

FOODSTUFFS NORTH ISLAND RESPONSE TO SUBMISSIONS ON THE PRELIMINARY ISSUES PAPER

Key: Confidential material in this response has been removed. Its location in the document is denoted by [REDACTED].

- 1 Foodstuffs North Island Limited (**FSNI**) welcomes the opportunity to respond to submissions on the Commerce Commission's preliminary issues paper.
- 2 In the interests of time, FSNI has limited its response to the following submissions:¹
 - 2.1 Submission by the New Zealand Food & Grocery Council, dated 4 February 2021; and
 - 2.2 Submission by Consumer NZ, dated 4 February 2021.
- 3 Brief responses to the submissions listed above, and the particular points they make, are set out in the table below.
- 4 Confidentiality is sought in respect of the information in this response that is [highlighted] on the basis that it is commercially sensitive and valuable information which is confidential. Disclosure of the information would be likely to unreasonably prejudice the commercial position of FSNI.
- 5 FSNI asks to be notified if the Commission receives any request under the Official Information Act 1982 for the release of any part of the information in respect of which confidentiality is sought. FSNI also requests that the Commission seek and consider the views of FSNI as to whether that information remains confidential and commercially sensitive before it responds to such requests.

¹ FSNI expects that it will have the opportunity to discuss the views expressed in the other submissions on the preliminary issues paper over the course of the study (and FSNI reserves its position regarding the content of those submissions).

TOPIC	NEW ZEALAND FOOD & GROCERY COUNCIL (FGC)	CONSUMER NZ	FSNI RESPONSE
<p>Duopoly and market concentration</p>	<p>Central to the submission is the view that there is a supermarket duopoly (with a competitive fringe), and associated concerns regarding the level of concentration in the traditional supermarket markets.</p> <p>Places significance on the 2001 merger of Progressive and Woolworths.</p> <p>States that, in the absence of proof, consequent competitive harms should be assumed (rather than proof being required).</p>	<p>Has major concerns about the high level of perceived concentration in the sector and risks this has for consumers.</p> <p>Notes that New Zealand has a small, isolated economy with a high degree of market concentration in the grocery sector.</p> <p>Argues that the existing duopoly of Foodstuffs and Woolworths has been in place for 20 years with no credible challenger emerging.</p>	<p>FSNI disagrees with the characterisation of the markets for the supply or acquisition of groceries as a duopoly.</p> <p>Rather, as highlighted in its response to the preliminary issues paper,² FSNI faces competitive constraints to meet customer needs across a wide range of product categories and shopping "missions". Consumer shopping habits have changed over time and continue to change, which is resulting in increased competitive pressure on FSNI.</p> <p>Grocery mergers of the past took place at a time when the single "one stop shop" or "full shop" mission may have been an appropriate characterisation of how the grocery needs of a typical New Zealand household were best fulfilled. However, this characterisation no longer in fact applies.</p> <p>Customers undertaking smaller missions have a much larger range of grocery retailers from which to choose, certainly beyond those specialising in the one stop shop.</p> <p>Against the dynamic changes to consumer behaviour, characterising the New Zealand market as a duopoly (with associated assumptions of competitive harm) is misguided in terms of understanding the actual factors affecting competition for the supply and acquisition of grocery products.</p>

² See, for example, paragraphs 7 to 14 of the main body of FSNI's response.

TOPIC	NEW ZEALAND FOOD & GROCERY COUNCIL (FGC)	CONSUMER NZ	FSNI RESPONSE
<p>Meal kits and online shopping</p>	<p>States that the impact of online shopping has in some way enhanced the scope/power of the two major grocery retailers. States that smaller retailers do not have the ability to invest in establishing online offerings to compete with FSNI and Woolworths.</p> <p>Asserts that meal kits are likely to primarily appeal to a particular customer segment, delineated by socio-economic lines and geographic reach, rather than the mainstream, general population.</p>	<p>Highlights the cost of these services and asserts that they are more accessible to higher income households than to others. Does not see them providing a major source of competition to the two main supermarket chains. Cites research suggesting that most consumers use the supermarkets' online services rather than other retailers. States that competition is at the margins.</p>	<p>Both submissions materially understate the impact of meal kits and online shopping on competition for the supply and acquisition of groceries.</p> <p>As set out in FSNI's response to the preliminary issues paper:³</p> <ul style="list-style-type: none"> - Meal kits and online shopping impact customer behaviour in ways which extend beyond customers who actually purchase online. For example, using online tools to plan their shopping lists, comparing prices and deciding where to shop. - Online purchasing has led to the trends the industry has seen with regard to customer shopping missions, in particular the decrease in the full shop. In addition, the rise of the use of online platforms has enabled the development of other constraints on FSNI outside the traditional grocery offerings, including Uber Eats and TheMarket. - As with traditional bricks and mortar stores, online suppliers (including meal kits) are increasingly competing across the full range of the PQRS spectrum and targeting different customer segments/demographics. The assertion that online shopping and meal kits are limited to high income households overlooks the diversity of offerings both within meal kit providers and the array of online-only players and direct-to-consumer providers identified by FSNI.

