

COMMERCE ACT 1986: BUSINESS ACQUISITION

SECTION 66: NOTICE SEEKING CLEARANCE

Date: 21 June 2018

The Registrar
Competition Branch
Commerce Commission
PO Box 2351
Wellington

Pursuant to section 66(1) of the Commerce Act 1986 notice is hereby given seeking clearance of a proposed business acquisition.

Part A: Summary of Application

1. Executive Summary

- 1.1 Clearance is sought for the proposed acquisition by Goodman Fielder New Zealand Limited or an interconnected body corporate (**Goodman Fielder**) to acquire from Lion - Dairy & Drinks (NZ) Limited (**Lion**), assets related to Lion's business of manufacturing "Yoplait" branded yoghurt under licence from Sodima (the **Proposed Transaction**).
- 1.2 Goodman Fielder and Lion (together, the **Parties**) are both food and beverage companies in New Zealand. The relevant competitive overlap is in relation to yoghurt and dairy food products.
- 1.3 Goodman Fielder manufactures and distributes several New Zealand yoghurt brands. Its main brand is Meadow Fresh. Lion manufactures and distributes the Yoplait brand of yoghurt, under a long-term licensing agreement with Sodima. Lion's yoghurt business makes up a small part of its total business **[Redacted]**. The Proposed Transaction will allow Goodman Fielder to continue to expand its range and diversify its product offering in the fast-growing yoghurt market in New Zealand. It will also position it to better compete against the market leader, Fonterra Brands.
- 1.4 The Commission has previously considered this market. In accordance with these previous decisions, the Parties submit the relevant market is the national market for the manufacture and wholesale supply of yoghurt and dairy food. In 2004, the Commission cleared a similar transaction aggregating the Meadow Fresh and Yoplait brands.
- 1.5 Since those decisions, the yoghurt and dairy food market has seen a number of new entrants resulting in a more diverse and competitive market. Market shares of the three more long-standing brands Yoplait, Meadow Fresh and Fresh 'n Fruity, have been static or in decline, while newer brands have shown strong growth. With a large number of manufacturers and brands, offering a wide range of differentiated products, consumers readily switch between products and supermarkets wield even stronger countervailing buyer power than before.
- 1.6 Given these changes, the Applicant considers that the reasons for the Commission's clearance of the combination of these brands in 2004 apply even more so today.

Strong existing competition

- 1.7 Fonterra's brand Fresh 'n Fruity is the largest brand by some margin and has high brand equity. It will continue to act as a strong competitive constraint on the merged entity. In addition, Epicurean Dairy (owner of *The Collective* brand), a new entrant since the Commission's previous decision, has grown quickly and is a strong and dynamic competitor. Indeed **[Redacted]**. It has recently announced plans to continue to significantly expand its business and manufacturing facilities following a recent capital injection from Pencarrow Private Equity. There are also multiple other suppliers, both well established and new entrants, that have gained market share, and will continue to react to evolving consumer trends.

Low barriers to expansion and entry

- 1.8 There are several competitors in the market with the ability to expand their current production and produce additional products and brands to compete with the brands of Lion, Fonterra and Goodman Fielder. In recent years, supermarkets have continued to allocate more shelf space to smaller competitors in response to consumer demand for a wide array of options, which in turn has resulted in faster growth by those brands.

High degree of countervailing market power

- 1.9 The two supermarket chains are responsible for selling more than **[Redacted]** of yoghurt and dairy food, with an estimated **[Redacted]**¹ of sales being products on promotion. This means that being allocated promotional slots by supermarkets is absolutely critical to the merged entity's financial performance. Any attempt to raise prices post-acquisition would readily be defeated by the supermarkets switching promotional slots and / or shelf space to competitors. **[Redacted]**.

Low risk of co-ordinated market power

- 1.10 The following factors will continue to operate in the market to prevent the exercise of coordinated market power:
- (a) there is no transparency of wholesale prices;
 - (b) all suppliers have highly differentiated products;
 - (c) the category is constantly evolving, with new products frequently being introduced, and the value of the yoghurt category continues to grow, making coordination difficult;
 - (d) as Fonterra is vertically integrated up to farm gate, it will always have a different cost basis to the merged entity;
 - (e) the countervailing power of the supermarkets would undermine any attempt by the parties to coordinate on price; and
 - (f) there has been significant entry and expansion in recent times, and those newer and smaller competitors could disrupt any attempts at coordination by expanding output further.

No substantial lessening of competition

- 1.11 Accordingly, for the reasons summarised above, the Parties are confident that the Proposed Transaction will not give rise to a substantial lessening of competition in the national market for the manufacture and wholesale supply of yoghurt and dairy food.

¹ **[Redacted]**

Part B: The Parties

2. The Acquiring Party

2.1 The party seeking clearance is Goodman Fielder.

2.2 Contact details for Goodman Fielder:

<i>Address</i>	Goodman Fielder New Zealand Limited 2/8 Nelson Street Auckland 1010
<i>Contact person</i>	Simon Smith
<i>Email Address</i>	[Redacted]
<i>Telephone</i>	[Redacted]
<i>Website</i>	www.goodmanfielder.com

2.3 Please direct all correspondence and notices for Goodman Fielder to:

<i>Address</i>	Bell Gully Barristers and Solicitors PO Box 4199 Auckland 1140
<i>Attention</i>	Torrin Crowther / Glenn Shewan
<i>Email Address</i>	torrin.crowther@bellgully.com glenn.shewan@bellgully.com
<i>Telephone</i>	+64 9 916 8621 / +64 9 916 8726

2.4 Goodman Fielder is well-known to the Commission as a food company across Australia, New Zealand and Asia Pacific. It was incorporated in New Zealand in 1985 and currently has 13 manufacturing sites and 1800 employees around New Zealand. Goodman Fielder produces a wide range of dairy, baked and grocery items in New Zealand, such as:

- (a) bread (Quality Bakers, Mackenzie, Vogels and Molenberg);
- (b) dairy (Activate, Chesdale, Meadow Fresh, Naturalea, Puhoi Valley);
- (c) baking items (Edmonds and Ernest Adams); and
- (d) spreads (Olivani and Meadow Lea).

2.5 Goodman Fielder's yoghurt business includes the following brands:

- (a) Meadow Fresh;
- (b) Activate probiotic;
- (c) Naturalea;
- (d) Kalo; and
- (e) Puhoi Valley.

2.6 Further information about the New Zealand Goodman Fielder business is available at: www.goodmanfielder.com/countries/new-zealand/

3. The Transferring party

3.1 The transferring party is Lion.

3.2 Contact details for Lion:

<i>Address</i>	Level 7, 68 York Street, Sydney, NSW 2000, Locked Bag 14, Royal Exchange Sydney, Sydney, NSW 1225, Australia
<i>Contact person</i>	Kylie Sturtz
<i>Email Address</i>	[Redacted]
<i>Telephone</i>	[Redacted]
<i>Website</i>	www.lionco.com

3.3 Please direct all correspondence and notices for Lion to:

<i>Address Attention</i>	Troy Pilkington / Sam Holmes Russell McVeagh Vero Centre 48 Shortland Street PO Box 8 Auckland
<i>Email Address</i>	troy.pilkington@russellmcveagh.com / samuel.holmes@russellmcveagh.com
<i>Telephone</i>	+64 9 367 8108 / +64 9 367 8077

3.4 Lion is a large food and beverage company in Australia and New Zealand. Lion's products are produced across 34 sites, with 6,700 employees. In New Zealand, Lion focuses on alcoholic and non-alcoholic beverages, including:

- (a) beer (Speights, Steinlager, Lion Red, Mac's, Corona, Guinness);
- (b) cider (Isaac's cider, Mac's cider, Speight's cider);
- (c) wine (Lindauer, Wither Hills, Huntaway, The Ned);
- (d) spirits and RTDs (Smirnoff, 42 Below, Appleton Estate, Gordon's, Baileys); and
- (e) non-alcoholic drinks, including adult soft drinks (Hopt, Mac's) and dairy alternatives (Vitasoy).

