have materially different systems and processes, and offer different pricing, product ranges and services. Participating in national tenders requires a substantial time commitment from both Parties to align products and pricing, and can be challenging to execute. In Trents' view, []. In addition, Gilmours considers [].
- 145 As a result, the Parties struggle to compete to supply national CW Customers. FSNI estimates they jointly hold an estimated []% share of supply to national CW Customers. Over the last three years, Gilmours and Trents have jointly participated in the following tenders for national customers, in which they have been unsuccessful as a result of being unable to provide true national service:⁸⁵
- 145.1 [],
- 145.2 [],
- 145.3 [], and
- 145.4 [].
- 146 Bidfood is the strongest competitor to supply national CW Customers (with an estimated []% share of supply to these customers), and Service Foods, Davis Trading and Foodchain, which the Parties consider are capable of supplying all types of customer on a national basis (with an estimated []%, []% and []% share of supply to national CW Customers respectively), also provide a material competitive constraint.

⁸⁵ A broader set of tender data is presented at **Appendix 12**.

No lessening of competition

147 The absence of [

] because:

147.1 Gilmours and Trents currently bid jointly for national CW Customers [] for those customers,

147.2 [

], and

147.3 [

].⁸⁶

No lessening of competition to supply local or regional CW Customers

148 [

].

149 In any event:

149.1 Trents [], and

149.2 there are a number of strong competitors in the South Island (including but not limited to Bidfood) that would continue to provide a material constraint on the Merged Entity.

⁸⁶ [

].

150 Trents' internal market share estimates⁸⁷ suggest that [Trents []].

151 There are two key reasons why Trents poses []:

151.1 []and

151.2 [].

There are a number of strong competitors in the South Island that would continue to provide a material constraint

152 Post-transaction, the Merged Entity would be constrained by national wholesale suppliers, including Bidfood and Service Foods, which hold material market share in the South Island (in addition to nationally). Further, there are a number of other, smaller competitors (such as Kaan's) that would exercise material constraint.

Table 2: Wholesale share of supply to CW Customers in the South Island⁸⁸

Wholesaler	Estimated share of supply
Bidfood	[]
Service Foods	[]
Trents	[]
Kaan's	[]
Raeward Fresh	[]
Others (including Davis Trading)	[]%

153 Trents' key competitors in the South Island include:

153.1 *Bidfood*: the largest wholesaler in New Zealand, with an estimated []% share of supply to CW Customers in the South Island. Bidfood is equally focused on foodservice and traditional customers and describes itself as "a full service food wholesaler supplying the full range of fresh, frozen and ambient food, non-alcoholic beverages and non-food consumables".⁸⁹ Given its strong national presence, Bidfood is a particularly strong competitor for national CW Customers (e.g. Spotless and Ryman), with an estimated []% share of

⁸⁷ [].

⁸⁸ Source: FSSI estimates. These market share estimates represent best estimates of the market based on desktop research, but FSSI is uncertain of their accuracy. In addition, this list may not be comprehensive, and there could well be other wholesalers not included in this list.

⁸⁹ See: <http://www.bidfood.co.nz>.

supply to these customers, but it also supplies local and regional customers in the South Island.

153.2 *Service Foods*: Service Foods has an estimated []% share of supply to CW Customers in the South Island. Service Foods has a particular focus on food production, and supplies the full range of products (including butchery, fresh produce, chilled and frozen goods and grocery products).⁹⁰ Like Bidfood, Service Foods operates nationally and is also a material competitor for national CW customers, with an estimated []% share of supply to these customers. FSNI understands that [].

153.3 *Kaan's*: a South-Island based wholesaler, with depots and branches in Dunedin, Invercargill, Central Otago, Timaru and Christchurch. Kaan's also supplies the full range of products (including butchery, fresh produce, chilled and frozen goods and grocery products).⁹¹ Kaan's share of supply to CW Customers in the South Island is approximately []%.

153.4 *Davis Trading*: a national wholesaler, with branches in Auckland, Wellington, Palmerston North and Christchurch. Davis Trading supplies a full range of products (including butchery, fresh produce, chilled and frozen goods and grocery products).⁹² [], its share of supply to national CW Customers is approximately []%.

153.5 *Raeward Fresh*: as noted above at paragraph 38, two Raeward Fresh Stores, in Richmond/Tasman and Harewood, participate in some wholesale supply to commercial wholesale customers in their local area. Raeward Fresh is primarily a retail grocery format specialising in fresh products. FSSI estimates that Raeward Fresh has a very small share of supply to CW Customers in the South Island (approximately []%) and these would be focused in the stores' local areas.

