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2**DAY 3 - RETAIL GROCERY MARKET STUDY CONFERENCE**

3

26 October 2021

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Session 4: Grocery code of conduct, private labels and collective bargaining by suppliers

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Ms Rawlings: Mōrena tēnā koutou, ngā mihi nui ki a tātou katoa. Good morning everybody, welcome back to the Commerce Commission's conference on its grocery market study for Day three. Welcome back to those who were here last week and welcome to those who didn't join us last week and are joining us for the first time this morning.

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I'm Anna Rawlings, the Chair of the Commerce Commission and with me here today are other Commissioners who have been working on the grocery market study. You can see on your screen I think, Dr Derek Johnston, Dr John Small and Vhari McWha.

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We've also got with us a number of our staff who have been working on the study and together we'll be conducting today's session and have questions for the rest of the week.

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Given that we do have some new people with us today, I'm going to quickly run through a few housekeeping matters and briefly summarise our process for the conference and our process for after the conference finishes.

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The purpose, as you know, of the Commission's study is to identify and assess factors that may be affecting competition in the grocery sector in NZ that is for the supply or acquisition of groceries and to make some recommendations to improve competition if we consider that those recommendations are required because competition isn't working as well as it could work. Our draft report, which you will have seen, sets out some preliminary views on the state of competition in the grocery markets. Those findings are preliminary, both this conference and the submission process prior and after the conference are really important to us to enable us to narrow-in on the issue most significant to the study and to finalise our conclusions in our report.

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To that end, we've been really interested and grateful for the comments that we've received to date and we found the discussion so far to be really insightful and very helpful, thank you.

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The purpose of the conference therefore is to provide the opportunity to hear more about some of the submissions we've received, but also to give you each the opportunity to hear a little bit more from one another and to understand a little more of the perspectives of others. It also gives the opportunity to raise additional issues that haven't been raised in submissions to date that you think that we need to consider as we finalise our report.

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We've divided the conference into a number of sessions. We held some of those last week. So far, we've discussed the nature of competition in the grocery sector, we've talked about retail pricing and promotional practices, unit pricing, more specifically, and also the use of loyalty programs to some extent.

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1 Today's sessions are going to cover a number of issues relating to suppliers and
2 their relationships with grocery retailers and we'll run now until 10.45 then we'll take a
3 short break for 30-minutes. And then we'll resume at 11.15 and run through till about
4 12.30 today. We'll pick up again tomorrow to work through the remaining sessions on the
5 agenda this week. There won't be a session on Friday, but we'll run sessions on Monday
6 and Tuesday next week as well.

7 Bear in mind that the conference isn't the last opportunity for you to have your say
8 in relation to the market study. We have asked for cross-submissions and follow-up
9 comments after the conference by the 23rd of November of this year. And we also might
10 have some additional questions that we'll follow-up with individual parties after the
11 conference to supplement those comments made at the conference and in submissions
12 and we'll let you know if we have some of those questions for you.

13 Our report will be available no later than the 8th of March next year and that's a
14 hard deadline for us.

15 Again, I just want to spend a few minutes now just outlining how the conference
16 has been running in an online format, so that people can follow along. And if you have
17 questions about the process or any other comments that you'd like to make, we'd invite
18 you please to contact our team through the market study's email address which is
19 marketstudies@comcom.govt.nz. And we'll try and get back to you as soon as we can in
20 relation to those.

21 If you have documents or material that you're referring to during your discussion
22 with us in the conference sessions, we'd ask that if you haven't provided that to us
23 already, that you forward it through that email address as well with an indication of who
24 that material has been sent from and the session in which you've referred to it.

25 The discussion in each session will be chaired by one of the Commissioners and the
26 Chair of the session will lead the discussion and the questioning and we'd ask for your
27 comments to be facilitated through the Chair of the session. Other Commissioners and
28 staff may have questions from time to time as well as the sessions progress.

29 The conference, you will have noted, is run in a webinar format and that means
30 that in advance of the conference, those who indicated that they'd like to participate in
31 sessions, have been joined as panellists to the session and can immediately and directly
32 respond to questions or comment on the matters under discussion.

33 If you've indicated that you didn't have an intention to speak on a topic, then you
34 will have been joined into the webinar as an attendee only. And that means that if you'd
35 like still to comment on this session, if you raise your hand, a member of our team will be
36 able to admit you into the panellist discussion so that you can comment. We don't want
37 the fact that you made a choice to be an attendee only to necessarily inhibit your ability to
38 comment if you'd like to do that as the sessions progress.

39 When you're speaking, use your kind of Zoom meeting etiquette that we're all
40 familiar with. If you don't mind, make sure that your microphone is turned on and that
41 you are near to the microphone so that you can speak at a reasonably deliberate but clear

1 pace for our transcription service to pick up what you're saying. And please have your
2 camera on as well. When you're not speaking, please make sure that your microphone is
3 turned off and over to you whether you wish to leave your camera on, or not.

4 When you first speak, if you could identify yourself and the organisation that
5 you're from, that will also support our transcription service to ensure that we can provide
6 a transcript of the session.

7 In this way, as time allows, we hope that we will be able to enable all who wish to
8 comment in each session the opportunity to do that. But if time or technology doesn't
9 allow or if you have thoughts after the session that you'd like to contribute, then I want to
10 emphasise again, please do hold those thoughts and bring them back to us by way of
11 submission after the conference in the manner that works best for you.

12 There is quite a lot of material to cover during the conference, so what we're
13 focused on in discussion are issues that haven't previously been raised with us. Or those
14 issues where we think that some greater discussion and discussion between participants is
15 helpful to our study. If there's something again that you'd like to say in response to the
16 discussion but its confidential and you'd rather not raise it in a public forum, even if in
17 response to a question, please don't hesitate to let us know that, that you'd like to pick up
18 the conversation outside of the session and we can readily do that.

19 You'll note also from your Zoom stream, that the session are being recorded, that's
20 for our purposes, so that we can prepare a transcript after the sessions.

21 And finally, I want to note that we have members of the media attending the
22 sessions from time to time as we would in a public forum. You'll be aware that there's
23 been a significant amount of public interest in the conference and also in our market
24 study as a whole. We've asked that the sessions are not recorded by attendees to help
25 facilitate the free and frank discussion that we're looking for, but welcome media to join
26 and drop off as they wish.

27 I'm now going to ask Dr Derek Johnston if he'll introduce and Chair the session for
28 today. Thanks Derek.

29 **Dr Johnston:** Thank you Anna. Good morning, for those who don't me, I'm Derek Johnston, one
30 of the Commissioners involved in the market study. I hope you've all had a relaxing and
31 enjoyable long weekend. We certainly had two days of worthwhile and productive
32 discussions at the end of last week and we're looking forward to those discussions
33 continuing over the coming days.

34 As Anna said, in this morning's discussion, we're focusing on our draft findings and
35 recommendations in relation to the acquisition of goods by retailers from suppliers. And
36 this session's focus mainly on addressing concerns that had been expressed as to how the
37 relationship between the major grocery retailers and some suppliers, operates. We would
38 particularly like to acknowledge those suppliers who have submitted in the course of this
39 process that their submission together with those of the major grocery retailers, the Food
40 and Grocery Council and other market participants, has been very helpful in enabling us to

1 get an oversight and some greater insight into how the relationship between the major
2 grocery retailers and suppliers is currently operating.

3 We set out our preliminary view on these issues in the draft report and that can be
4 summarised really twofold.

5 First, the competition isn't working well for suppliers for major grocery retailers
6 because the major grocery retailers are often in a stronger negotiating position than the
7 suppliers and that results in an imbalance of bargaining power, allowing major grocery
8 retailers to shift risks and costs onto suppliers. That in turn can reduce suppliers'
9 incentives to invest and innovate, leading ultimately to lower quality goods and reduced
10 choice for consumers.

11 The second aspect of our draft report focused on the question of private labels.
12 And our conclusion or preliminary conclusion in the draft report on that aspect was
13 somewhat tentative. We said that the overall impact of private labels on outcomes for NZ
14 consumers is unclear, but potentially some aspects could harm competition. In our
15 report we raised several options for addressing any imbalance in bargaining power
16 between suppliers and retailers, including the possibility of a code of conduct and also
17 collective bargaining.

18 The submissions we've received have been largely supportive of a mandatory code
19 of conduct. Although we received some specific comments on how a code should be
20 implemented. There are however differing views on the impact of private labels and
21 whether collective bargaining by suppliers should be permitted.