3.5 Lion's yoghurt business makes up only **[Redacted]** of the Lion group's total New Zealand revenue (including Lion's alcohol businesses). It only sells yoghurt under the Yoplait brand. Lion manufactures and distributes Yoplait in New Zealand and Australia under a long-term licensing agreement with Sodima **[Redacted]**. (This transaction relates only to New Zealand.)

3.6 Further information about the New Zealand Lion business is available at: www.lionco.com

Part C: The Transaction

4. The Transaction

4.1 The Proposed Transaction for which clearance is sought is the acquisition by Goodman Fielder of the assets related to Lion's business of manufacturing "Yoplait" branded yoghurt under licence from Sodima.

4.2 [Redacted]

4.3 [Redacted]

5. Rationale

5.1 [Redacted]

5.2 [Redacted]

5.3 [Redacted]

5.4 [Redacted]

5.5 [Redacted]

6. Transaction document

6.1 A copy of the Business Purchase Agreement, and a draft of the Sodima Yoplait NZ Licence Agreement are both attached as **Annex 4**.

7. Clearance sought

7.1 This application seeks clearance for Goodman Fielder (or an interconnected body corporate) to acquire from Lion, assets related to Lion's business of manufacturing "Yoplait" branded yoghurt under licence from Sodima. As above, the relevant transaction documents are attached as **Annex 4**.

8. Global filings

8.1 There are no global filings involved with the Proposed Transaction.

Part D: Industry Background

9. Overview of yoghurt industry

- 9.1 The Proposed Transaction relates to the yoghurt and dairy food industry in New Zealand.
- 9.2 Yoghurt and dairy food have the same primary ingredients, but dairy food is not cultured. Both products are predominately packaged as single units of between 100gm to 250gm, 6 packs of single units or 1kg packs. CalciYum, manufactured by Anchor, is an example of a dairy food.
- 9.3 In *Decision 542*², the large majority of yoghurt was plain or fruited, and produced under the three brands: Fresh 'n Fruity, Meadow Fresh and Yoplait. The remaining volume (approximately 10%), was termed 'health yoghurt', and produced mainly by smaller players.
- 9.4 While the Fresh 'n Fruity, Meadow Fresh and Yoplait brands remain popular, competing brands now account for a significantly higher proportion of overall sales. For example, brands such as The Collective and Gopala, both which were not previously present in the market, now hold market shares (by value) of **[Redacted]** and **[Redacted]** respectively.
- 9.5 Supermarkets are responsible for selling approximately **[Redacted]** of yoghurt and dairy food. Gaining promotional slots is key in this industry, with an estimated **[Redacted]**³ of sales being products on promotion.

10. Market participants

Fonterra

- 10.1 Fonterra Co-operative Group Limited (**Fonterra**) is a New Zealand-headquartered co-operative dairy company comprising of two main businesses:
- ingredients, which produces and internationally markets dairy commodities, such as milk powders, butter and cheese and value-added dairy ingredients. It also carries out the collection and processing of milk; and
 - consumer dairy products, which operates in 40 countries internationally under the name New Zealand Milk. It has 35 manufacturing sites across New Zealand, Australia, the Americas, Asia and the Middle East.
- 10.2 Fonterra's yoghurt products are sold under the following brands in New Zealand:

- Fresh 'n Fruity;
- Anchor (including CalciYum);
- De Winkel;
- Piako; and
- Symbio.



² Commerce Commission, *Decision 542: Fonterra Co-operative Group Limited and National Foods Limited* (9 December 2004).

³ **[Redacted]**

Epicurean Dairy Co. Limited

10.3 Epicurean Dairy Co. Limited (**Epicurean Dairy**) manufacturers and supplies yoghurt across New Zealand under the brands:

(a) The Collective

- (i) gourmet yoghurt (flavoured probiotic yoghurt);
- (ii) 'Straight up' yoghurt (natural probiotic yoghurt);
- (iii) greek yoghurt;
- (iv) Kefir 13 (fermented probiotic yoghurt);
- (v) pourable yoghurt;
- (vi) 'Suckies' yoghurt pouches; and



(b) Moogurt

- (i) single yoghurt pouches (70g) or packs of 5 (350g) in Berry, Banana, Strawberry, Apricot Custard, Peach and Caramel.

10.4 Epicurean Dairy has proven it is a strong competitor in the yoghurt market, with a larger market share (by value) at **[Redacted]**, than established brand Meadow Fresh brand, at **[Redacted]**. Its growth looks to continue with recently announced plans to launch its products in Europe in 2019 and expand further in the UK after Pencarrow Private Equity took a 39% stake in the company. As part of that capital injection, Epicurean Dairy has announced plans to undertake substantial new investment at its Auckland manufacturing plant, enabling it to increase production and launch new products in the New Zealand market.

Gopala

10.5 Gopala manufactures yoghurt, lassi, paneer and ghee using milk from New Zealand suppliers. Gopala specialises in the production of pure, natural dairy products. All its products are GE Free and 100% Vegetarian.⁴

10.6 Gopala's yoghurt portfolio consists of 750g tubs of natural yoghurt including standard, full cream, low fat, and 'thick & creamy'.

*The Dairy Culture Company Limited*

10.7 The Dairy Culture Company Limited (**The Dairy Culture Co.**) sells yoghurt through New Zealand under the "Cyclops" brand. The Cyclops brand has been sold in New Zealand since being founded in Canterbury in 1988⁵, and its range includes the following products:

- (a) Natural probiotic yoghurt (375g or 800g pots);
- (b) Authentic Greek Fruit Toppers (400g pots);
- (c) Organic Plain & Creamy (400g pots); and



⁴ <http://gopala.co.nz/>

⁵ https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10830278

(d) Bliss yoghurt (1kg pots).⁶

10.8 The Dairy Culture Co has achieved material shelf-facing in supermarkets, as demonstrated in the picture below.⁷



BioFarm

10.9 Biofarm Products Limited (**BioFarm**) is an organic farm that produces both milk and organic yoghurt with biodynamic methods. It specialises in producing natural foods with nutritional benefits, being the first company in New Zealand to supply organic dairy products to mainstream supermarkets. Biofarm's range of yoghurt products is available nation-wide and includes 1 litre plastic bottles and 500g Ecolean pouches of organic yoghurt.



Raglan Coconut Yoghurt

10.10 Raglan Coconut Yoghurt produces coconut yoghurt in Raglan on the West Coast of New Zealand. It distributes its products throughout New Zealand, Australia, Singapore and Hong Kong.⁸



10.11 Raglan Coconut Yoghurt products are all probiotic, dairy-free and refined sugar-free. Its range includes coconut yogurt (natural and flavoured) in 400ml and 700ml glass jars, and Little Yoghi coconut yoghurt pouches.

Cathedral Cove Naturals

10.12 Cathedral Cove Naturals started on an organic macadamia orchard in Hahei, in the Coromandel, New Zealand. It now produces coconut yoghurt and breakfast cereals out of a new purpose-built manufacturing facility operating in Auckland. Its products are paleo, vegan, dairy free and gluten free. Cathedral Cove's Naturals product range includes natural and flavoured coconut yoghurt in 210g and 500g glass jars.⁹



The Coconut Collaborative

10.13 The Coconut Collaborative produces coconut yoghurt and distributes it in supermarkets throughout New Zealand. Its coconut yoghurt comes in 300g pots in an array of flavours.¹⁰



⁶ <http://www.thedairycultureco.com/>

⁷ Taken at Countdown Greenlane on 20 May 2018.