154 In addition, in the Parties' view:

154.1 CW Customers generally source food from multiple suppliers (including suppliers that are narrowly focused on specific products, and suppliers with a local/regional focus) and do not appear to place much value on having access to a supplier that is a "one-stop shop". For example, many large CW Customers have contracts in place with multiple suppliers and may choose to source products from different suppliers (e.g. ambient products from Gilmours, meat from Bidfood and produce from Service Foods). Smaller CW Customers are particularly focused on price and availability and are even less likely to have an established relationship with any one supplier, preferring to shop around for the best price. The Parties do not have complete visibility of the market, but they consider most local customers shop around the various foodservice and retail offers and select based on their needs. National and regional customers will generally have a preferred supplier, or dual preferred suppliers, as a result of a competitive tender process. However, such customers will typically have some direct supply relationships as well,

⁹⁰ See: <https://www.servicefoods.co.nz/>.

⁹¹ See: <https://www.kaans.co.nz/en-nz/>.

⁹² See: <https://davis.nz/>.

154.2 in addition to the wholesale suppliers included in Table 2 (which offer a wide product offering), there are also a number of suppliers that focus on one or two product categories. For example, Allied Tasman is a strong competitor for the wholesale supplier of liquor. Given CW Customers tend not to place particular value on having access to a supplier that is a "one-stop shop", these suppliers exercise a material competitive constraint,

154.3 direct supply from suppliers such as [], which as noted above have their own wholesale businesses, provides a material constraint, and suppliers regularly exercise material bargaining power,

154.4 there are many market participants in adjacent markets that could readily expand into foodservice wholesale e.g. a supplier could enter commercial wholesale by investing in delivery capability, and

154.5 traditional wholesale customers (at least) have protections available under the GICA as to the competitiveness of their terms.

155 For the reasons set out above, the Parties consider that the Proposed Transaction would not be likely to result in a lessening of competition in relation to commercial wholesale supply.

No lessening of competition in relation to the supply of groceries to wholesale customers under the quasi-regulatory regime

156 The provision of regulated wholesale supply is conducted by FSNI in the North Island. The provision of regulated wholesale supply is conducted by FSSI in the South Island, albeit FSSI uses many of the Trents systems to deliver the offering.

157 For completeness the Parties note that there will 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. That is:

157.1 for national customers operating in both the North and South Islands, FSNI and FSSI may partner with each other.⁹³ FSNI and FSSI would only be able to service national customers by working with each other or another market participant (and the only other regulated grocery retailer is Woolworths, which has national capability). [

],

157.2 in respect of a wholesale customer that is based in either the North Island or South Island:

- (a) typically, the customer would request wholesale supply of groceries from the co-operative that operates in the same island as the customer, and
- (b) in any event, neither co-operative could realistically (or at least, cost-effectively) supply outside of the geographic area in which it operates,

⁹³ [

].

and this position would therefore be the upshot of any discussions with customers.

- 158 As set out above at paragraph 13, pursuant to the amalgamation, FSNI and FSSI would amalgamate and then continue as a single company. The single company would in law be a continuation of both FSNI and FSSI.⁹⁴ As a result, the Merged Entity would succeed to all rights, obligations and liabilities of both FSNI and FSSI under the wholesale supply agreements established under the quasi-regulatory regime. As a continuation of FSNI and FSSI, the Merged Entity would also be within the existing definition of “regulated grocery retailer” under section 26 and remain subject to the quasi-regulatory wholesale regime under the GICA.⁹⁵
- 159 To the extent that, prior to the amalgamation, FSNI and FSSI had different rules, criteria and procedures for considering wholesale supply requests, or different standard terms and conditions for wholesale supply, the Parties expect that the Merged Entity would undertake a review and make any necessary or appropriate amendments, in accordance with sections 37 and 39 of the GICA.⁹⁶
- 160 While the Proposed Transaction is unlikely to result in material changes for local and island-wide customers, the Parties consider the Proposed Transaction will be pro-competitive for national customers. That is because, [
-] In the factual, the Parties expect a much-improved national offering. [
-].
- 161 The Parties therefore consider that there is no realistic prospect of a lessening of competition in relation to the quasi-regulatory wholesale regime under the GICA as a result of the Proposed Transaction.

