

SUBMISSION TO THE COMMERCE COMMISSION'S
"STATEMENT OF UNRESOLVED ISSUES" ON THE
FOODSTUFFS NORTH ISLAND/SOUTH ISLAND APPLICATION

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Dear Commissioners

Do you remember the Rugby World Cup final last October? That's the match where the unfortunate (for New Zealand) result was determined by the TMO overruling decisions of the on-field referee. Spectators and commentators decried the rulings as mutually inconsistent. It was a talking point for weeks. Coach Ian Foster concluded that "the game has a few issues to sort out." Few were happy.

Its not the only time the TMOs have been criticised fiercely. The man on the field, immersed in the game, running around amid the play, hearing the team chatter, feeling the vibe and smelling the sweat, gets overruled by the one high in the stand with immaculate blazer and shiny shoes - sometimes minutes after an alleged infringement has occurred.

There is a useful analogy. You as Commissioners, chosen for your clear judgement, ethics, life skills, business acumen and understanding of economics, do the seriously hard yards on the field understanding and analysing every element of the industry you are studying. You study and weigh a myriad of complex issues, then make a balanced judgement call in the interests of consumers, the economy and fair competition. Like the on field referee, you are amid the play and immersed in the detail.

Then – like the TMO – a bunch of lawyers hired by the disadvantaged team swoop in and rain on your parade. Your honest judgement call counts for little as they analyse every word of evidence and your conclusions, question consistency with legal precedents, make erudite reference to case law, and challenge the outcome. The wellbeing of consumers and the desire for healthy competition gets swept aside as they set out to destroy your case on some obscure technicality.

That, I suspect, is why your Statement of Unresolved Issues, which could have been summarised in a few paragraphs, has run to 149 pages of endless repletion of the same points in marginally different language.

In short, the Commission's worthy and extremely critical work has become a lucrative playground for some of the country's most expensive lawyers to ply their trade.

Just as Foster said "the game has a few issues to sort out" I say the same of our competition law. I know you, the Commissioners, cant fix this - only the government can do that. So I'm copying this submission to your Minister, Hon Andrew Bayly, with the suggestion that the government take immediate steps to improve the Commerce Act so that it benefits and protects consumers at the checkout instead of just the legal profession and the wealthiest party in each issue.

Meanwhile her are my pragmatic answers to selected aspects of your SOUI:

Para 10.1

This paragraph understates the issue. The parties and Woolworths often are not just "a key route to market" but the only route to market in viable volumes. Reducing the number of buyers from 3 to 2 is by definition a "substantial lessening of competition."

Para 10.3

The loss of competition would result in not just the removal of an important option, but the potential closure of many supplier businesses if they lost access to just one of the two remaining outlets.

Para 10.4

Yes, of course the merged entity would cheery pick the better price – North or South Island – the supplier would have no option but to accept the lower of the two, removing any cross-subsidisation that was keeping them afloat.

Para 10.5

Innovation would effectively come to an end. The sole remaining purpose of stocking manufacturers' brands would be to make the Pams prices look good.

Para 10.8

The prospect of entry or expansion by rival retailers, given the history of illegal land covenants, anticompetitive land banking, and failure of the regulatory system to avert the catastrophic Foodtown/Woolworths merger, is dismal now. If the merger were allowed, the regulatory system would be seen as even more toothless, so the prospect of new entry would be even smaller - less than winning Lotto.

Para 11

Obviously approval would make (tacit) coordination with Woolworths more efficient. For one timely example, see RNZ's Checkpoint price survey this month. RNZ has tracked 36 supermarket items for 2 years. Cheese and produce, which had become bellwether items for angry consumers after going through the roof, had dropped nearer to 2022 levels at both retailers, undoubtedly in part because extensive publicity made Kiwi consumers aware that NZ-made cheese was far cheaper in Melbourne and London than in Hamilton. However, products like dishwash detergent, nappies and mince had increased vastly. The striking thing is the similarity in pricing practice between the two retailers. It is clear that both subscribe to the "confusion as a marketing tool" philosophies used in industries with massive market power, deliberately adopting pricing tactics that make it impossible for consumers to know what the "right" or "normal" price of an item might be. How much easier this would become if Foodstuffs were spared the inconvenience of having to deal with the market as two entities.

Para 32

Of course there are commercial dependencies between selling and acquisition markets. Supermarkets in better times were traders who simply bought a product in bulk, broke it down, and sold it in small quantities with a standard margin added to each item to cover their costs and a fair profit. In these times they have used their market power and lack of regulatory intervention to manipulate markets so there is often little relationship between margins across different products. These have little to do with costs, and everything to do with what the supermarkets algorithms tell them about consumers' awareness of what a "normal" price for that item might be – aided by loyalty cards and AI. Any new entrant faces an information deficit against the incumbents.

Para 35.3

The parties submit the transfer of surplus is procompetitive *if* passed on to consumers. But in the current duopoly the incentive to pass it on is minimal. Every incentive is to stick it in the distributor's piggy bank.

Para 44

Lack of competitive tension in one market (eg distribution) can reduce competitive tension in an adjacent market (eg manufacturing) by taking smaller businesses out of the market.

Para 46

There is simply no way this merger proposal could be seen as having a net public benefit despite lessening competition. The history of consolidation in the grocery distribution sector proves that.

Para 50

The downstream effects on retail consumers are pivotal. Consolidation of market power has already deprived consumers of choice. Shelves that in the past carried a tantalising choice of healthy foods are now given over to hectares of Coca Cola and potato crisps. There is a far better choice of dog food and cat food than of food for humans! The Commission's (or TMO's) decision on this issue will correlate directly with the obesity statistics in a decade's time, and have a real impact on our health system.

Closing Observations

The merger application brings into focus the ongoing role of the Grocery Commissioner. While there will no doubt be another time and place to make submissions on this I signal a need for strengthening of that role as follows:

- Introduction of full accounting separation between wholesale and retail to be made public, modelled on the similar separation within Telecom in the 2000s which started the process toward structural separation of what became Chorus and Spark
- A deep investigation into the use of loyalty cards and AI to deliberately confuse consumers about what is the "fair" or "normal" price of an item. There is too much at stake for consumers for this industry to remain as an unsupervised playground for creative marketers. Far greater transparency is needed.
- Specific policies to encourage and protect any new entrants to the market for their first decade of entry.

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