22 Consequently, the three topics we want to cover in this morning's sessions are
23 how should a mandatory code of conduct be implemented.

24 Secondly, what effect are private labels having on competition between retailers
25 and suppliers and should anything be done specifically in relation to private labels.

26 And thirdly, should collective bargaining be introduced.

27 In addition, it was apparent from the discussion at the conference session on
28 Friday, that there may remain some concerns on the part of some parties, that we haven't
29 been fully informed as yet about all the concerns that are affecting suppliers.

30 So, we will be providing an opportunity at the end of Topic One this morning for
31 suppliers or others to raise issues affecting suppliers which arise from a perceived lack of
32 competition in the sector, which they believe we might not yet be aware of. If suppliers or
33 others would prefer not to raise their concerns in the public forum of this conference, we
34 will nevertheless welcome their written submissions or if they'd prefer a private meeting
35 with us, we'd invite them to contact us at our email address,
36 marketstudies@comcom.govt.nz.

37 Before we start the session, we want to acknowledge that the details of suppliers'
38 relationships with retailers are commercially sensitive. So, we will be discussing matters in
39 general terms at a high level without referring to specific suppliers or retailers. The

1 current intention is to address the grocery code of conduct before the morning break and
2 deal with private labels and collective bargaining after the break, although we may need
3 to be flexible and modify this timing as we go given the amount we've got to get through
4 this morning.

5 Before turning to those three topics, we wanted to invite some stakeholders to
6 make brief introductory remarks and to give a brief overview of their perspectives on
7 these three topics. As these issues all relate to the interest of suppliers, we've asked the
8 Food and Grocery Council to kick off this discussion by providing an initial view from the
9 perspective of suppliers on these issues. We then ask Foodstuffs NI and Foodstuffs SI and
10 then Woolworths NZ to respond with their respective views on these issues.

11 So at this stage I'd like to invite the Food and Grocery Council to speak and I'll pass
12 over to Katherine Rich, please, if Katherine you're happy to pick this up.

13 **Ms Rich:** Thank you Dr Johnston. Good morning, I'm Katherine Rich, Chief Executive of the NZ
14 Food and Grocery Council, FGC is the industry association for suppliers to supermarkets.
15 As CEO it is my job to aggregate and represent positions best representing the overall
16 interests of FGC members. Thank you for the opportunity to speak and for the work put
17 into producing the comprehensive, compelling draft report and supporting evidence.

18 Many FGC members wanted me to speak up earlier in the conference but I thought
19 it was more constructive to hear about retail competition. However, I've yet to hear any
20 evidence presented that there are real substitutes for the supermarket duopoly for the
21 main shop, or many other so-called missions.

22 From the supply perspective, the position is arguably starker. There is generally no
23 substitute for supplying both supermarkets. Due to NZ's unique market structure, the two
24 are complements, not substitutes, from a supplier's perspective. The suppliers each
25 supermarket chain affectively has a monopoly over its network and its marketplace. We
26 provided detailed submission on this market power and the resulting conduct. For
27 example, the harmful procurement practices in paragraph 174 in our submission on the
28 preliminary issues paper to the detriment of suppliers and consumers alike. I won't spend
29 our limited time repeating that long list, these issues are longstanding.

30 But in summary over the past two decades, there has been a methodical shift in
31 costs and business risk from retailer to supplier and profit margin from supplier to retailer.

32 You have heard many marketing buzz words saying that supermarkets are
33 customer driven and customer focused. But like any businesses, they are profit
34 maximising entities, as such and unconstrained by effective competition, they regularly
35 make decisions to maximise profits which seem against the interests of consumers in
36 terms of choice, availability of lower priced options and access to innovation.
37 Supermarkets are not just operators of those marketplace monopolies or monopsonies.
38 They also compete with suppliers through private label and sponsored or controlled
39 brands. While private labels are ubiquitous in retail around the globe, it is important to
40 take care and recognise harms that can arise with NZ's unique market structure,

1 particularly in terms of blocking lower priced options for shoppers and encouraging
2 innovation investment.

3 There is a growing concern from regulators about powerful marketplace operators
4 who also compete with their suppliers in those marketplaces. Indeed, the Chair of the
5 Federal Trade Commission is famous for her position, in 2019 she wrote in the Columbia
6 Law Review on the separation of platforms and commerce. As Commissioner Khan put it,
7 *“For many merchants not being on Amazon doesn’t seem like an option”*. It’s the same in
8 NZ in relation to the supermarkets.

9 Closer to home the Commissions merger clearances has long recognised, “The
10 countervailing power of supermarkets including their ability to sponsor price fighters and
11 expand their existing their house brands”. That comment is from 2004, when the
12 Commission observed, “Pams is NZ’s single largest grocery brand by turnover and private
13 label”., Pams seems to be the major winner, as Foodstuffs NI rationalises categories,
14 reduces choice on shelf for consumers at the same time, apparently aiming to at least
15 double trading margins from suppliers’ products that have survived the cull. That’s
16 probably the most recent example of upheaval in the grocery sector.

17 In a time of well publicised delisting in NZ, private label use is only expected to
18 grow. There’s ample support for this view. In 2019, the Reserve Bank of Australia wrote
19 about the trend of food and non-food retailers adjusting product mixes to incorporate
20 more own brand and private label. Supermarket News has reported about the growth in
21 private label at the expense of branded products. It’s been reported that pre-Covid,
22 13.8% of every dollar went to private label, but this value growth amplified during Covid
23 with now 14.2% of every dollar spent on private label. IRI recently reported that by
24 volume, private label has 18.7% market share. These are all averages however, in some
25 categories, FGC members have reported private label reaching much higher levels and
26 genuine choice for consumers is impacted and local manufacturing capacity weakened.

27 Similarly the EY Future Consumer Index on behaviour and sentiment is tracking a
28 fundamental pivot away from brands to private labels. These concerns arise in markets
29 where there is much greater competition than NZ. The duopoly has a privileged position
30 and with that should come responsibility.

31 Today’s first session is on the need for an independently produced and
32 independently administered mandatory code of conduct for supermarkets. I would add
33 that it must be principles based, include a Grocery Commissioner, genuine strong dispute
34 resolution mechanisms and relevant safeguards on private labels as well as other headings
35 found in both the Australian and United Kingdom codes.

36 Today we are fortunate to have former UK Grocery Code Adjudicator Christine
37 Tacon, joining us, with the Chair’s permission, we request that she present on her
38 experience following my comments.

39 **Dr Johnston:** Would it be possible to leave that till later in the session, where I was going to
40 specifically ask, she and Graeme Samuel to provide input from their perspective. I’m quite
41 keen to just get through these introductory comments first if we could, Katherine.

1 Did you have anything else that you wanted to add at this point Katherine?

2 **Ms Rich:** No, thank you for the opportunity.

3 **Dr Johnston:** Thank you. Then I wondered if we could perhaps move on to Foodstuffs NI, Chris
4 Quin or Mike Brooker, did you want to provide any response to what we've heard from
5 Katherine Rich?

6 **Mr Brooker:** Yes, thank you very much Commissioner Johnston, we would like to give a brief
7 introduction and I'll hand to our Merchandising General Manager David Stewart to do
8 that, thank you and then I'll take a lot of the code conversation, thank you very much.

9 **Mr Stewart:** Thank you Mike and good morning all, David Stewart, General Manager for
10 Merchandising Foodstuffs NI.

11 To start off, Foodstuffs NI values and is committed to our supplier relationship and
12 engages extensively with a larger number of our suppliers. The importance of our
13 relationship with suppliers sits alongside our drive to range products that meet the needs
14 of our largest groups of customers, and also our responsibility to buy well for NZ'ers.

15 The values set out in our supplier charter are at the heart of our relationships and
16 are reflected in the success of our 2021 supplier expo, where 83% of our suppliers said we
17 have a positive impact on their businesses. The many examples of our commitment and
18 engagement with suppliers is outlined in our submission on the Commission's draft report.
19 And in addition, we regularly connect with over 250 suppliers, fortnightly, for a questions
20 and answer call, where suppliers are able to ask us anything.

21 We are happy to share more detail of these later in the session or in a confidential
22 session with the Commission.

23 We welcome the opportunity to further improve our relationships for the benefit
24 of consumers and to address the conference on the topics of the grocery code of conduct,
25 private label, and collective bargaining.