No coordinated effects

- 162 The Proposed Transaction will not enhance the ability of the amalgamated entity to coordinate its activity with competitors.

Retail supply of groceries

- 163 The Commission in the 2022 market study acknowledged that there are features of retail grocery supply that may hinder accommodating behaviour, such as the high degree of product and brand differentiation, the large number of products sold by the major grocery retailers, and a prevalence of discounts and non-price promotions (although there may be some visibility of competitors’ likely discounting and promotional arrangements through common suppliers).⁹⁷ In addition, the

⁹⁴ The Supreme Court in *Elders v PGG Wrightson* [2008] NZSC 104 held that the principle of ‘fusion and continuance’ applies to amalgamations approved under Part XV of the Companies Act 1993. The Supreme Court further held that “continuance through a process of fusion ... extends to assets and liabilities and carries forward contractual rights and obligations into the amalgamated company”.

⁹⁵ Similarly, the Merged Entity will also be a “regulated grocery retailer” for the purposes of the GICA’s grocery supply code provisions under section 8.

⁹⁶ In addition, section 38(2) of the GICA expressly states that a regulated grocery retailer may establish and implement different standard terms and conditions that apply in different circumstances, which could include different geographic areas.

⁹⁷ Commerce Commission, [Market study into the retail grocery sector: draft report](#), 29 July 2021 at 5.154 and [Market study into the retail grocery sector: final report](#) at 5.151.

Commission found no evidence of leader-follower behaviour.⁹⁸ These features will not change as a result of the Proposed Transaction, as the Proposed Transaction will not affect the level of differentiation, product numbers and pricing, nor does it give rise to consolidation in any geography such that the prospects of leader-follower behaviour will increase. In addition, the increase (and, particularly following the GICA, the expected continued increase) in competition from diverse market participants, means coordination between the Merged Entity on the one hand, and Woolworths on the other, would not be rational and would only result in a loss of share to competitors.

164 The Parties do not agree with the view expressed by the Commission in the 2022 market study, that retail grocery supply has some features that make it vulnerable to coordination. Nevertheless, for completeness, the effect of the Proposed Transaction on those features is addressed below.⁹⁹

165 The Commission considered the following market features reduce the incentive to compete:¹⁰⁰

165.1 the major grocery retailers:

- (a) are each other's closest competitors and have similar competitive strategies which are well known, and
- (b) monitor each other closely. Their competitive strategies are relatively transparent meaning they can quickly detect and respond to any changes, and

165.2 the market is relatively stable and there are barriers to entry and expansion.

166 None of these factors will change as a result of the Proposed Transaction. In particular, there will be no change to the number of competitors at the national, regional or local level.¹⁰¹

167 The Commission indicated that it had seen evidence of information being sought from suppliers regarding competitors' prices, discounts and promotions and that for some products, "promotional clashes are avoided".¹⁰² The market study proceeded on the basis that there are, for these purposes, two major grocery retailers.¹⁰³ As above, such effects would not change due to the Proposed Transaction given there would not be fewer market participants in any geography.

168 The Commission stated that it had seen evidence that the major grocery retailers actively manage price differentials between their respective retail banners for specific product categories (but not between the major grocery retailers

⁹⁸ [Market study into the retail grocery sector: draft report](#) at 5.158 and [Market study into the retail grocery sector: final report](#) at 5.155.

⁹⁹ [Market study into the retail grocery sector: final report](#) at 5.154.

¹⁰⁰ At 5.148.

¹⁰¹ Noting that the Commission, in its draft and final reports (including in relation to its discussion of coordinated effects), proceeded on the basis that two major grocery retailers are in operation, being Foodstuffs and Woolworths. See [Market study into the retail grocery sector: draft report](#) at 5.153 and [Market study into the retail grocery sector: final report](#) at 5.149.

¹⁰² [Market study into the retail grocery sector: final report](#) at 5.156.

¹⁰³ [Market study into the retail grocery sector: draft report](#) at 5.153.

themselves).¹⁰⁴ Further, the Commission considered that increased price transparency through uniform pricing is a feature of the retail grocery market that could make it vulnerable to accommodating behaviour through increased visibility of each other's retail grocery offerings.¹⁰⁵

- 169 As noted above, 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. Further, regardless of the Proposed Transaction store owners will maintain the same level of freedom to price independently.
- 170 Retail grocery supply is, in the Parties' view, not vulnerable to coordination. Regardless, the Proposed Transaction would not change conditions such that coordination would be more likely, more complete or more sustainable.