³ See answer to question 13 in Appendix A of FSNI's response.

TOPIC	NEW ZEALAND FOOD & GROCERY COUNCIL (FGC)	CONSUMER NZ	FSNI RESPONSE
			FSNI's response to the preliminary issues paper highlights its competitive response to the trends described above. ⁴ Since FSNI must cater for all customers and is unable to price discriminate on the basis of the shopping mission a customer is on, any competitive response benefits all customers irrespective of whether they themselves purchase meal kits or groceries online.
Higher grocery prices	<p>The submission references:</p> <ul style="list-style-type: none"> - "preliminary for discussion" research which purports to show that New Zealanders pay a duopoly premium. - "numerous anecdotes" that New Zealand prices are higher than Australia. - 2014 research that food expenditure in New Zealand is among the highest in the world. 	<p>Highlights that Statistics NZ's Food Price Index shows fruit and vegetable prices increased 8.9 percent last year, while general inflation sat at 1.4 percent.</p> <p>Cites comparisons for Woolworths' private label brands sold at Countdown in New Zealand and Woolworths in Australia.</p>	<p>As set out in its response to the preliminary issues paper,⁵ FSNI seeks to, and is constrained to, price competitively at a North Island level and at every local market.</p> <p>FSNI reaffirms the risks involved with international price comparisons, highlighted to the Commission in its response to the preliminary issues paper.⁶</p>
Accommodating behaviour	Considers that accommodating behaviour may either have obvious intent, or may have implicitly evolved over time.	Believes accommodating behaviour is a major risk in the New Zealand market, particularly in regard to pricing.	FSNI confirms that it does not consider that there is accommodating behaviour between retailers in the New Zealand grocery sector.

⁴ See paragraph 13 of the main body of FSNI's response.

⁵ See paragraph 28 of the main body of FSNI's response.

⁶ See answer to question 20 in Appendix A of FSNI's response.

TOPIC	NEW ZEALAND FOOD & GROCERY COUNCIL (FGC)	CONSUMER NZ	FSNI RESPONSE
			<p>As set out in FSNI's response to the preliminary issues paper, there are a number of reasons why such behaviour is not occurring.⁷ Among other things, engaging in such accommodating behaviour is not in FSNI's interests due to competitive constraints.</p> <p>In terms of the examples of accommodating behaviour listed by FGC, FSNI comments as follows:</p> <ul style="list-style-type: none"> (a) Products: FSNI's product range in any category is driven by customer demand and workable competition from a <i>range</i> of retailers across the PQRS spectrum (not just Countdown).⁸ There is no conduct relating to products that could be said to be "accommodating" of Countdown. (b) Promotions: [REDACTED] (c) Price increases: FSNI's dealings with its suppliers (including pricing) reflect the need to remain competitive with Countdown and other retailers (not to accommodate any competitor). (d) Retailers seeking "margin compensation" for price competitiveness: As noted above, FSNI's dealings with suppliers reflect effective competition and involve no aspect that could be said to be accommodating of competitors.

⁷ See answers to questions 27 to 29 in Appendix A of FSNI's response.

⁸ See answer to question 3 in Appendix A of FSNI's response to the preliminary issues paper.

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			<p>(e) Use of data to conduct sophisticated analysis of rivals' behaviour: As discussed in FSNI's response to the preliminary issues paper,⁹ all data-gathering and monitoring is for the purpose of ensuring that FSNI's stores remain competitive, not to accommodate any competitors.</p> <p>(f) Loyalty programs: No accommodating behaviour.</p> <p>(g) Store locations: [REDACTED]¹⁰ Coordination or accommodating behaviours in relation to these decisions is next to impossible.</p> <p>(h) "Slotting fees": All terms are negotiated independently with suppliers, and there is no accommodating behaviour.</p>
<p>Entry and expansion</p>	<p>Asserts that buyer-power is being used to raise strategic barriers to entry and expansion by potential entrants. Asserts that numerous other strategic barriers limit entry and expansion.</p>	<p>Notes land-banking and supplier terms as examples of barriers to entry. Also highlights New Zealand's size and geographic location.</p>	<p>Barriers to entry are discussed extensively in FSNI's response to the preliminary issues paper.¹¹ In markets for retail groceries, FSNI's buying power is pro-competitive in that it allows FSNI to more effectively compete with Woolworths and other suppliers of groceries. FSNI does not use its buyer power to raise strategic barriers to entry by potential entrants or expansion by existing players.</p> <p>Regarding barriers to entry more generally, the comments in both submissions on this topic may well be applicable to a traditional full service bricks and mortar supermarket offering. However, as noted in its response to the preliminary issues paper,¹² FSNI's view is that for an online-only offering, the factors affecting entry and expansion are very different, with</p>

⁹ See answer to question 29 in Appendix A of FSNI's response.