⁸ <http://raglancoconutyoghurt.co.nz/>

⁹ <https://eatwellbewell.co.nz/>

¹⁰ <https://coconutcollab.co.nz/>

Clearwaters Organic Dairy Co

- 10.14 Clearwaters Organic Dairy Co (**Clearwaters**), established 14 years ago, is based at an organic dairy farm in South Canterbury where it manufactures a range of yoghurt products, including Natural Cream Top Yoghurt, Topless Yoghurt (Fat Free), Cream Top Apple & Cinnamon Yoghurt, and Cream Top Honey Yoghurt in 300g, 700g and 2kg pack sizes.¹¹ Its products are stocked in a range of supermarkets and specialist grocery stores.



Doctors Choice

- 10.15 Doctors Choice Bio Yoghurt is produced by BioFoods Ltd (**BioFoods**) in Christchurch. BioFoods specialises in making probiotic yoghurt. Its products include dairy-free coconut yoghurts, as well as yoghurt made from cow and goat milk. The products are stocked through New Zealand in health stores and supermarkets.¹²



Other yoghurt manufactures and suppliers

- 10.16 There are a wide range of other suppliers, both manufactured in New Zealand and imported, including:

- (a) Good Boost Co.;¹³
- (b) Clevedon Buffalo Co.;¹⁴
- (c) Crescent Dairy Co.;¹⁵
- (d) Zenzo;¹⁶
- (e) Alpro Soya;¹⁷
- (f) Kingland;¹⁸
- (g) Yocomo Island Style Yoghurt;¹⁹
- (h) Cocowow;²⁰
- (i) Co Yo;²¹
- (j) Zorganic;²²
- (k) Wicked Sister;²³
- (l) Puka;²⁴



¹¹ <http://www.clearwaters.co.nz/our-products>

¹² <http://www.biovog.co.nz/>

¹³ <https://www.goodboostco.co.nz/>

¹⁴ <https://www.clevedonbuffalo.co.nz/>

¹⁵ <https://crescentdairyco.co.nz/collections/dairy-range>

¹⁶ <https://www.zenzo.co.nz/>

¹⁷ <https://www.realfoods.co.nz>

¹⁸ <https://www.kingintl.com.au/>

¹⁹ <http://www.yocomo.co.nz/>

²⁰ <http://www.cocowow.co.nz/>

²¹ <http://coyo.com/nz/>

²² <https://www.zanyzeus.co.nz/>

²³ <http://www.wickedstister.com.au/>

²⁴ <http://pucka.co.nz/>

- (m) Meredith Dairy Yoghurt;²⁵
- (n) Mahoe Farmhouse Yoghurt;²⁶
- (o) Nomoo;²⁷ and
- (p) Vaalia.²⁸

11. Yoghurt and dairy foods retailers

11.1 The vast majority of retail yoghurt sales are made through Progressive Enterprises (Countdown, Super Value and Fresh Choice) and Foodstuffs (New World and Pak 'n Save) supermarkets. For example, **[Redacted]** of Lion's yoghurt sales are to either Progressive Enterprises or one of the Foodstuffs entities, while the Goodman Fielder figure is approximately **[Redacted]**.

11.2 **[Redacted]**

11.3 **[Redacted]**

11.4 **[Redacted]**

12. Market trends

Previous Commission consideration

12.1 The Commission has previously considered the market for these products in New Zealand in *Decision 459 (2002)*²⁹ and *Decision 542 (2004)*³⁰. The Commission declined clearance in 2002 (for a merger of the Fresh 'n Fruity and Meadow Fresh brands), but granted clearance in its later decision in 2004 for Fonterra to acquire up to 100% of the shares in National Foods (giving rise, under the then ownership structures, to a merger of the Yoplait and Meadow Fresh brands). The reasoning in *Decision 542* is therefore highly relevant to the Proposed Transaction (as expanded upon below).

Market developments since Decision 542

12.2 In *Decision 542*, the Commission found that yoghurt and dairy food products were differentiated by packaging, price, product innovation and strong branding. The Parties agree these factors still play a significant role in the market with new entrants using these factors to quickly increase their sales volumes.

12.3 Packaging is used by suppliers to differentiate their brands from others. When the Commission previously considered this market, 6-packs and 1kg tubs were the most common, and most popular, formats. In recent years, single serve pottles, pouches and medium to large containers have all risen in popularity as being more suitable for many consumers' lifestyles. For instance, there has been a shift away from 6 and 12 packs of pottles for children (with a **[Redacted]** decrease in value share in the past year alone³¹), and towards pouches, which has been an area of significant growth for the multiple suppliers providing this format. Pouches now account for **[Redacted]** of 'kids' yoghurt and close to **[Redacted]** of the total market. Large tubs have remained popular, illustrated by a **[Redacted]** increase in value share in the past year.³²

²⁵ <http://meredithdairy.com/products.html>

²⁶ <http://www.mahoecheese.co.nz/yoghurt/>

²⁷ <http://www.nomoo.co.nz/>

²⁸ <http://www.vaalia.com.au/>

²⁹ Commerce Commission, *Decision 459: National Foods Limited and New Zealand Dairy Foods Limited* (22 March 2002).

³⁰ Commerce Commission, *Decision 542*.

³¹ **[Redacted]**

³² **[Redacted]**

- 12.4 Demand is price sensitive, with an estimated **[Redacted]**³³ of yoghurt sold on promotion. Consumers are generally open to switching from their preferred brand to others on promotion. The short shelf life means the promotional uplift is overwhelmingly from consumers substituting away from other brands, rather than stockpiling when a favoured brand is on promotion, further enhancing the ability of supermarkets to use promotional slots to drive sales to a particular brand.
- 12.5 Market participants increasingly use product innovation to differentiate their products. For example, medium to large tubs of greek, plain and unsweetened yoghurts have increased in popularity since 2004, as have lower-sugar options. Similarly, non-dairy yoghurts, such as coconut yoghurts, have been successfully introduced to meet consumer demand for new options. Consumers have also driven significant growth with demand for single serve and medium size gourmet products, as well as pouches of yoghurt. This reflects a change in consumer preferences over time, away from 'large corporate' food and beverage brands and towards smaller, more 'niche' brands that reflect different qualities and characteristics, such as local provenance or greater health and wellbeing benefits. These changes in consumer tastes have accelerated over time and now provide opportunities for market entry and expansion by a wide range of suppliers offering alternative product choices. This has resulted in an innovative, disruptive and fast-growing range of newer competitors.
- 12.6 Specifically, the result of these market changes has been a reduction in market share of Fonterra, Lion and Goodman Fielder brands, and a substantial increase in share of other manufacturers, Epicurean Dairy in particular. This is demonstrated in **Figure 1** below, which shows market shares of the main competitors (by value) over the past 10 years.³⁴

[Redacted]

- 12.7 Product innovation has largely been driven by new participants in the market, as they have introduced products and grown their brands. These new brands bring new products, with different attributes, such as different formats, health claims, flavours and price points. This has resulted in a broader range of products for consumers to choose between, which has resulted in a decline in the more traditional formats and flavours, and a move towards these new alternatives. Indeed, over the last three years, Epicurean Dairy and Gopala have grown by **[Redacted]** and **[Redacted]** respectively³⁵, while the recent growth of coconut yoghurt suggests some switching by consumers of dairy yoghurt, seen by some as a healthier alternative. The broad array of products available is illustrated in the photos below, showing the full selection of yoghurt on offer on supermarket shelves.³⁶

³³ **[Redacted]**

³⁴ **[Redacted]**

³⁵ **[Redacted]**

³⁶ Goodman Fielder – New World, Stonefields store.