26 On the first topic, being the grocery code of conduct. We put forward in our
27 submission a commitment to support a consumer-focused grocery code for the industry,
28 covering both retailers and suppliers and that was to guide our dealings with suppliers and
29 protect supplier's freedom to support other retailers. Mike Brooker will speak on that
30 topic in a moment.

31 On private label, we are proud of our offering. We are, and we strongly believe
32 our offer is pro-competitive. Our view is private label products are highly valued by our
33 customers and in particular, by our budget conscious customers. Private label are a
34 significant feature of competitive grocery markets around the world, including Australia,
35 United Kingdom, Europe and USA and they're a key feature of almost all grocery retailers
36 in those markets. And in NZ, private label products are commonly manufactured locally
37 by branded suppliers. This give those suppliers valuable economies of scale to support
38 their branded offer.

1 On the topic of collective bargaining, our view is that changes to the existing laws
2 to allow competing suppliers to collectively bargain, is unnecessary and not in the
3 interests of consumers. A change to the current laws is unnecessary as there is already an
4 authorisation process available in the Commerce Act. The Commerce Act allows the
5 Commission to authorise collective bargaining that is in the public interest. Of course we
6 welcome offers to supply from any supplier or groups of supplier.

7 And finally, I'd just like to make the comment that we refute the suggestion that
8 our range review process is looking to double trading margin. Mike, over to you.

9 **Mr Brooker:** Thank you David. Just appreciate the time and also, I'd just like to acknowledge the
10 absolute expertise that we've got on this call with Graeme Samuel, obviously, from the
11 ACCC formerly. And Christine Tacon, former Adjudicator of the UK Code. I think is a real
12 opportunity to have robust discussion and get some great outcomes here.

13 We have also got a consultant, Neil Rechlin, on the call, who has had 20-years'
14 experience in the Australian market regarding code and acting for both suppliers and
15 retailers, so can provide some useful insight. So I think we've got the expertise in on the
16 call, we're committed to the process, we've had a relationship charter and a dispute
17 resolution process agreed with the FGC, but we hear that is not working. So we want to
18 be part of the solution and get the best outcome for consumers.

19 There will always be healthy tension between suppliers and retailers and that
20 delivers a competitive tension and best outcome for consumers. So we need to recognise
21 that that is part of the process, but we need to ensure that we engage in a respectful and
22 appropriate manner so that we get those good outcomes.

23 There will need to be a process for development of the code, I won't go into any
24 details here because I can see in the questions that are coming, that we have got most of
25 the topics canvasses and we'll happily leave that conversation for that question and
26 answer session. But thank you for the opportunity.

27 **Dr Johnston:** Thank you Mike and David in the way you're approaching this session, its much
28 appreciated. And is Foodstuffs SI, Tim Donaldson want to add anything from its
29 perspective to this?

30 **Mr Donaldson:** Yes, thank you. Good morning, Tim Donaldson, General Manager of Retail for
31 Foodstuffs SI.

32 Foodstuffs SI is very proud of our long history of consistently strong relationships
33 with our supplier partners. We value our supplier relationships, because they're critical to
34 our mutual success in meeting the needs of the customer. We'd like to note in the
35 Neilson 2020 Barometer Survey, 75% of suppliers rated their overall trading relationship
36 with us as good or excellent. We conduct business with our supplier partners in
37 accordance with the Foodstuffs Supplier Charter. This charter outlines our principles, our
38 expectations, our commitments, and our dispute resolution process.

39 Foodstuffs SI is supportive of a mandatory grocery code of conduct, but one that's
40 developed in conjunction with the industry and meets NZ market conditions. We believe

1 the code should set minimum standards of conduct and behaviour, but it should not
2 constrain parties from negotiating genuine commercial terms in good faith and as they see
3 fit. We also believe there needs to be a disputes resolution process within the code, but
4 we need to ensure that it's not cost prohibitive or unwieldy so as to reduce its
5 effectiveness.

6 Regarding private label, in our view private label is driven by customer preferences
7 and is pro-competitive. Private label principally involves Foodstuffs and therefore
8 customers paying less for commodity type items. Private label also plays an important
9 role in evening up bargaining between Foodstuffs and suppliers that have strong brands
10 for which Foodstuffs has few alternative supply options. Therefore we believe private
11 label plays a crucial role in keeping grocery prices low, recognising that for us, 67c of every
12 retail dollar is made up of the product cost.

13 It's also important to note that in NZ, private label products are commonly
14 manufactured by local branded suppliers, giving them valuable economies of scale, that
15 among other things, help drive innovation for their branded products.

16 In terms of collective bargaining, it is our view, it is not in the best interest of
17 consumers as it could actually reduce competition. There would also be difficulties in
18 accommodating a group of suppliers who have similar, but not the same products in a
19 category. However, that said, we're happy to negotiate with any group of suppliers acting
20 on a lawful basis.

21 Thank you for the opportunity to speak.

22 **Dr Johnston:** Thank you Tim and if we could now come to Woolworths to Josh Gluckman.

23 **Mr Gluckman:** Thank you Commissioner. Mōrena tēnā kautou katoa, I'm Josh Gluckman from
24 Woolworths NZ.

25 This is a really important session. We're very proud to partner with over 1400
26 suppliers, that includes 120 produce growers and 900 small suppliers and having good
27 relationships with our supplier partners is extremely important to us.

28 And at Woolworths NZ we've worked exceptionally hard at our buying practices
29 and our supply relations over recent years. And we're very proud to be ranked number
30 one in both of the two major independent supplier sentiment surveys that exist, including
31 for 2-years in a row, in the Advantage Report.

32 Our relations with our suppliers are extremely important as ultimately, we're all
33 aligned in wanting to meet customers' needs and there's a unique dynamism and
34 partnership that occurs in grocery retail that manifests for customers on the shelf in things
35 like innovation, price, promotions, and quality competition.

36 Our relationships with our suppliers are also important because the vast majority
37 of what customers pay, in our case, 63c in every dollar spent, is as a result of what we pay
38 to our suppliers. And often these suppliers are large multinationals like a Coke or like a
39 Unilever, that often appear to have much higher margins and returns than our own. And

1 in those instances, it's certainly in NZ's interests and in our customers interests for us to
2 be able to negotiate firmly but fairly, which we do.

3 We also see many outside options that do exist and I'd be happy to come back to
4 that topic in due course today.

5 Of course our suppliers are not one size fits all and we're especially proud of our
6 relationships with our small suppliers. Especially Kiwi small suppliers, which we love as
7 much as anyone else. In the last 3-years we've onboarded more than 400 new suppliers
8 overall and small suppliers now comprise over 20% of the new products that we range.
9 And of note, our small suppliers also give us our highest positive supplier feedback scores.

10 The reality is we operate in a sector with tens of thousands of products that are
11 constantly changing, as customer preferences constantly evolve. And as such, its
12 inevitable that some products won't succeed or that some products will need to be
13 replaced. And that can be disappointing for individual suppliers, just as it can be
14 disappointing for retailers and just as it can be disappointing for buyers. But in aggregate,
15 we note that our product count over the last decade, has been increasing, not shrinking.
16 Of course with thousands of interactions a week, we probably don't always get it right and
17 inevitably there's always more that we can do. And if there are issues or examples of
18 specific things in our business that we need to address, we will absolutely do that. And
19 while we've heard a lot of, in recent times, of the alleged behaviour of supermarket
20 participants, we note this is a market study focused on matters of competition as opposed
21 to any individual matters of conduct. And we'd expect appropriate fact gathering
22 processes to separately apply.

23 In any case, we think, as do many others, the answer to all of this is a well-
24 constructed grocery code. We propose that this should be mandatory, this should apply
25 to all grocery retailers, owners, and wholesalers in the market. We also believe large
26 suppliers should be covered, for example, by provisions relating to good faith. And we
27 think it makes good sense to align with the Australian Grocery Code.

28 We're comfortable at Woolworths NZ with such a code because it will largely
29 enshrine the processes and practices of fair dealings and transparency that we already
30 hold ourselves against. And we also propose a Grocery Ombudsman to support and
31 oversee this regime.

32 We don't support collective bargaining for small suppliers because while it may
33 seem attractive in principle, as I'm sure we'll spend some time discussing this morning, we
34 see a number of issues in practice, which we'd be happy to discuss.