Acquisition of groceries

- 171 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 Transaction will not change that.
- 172 As above, in the Market Study the Commission indicated that it had seen evidence of information being sought from suppliers regarding competitors' prices, discounts and promotions and that for some products, "promotional clashes are avoided".¹⁰⁶ FSNI and FSSI do not have visibility of whether and how suppliers avoid promotional clashes (but assume this does occur). Suppliers will not gain increased visibility as a result of the Proposed Transaction, and as is clear from the analysis above there would be no merger-specific change to competitive strategies or the Merged Entity's competitors' visibility of such strategies.

Commercial wholesale supply

- 173 Commercial wholesale supply is not conducive to coordination. That is:
- 173.1 it involves supply of a large number and variety of differentiated products,
- 173.2 suppliers have little interaction with one another,
- 173.3 suppliers have little visibility over each other's terms of supply. For larger CW 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
- 173.4 there is a variety of size and cost structure among suppliers. For example, there are broadline 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.
- 174 Even if the Proposed Transaction were assumed to give rise to some degree of consolidation relative to the counterfactual [

¹⁰⁴ [Market study into the retail grocery sector: final report](#) at 5.157.

¹⁰⁵ At 5.158.

¹⁰⁶ [Market study into the retail grocery sector: final report](#) at 5.156.

] it would not materially alter any of the factors set out above. Specifically, the Proposed Transaction would not affect any of the conditions of competition outlined in paragraphs 173.1 to 173.3. It would not materially reduce the variety in size and cost structure of suppliers, since it would aggregate only two of several broadline suppliers, with other broadline suppliers, specialised suppliers, direct supply and retail supply continuing to provide alternatives.

Regulated wholesale supply

175 Regulated wholesale supply is not conducive to coordination. That is:

175.1 sales involve a large number and variety of differentiated products,

175.2 prices and volumes are not readily observable. Prices are not publicly displayed and, where tenders exist, feedback is likely to be limited,

175.3 suppliers are likely to have limited interaction with each other,

175.4 demand is likely to change over time as retail entrants emerge and develop, and

175.5 suppliers face close and ongoing regulatory scrutiny, providing additional pressure to supply products and services in as competitive a manner as possible.

176 The Proposed Transaction is not capable of giving rise to any lessening of competition, given it would not result in consolidation in any geographic market. The Proposed Transaction is expected to result in the Merged Entity's national offering becoming more coherent and competitive, but this would not alter the features described above.

PART 8: CONFIDENTIALITY

- 177 Confidentiality is sought in respect of the information in this application that is highlighted (**Confidential Information**). Confidentiality is sought for the Confidential Information for the purposes of section 9(2)(b) of the Official Information Act 1982 on the following grounds:
- 177.1 the Confidential Information is commercially sensitive and valuable information which is confidential to either, or both, Parties, and
- 177.2 disclosure of the Confidential Information would be likely to unreasonably prejudice the commercial position of the Parties.
- 178 The Parties request that they are notified if the Commission receives any request under the Official Information Act 1982 for the release of any part of the Confidential Information. They also request that the Commission seek and consider their views as to whether the Confidential Information remains confidential and commercially sensitive before it responds to such requests.

DECLARATION BY FSNI

I, Chris Quin, have prepared, or supervised the preparation of this notice seeking clearance.

To the best of my knowledge, I confirm that:

- All information specified by the Commission has been supplied;
- If information has not been supplied, reasons have been included as to why the information has not been supplied;
- All information known to the applicant that is relevant to the consideration of this notice has been supplied; and
- All information supplied is correct as at the date of this notice.

I undertake to advise the Commission immediately of any material change in circumstances relating to the notice.

I understand that it is an offence under the Commerce Act to attempt to deceive or knowingly mislead the Commission in respect of any matter before the Commission, including in these documents.

I am a director/officer of FSNI and am duly authorised to submit this notice.

Name and title of person authorised to sign:

Chris Quin, Chief Executive Officer, Foodstuffs North Island Limited

On behalf of Foodstuffs North Island Limited

Sign: []

Date: []

DECLARATION BY FSSI

I, Mary Devine, have prepared, or supervised the preparation of this notice seeking clearance.