Part E: Relevant Markets

13. Market definition

- 13.1 The Parties have overlapping sales in the market for the manufacture and wholesale supply of yoghurt and dairy food.
- 13.2 After speaking with industry participants during its investigation in *Decision 542*, the Commission found it appropriate to use the term “dairy food” as opposed to term “dairy desserts”, as used in *Decision 459*, and so concluded that the relevant market was the market for the manufacture and wholesale supply of yoghurt and dairy food in New Zealand.
- 13.3 The Parties submit that this definition remains appropriate. As set out below, the rationale for the Commission’s previous market definition has not changed, although the variety of products competing in this market has expanded.

Product market

- 13.4 As set out above, in response to recent market trends consumers can choose from a broad range of products with varying attributes, from different flavours to formats.
- 13.5 In *Decision 542*, the Commission excluded homemade yoghurts and other cultured products.³⁷ There was also discussion in past decisions in regards to a range of products that can be put to similar use as yoghurt or dairy food, although they were ultimately excluded from the market.³⁸ For example:
- (a) drinkable yoghurt products and pre-packages smoothies;
 - (b) dairy and non-dairy snacks;
 - (c) cream based products (sour cream, crème fraiche, cream cheese, etc.); and
 - (d) dairy and non-dairy desserts (frozen yoghurt, ice cream, custard-based desserts, etc.).
- 13.6 The Parties consider that there is a degree of substitution with these products, but no competition issues on any definition, so have excluded these from their definition of the market for the purposes of this application.
- 13.7 In relation to dairy foods, the Parties submit that the Commission’s conclusion in *Decision 542* is still relevant. Due to the high supply-side substitutability, it is appropriate for the purposes of the competition analysis to treat yoghurt and dairy food as being one market³⁹ (although this does not affect the competition analysis to a material extent).

Geographic market

- 13.8 In both *Decision 459* and *Decision 542*, the Commission concluded that as all major suppliers of yoghurt supplied nationally, the relevant geographic market was national.⁴⁰ This remains appropriate.

³⁷In *Decision 542*, the Commission revisited its decision in *Decision 459*. It found insufficient evidence to reverse its previous assessment. In *Decision 459*, the Commission determined that homemade yoghurt was not part of the same market as fresh yoghurt as it exhibited different characteristics on both the demand and supply side, and although it did consider there was some substitution, it was only at the margins [*Decision 542*, at 48-51].

³⁸ *Decision 542*, at [46].

³⁹ *Decision 542*, at [61].

⁴⁰ *Decision 542*, at [66].

Part F: Competitive Assessment

Overview of competitive effects

14. Introduction

14.1 The Proposed Transaction will not substantially lessen competition in the relevant market.

- (a) Fonterra, in particular its brand Fresh 'n Fruity, will provide a strong and vigorous competitive constraint on the merged entity. Epicurean Dairy, and a broad range of other competitors will provide further constraint as product offerings in the market continue to expand.
- (b) With the vast majority of products sold through supermarkets while on promotion, supermarkets impose a high degree of countervailing power on suppliers which would prevent the merged entity raising prices above competitive levels.
- (c) Barriers to entry and expansion are low, as illustrated by the number of new entrants into the market since the Commission last considered the market. Established suppliers will also be capable of expanding their product range and volume in order to compete more directly with the merged entity should prices of the merged entity's products increase.
- (d) The merged entity would be prevented from exercising coordinated market power with a range of different sized suppliers supplying highly differentiated products, no transparency of wholesale prices (rendering any possible price coordination difficult), the market being highly competitive, and the supermarkets having the ability to impose countervailing power.

15. The counterfactual

15.1 Absent the Proposed Transaction, Goodman Fielder will continue to manufacture and supply yoghurt and dairy foods, and will pursue growth options as they present. Fonterra will likely continue to hold a large share of the market with its brand Fresh 'n Fruity while a range of other competitors will continue to develop and expand their offerings.

15.2 The Applicant understands that Lion will separately provide a document setting out its counterfactual.

16. Market shares

16.1 A summary table of market shares by value in the total yoghurt and dairy food market sold through supermarkets is set out in **Table 1**.

Table 1: Market shares (by value) for total yoghurt market	
Manufacturer	Market share % (value)
Lion	[Redacted]
Goodman Fielder	[Redacted]
Combined Entity	[Redacted]
Fonterra	[Redacted]
Epicurean Dairy	[Redacted]
Gopala	[Redacted]
Others (BioFarm, Cyclops, etc.)	[Redacted]

Total	[Redacted]
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[Redacted]

- 16.2 The above table indicates that the merged entity would have a market share of **[Redacted]** by value. While this is outside the Commission's concentration indications (given that the three largest firms post-transaction will account for greater than 70% combined market share) it is not at a level that is likely to give rise to unilateral effects.
- 16.3 A table showing market shares (by value) of each brand for the total yoghurt market is set out at **Table 2**.

Table 2: Market shares by brand (by value) for total yoghurt market (19/03/17 – 18/03/18)			
Manufacturer	Market share % (value)	Brand	Market share % (value)
Lion	[Redacted]	Yoplait	[Redacted]
Goodman Fielder	[Redacted]	Meadow Fresh	[Redacted]
		Puhoi Valley	[Redacted]
		Naturalea	[Redacted]
Fonterra	[Redacted]	Fresh 'n Fruity	[Redacted]
		Anchor	[Redacted]
		Piako	[Redacted]
		De Winkel	[Redacted]
		Symbio	[Redacted]
Epicurean Dairy	[Redacted]	The Collective	[Redacted]
		Moogurt	[Redacted]
Gopala	[Redacted]	Gopala	[Redacted]
Other (BioFarm, Cyclops, etc.)	[Redacted]	Other (BioFarm, Cyclops, etc.)	[Redacted]

Total	[Redacted]	[Redacted]
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16.4 The above table shows the large number of brands under which yoghurt products are sold in the market. Both Goodman Fielder and Fonterra have developed and / or acquired additional brands as a competitive response to the rising competition across the board from new, vigorous entrants. Despite that, The Collective has managed to grow its brand to have higher value share than the long established Meadow Fresh brand (and not far behind Yoplait).

Strong existing and emerging competition

16.5 As set out above, competitors in the yoghurt and dairy food market compete with each other through packaging, pricing promotions, product innovation, and branding. The wide range of products now available across the market allows consumers to easily switch between products, and brands, often depending on what is on promotion at the time. The result of this is a highly competitive market. **Figure 2** below illustrates just some of the options available to consumers, with a selection of products available on the Countdown website (as of 12 June 2018), ordered by non-promotional price per 100G/ML (with competitors to Goodman Fielder/Lion shaded).

Figure 2

Gopala Natural Yoghurt Tub 750g  \$3.29 \$0.44/100G	Meadow Fresh Yoghurt Tub Boysenberry 1kg  \$5.00 \$0.50/100G	Fresh N Fruity Yoghurt 6pk Apricot 150g pottles  \$4.90 \$0.54/100G	Fresh N Fruity Simply Strawberry Yoghurt Tub 1kg  \$5.50 \$0.55/100G	Dewinkel Yoghurt Carton Plain Unsweetened 1kg  \$5.50 \$0.55/100G	Yoplait Yoghurt Tub Mixed Berries 1kg  \$5.99 \$0.60/100G	Meadow Fresh 6pk Creamy Berries 125g  \$4.60 \$0.61/100G
Yoplait Tub Greek Style Blueberry 1kg  \$6.00 \$0.60/100G	Biofarm Organic Wild Apple Bottle 1 litre  \$6.90 \$0.69/100ML	Fresh N Fruity Yoghurt Greek style plain 1kg  \$7.00 \$0.70/100G	Yoplait Yoghurt 6pk Berries 125g pottles  \$5.50 \$0.73/100G	Anchor Protein Plus Yoghurt Tub Plain 950g  \$7.00 \$0.74/100G	Anchor Uno Smooth Tub Mixed Berry 500g  \$3.80 \$0.76/100G	Yoplait 2 X Protein Yoghurt Tub Greek style natural 900g  \$6.80 \$0.76/100G
The Collective Kefir Pourable Yoghurt Boysenberry bottle 700ml  \$5.90 \$0.84/100ML	The Collective Greek Style Yoghurt Tub Just Greek 900g  \$7.80 \$0.87/100G	Cyclops Yoghurt Tub Probiotic Thick & Creamy 800g  \$6.99 \$0.87/100G	Meadow Fresh Kalo Yoghurt Tub Greek Berries 800g  \$7.00 \$0.88/100G	The Collective Straight Up Yoghurt Tub Boysenberry 900g  \$8.00 \$0.89/100G	Cleanwaters Yoghurt Tub Apple & Cinnamon 700g  \$7.50 \$1.07/100G	The Collective Tub Blueberry 500g  \$5.50 \$1.10/100G
Piako Gourmet Yoghurt Tub Mixed Berry 500g  \$5.99 \$1.20/100G	Puhoi Valley Yoghurt Tub Devine Berries 450g  \$6.30 \$1.40/100G	Moogurt Yoghurt Pouch Banana 70g  \$1.35 \$1.93/100G	Yoplait Petit Miami Pouch Strawberry & Beetroot 70g  \$1.99 \$1.99/100G	Clevedon Valley Buffalo Yoghurt Passionfruit 450g  \$9.99 \$2.22/100G	Cathedral Cove Coconut Yoghurt Natural Jar 500g  \$11.50 \$2.23/100G	Raglan Coconut Yoghurt Strawberry & Acai 400ml  \$9.00 \$2.25/100ML