35 And lastly, while it's still a relatively small part of our business, we're very proud,
36 similarly, to offer the growing private label offer that we do. Kiwis love private label and it
37 clearly delivers a number of benefits for them. Through lower prices, increased choice
38 and more competition on quality, variety, and innovation. All of which are among the
39 benefits noted by the Commission in its draft report. And while for some incumbent
40 branded suppliers, this may indeed represent more competition. For many other
41 suppliers, it represents a great way to build scale and to underpin investment and growth.

1 And in fact, over 70% of our private label products are locally sourced in NZ and private
 2 label clearly delivers positive outcomes for Kiwis on the shelf as occurs all around the
 3 world. As such, we look forward to today's topics, thank you.

4 **Dr Johnston:** Thank you for that Josh and I think that leads nicely straight into the first of our
 5 topics for today, which is how should a grocery code be implemented?

6 Now, it's apparent there's a high level of agreement there should be a mandatory
 7 grocery code introduced. So this morning's discussion is really on some of the suggestions
 8 that have been made regarding implementation of the code. And those will help shape
 9 our final recommendations.

10 And the five questions we want to address in this session are:

- 11 • Who should be subject to a grocery code?
- 12 • To what extent might the Australian code be relevant or helpful as the basis
 13 for developing a NZ code?
- 14 • Should there be different requirements for fresh produce?
- 15 • To what extent should the code seek to place limits on best price
 16 guarantees and exclusive supply arrangements?
- 17 • And what should the oversight, code compliance, monitoring and dispute
 18 resolution process be in relation to a code?

19 Just before we come on to those five specific questions, I wanted to circle back to
 20 one point that was in the Foodstuffs submission that we were just wanting some
 21 clarification on and perhaps Mike or Tim, you might be able to help us on that.

22 In your submission, you referred on several occasions to a consumer-focused code.
 23 Can you clarify what you mean by a consumer-focused code?

24 **Mr Brooker:** Yeah sure and thank you. So, we're here in the study to get a look at the
 25 competitive environment in our industry and to ultimately get benefit for consumers,
 26 because that's what competition does.

27 So, I guess what we're saying in saying that is that we recognise that there is a
 28 need for improvement in this area, but we also just want to keep our minds on the
 29 consumers as the ultimate beneficiaries of this entire process. So, as I said earlier, there is
 30 always going to be a degree of tension in the relationship between supplier and retailer,
 31 and we need to keep that in the right balance, such, that we deliver the best outcome for
 32 consumers.

33 So, we have a very customer-focused centric look in our business and so that's
 34 what we're focusing on in this process and we want to view everything from the customer
 35 and look back, so we would describe our model as a pull-model, so it ultimately starts with
 36 the consumer and what the demand is and then we take that demand, we use insights, (as
 37 we've discussed) and we work out what the best thing is to have on our shelves and then
 38 we go to suppliers and seek the best deal for the goods that consumers want to buy. We
 39 don't see it as a push-model, we're suppliers actually have the opportunity to push their

1 products, by right, through our stores to their consumers. It's a pull-model in our view, so
2 that's what we mean.

3 **Dr Johnston:** Thank you for that, that's helpful to get that clarification at the outset I think.

4 Coming now to the question of who should be subject to a grocery code.

5 Foodstuffs, in your submission, you expressed the view that the grocery code
6 should apply to all retail and wholesale participants in a way that ensures a level playing
7 field.

8 And I guess, keen to understand from your perspective as to what you see the
9 advantage of making all retail and wholesale participants subject to the code?

10 **Mr Brooker:** Yep, sure. Sorry that question was directed at me, is that correct?

11 **Dr Johnston:** Yes.

12 **Mr Brooker:** Yes thank you Commissioner Johnston. I guess the thing we're trying to establish
13 here is, as I said earlier, the right balance in the interactions between suppliers, retailers,
14 wholesalers, and the like. So, our view is that all of those that participate in that process
15 should be subject to the same set of rules and we're happy to be and we want to be
16 involved in the process development of those rules, but we do think it needs wide reach.
17 I'll come to detail of how we might reach into the wider parts of our organisation when we
18 get to that, cause that's a separate topic. But that's what we see is the opportunity here is
19 to put in place an industry focused code that works for all participants in the industry.

20 **Dr Johnston:** Well what's your view or response to the view that's been expressed by some of
21 the other submitters that there should be some threshold before a code applies to a
22 retailer to avoid imposing disproportionate costs on smaller retailers where those
23 additional costs may in themselves be an additional barrier to entry or expansion?

24 **Mr Brooker:** Thank you, yes, that's a good question and I do think that there needs to be very
25 good consideration of how the code would apply across the wider industry, as I described,
26 and thresholds maybe one of those ways of doing that. And, for instance, we just need to
27 understand of course, in our network we only have (and I can only speak for our network)
28 but we have some very, very large stores that turnover multi millions of dollars and then
29 we have some quite small stores that you might think of as large dairies.

30 So, there's a huge range, it would be hard, perhaps, to do it by brand, because we
31 have New Worlds that a smaller than large Four Squares and Four Squares that are bigger
32 than small New Worlds. So, there are some challenges and I think what we can say
33 unequivocally is that we, as an organisation, are committed to this process and we're
34 committed to a mandatory obligation to honour the obligations of a code. How we might
35 do that in a practical sense, needs working through because I can't honestly see that a
36 Four Square, quite a small Four Square should appropriately be bound by very detailed
37 provisions of code and say, have to have a code arbiter and the like.

1 For instance, in the UK, the code threshold is a \$1b turnover. So that's the sort of
2 level and threshold that the UK code is aimed at. The Australian code is of course
3 voluntary, so only those that wish to participate will participate. But the code here, we're
4 agreed, should be mandatory and we'll look to make sure that our organisation, as a
5 whole, is committed to the code. But that might not necessarily mean, say, that every
6 Four Square is signed up to it.

7 **Dr Johnston:** Thank you Mike. Tex, I can see you've got your hand up, I'll come back to you in a
8 moment if that's okay, but just before I do, I'm just interested, Josh, whether Woolworths
9 has a view. I know in your submission you talked about there should be some threshold
10 before grocery retailers were subject to the code and wonder if you had any thoughts on
11 how that threshold might be set, whether it's by size, turnover, or by floor size of stores,
12 or some other means?

13 **Mr Gluckman:** Thank you Commissioner Johnston, I'll just hand over to Andrew Dixon from our
14 buying team to talk to some of those points.

15 **Mr Dixon:** Thank you Josh, and good morning, Andrew Dixon from Woolworths NZ. Look we
16 believe the code is about behaviours and protocols that will, I guess, level the playing field
17 across the industry and we would not see size as a barrier to being bound by the principles
18 outlined in a code.

19 I think one of the things is unique about the NZ industry is the number of
20 owner/operated store and, I guess, whether they're standalone or part of a cooperative,
21 including these stores by default is important. And it would certainly be undesirable for
22 owner/operated stores in particular to be able to opt out.

23 And I guess we also see no reason why grocery retailers, such as The Warehouse,
24 the Chemist Warehouse, Costco, Hello Fresh, why they should be exempt from complying
25 with the behaviours and protocols outlined by a code.

26 **Dr Johnston:** Thank you Andrew. Tex, if I can come to you.

27 **Mr Edwards:** Thank you Dr Johnston. Its Monopoly Watch's position that market structure
28 matters. Market structure determines market conduct and market conduct determines
29 market profitability. Excuse me if I stutter when I hear level playing field, but essentially,
30 what are the outcomes, (it might not be the outcome) but what are the outcomes of the
31 final report might be a changed market structure in NZ. And my submission point to
32 Commissioners here, is that when the code is developed, it should understand the
33 changed dynamics of a potential third or fourth, or fifth, sizable, scalable operator.

34 Previous experiences in previous industry transformations, industry codes
35 inevitably, inevitably get used to quarantine competition and third and fourth operators
36 are squashed by the sudden appetite for an industry code.

37 And so I just reference that submission point.

1 My other point quickly is, we do support the application of a specialist
2 supermarket Commissioner for an initial period of 5-years as we go through this
3 transition, thank you very much.

4 **Dr Johnston:** Thank you Tex and I see Mike Chapman from Horticulture NZ has got his hand up,
5 so if I could come to you please, Mike.

6 **Mr Chapman:** Thank you, as you said, Mike Chapman from Horticulture NZ, talking particularly
7 to, should the code be mandatory? We obviously accept that and have submitted on that.
8 But the threshold is really important and I don't think it's, and our submission is, its not
9 feasible to apply the code to all retail type operations. However, where a cooperative has
10 a large range of operations, such as Foodstuffs, it should apply to the whole cooperative.