¹⁰ See answer to question 27 in Appendix A of FSNI's response.

¹¹ See paragraphs 18 and 19 of the main body of FSNI's response, and the answers to questions 30 to 32 in Appendix A of the response.

¹² See paragraph 18 of the main body of FSNI's response.

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			<p>only some form of consolidation and distribution network required. In essence, entry simply requires a commitment of capital (a very different proposition to the property, regulatory and infrastructure issues faced by a traditional supermarket). As noted in FSNI's response to the preliminary issues paper,¹³ the shifting preference towards shorter, more convenience-based missions (which facilitates entry of this type) also lessens the competitive advantage of the one stop shop, and full format supermarkets can be [REDACTED]</p>
<p>Theories of buyer power harm</p>	<p>States that "traditional" competition policy and models have failed to recognise the full harm of buyer power. Asserts that practices squeeze supplier margins and reduce purchase prices below competitive market prices/total economic outputs.</p>	<p>Brings a focus to perishable agricultural products.</p> <p>Asserts there is a significant imbalance of bargaining power and constraints on suppliers' ability to negotiate due to supermarket concentration.</p>	<p>As noted in FSNI's response to the preliminary issues paper,¹⁴ even outside the categories where there is supplier concentration, suppliers have other sources of countervailing bargaining power available to them, including:</p> <ul style="list-style-type: none"> - The ability to sell to other retailers, meal kit providers or other commercial customers, or offer products direct to consumers. - The availability of a competing export alternative (FSNI competes with international retailers). - Aggregation of volumes, or sales knowhow (e.g. selling agents).

¹³ See paragraph 32 of the main body of FSNI's response.

¹⁴ See paragraph 25 of the main body of FSNI's response.

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			<p>The submissions also give inadequate weight to the literature and analysis by both the UK Competition Commission and the Australian Competition and Consumer Commission regarding the benefits of buyer power for consumers.¹⁵ Among other things, there is no genuine acknowledgement or analysis of the impact of suppliers' countervailing market power.</p>
<p>Relationships with suppliers</p>	<p>Describes a range of behaviour by large retailers as evidence of exploitation of suppliers.</p> <p>Describes a range of negative effects on both suppliers and consumers.</p>	<p>Asserts unfairness to suppliers, a lack of practical options to challenge the behaviours and an unwillingness on the part of suppliers to come forward.</p>	<p>As noted in FSNI's response to the preliminary issues paper,¹⁶ FSNI values its supplier relationships, invests time and endeavours to always act consistently with the Supplier Relationship Charter. Accordingly, FSNI is surprised by the allegations in the submissions, particularly given (as discussed below), the range of forums designed to allow suppliers (including through the FGC on an anonymous basis) to raise the issues the submissions allege occur on a systemic basis.</p> <p>Examples of investment in FSNI's supplier relationships highlighted in FSNI's response to the preliminary issues paper include:¹⁷</p> <ul style="list-style-type: none"> - regular all-supplier events at which FSNI provides FSNI strategic and operational updates in person and virtually with attendance typically in the range of 300 to 500 suppliers,

¹⁵ See section 14.5.4 of the ACCC's report on its inquiry into the competitiveness of retail prices for standard groceries, July 2008; and see for example the benefits discussed in paragraph 35 of the summary in the UKCC's report on its market investigation into the supply of groceries in the UK, April 2008.

¹⁶ See answers to questions 39 to 41 in Appendix A of FSNI's response.

¹⁷ See answer to question 41 in Appendix A of FSNI's response.

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			<ul style="list-style-type: none"> - monthly electronic supplier updates sharing developments in the business, - fortnightly meeting with the FGC Industry Relations Working Group covering any supplier issues and/or seeking input from the Working Group on FSNI developments. FSNI's participation in these meetings reflects its commitment to prevent exploitative behaviour and, as noted above, provide a forum for the FGC to raise issues of the type which it highlights in its submission on the preliminary issues paper, - executive and regular joint business plans with significant suppliers, - a complaint process, which has been agreed with the FGC, pursuant to which any supplier complaint can be escalated within the business to the GM, Merchandise, Chief Executive Officer or General Counsel,¹⁸ - attendance and presentation at the annual FGC conference, - participation and engagement in the Nielsen Retail Barometer Survey and Advantage and Coalface Survey conducted by independent parties, and - regular CEO and GM, Merchandise meetings with senior leaders in suppliers.