Source: Countdown website (shop.countdown.co.nz)

16.6 The above table illustrates the array of new manufacturers and brands that will continue to constrain the merged entity. Even setting aside the more recent entrants, the merged entity will continue to face strong competition from Fonterra with its Fresh 'n Fruity brand and other brands such as Anchor. Both Parties currently compete vigorously against Fresh 'n Fruity and Fonterra's other brands, with supermarkets playing each of Meadow Fresh and Yoplait off against Fresh 'n Fruity on price and for promotional slots. This competition would remain post transaction and pose a considerable competitive constraint on the merged entity: if the merged entity was to increase prices, consumers would readily switch to Fonterra's products while supermarkets would reassign promotional slots and shelf space in response to any attempt to increase price. The willingness of consumers to substitute to other brands in response to price means there is no real cost to the

supermarkets from relocating slots away from the merged entity, if that was needed to impose pricing constraint. Such a threat is highly credible.

- 16.7 Quite separately, any price increase would further accelerate the substitution already occurring to new brands of yoghurt.
- 16.8 In this regard, the Parties submit there is substantial supply and demand-side substitution between categories. As such, there is no basis on which to define separate markets for 'gourmet' or other yoghurt products.
- (a) On the demand side, the market is characterised by a wide array of brands with products with a range of characteristics and price points. Consumers can and do switch between products and will do so in response to price changes, marketing and preferences.
- (b) On the supply side, the difference between products essentially comes down to the level of fat and protein, which can be tweaked to produce different characteristics (e.g. thickness, flavouring, creaminess, etc.). Manufacturers can use a single line to produce multiple products with various attributes by simply tweaking certain production methods, and often do so across a single brand to appeal to different tastes. For example, [Redacted].
- 16.9 For example, Yoplait has introduced a whole range of 'greek style' yoghurt available in pottles, medium, and large tubs. Fresh n' Fruity also offers a large tub of 'greek style' yoghurt. The Meadow Fresh brand also has a 'greek-style' option. Furthermore, Goodman Fielder has increased its yoghurt portfolio with such brands as Kalo, which markets as 'authentic greek' yoghurt. The products offered by these brands are all very similar to that provided by Epicurean Dairy with its 'just greek' yoghurt. Similarly, there are a range of products marketed as 'vanilla', 'natural' and 'unsweetened' from each of these brands, which also all have very similar characteristics.
- 16.10 Therefore, it would be arbitrary to draw a distinction between sets of yoghurt products, and place them in different markets.
- 16.11 In addition to demand side substitution, the Parties submit that supply-side substitution is a further reason why an overall market is appropriate. There are several competitors in the market that could develop a new offering in response to perceived market opportunity following the Proposed Transaction.
- 16.12 For example, Epicurean Dairy successfully entered the market with its range of gourmet yoghurts, but has expanded its product offering to include large pots of plain and fruited yoghurts, pouring probiotic yoghurt and kids yoghurt pouches, as these areas have grown in popularity. On this basis, Epicurean Dairy could readily expand further into additional sizes and formats. Such expansion has, for example, been undertaken by other yoghurt suppliers overseas that similarly initially entered and expanded into the yoghurt market by focusing on more greek-style / probiotic yoghurts, before expanding their focus. For example, while initially entering and expanding through a focus on greek-style yoghurt, in 2017 Chobani began selling "smooth" style yoghurt in the USA:

The company that essentially sold America on thicker, strained yogurt has just released a new line called Smooth, an utterly normal, very Yoplait-ish set of five flavored yogurts.⁴¹

- 16.13 Given its presence across the yoghurt category, its manufacturing facilities, and relationships with supermarkets in NZ, Epicurean Dairy, Gopala and others, could all readily make a similar expansion if any market opportunities were to arise (including being sponsored by the supermarkets to make that expansion if the supermarkets regarded that to be in their interests).

⁴¹ <http://www.grubstreet.com/2017/06/chobani-introduces-its-first-conventional-non-greek-yogurt.html>

16.14 Manufacturing kit is widely available on second-hand markets globally. Further, the packaging could be contracted out to a third party, if this was seen as being more cost effective.

Low barriers to entry / expansion

16.15 In *Decision 542*, the Commission did not rely low barriers to entry and / or expansion as a sufficient constraint on the merged entity (clearing the transaction on the basis of existing competition and countervailing power of the supermarkets). However since this decision, there has been substantial new entry and expansion in the market, illustrating that this constraint is much greater than it was previously.

16.16 Recent examples of entry and expansion in New Zealand, Australia, and elsewhere, demonstrate that the yoghurt market is dynamic, and that there are no insurmountable barriers to entry or expansion. For example:

- (a) **The Collective in New Zealand:**⁴² Epicurean Dairy (known as 'The Collective') supplies products through its brand The Collective and Moogurt. The Collective began yoghurt production in New Zealand in November 2009, after being founded by two friends (Angus Allan and Ofer Shenhav).

The Collective was able to achieve rapid growth, becoming "New Zealand's number one gourmet brand within 10 months" and experienced growth of 251% in 2011, 360% in 2012 and 212% in 2014.⁴³ While the total yoghurt market has increased in value by 14% since 2015, The Collective has increased by 77%.⁴⁴ The company has continued to achieve average revenue growth of 35% in each of its last four years, and now has 90 staff (compared with 9 when it started), 90 products in its range, and a comparable market share of yoghurt sales to each of Lion and Goodman Fielder, with The Collective brand holding a larger market share (by value) at **[Redacted]**, than Meadow Fresh at **[Redacted]**.

Competing with established brands to this level demonstrates that there are low barriers to building a brand in this market. The Collective offers both gourmet 'treat' products and healthier options, with a broad and original array of flavours and packaging options, including single serve pottles, medium pots, large pots, and pouring containers. It has also driven product innovation with its kids 'suckies' and Moogurt yoghurt pouches, both of which continue to increase strongly in popularity. Furthermore, The Collective's New Zealand market share likely only captures a small portion of its overall size given it is also a significant exporter of yoghurt products.