11 It's really, in our view, should be based on turnover, cause those small start-up
12 retail operations need flexibility so they can innovate and really capture the market. And
13 that's been one of the things that has been stifled in the last couple of decades, is the
14 creation of new opportunities. And our view is a turnover threshold would be appropriate
15 to ensure that there would be start-ups who are innovative and flexible.

16 **Dr Johnston:** Thank you for that. I also see Matthew Lane of Night 'n Day has got his hand up.
17 Certainly would be interested in your perspective Matthew as a owners about 50-odd
18 small stores, how you would feel about your organisation being subject to a code?

19 **Mr Lane:** Yeah, good morning, Matthew Lane Night 'n Day. Look I sought of reiterate the point
20 around disproportional costs and where the problem actually lies. I don't think the
21 problem is our buying power or our relationships with supplier and we don't hold an
22 overbearing balance in terms of those negotiations. And I sort of heard there that
23 Foodstuffs tried to downplay their position in the market for small dairies and small Four
24 Squares. In this case I just don't think that's relevant to the code should apply where the
25 buying power is held and where it can be aggregated, rather than in a network like
26 ourselves, we do have a number of small sites, but I think there's a difference there being
27 able to leverage the buying power of PAK'nSAVE, the New World, down the whole food
28 chain, down to those lower stores.

29 So that's just my thoughts on it, I think the code needs to relate to a threshold,
30 whether that's 5%, 10% of market or the like and not have unintended consequence of
31 pushing more sort of red tape right away across the board to those smaller retailers trying
32 to grow and hold good relationships.

33 **Dr Johnston:** Thank you Matthew, that's really helpful. Now I'd like to sort of come back to the
34 Food and Grocery Council, whether they've got any general comments on behalf of
35 suppliers as to where they should see a threshold. And as part of that I'd also like to ask if
36 Graeme Samuel and Christine Tacon can provide any insight from their experience in
37 Australia or the UK, as to how one should think about setting a threshold. I think the
38 experience in overseas jurisdictions could be quite helpful here.

39 **Ms Rich:** Thank you Commissioners. This whole market study has been put in place because of
40 concerns over the duopolies, so in the first instance, the two major supermarket chains
41 should be designated within a code. But also if there are large scale retailers to enter the

1 market, then they should be covered as well. We don't think that it should cover
2 absolutely all retailers because to emphasise the point made by Matthew Lane, this is
3 about curbing extreme buying power and the harm caused by that. And there have been
4 no reports of anything from those smaller retailers that have led us to having this
5 discussion today. Thank you.

6 **Dr Johnston:** Thank you, I wonder if Graeme Samuel or Christine Tacon have got any particular
7 comments on how to go about setting a threshold based on their experience overseas?

8 **Ms Tacon:** Christine Tacon here. The threshold was obviously set by the Competition
9 Commission, so our authority at the time. And they set the threshold at a billion pounds
10 turnover, not dollars, but same sort of point.

11 I thought I'd let you know that that actually covered 10 retailers at the time and by
12 the time I finished after 7-years in office, a further three retailers had gone over the
13 billion-pound threshold. [inaudible] that I was regulating and there was also a lot of calls
14 for other very large retailers to be covered as well. I think it was an interesting debate as
15 to whether the suppliers felt they were over a billion and the Commission thought that
16 they weren't. But they didn't actually put anything in their regulation that allowed them
17 to determine what actually grocery's turnover was.

18 So there's a piece of advice to you there is make sure that your regulation is
19 future-proofed.

20 **Dr Johnston:** Thank you for that. Are there any other grocery retailers or Supie, anyone else that
21 wanted to contribute to the question of threshold? Graeme Samuel, sorry did you have
22 something you wish to say?

23 **Mr Samuel:** Thanks Dr Johnston. Graeme Samuel, Former Chair of the ACCC and the
24 Independent Reviewer of the Australian Food and Grocery Code, with the report delivered
25 in September 2018.

26 We considered the issue of thresholds; we didn't set any. It was probably a little
27 bit clearer in Australia in that there are three or four major parties that deal with
28 suppliers. Coles, Woolworths, of course, Aldi and then the other participant was Metcash,
29 which was in fact a wholesaler. And the fundamental recommendation, one of the
30 fundamental recommendations in my review of the Food and Grocery Code of Conduct
31 was that Metcash, as a wholesaler, ought to be brought within its coverage.

32 We considered some others, including Costco and smaller retailers, but considered
33 that their position in the market was so small that they didn't exercise the market power
34 that would have impacted upon their dealings with supplies, so we were less concerned
35 with those. But ultimately, we did invite Government to consider the potential for
36 thresholds, they would have been turnover thresholds.

37 **Dr Johnston:** Thank you Graeme. While you're there, I think it's probably an appropriate time to
38 transition into the second topic, which is to what extent the Australian Code is appropriate
39 as a basis for adoption in NZ Code and I'd certainly be interested in your perspective,
40 Graeme, on whether key aspects of the Australian Code, which you think should be

1 changed or shouldn't be adopted in the NZ context if the Australian Code was being
2 considered as the basis for a NZ Code?

3 **Mr Samuel:** Well thank you very much and as I just indicated, there is the benefit of the review
4 which we undertook which was a 3-yearly review as required under the original legislation
5 relating to the Food and Grocery Code. I'll mention five particular items, I've got some
6 views on collective bargaining and private labels which I can express later.

7 But the first one is that I see you've reached, if you like, a tentative conclusion on
8 that is, the question about whether it should be a voluntary or mandatory code? In
9 Australia it's a voluntary code, but I should point out that the voluntary nature of the code
10 is a little more of an illusion than it is a practical reality. It's an illusion in this sense that it
11 is voluntary only as to whether or not you join the code, whether or not you agree to be
12 bound by it. But having agreed to be bound by it, the code's a prescribed code and
13 therefore is fully enforceable under the law by the ACCC.

14 One of the things I was concerned about when I did the review, was that parties
15 that should have been bound by the voluntary code, or should have volunteered to be
16 bound by it when it was first instituted in 2015, had not done so. And in particular,
17 Metcash was the primary party, it's a wholesaler, but it has very substantial dealings with
18 suppliers. And the fundamental reason Metcash had not joined the code was because no
19 pressure was brought to bear on them following the 2015 Code being instituted, no
20 pressure was brought to bear on them to join.

21 So what I recommended was that the code should continue to be a voluntary code,
22 that is as to whether or not you join the code, whether or not you're bound by it. But that
23 those parties that ought to be bound by it, that didn't volunteer to, should be subject to
24 mandatory code. So we had a hybrid situation. And it worked. And now Aldi and
25 Metcash are bound by the voluntary code because they volunteered.

26 Now there is an advantage in a voluntary code and it's a constitutional advantage
27 because the Code of Conduct in Australia rests very much, not only on cultural change, but
28 on the ability to impose arbitration upon the parties and there's an arbitral process that's
29 in the code (and I'll come to that just in a moment) and there is a real constitutional
30 question as to whether a mandatory code can impose private arbitration on parties, or
31 whether parties have to volunteer to that occurring.

32 And so I invite you just consider that. You of course can get a copy of the review
33 that I undertook and invite you just to have a look at pages 23 and 24 of that review which
34 discusses the issue of mandatory versus voluntary. The ACCC was keen to have a
35 mandatory code, they wanted to work much more towards enforcement. My view was
36 that enforcement was a second, if you like, a second-best way of dealing with issues
37 between suppliers and retailers (and wholesaler, of course, with MetCash being
38 introduced) but that arbitration was a better way of dealing with it. Now, I'm going to
39 come to that in a moment.

40 We did require that wholesalers be included. Metcash was a powerful party in the
41 Australian grocery market. It is a single wholesaler and therefore has significant

1 monopsony power and the proposal was that Metcash should volunteer, but if they didn't
2 volunteer, there would be a targeted mandatory code that would apply to them alone.
3 They volunteered and are now part of the voluntary code. Which of course I say, the
4 moment you become a voluntary participant or be bound voluntarily by the code, the
5 code then has the force of law because it is a prescribed code. And no party that has
6 volunteered to be bound by the code has withdrawn, particularly when they know that a
7 mandatory code will then be imposed on them. So that hybrid model has worked very
8 well, but it does retain the constitutional, if you like, the constitutional issue of being able
9 to impose private arbitration.