To the best of my knowledge, I confirm that:

- All information specified by the Commission has been supplied;
- If information has not been supplied, reasons have been included as to why the information has not been supplied;
- All information known to the applicant that is relevant to the consideration of this notice has been supplied; and
- All information supplied is correct as at the date of this notice.

I undertake to advise the Commission immediately of any material change in circumstances relating to the notice.

I understand that it is an offence under the Commerce Act to attempt to deceive or knowingly mislead the Commission in respect of any matter before the Commission, including in these documents.

I am a director/officer of FSSI and am duly authorised to submit this notice.

Name and title of person authorised to sign:

Mary Devine, Chief Executive Officer, Foodstuffs South Island Limited

On behalf of Foodstuffs South Island Limited

Sign: []

Date: []

APPENDICES

Appendix	Title
Appendix 1	Transaction documents
Appendix 2	Proposed Transaction structure diagram
Appendix 3	FSNI Annual Report and Financial Statements
Appendix 4	FSSI Annual Report and Financial Statements
Appendix 5	Trade and industry associations
Appendix 6	FSNI key wholesale customers
Appendix 7	FSSI key wholesale customers
Appendix 8	FSNI key suppliers
Appendix 9	FSSI key suppliers
Appendix 10	Parties' competitors

APPENDIX 1: TRANSACTION DOCUMENTS

Attached separately [].

APPENDIX 3: FSNI FINANCIAL STATEMENTS AND ANNUAL REPORT

FSNI's annual report and financial statements are available here:

<https://annualreports.foodstuffs.co.nz/>

APPENDIX 4: FSSI FINANCIAL STATEMENTS AND ANNUAL REPORT

FSSI's annual report and financial statements are available here: <https://www.foodstuffs-si.co.nz/who-we-are/performance-and-reports>

APPENDIX 5: TRADE AND INDUSTRY ASSOCIATIONS

- 179 Foodstuffs NZ holds memberships with 15 trade or industry associations on behalf of both Parties, as set out in the first table below. In addition, FSNI is a member of three additional associations and FSSI is a member of four additional associations, as set out in the subsequent tables.

Foodstuffs NZ Trade or industry associations

Trade or industry association	Contact details
BusinessNZ Inc.	[] Website: https://businessnz.org.nz/
Retail NZ Inc.	[] Website: https://retail.kiwi/
Business Parliament Trust	[] Website: https://nzbpt.nz/
Consumer Healthcare Products NZ Inc. (CHPNZ)	[] Website: https://chpnz.org.nz/
GS1 NZ Inc.	[] https://www.gs1nz.org/
Business Leaders' Health & Safety Forum Inc.	[] Website: https://www.forum.org.nz/
Retail Meat New Zealand Inc.	[] Website: https://www.rmnz.co.nz/
Sustainable Business Network Inc.	[] Website: https://sustainable.org.nz/
Packaging Forum Inc.	[] Website: https://www.packagingforum.org.nz/

Climate Leaders Coalition Inc.	[] Website: https://climateleaderscoalition.org.nz/
Australian Packaging Covenant (APCO)	[] Website: https://apco.org.au/
Organics New Zealand Inc. (OANZ)	[] Website: https://www.oanz.org/
Wasteminz	[] Website: https://www.wasteminz.org.nz/
New Zealand Food Waste Champions 12.3 Trust (Kai Commitment)	[] Website: https://www.nzchampions123.org/
NZ Alcohol Beverages Council	[] Website: http://www.nzabc.org.nz

FSNI trade or industry associations

Trade or industry association	Contact details
EMA Inc.	[] Website: https://www.ema.co.nz/
Property Council New Zealand Inc.	[] Website: https://www.propertynz.co.nz/
New Zealand Initiative	[] Website: https://www.nzinitiative.org.nz/

FSSI trade or industry associations

Trade or industry association	Contact details
Beef & Lamb NZ	[] Website: www.beeflambnz.co.nz
Retail Meat NZ	[] Website www.rmnz.co.nz
NZ Association of Convenience Stores	[] Website: www.nzacs.com
Chartered Institute of Logistics and transport	[] www.cilt.co.nz

APPENDIX 6: GILMOURS KEY CW CUSTOMERS

180 []
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	Customer name	Contact details for customer (email address or phone number)	FY2023 revenue obtained from the customer (excl. GST)
[]			
1	[]	[]	[]
2	[]	[]	[]
3	[]	[]	[]
4	[]	[]	[]
5	[]	[]	[]
[] ¹⁰⁷			
1	[]	[]	[]
2	[]	[]	[]
3	[]	[]	[]
4	[]	[]	[]
5	[]	[]	[]
6	[]	[]	[]
7	[] ¹⁰⁸	[]	[]
8	[]	[]	[]
[]			
1	[]	[]	[]
2	[]	[]	[]
3	[]	[]	[]
4	[]	[]	[]
5	[]	[]	[]

¹⁰⁷ []
].