In May 2018, Pencarrow Private Equity announced that it had taken a significant (39%) equity stake in The Collective. Pencarrow's investment strategy is to acquire businesses that it has identified as being capable of further growth:⁴⁵

*We partner with shareholders and successful management teams of established New Zealand companies. We look for opportunities where the business has a track-record of positive earnings **and the potential for further growth.** [Emphasis added]*

As part of that investment by Pencarrow, "substantial new investment" in the Collective's Avondale yoghurt manufacturing plant has been announced,⁴⁶ and Pencarrow has significant growth aspirations for The Collective:⁴⁷

It's clear that The Collective is very special. We were impressed with how the brand has turned a declining category into one of

⁴² New Zealand Herald: *Equity investment sweetens plans for yoghurt maker* (2 May 2018). Retrieved from:

https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=12043684

⁴³ <https://www.stuff.co.nz/business/better-business/69339986/doing-dairy-right-the-collectives-repeat-deloitte-fast-50-success>

⁴⁴ **[Redacted]**

⁴⁵ <https://pencarrowpe.co.nz/partnership/>

⁴⁶ https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=12043684

⁴⁷ <https://idealog.co.nz/venture/2018/05/done-deal-recent-fundings-secured-contracts-inked-and-deals-done-tldr-crowd>

immense innovation and excitement. We are particularly pleased with the company's growth over a short period of time and we look forward to supporting the business with our strategic expertise as we work to build the global brand.

Any attempt by the merged entity to the increase price will only accelerate this expansion.

- (b) **Piako in New Zealand:** The entry and expansion of the Piako brand similarly demonstrates that there are no insurmountable barriers to entry or expansion in the New Zealand yoghurt market. Piako was founded as a family-run business in 2008, and within 3 years was stocked in supermarkets across New Zealand,⁴⁸ with material brand share in the New Zealand yoghurt market.⁴⁹ Piako is now owned by Fonterra but its introduction and growth in the market illustrates the opportunity for other potential entrants.
- (c) **Gopala in New Zealand:** Gopala specialises in producing large tubs of natural yoghurt, that is both vegetarian and GE free. Selling a healthy product at a good price point, Gopala has experienced fast growth and popularity, with [Redacted] value growth since 2015.⁵⁰ In light of this, it has demonstrated its capability to scale up, with supermarkets accepting its products onto their shelves. With the company's significant growth in recent years, it now has 45 employees and has plans to hire another 10-15 this year,⁵¹ and invested \$10m into its manufacturing site to double its current size and output. It is currently present in most North Island supermarkets, and intends to expand into South Island stores. With its aggressive price point, Gopala's entry has made a significant impact on the market.
- (d) **Chobani entry into the Australia Market:** Chobani was founded in 2005 in New York when Hamdi Ulukaya purchased a defunct former Kraft yoghurt factory. By 2017 Chobani "had overtaken Yoplait as America's most popular yogurt brand in just 12 years in business".⁵² Chobani is also growing internationally. For example, in 2011 it entered the Australian market, and grew rapidly. When Chobani first entered the Australian market, its Australian factory was producing 25,000 cases of yoghurt a week. However, within a year Chobani had increased its yoghurt production to 25,000 cases a day.⁵³ By 2014, it was the second best-selling yoghurt brand in Woolworths (the largest Australian supermarket chain).⁵⁴ [Redacted]. The company continues to diversify and expand in the Australian market, last year launching the "Chobani Flip" yoghurt range.⁵⁵ Chobani has ambitious plans to expand into Asia, and could easily readily the New Zealand market if market opportunities were to arise.
- (e) **Danone entry into the Australian yoghurt market:** In 2010, Danone, the largest yoghurt manufacturer in the world,⁵⁶ entered the Australian yoghurt market via a joint venture with dairy co-operative Murray Goulburn.⁵⁷ Since its formation, the JV has launched a number of yoghurt products (including the recent release of a high protein yoghurt range),⁵⁸ and is

⁴⁸ New Zealand Herald: *Yoghurt maker scores a double* (8 May 2011). Retrieved from https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10724311

⁴⁹ Stuff.co.nz: *Yoghurt star sold to mystery buyer* (January 18 2013). Retrieved from www.stuff.co.nz/business/industries/8192417/Yoghurt-star-sold-to-mystery-buyer

⁵⁰ [Redacted]

⁵¹ Pukekohe Business Association: *Pukekohe Success Story: Gopala*. Retrieved from <http://www.pukekohe.org.nz/file/edit599df61023164/open>

⁵² <http://www.brandchannel.com/2017/03/10/chobani-031017/>

⁵³ Australian Trade and Investment Commission: *Success Stories - Chobani invests in the future of Victoria's dairy industry* (5 July 2017). Retrieved from: <https://www.austrade.gov.au/news/success-stories/chobani-invests-in-the-future-of-victorias-dairy-industry>

⁵⁴ Food Navigator US: *Chobani generates explosive growth in Australia, unveils aggressive expansion plans in Asia, Latin America* (15 April 2014). Retrieved from: <https://www.foodnavigator-usa.com/Article/2014/04/16/Chobani-generates-explosive-growth-in-Australia-unveils-aggressive-expansion-plans-in-Asia-Latin-America>

⁵⁵ PKN Packaging News: *Chobani takes a walk on the flip-side* (31 July 2017). Retrieved from: <http://www.packagingnews.com.au/news/chobani-takes-a-walk-on-the-flip-side>

⁵⁶ Bloomberg: *Danone Looking to Make World Better One Cup of Yoghurt at a Time* (13 April 2018). Retrieved from <https://www.bloomberg.com/news/articles/2018-04-12/danone-looking-to-make-world-better-one-cup-of-yogurt-at-a-time>

⁵⁷ Regional Development Victoria: *Danone-Murray Goulburn Co-operative* (15 April 2016). Retrieved from <http://www.rdv.vic.gov.au/search-results?cx=004286227392849826370%3Ad85gbahwofa&cof=FORID%3A10&ie=UTF-8&q=Danone-Murray+Goulburn+Co-operative&sa=Submit+Query>

⁵⁸ Food & Beverage Industry News: *Danone Murray Goulburn launches high protein yoghurt* (1 September 2017). Retrieved from <https://foodmag.com.au/danone-murray-goulburn-launches-high-protein-yoghurt/>

now stocked across all of Australia's major supermarket chains (Woolworths, Coles, IGA).⁵⁹ As the largest yoghurt manufacturer in the world, and already with a presence in New Zealand in other products, Danone could readily expand into New Zealand if it were to identify market opportunities.

16.17 With the introduction and growth of suppliers and products the market is much more dynamic than when the Commission considered it previously. Consumers have more choice and are more readily substituting products. **[Redacted]**.

16.18 As set out above, the Parties submit there is substantial supply and demand-side substitution between categories, with the potential for manufactures to further expand their current production and produce more products of varying attributes.

16.19 In this regard, it is also worth noting that supermarkets offer those brands which provide them with the best sales performance and they, in turn, will readily substitute a high performing brand for one that is not performing as well against the retailer's KPIs. Shelf space is 'valuable real estate' and the growth in market share and number of small suppliers' SKUs ranged on supermarket shelves is a reflection of newer, smaller rivals' ability to compete successfully for share of shelf against existing larger brands.

16.20 In terms of entry, **[Redacted]**.

16.21 Furthermore, Lewis Road Creamery has steadily increased its product range across various dairy categories, and could be expected to readily expand into supplying yoghurt products if it identified market opportunities.