10 The third element, which I thought was really important, was a combination of
11 good faith obligations and fair dealings obligations. Now interestingly, the Government, in
12 its response to my review, adopted the view the good faith should be subject to further
13 definition, it has a common law definition, but there are other factors that could be
14 outlined and they have been outlined in the revised code as to what constitutes good
15 faith.

16 But I also recommended that there should be another provision relating to fair
17 dealings. Now, you might ask, what's the difference between fair dealings and good faith?
18 Good faith requires the parties to act, as it says, in good faith. It has a legal definition.
19 Fair dealings is a lot more subjective. It relates to the question of what's fair and what's
20 unfair and it takes account of the exigencies of suppliers in particular circumstances and I
21 had a strong view that fair dealings ought to be introduced into the code of conduct, it
22 would have had a slight overlap with good faith, but it was important. The Government in
23 its response agreed with that recommendation, but then in the final outcome, with which
24 I had no involvement, they omitted the fair dealings provisions. And I have to say to you, I
25 think that's a deficiency. I don't agree with it and let me explain why.

26 I have long been an advocate of non-prescriptive law. For those who took an
27 interest in the Hayne Royal Commission in Australia into financial misconduct, Ken Hayne,
28 a former Judge of the High Court of Australia said, "Look there are six fundamental
29 principles you've got to deal with". I won't go into the principles, but he said, the problem
30 he's got with the corporations and securities law in Australia, is that the more complex the
31 law, the more difficult it is to understand, the more difficult it is to comply with, but most
32 importantly, he said, "It is a breeding ground for loopholes for lawyers to discover
33 loopholes and to get around the law".

34 And one of the things I discovered when I did the initial analysis of the Operation
35 of the Food and Grocery Code, was that although the major retailers professed that they
36 complied with the code, in fact in practice, they had with proper legal advice, found
37 loopholes in the prescriptive provisions. And I was concerned about that. I've always
38 been in favour of much more general law in principles law that says you should behave
39 fairly; you should behave in good faith.

40 And those sort of things are very important. You would not be surprised to hear
41 that the major retailers were not keen on a fair dealings provision.

1 **Dr Johnston:** If I could just interrupt you there, I think that point you make about fair dealings,
2 you know, are very important. I think we've heard that quite clearly, but I'm keen to
3 move on and hear from Christine Tacon as to any experiences from the UK that she thinks
4 would also be useful for us in NZ. And perhaps Christine, are you able to provide us with
5 any particular features of the UK experience, particularly perhaps two or three examples
6 of things in the UK code that you would think would be useful to us here in NZ?

7 **Ms Tacon:** Indeed, thank you very much. I think first of all, to pick up on the last point that the
8 UK code did have an overarching principle of fair dealing that I always said that that I
9 would never take an issue on the fair dealing along that also had [inaudible] fifteen
10 specific ... fair dealing. And I think you could bring cases, lots of people wanted to say,
11 "This just isn't fair". Can you still hear me alright?

12 **Dr Johnston:** Yes.

13 **Ms Tacon:** I'll carry on. And so in terms of the practices, I thought I should say that there was
14 nothing consumer focused in our practices, they were all to do with the way that the
15 retailers were treating their suppliers. And the main one, the one that I think that had
16 most success with and which is one of the biggest issues was that large retailers mustn't
17 delay payments to suppliers. That they can't unilaterally make changes to agreements or
18 to delist suppliers without giving reasonable notice, and I ended up doing quite a lot of
19 clarification about how do you define what reasonable actually means. They can't ask for
20 shelf positioning payments unless they're part of a promotion. And listing fees can only
21 represent the risk in listing the product and not provide another income stream
22 [inaudible].

23 So I've listed what I felt were the key ones there. There was and remains nothing
24 in the UK code about price, types of promotion, below cost selling, all of which I know
25 you've been discussing.

26 On promotions there are in the UK code are rather ill-defined provisions that the
27 supplier can't be required to predominant fund the cost of a promotion and actually that
28 never really came up because it's really about what was agreed at the outset and has that
29 been changed.

30 But you've obviously got a different structure, as I was saying earlier that I ended
31 up with the thirteen retailers by the end. I thought you'd be interested to know, given
32 some of your other topics last week, that five of the thirteen regulated retailers in the UK,
33 are limited range discounters. And two of them went over the one billion threshold while
34 I was in office and the third one that got designated was an online retailer. I actually did
35 have the power to investigate and fine retailers. The maximum fine was 1% of their UK
36 annual turnover. So for Tesco the maximum fine could have been half a billion pounds.
37 And I also had the power to arbitrate in code related disputes and to make money awards.

38 And you've probably already heard, but you know, I took a collaborative approach
39 in the way that I worked with the retailers. I worked closely with their code compliance
40 officers and one of the biggest issues anybody will have in this position is getting suppliers
41 to talk to them and to tell them what the problems were. I spent a lot of time talking to

1 suppliers and tended to rely on anecdotes for some more granular evidence to identify
2 the main issues and then work with the code compliance officers who were generally in
3 legal or in audits. They were not allowed to be in the buying chain, to tell them what the
4 issues were and give them time to put things right.

5 And occasionally I escalated issues to the Chair of the Audit Committee or the
6 Chief Exec, but I have contacts with all of them. But generally I had good relationships
7 with the retailers because when I raised things with them, they did something about it.

8 And I also ran a supplier perception survey each year and I published a league table
9 setting out [inaudible] most compliant with the code, responses to those surveys.
10 [inaudible] to which would be top. Including if they were doing well, which Aldi was, used
11 it in their consumer advertising. And used the information from the survey to work with
12 the retailers to show them where they were doing badly [inaudible] against their
13 competitors.

14 I just felt it was worth saying [inaudible] huge improvement on every single
15 measurement with yourselves and suppliers told me right to the end of my time as the
16 Adjudicator, that the retailers were still hard bargainers. But suppliers knew where they
17 stood and increasingly had the confidence to challenge the retailers knowing that there
18 was a regulator to turn to if they felt the code was being broken. And in 7-years, I only did
19 two investigations, I imposed no fines and only had eight arbitrations. That's in 7-years
20 and that's with only me as part-time with five staff at the maximum running the office.

21 From a consumer point of view, over that period of time there was 8% price
22 decrease from what they paid. Markedly increased choice driven by online businesses
23 having greater ranges and a focus by many retailers on innovation to differentiate their
24 offerings [inaudible] picked up few of the points that have been coming up today and last
25 week, and happy to answer any further questions that have been raised by anything that
26 I've said.

27 Thank you very much.

28 **Dr Johnston:** Thank you Christine, that's been really instructive in terms of your experience in the
29 UK and how that might translate to NZ. I see Graeme Samuel's got his hand up, Graeme
30 have you got some additional point you were wanting to make?

31 **Mr Samuels:** Yes, look we're informed by Christine's experience and I spent some time on the
32 phone with her in looking at this review. The fundamental basis of the Australian Code is
33 to bring suppliers and retailer, wholesalers together in the form of arbitration. And thus,
34 we put a lot of store on the process of code arbiters. We had, what I called, 'The Kennett
35 Model'. I describe it as the Kennett Model, it's the model that had been established by
36 Coles in Australia where the Former Premier of the State of Victoria, Jeff Kennett, was
37 appointed as the Code Arbiter. And the great beauty of the way that model worked was
38 that Kennett had the gravitas, had the authority and had the agreement of Coles
39 management and Coles Board to be able to reach conclusions, reach decisions to deal
40 with issues raised by suppliers. And he imposed those, he imposed them on Coles and he
41 imposed them on suppliers. And that process worked very, very well indeed. And as a

1 result, I recommended that the process should be extended across others who were
2 bound by the code.

3 So code arbiters now are appointed by each of those who are bound by the code,
4 that is each of the retailers/wholesalers. They have to be independent; they're paid for by
5 the retailer concerned, but they have complete independence as to their ability to deal
6 with issues.

7 The important thing is that the timeframe in which they deal with complaints is
8 very short indeed. And there's very good reason for that because had matters gone
9 through a process of enforcement by a regulator, the timeframe could have been
10 stretched out to one or two years or more, including Court cases and the like. And the
11 problem was that by that time the supplier would have gone broke. It just would have
12 vanished.