¹⁰⁸ []
].

APPENDIX 7: FSSI KEY CW CUSTOMERS

181 The table below sets out FSSI’s top five CW Customers. [

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182 The final column indicates whether the customer is a national CW Customer (i.e. a customer that Trents partners with Gilmours to serve).

	Customer name	Contact details for customer (email address or phone number)	FY2023 revenue obtained from the customer (excl. GST)
[]			
1	[]	[]	[]
2	[]	[]	[]
3	[]	[]	[]
4	[]	[]	[]
5	[]	[]	[]
[]			
1	[]	[]	[]
2	[]	[]	[]
3	[]	[]	[]
4	[]	[]	[]
5	[]	[]	[]
6	[]	[]	[]
[]			
1	[]	[]	[]
2	[]	[]	[]
3	[]	[]	[]
4	[]	[]	[]
5	[]	[]	[]

APPENDIX 8: FSNI SUPPLIERS

183 The table below sets out details of FSNI's (including Gilmours') top five suppliers. Note that all figures in the table are inclusive of GST and before application of settlement terms.

Supplier name	Contact details for supplier	Amount paid to the supplier in FY2023
[]	[]	\$[]
[]	[]	\$[]
[]	[]	\$[]
[]	[]	\$[]
[]	[]	\$[]

APPENDIX 9: FSSI SUPPLIERS

184 The table below sets out details of FSSI's (including Trents') top five suppliers. Note that all figures in the table are GST exclusive.

Supplier name	Contact details for supplier	Amount paid to the supplier (MAT Nov 2023)
[]	[]	\$[]
[]	[]	\$[]
[]	[]	\$[]
[]	[]	\$[]
[]	[]	\$[]

APPENDIX 10: THE PARTIES' KEY COMPETITORS

185 The contact details for the Parties' key competitors are set out in the table below.

186 The Parties have identified their closest competitors (with regards to the similarity of offerings). They have not, for the purposes of this Appendix, identified the Parties' competitors that provide more specialised offerings or local competitors to the Parties' members' individual stores.

Retail – key competitors

Competitor	Contact details for competitor	Present in North Island?	Present in South Island?
Woolworths	[] Website: https://www.countdown.co.nz/	Yes	Yes
Costco	[] Website: https://www.costco.co.nz/	Yes	No
The Warehouse	[] Website: https://www.thewarehouse.co.nz/	Yes	Yes
Farro Fresh	[] Website: https://www.farro.co.nz/	Yes	No (delivery only)
Moore Wilson's	[] Website: https://moorewilsons.co.nz/	Yes	No (delivery only)
Bin Inn	[] Website: https://www.bininn.co.nz/	Yes	Yes
Huckleberry	[]	Yes	No

			(delivery only)
]		
	Website: https://www.huckleberry.co.nz/		

Wholesale – key competitors

Competitor	Contact details for competitor	Present in North Island?	Present in South Island?
Bidfood	[] Website: https://www.bidfood.co.nz/	Yes	Yes
Service Foods	[] Website: https://www.servicefoods.co.nz/	Yes	Yes
Food First	[] Website: https://foodfirst.co.nz/	Yes	Yes
Davis Trading	[] Website: https://davis.nz/	Yes	Yes
Kaan's	[] Website: https://www.kaans.co.nz/en-nz/	No	Yes
Food Chain	[] Website: https://www.foodchain.co.nz/	Yes	No

Goodman Fielder Foodservice	[] Website: https://gffoodservice.co.nz/	Yes	Yes
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APPENDIX 11: FOODSERVICE SPECIALIST WHOLESALERS¹⁰⁹