16.22 In Australia, Woolworths sells private label "Woolworths Select" yoghurt,⁶⁰ as does Coles.⁶¹ **[Redacted]**. In overseas markets, the penetration of private label yoghurt appears to be higher again. The parties expect the supermarkets chains in New Zealand would readily introduce, or threaten to introduce, a private label offering should they consider it to be profitable, or necessary, in order to exercise countervailing power over the merged entity. That is particularly the case given:

- (a) an estimated **[Redacted]**⁶² of yoghurt in New Zealand is sold on promotion, which demonstrates that New Zealand consumers would readily be willing to switch brands in response to lower prices;
- (b) the New Zealand supermarket chains already have well-recognised private label brands – such as "Select", "Signature Range", and "PAMS", and they already use those brands in the sale of other dairy products (for example, butter and cheese). The fact consumers already purchase those other private label products demonstrates that consumers would be willing to purchase private label yoghurt if it were available;
- (c) Countdown's parent company, Woolworths, already supplies private label yoghurt in Australia;
- (d) the trends overseas are for increasing sales of private label yoghurt:

"Demand for private label yoghurt is really growing, particularly in Europe. Established brands are facing tough competition from them... If a private label Greek-style yoghurt is a few pence or £1 cheaper

⁵⁹ Aus Food News: Murray Goulburn launches protein yoghurt range (4 September 2017). Retrieved from <http://www.ausfoodnews.com.au/2017/09/04/murray-goulburn-launches-protein-yoghurt-range.html>

⁶⁰ <https://www.woolworths.com.au/shop/search/products?searchTerm=yoghurt>

⁶¹ <https://shop.coles.com.au/a/a-national/everything/search/yoghurt>

⁶² **[Redacted]**

*consumers will try it... If it is comparable in taste with the big brand versions they will stick with it.*⁶³

- (e) there would remain a number of yoghurt manufacturers in New Zealand that the supermarkets could contract with if they wished to obtain private label yoghurt, including: Fonterra, The Collective and Gopala. It is common overseas for the largest branded yoghurt manufacturers, as well as smaller growing manufacturers, to be suppliers of private label product, due to the following reasons:
 - (i) private label contracts can help drive volumes for those manufacturers in order to generate cost savings, capacity utilisation, and greater fixed cost recovery, as well as develop stronger relationships with the supermarkets in respect of the manufacturers' branded products (for example, greater shelf-facings can be negotiated as part of private label manufacturing contracts);
 - (ii) supermarkets are often content to contract out private label manufacture on a SKU-by-SKU basis [Redacted], so it is possible for smaller manufacturers to tender for private label contracts on an incremental basis; and
- (f) from the supermarkets' perspective, there can also be a number of additional benefits for them from diversifying their private label offerings, in particular to help differentiate their offering from other supermarkets.

16.23 In these circumstances, any threat by a supermarket to introduce private label product would be regarded as credible, and would impose competitive constraint on the merged entity.

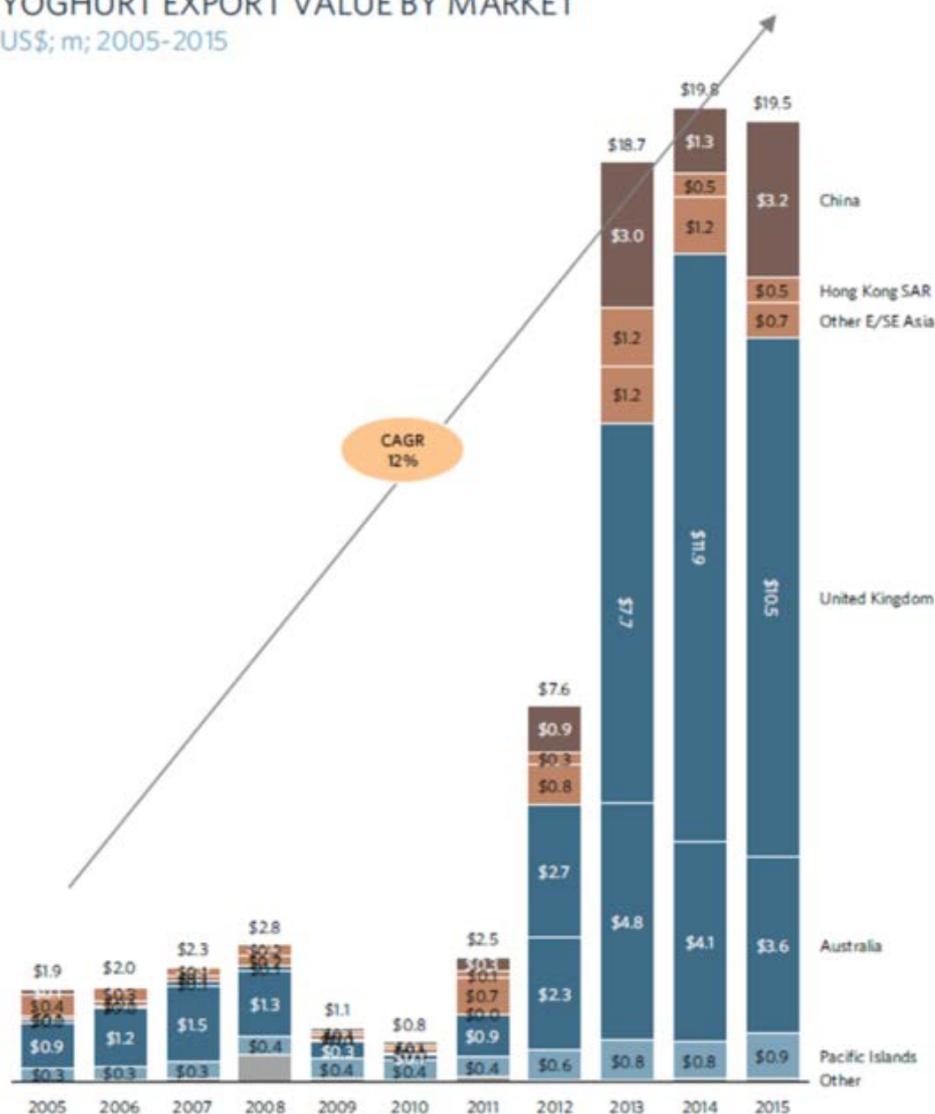
16.24 In addition, the significant growth in exports of yoghurt from New Zealand will likely encourage further entry by New Zealand based manufacturers, with the New Zealand yoghurt industry identified as a "growth star" by Coriolis Research in a 2017 report commissioned by MBIE.⁶⁴ This allows New Zealand based producers to enter the market and expand quickly, focusing on both domestic and export sales. The growth in export sales is demonstrated in the chart below.

⁶³ <https://www.dairyreporter.com/Article/2013/03/22/Greek-yogurt-makers-face-increasing-private-label-competition-analyst>

⁶⁴ <http://www.mbie.govt.nz/info-services/sectors-industries/food-beverage/documents-image-library/folder-2017-investors-guides/investors-guide-to-the-new-zealand-diary-industry-2017.pdf>

YOGHURT EXPORT VALUE BY MARKET

US\$, m; 2005-2015



High degree of countervailing power

16.25 In *Decision 542*, the Commission concluded that the supermarket companies would have sufficient countervailing power to constrain the combined entity from exercising market power. This remains the case.

16.26 As set out above, not only is [Redacted] of all volume sold in supermarkets, but an estimated [Redacted]⁶⁵ is sold on promotion. Through the allocation of promotional slots, supermarkets impose a high degree of countervailing power on competitors in the market. Supermarkets select certain products to go on promotion each week, with these promotional slots critical to suppliers' ability to maintain sales volumes. Not surprisingly, on a number of prior occasions the Commission has noted how the extent of promotional sales magnifies countervailing power.⁶⁶

16.27 In *Decision 542*, the Commission found that if a supplier increased pricing, the supermarket would act to counter it. Supermarkets may refuse to accept the increase, refuse to put products on promotion, and/or refuse to accept new product lines. Supermarkets may also choose to approach other suppliers and organise another form of promotion with them. Supermarkets want

⁶⁵ [Redacted]

⁶⁶ *Decision 487, Decision 529, Decision 542, Decision 560 and Decision 599.*

to avoid price increases, in order to avoid consumers believing they are increasing prices themselves.⁶⁷

16.28 In particular, the supermarkets can use their control of promotional slots to constrain suppliers. **[Redacted]**.

16.29 If suppliers do not get promotional slots, their sales and volumes suffer. There is no guarantee of slots, or the continuation of slots. **[Redacted]**.