¹⁸ [REDACTED]

TOPIC	NEW ZEALAND FOOD & GROCERY COUNCIL (FGC)	CONSUMER NZ	FSNI RESPONSE
Private label and other vertical integration	<p>While acknowledging the potential for some consumer benefits, states that private label gives rise to issues around conflict of interest, misuse of information and exclusionary conduct (without appropriate safeguards).</p> <p>Asserts that supermarket power is being leveraged into other markets such as distribution and transport.</p>	<p>Urges the Commission to give particular attention to product categories where supermarkets' own brands are growing.</p> <p>Asserts a risk of branded suppliers being squeezed out leading to consumer harm and rising prices due to lack of supply. Views risks to supply-side diversity posed by the increasing role of private labels.</p>	<p>As with buyer power issues more generally, both submissions underestimate the consumer benefits of FSNI's private label offering. FSNI's perspective is supported by literature and analysis of the benefits of growth of private label products for consumers.¹⁹</p> <p>Ultimately, demand for FSNI's private label products (a large number of which are manufactured in New Zealand) is driven by consumers. In addition, the supply of private label products is an important way in which FSNI responds to the market power of major global and domestic suppliers.</p> <p>FSNI does not accept that it misuses supplier information or intellectual property in the development or sale of its private label offering (much of which is in fact supplied by branded suppliers which enables increased manufacturing efficiencies).</p>
Consumers' access to pricing information	<p>Focuses on impact on suppliers of promotions including funding obligations and other issues such as placement.</p>	<p>States that while supermarkets' advertising and websites provide some information, comparisons of supermarket offerings can be hindered by supermarkets' use of confusing pricing and promotion strategies. Asserts that inconsistent use of unit pricing also hinders comparisons and that frequent "specials" are a major factor hindering shoppers' ability to make informed choices.</p>	<p>As set out in FSNI's response to the preliminary issues paper:²⁰</p> <ul style="list-style-type: none"> - FSNI works to ensure its pricing, promotions and practices are pro-competitive, clear and transparent. - consumers have access to a large amount of information available to them about grocery products, including in relation to prices, quality and content. - FSNI believes consumers are well-informed about grocery options, and this supports a rigorously competitive environment.

¹⁹ See for example section 16 of the ACCC's report on its inquiry into the competitiveness of retail prices for standard groceries, July 2008.

²⁰ See answers to questions 42 to 44 in Appendix A of FSNI's response.

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			<ul style="list-style-type: none"> - FSNI has increased the use of unit pricing on products to help consumers compare pricing on different size products. If a product is discounted, the in-store price display will typically display both the discounted and previous price to allow consumers to assess the discount.
Loyalty programmes	Urges the Commission to look more closely at the role of loyalty programmes - stating they raise a number of competition, privacy and consumer protection issues.	Expresses concerns about the impact on the market and privacy issues.	<p>FSNI does not accept the assertion that New World's loyalty programmes give rise to any competition, privacy or consumer protection issues. As noted in FSNI's response to the issues paper, a loyalty programme of one kind or another is a key part of New World's history and brand positioning, with coupon books operating for decades. FSNI considers the scheme offers real benefits to consumers as well as the New World brand. From a competition perspective, having a loyalty programme is also not a prerequisite for any effective grocery competitor i.e. a need for a loyalty programme is not a material barrier to entry.²¹</p> <p>All personal information is used and collected in accordance with the Privacy Act 2020 and good practice privacy principles.</p>
COVID-19	Acknowledges that the pandemic sped up the growth trend of online shopping and notes a range of changes in consumer behaviour. Asserts that bulk buying by consumers during COVID-19 has enhanced supermarket market power.	Cites anecdotes that the growth of private label in the wake of COVID-19 lockdowns is associated with reduced brand availability.	As discussed in FSNI's response to the preliminary issues paper, COVID-19 has caused changes in the New Zealand grocery sector. However, FSNI considers that it is currently unlikely that changes will persist in the longer term and it is more likely that such changes will be transient (with the exception of an increase in online shopping, which was a trend pre-COVID-19 and which has accelerated as a result of COVID-19). ²²

²¹ See answer to question 48 in Appendix A of FSNI's response to the preliminary issues paper.

²² See answers to questions 16 and 17 in Appendix A of FSNI's response to the preliminary issues paper.

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			<p>FSNI rejects the suggestion that any increase in the availability of private label products to meet consumer needs during and following COVID-19 lockdowns was a deliberate strategy by FSNI to prejudice branded suppliers. Rather, it is more likely that any increase reflects demand from consumers for best value during uncertain economic times. Also at play was a lack of availability of supply of some branded products due to demand and logistics challenges.</p>