Competitor	Product offering					Customer type		Type of wholesaler		Sales channels	
	Butchery	Fresh produce	Chilled and frozen	Beverages	Grocery	Traditional ¹¹⁰	Foodservice ¹¹¹	Specialist ¹¹²	Broadline ¹¹³	Delivery	Self-service/cash and carry
Bidfood	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	No
Gilmours	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes
Trents	No	No	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes
Service Foods	Yes	Yes	Yes	Yes	Yes	No	Yes	No	Yes	Yes	No
Kaan's	Yes	Yes	Yes	No	Yes	Yes	Yes	No	Yes	Yes	No
Davis Trading	Yes	Yes	Yes	No	Yes	Yes	Yes	No	Yes	Yes	No
Raeward Fresh	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	No	Yes
Food First	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	No
Food Chain	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	No
Goodman Fielder Foodservice	Yes	No	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	No
Fresh Connection	No	Yes	No	No	No	No	Yes	Yes	No	Yes	No
Allied Tasman	No	No	No	Yes	Yes	Yes	Yes	Yes	No	Yes	No

¹⁰⁹ The table excludes the direct participation in foodservice wholesaling by suppliers.

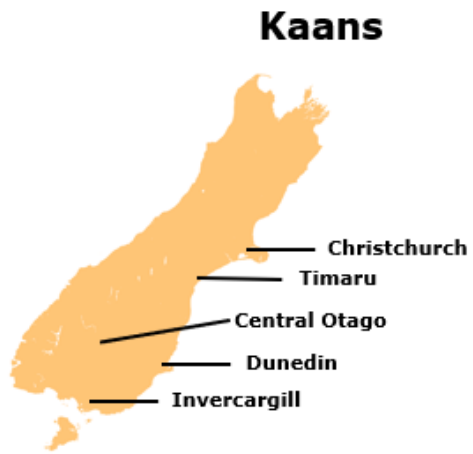
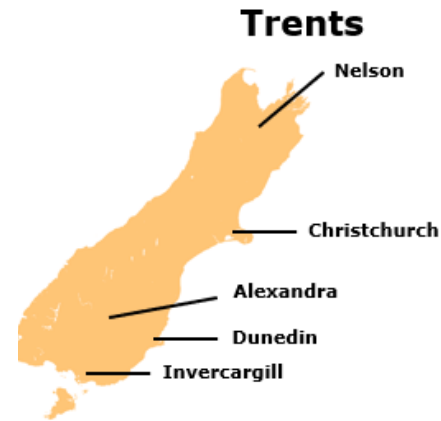
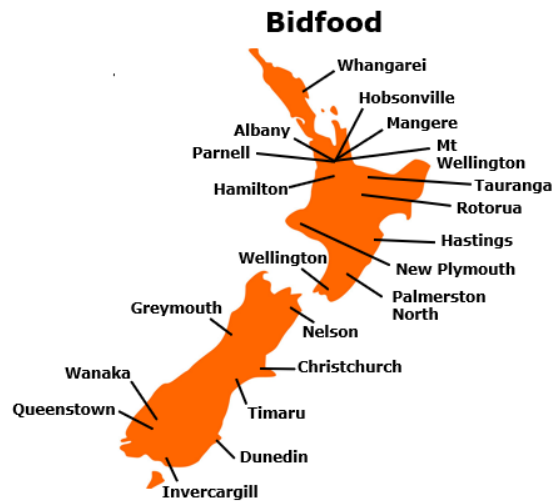
¹¹⁰ "Traditional" refers to dairies, resellers and other convenience store customers.

¹¹¹ "Foodservice" refers to wholesaling to hospitality, catering and other foodservice customers.

¹¹² "Specialist" refers to suppliers that specialise in a specific category of products, such as halal, or organic food.

¹¹³ "Broadline" refers to suppliers that handle larger volumes of different products and are most often utilised by grocery stores and other foodservice chains.

WHOLESALE SUPPLIER LOCATIONS



WHOLESALE SUPPLIER LOCATIONS

Food Chain



Goodman Fielder



Fresh Connection



Allied Tasman



APPENDIX 12 – GILMOURS/TRENTS TENDER DATA

[]

[]	[]	[]	[]	[]	[]
[]	[]	[]	[]	[]	[]
[]	[]	[]	[]	[]	[]
[]	[]	[]	[]	[]	[]
[]	[]	[]	[]	[]	[]
[]	[]	[]	[]	[]	[]
[]	[]	[]	[]	[]	[]
[]	[]	[]	[]	[]	[]
[]	[]	[]	[]	[]	[]
[]	[]	[]	[]	[]	[]
[]	[]	[]	[]	[]	[]
[]	[]	[]	[]	[]	[]
[]	[]	[]	[]	[]	[]
[]	[]	[]	[]	[]	[]