13 And the beauty of the way that the Kennett model works and the Code Arbitrator
14 model works, is that these matters are dealt within a matter of days, not months or years,
15 and the process ultimately works for the satisfaction of all parties. Indeed, Kennett
16 described to me one instance where he recommended a seven-figure settlement in favour
17 of a supplier because chief executive called a meeting, he said, Jeff I think you're wrong,
18 he said it should be higher than what you've recommended. So that sort of cultural
19 change had started to occur.

20 At the end of that a review was a very important element of it and I'm pleased to
21 see the Government has appointed an independent reviewer in Australia. The
22 independent reviewer is not there as an appeal body, against code arbitered decisions,
23 but is rather there to deal with failures in process. And if there has been a failure in
24 process or a complaint by a supplier as to a failure in process, that goes to the
25 independent reviewer. The reviewer then looks at the process, can go to the code arbiter
26 and say, "I think there's a problem with the way you've handled this", discuss with him,
27 look at the documentation that the code arbiter has had to deal with, etc, and can invite
28 the code arbiter to reconsider the matter on the basis of a failure in process. The ultimate
29 sanction is that the independent reviewer can then go to the ACCC and say to the ACCC,
30 "The process that's being applied by a particular retailer (or wholesaler) is not right. The
31 code arbiter is not doing the role that is required to do, and my recommendation is, that
32 for example, the code arbiter ought to be replaced". And that can be an order that is
33 given by the ACCC. The reviewer also has roles in providing annual reports and is there to
34 really have code arbiters, wholesalers, retailers, suppliers sit down together and work
35 through the cultural change that is necessary.

36 **Dr Johnston:** Thank you for that Graeme. Mike Brooker, I'll come to you first, I see you've got
37 your hand up and I was actually quite keen to get Foodstuff's perspective on the
38 appropriateness of the Australian Grocery Code, particularly I don't think you said
39 anything one way or the other in your submission on the appropriateness of the
40 Australian Code.

41 **Mr Brooker:** Thank you Dr Johnston and again, just like to acknowledge the expertise that
42 we've got on the call with Graeme Samuel and Christine.

1 I think we can probably tick some of these off, which would be really helpful. So
2 we've made it clear that we're up for a mandatory code. So that takes that off the table, I
3 believe, as has Woolworths.

4 In terms of the constitutional issues that were raised, we don't have those,
5 because we've got a clean slate to work from and we'll need legislation to put in place a
6 code environment. So, that's the way that we'd go with that.

7 We're completely okay with good faith. We're open to fair dealing as long as
8 understand what that means in context.

9 So, in terms of the Australian Code, yes, we think there's a lot of valuable things in
10 that code and there's a lot of work that's been done that we'll just be able to utilise.

11 Sorry, I should also start with, we're absolutely up for a commitment to the code
12 on a whole of business basis. So if there's any misconception there, then let's clarify that.
13 We're up for it on a whole of business basis. That doesn't mean that necessarily every
14 one of our 350 stores would sign the documents. It's just that we need to work out
15 appropriate enforcement mechanisms because it's been made quite clear that it doesn't
16 apply to small retailers in other jurisdictions, in Australia for instance when we talk about
17 Metcash. Metcash has signed up to the code under some pressure it seems, but the IGA
18 network, which is their retail network is not signed up to the code.

19 So, we just need to be careful that it's workable and appropriate and cost effective
20 and we've heard that from other submitters.

21 But there is a lot of good stuff in the code. I would just caution there is, and we've
22 heard a lot from Christine and Graeme about the two codes, Australia/UK, they're both
23 obviously workable in their jurisdictions. They are quite different in that the UK is much
24 more of a principle base code and the Australian code is much more prescriptive.

25 So I'd just caution that we're open to taking a lot of the Australian code, but we
26 need to make sure that it works in the NZ market. We need to make sure that there's
27 appropriate thresholds and we need to also ensure that we don't just take, for instance,
28 an arbitrary provision out of the UK and pop it into a Australian provision and hope that it
29 works, cause they are different codes and you've got different enforcement regimes and it
30 would be like saying we've got a league game refereed by union ref.

31 So we just need to make sure that it works. But thank you for your time.

32 **Dr Johnston:** Thank you for that Mike. So I'd like to come onto Mike Chapman and it's quite
33 sort of timely, I'm keen to get Mike Chapman's comments on this current issue and it also
34 then transitions into the following issue, which is, is a separate code appropriate for fresh
35 produce, so Mike Chapman.

36 **Mr Chapman:** Thank you. I think the first point that's really important is, if it's very
37 prescriptive, I don't think it will fit the NZ situation that well. What we should be doing is
38 looking at the best from codes around the world. UK is certainly on a more principle basis
39 and the most important thing when it comes to fresh, because it's perishable, is that

1 there's speed. And if you have prescriptive code, it will get bogged down in how that
2 might work. What Graeme was talking about in terms of quick action by arbiters that are
3 appointed, is exactly what's needed. Cause you know, the dynamic nature of the fresh
4 market, the fact that price is very dynamic and quality is very dynamic, it means that there
5 needs to be very quick decisions before the produce is wasted.

6 So, I think it needs to be tailored to a NZ situation. Prescriptive will work so much
7 better for fresh, with a very fast arbitration type system that the supermarkets who are
8 above the threshold, commit to.

9 So, that's essentially my comment on that, I hope that answer the questions you
10 had.

11 **Dr Johnston:** Thank you, so I take it from that Mike, that providing there's a mechanism for
12 quick resolution of issues involving fresh, that could be addressed in a single grocery code
13 and perhaps we don't need a separate fresh code as you have proposed in your
14 submissions?

15 **Mr Chapman:** I think the reason we propose that was we saw such a difference between dry
16 and fresh. And if it could be constructed so that fresh is adequately covered, recognising
17 it's a sort of completely different dynamic market in one code, that would be fine. The
18 two-code thing was to very much hammer home the point, if you know what I mean.

19 **Dr Johnston:** Thank you for that. I'd like to come now to Woolworths, we've had quite a big
20 discussion over the last few minutes on the Australian Grocery Code, which I think you've
21 said you're happy with adopting as the base in NZ and the appropriateness of Mike
22 Chapman's comments on incorporating fresh product within a grocery code. I just wonder
23 at this point if Woolworths, Josh, you had anything to add at this point or whether happy
24 for us to move on?

25 **Mr Gluckman:** I'll let Andrew lead out on that.

26 **Mr Dixon:** Look, yeah, as we've submitted already, we are very supportive of the Australian
27 Grocery Code being the starting point for a NZ code and I guess with so many suppliers
28 operating on both sides of the Tasman, I think consistent principles would be helpful. It's
29 great to hear from Foodstuffs that they see their owner/operated stores being included in
30 the code. We think certainly think that's important and likewise, large retailers like
31 Costco, we'd see them as being part of the code as well.

32 In terms of produce, look, yes, we agree. Produce has unique considerations and
33 we certainly support the inclusion of specific terms relating to produce. We note the
34 Australian code covers things such as produce specifications, labelling, packaging,
35 rejection and receipt of goods. We also note that it outlines protocols for the
36 management of produce cost prices.

37 I guess the only other point we'd add is we also support the inclusion of provisions
38 for other categories, such as meat and seafood. If making these clearer would make the
39 code more workable and effective for the industry, we'd support that also.

1 **Dr Johnston:** Thank you, well we're just coming to time for the morning break but before doing
2 that I'd like to go to Hans Maurer of United Fresh for any comments he wishes to make.

3 **Mr Maurer:** Yes, good morning, thank you Commissioner. Similar to Horticulture NZ's position,
4 we caution against produce being in a general code for exactly the same reasons. But
5 similar to Horticulture NZ, we encourage to hear that there is an option to have faster
6 moving produce solutions in there.

7 I just want to make a couple of other points on that though.

8 The first thing is that the NZ produce industry along the entire supply chain is
9 structured differently to Australia. We don't have wholesale market facilities here owned
10 by city councils where you can go and find dozens of wholesalers selling of samples, we
11 have a limited number of wholesalers occupying their own spaces, etc.

12 And we also don't grow the same produce. We don't have a commercial banana
13 industry, we don't have a commercial pineapple industry, we don't have a commercial
14 mango industry. We have other industries. So, we need to look carefully at the Australian
15 produce related code to make sure that we bring the appropriate aspect of it into our
16 industry and at that, I'd just like to point out there's also another code existing over there
17 in Australia, also administered by the ACCC. It's called the Horticulture Code. And there
18 may well be aspects of the Horticulture Code that has the ability to be brought into
19 produce related code within the discussion we're having here.