16.30 **[Redacted]**

16.31 **[Redacted]**

16.32 **[Redacted]**. This demonstrates the high degree of countervailing power the supermarkets have in this market.

16.33 Removing promotional slots is only one mechanism through which supermarkets are able to discipline suppliers. Supermarkets also have the potential to sponsor entry/expansion (e.g. guaranteeing shelf space/promotional slots to a competitor for a new and very closely competing product), and/or launch a private label offering (similar to the Australian offerings set out above) etc.

16.34 **[Redacted]**

16.35 **[Redacted]**

16.36 **[Redacted]**

16.37 **[Redacted]**

16.38 Supermarkets also have the ability to constrain Goodman Fielder in other categories, such as milk, cheese, bread and baking ingredients. This ability to impose further countervailing power on Goodman Fielder, with the potential to affect its sales across its product range, will act as a strong constraint on the merged entity.

Low risk of co-ordinated market power

16.39 In *Decision 542*, the Commission listed the following factors as likely to reduce the likelihood of the exercise of coordinated market power:

- (a) there is a high degree of product differentiation, with a large number of brands and SKUs supplied at differing price points, making it extremely difficult for competitors to reach a tacit agreement on price;
- (b) no history of anti-competitive behaviour and the market is very competitive; and
- (c) the countervailing power of the supermarkets would undermine any attempt at coordinated market power.⁶⁸

16.40 The Commission concluded that the type of non-coordinated market power that can occur in an oligopoly market is unlikely to occur to an extent that would result in a SLC.

16.41 The Parties submit that these factors are still relevant (if not more so) and provide a strong constraint on any supplier attempting to enter an anticompetitive agreement and, therefore, the

⁶⁷ *Decision 542*, at [150].

⁶⁸ *Decision 542*, at [138].

Proposed Transaction will not have any material impact on the likelihood of coordinated conduct. In particular:

- (a) the New Zealand wholesale yoghurt market is not a market with transparent wholesale prices. This is due to individually negotiated customer terms (including discounts, rebates, payment terms and promotional spend), which results in net prices that are likely to differ significantly between customers (and suppliers);
- (b) as set out above, suppliers have highly differentiated products (more so now than in *Decision 542*) which would make it difficult to reach any kind of agreement in relation to price. Indeed, the category is constantly evolving with new products, and growth of the retail value of the yoghurt category, which would make any attempt at coordination difficult, and any changes in prices and volumes difficult to detect;
- (c) supermarkets will also undermine any attempt by suppliers to fix price, and have the ability to deny suppliers of promotional slots, thus rendering them uncompetitive;
- (d) Fonterra will continue to operate with a very different scale, and asymmetry in market share and cost structure, to Goodman Fielder, including because it is vertically integrated up to farm gate, and owns all its brands (whereas the Yoplait brand would be licensed to Goodman Fielder by Sodima);
- (e) there has been significant entry and expansion in recent times, and those newer and smaller competitors could disrupt any attempts at coordination by expanding output further. The continued presence of Epicurean Dairy as a vigorous and growing 'number three' player, as well as an emerging range of smaller competitors will serve to disrupt any efforts at coordination by the merged entity and Fonterra; and
- (f) **[Redacted]**. Rather, Fonterra, with its traditional and new brands and the large number of high-growth brands, is more aggressive and dynamic.

Previous ACCC findings

16.42 The aspects discussed above in relation to the New Zealand market are consistent with the findings of the ACCC, where it has previously considered that an acquisition that would result in National Foods and Dairy Farmers together have more than 50% of yoghurt sold nationally would not result in a substantial lessening of competition:

Information provided to the ACCC suggested that there were also a number of factors likely to provide a competitive constraint on the merged entity.

- (a) *The market has been a relatively **dynamic one, with product differentiation** and innovations (for example, health related innovations) enabling competitors to take a larger share of the market. This environment offers scope for the erosion of market shares over time, particularly if the merged entity sought to increase prices above the competitive level.*
- (b) *While the views of market participants regarding the level of brand loyalty for yoghurts varied, there was some evidence that many consumers, while insisting on branded yoghurt, are prepared to purchase any one of a number of yoghurt brands on a given shopping trip. Data provided to the ACCC during market inquiries also indicated that **sales volumes are influenced by promotional pricing. As a result, consumers may be willing to switch brands in response to a price increase** by the merged entity.*
- (c) *The large **majority of yoghurt is sold through the grocery channel**. Given the ability of the major grocers to control shelf space and to switch to alternative suppliers with excess capacity, the ACCC considered that the **bargaining constraint provided by major grocers is relatively strong** and is unlikely to be significantly diminished post acquisition.*

- (d) *While new entry is difficult, the threat of **expansion by existing competitors or other dairy processors is more feasible and was considered likely to provide a constraint** on the ability of the merged entity to raise prices above competitive levels.⁶⁹ [Emphasis added]*

16.43 As outlined in this application, the same constraints would apply on the merged entity in New Zealand.

⁶⁹ACCC - *National Foods Limited - proposed acquisition of Australian Cooperative Foods Limited and associated joint venture with Warrnambool Cheese and Butter Factory Company Holdings Limited* (19 September 2008).

Part G: Confidentiality

17. Reasons for seeking confidentiality

- 17.1 Confidentiality is sought in respect of the information in this application that is highlighted, in bold and contained within square brackets (the 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.
- (a) The Confidential Information is commercially sensitive and valuable information which is confidential to either, or both, the Parties.
 - (b) Disclosure of the Confidential Information would be likely to unreasonably prejudice the commercial position of the Parties.
- 17.2 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.

Part H: Declaration

I, _____, 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 me 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 the 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 the company and am duly authorised to submit this notice.

Name and title of person authorised to sign:

Sign: _____

Date: _____

Part I: Annexures

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Annex 1: Structure diagram of Goodman Fielder

[Redacted]

Annex 2: Goodman Fielder's New Zealand management accounts

[Redacted]

Annex 3: Structure diagram of Lion

[Redacted]

Annex 4: Transaction documents

[Redacted]

Annex 5: Competitor Contact Details

Competitor	Contact details
Fonterra Co-operative Group Limited	Phone: +64 9 374 9000
Epicurean Dairy Co. Limited	Email: info@epicdairy.com Phone: 09 820 5555
Gopala	Email: info@gopala.co.nz Phone: 09 818 7038
The Dairy Culture Company Limited	Phone: 0800 473 772
BioFarm	Fax: 06 354 8600
Raglan Coconut Yoghurt	Email: tesh@raglancoconutyoghurt.co.nz
Cathedral Cove Naturals	Email: info@eatwellbewell.co.nz Phone: 09-570 6036
Kingland	Email: kingintl@kingintl.com.au Phone: + 61 7 3277 78277 7899

Annex 6: Goodman Fielder's Key Customers

Customer	Totally reporting Qty	Total Net Sales	Contact details
Goodman Fielder's top 10 customers for 2017			
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]

Annex 7: Lion's Key Customers

Customer	Volume (kgs)	Sales Revenue	Contact details
Lion's top customers for 2017			
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]

Annex 8: Goodman Fielder's Top Suppliers

Supplier	Vendor number	What is supplied	Contact details	Sales (\$000)
Goodman Fielder's top 10 suppliers				
[Redacted]	[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]	[Redacted]

Annex 9: Lion's Top Suppliers

Supplier	Sales to (19/02/17 – 19/03/18)	What is supplied	Contact details
Lion's top 10 suppliers			
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]

Annex 10: Goodman Fielder's 2016, 2017 and 2018 New Zealand sales

Goodman Fielder Sales (\$)				
[Redacted]	[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]	[Redacted]

Annex 11: Lion 2015 - 2018 New Zealand sales

Lion Sales (\$)				
[Redacted]	[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]	[Redacted]	[Redacted]	[Redacted]
[Redacted]	[Redacted]			