20 **Dr Johnston:** Thank you for that Hans. Well I think, given the time we're at its appropriate we
21 take our morning break and thank you for the contributions everybody's made so far this
22 morning, its been a very insightful and useful discussion and look forward to reconvening
23 at 11.15, thank you.

24

25 **Dr Johnston:** Welcome back. I understand that Mark Sullivan had his hand up at the end of the
26 session and I missed it, so perhaps I thought I might start just by going to Mark Sullivan
27 and inviting him to provide the comment that he was wishing to make.

28 **Mr Sullivan:** We would just like to say that from Foodstuffs SI perspective that we see the code
29 applying across our cooperative. And equally we're happy with the Australian code as a
30 starting point, but we are concerned or want to make sure it doesn't get prescriptive in its
31 terms. And equally we're happy for a robust and speedy disputes resolution process. Our
32 concern there is if it is cost or there are some sort of prohibitive terms in there that it just
33 won't be used. So thank you.

34 **Dr Johnston:** Thank you for that Mark and we're going to come back a little later to talk a bit
35 more about the dispute resolution processes under the code.

36 Just looking at where we're at in the process at this stage, the next topic we were
37 going to talk about was the inclusion of best price guarantees and exclusive supply
38 arrangements in a code. We've had a bit of discussion among ourselves over the break
39 and our thinking is that is probably something that can be dealt with by way of written

1 submissions, I mean unless somebody feels strongly that there should be a separate
2 discussion about that.

3 So, we'd like to propose that if you've got views on that topic that you write to us
4 at our email address with those thoughts. If however anybody thinks it's important that
5 we have a discussion specifically on those aspects, we propose to do that on the final day
6 of the conference where we're holding topics we don't get through during the course of
7 the conference. So if people have particular views on the need for a discussion on the
8 topic of exclusive dealing clauses, and most favoured nation pricing provisions, please
9 drop us a note on that.

10 So, against that, I'd now like to turn to the final question under the topic of the
11 code and that is the oversight, compliance, monitoring and dispute resolution processes.
12 And there's been quite a bit of discussion about that topic already with various
13 discussions, people mentioning adjudicators. We've heard about the process in Australia
14 and the UK. But I'd like to perhaps start the session by coming back to the Food and
15 Grocery Council, to Katherine Rich, and in the FGC's submission it made suggestions of a
16 few changes to the Australian code, but one in particular is they were, as I understood it,
17 proposed using the use of an adjudicator model rather than just the arbitration model
18 that's in the Australian code. So I would be interested in understanding a bit more fully
19 where the FGC currently sits in terms of their thinking about an adjudicator role. Although
20 I think I heard Katherine Rich, in her discussion earlier talk about a Commissioner, so I'd be
21 keen to get clarity from FGC on what it sees as the optimal solution for dispute resolution.

22 **Ms Rich:** Thank you. We believe that all matters in the Australian code, all the issues that they
23 cover are relevant and we do favour the UK system of dispute resolution. And the reason
24 for that is that having watched the way the Brits have used the Grocery Adjudicator,
25 originally called an Ombudsman, Christine Tacon became not just a champion and an
26 independent person looking at grocery issues, but because she was working, a designated
27 person working on these issues all time, she actually was able to work closely with
28 retailers and suppliers to change business practices.

29 So, I think for a small country like NZ, it would be worthwhile considering a
30 Commissioner – I don't have any view on what it might be called, Adjudicator,
31 Ombudsman - but to have someone who is designated with being the referee, overseeing
32 the grocery game, to be someone that suppliers could contact, discuss issues with,
33 oversees the code and perhaps changes to it. I think you should look at whistle-blower
34 provisions so that any supplier feels that they're able to raise issues.

35 Also I think one of the things the UK did which has been very useful, it is to
36 undertake annual supplier surveys so you can actually see trends in progress over time.

37 I hear the retailers talking about a consumer focus code. I don't know what that
38 language means because always and everywhere, these codes are about those
39 transparent business relationships between suppliers and the supermarkets.

40 Just to go back to a previous point, Mr Chair, certainly the code has to cover all
41 aspects of the retailer's businesses. And I think if they did, then we would see some of the

1 more egregious behaviour that happens at store level disappear overnight because you
2 could point to it and raise it with the Ombudsman leader who becomes the curator in the
3 overseer of that code for NZ.

4 **Dr Johnston:** Thank you for that Katherine. I'd like to come back now to Horticulture NZ; we've
5 heard already from them about the importance of a dispute resolution mechanism that's
6 quick and fast to get resolution. I just wondered if you had anything else at this stage,
7 Mike Chapman, you wanted to add or were there any other aspects of enforcement
8 around a code that your members would think would be helpful to get resolution of
9 disputes in the fresh space?

10 **Mr Chapman:** I think Mr Chair, we've probably covered them, but I'd just like to endorse what
11 Katherine Rich has said, you know, there does need to be some arbitration, arbiter,
12 whatever you want to call it, dispute resolution system, that is very, as we said just before
13 morning tea, fast and flexible so that it can cover the dynamic produce market. But, yes, I
14 think that's all I can say on that usefully.

15 **Dr Johnston:** Thank you and Hans Maurer, you've got your hand up if you could add your
16 contribution please.

17 **Mr Maurer:** Yes, certainly. I agree with Katherine Rich in terms of NZ being a small country and
18 there's a limit of what we can afford. But in terms of fresh produce, it is a separate
19 discipline, so to have an adjudicator or whoever that individual is being called, with
20 general skillsets, isn't enough. He or she needs the ability to actually draw on quite
21 specific fresh produce related skillsets in order to make a meaningful contribution in that
22 area. So competency comes into it for me.

23 **Dr Johnston:** I can fully understand the need for the competency in the fresh space, so thank you
24 for that.

25 I'd like to now come to Consumer NZ, either Jon Duffy or Aneleise Gawn, in terms
26 of your submission, I think you took a slightly different approach in terms of dispute
27 resolution where you were suggesting that there should be a Commissioner sitting in the
28 Commerce Commission to have this role and keen to understand why you're proposing
29 that rather than the arbitration/mediation role, as per Australia or the adjudicator role as
30 per the UK?

31 **Ms Gawn:** Hi there, probably not a lot further to add on that, at the moment, we haven't
32 thought through too much the arbitration and adjudication options. We just thought the
33 Commissioner seemed like a good way to ensure that it is monitored and enforced
34 appropriately.

35 **Dr Johnston:** Thank you for that Aneleise. If I could now come back to Foodstuffs obviously had
36 a range of views on the table about the dispute resolution options and using arbitration
37 versus an adjudicator. Josh, perhaps if I could come to you from Woolworths perspective,
38 do you have any particular thoughts around the resolution mechanism?

39 **Mr Gluckman:** Thank you Commissioner. From a Woolworths NZ perspective, James Radcliffe,
40 our General Counsel will just speak to our views on this matter.

1 **Mr Radcliffe:** Thanks very much Josh and thanks Commissioner. It's been an interesting morning
2 I think, in terms of hearing the different perspectives and particularly thank you for
3 Graeme and Christine, I think that's been very interesting to get your expertise. And it
4 sort of highlights to me, I suppose, that the grocery retail industry can sort of seem quite
5 simple at first glance, but there's really a lot of, sort of, fishhooks and issues that need to
6 be considered in terms of the market, characteristics of the markets in different countries
7 and even sort of constitutional issues, thanks Graeme which I hadn't considered.

8 So we favour a Commissioner or an Adjudicator or Ombudsman, some role like
9 that that is properly resourced and has an ability to sort of really build and the time to
10 build a deep understanding I suppose of the industry and the players and the various roles
11 they have. And even some of the longstanding practices in our industry which, you know,
12 are quite unique. So we favour that, we consider that it's important that it be
13 independent and properly resourced. And we consider there's a number of matters that
14 that role could also deal with and those are matters we've discussed earlier including a
15 mandatory unit pricing code. Even some of the initiatives we've talked around about sort
16 of consumer facing promotions and things such as that.

17 So we favour it, we think, we agree that the key issue is robust, quick decisions and
18 independent decisions and we think that independent role would provide that sort of
19 visibility and I guess confidence in the industry in how participants are behaving.

20 Arbitration, Commissioner would seem like a sort of good way to deal with that,
21 but we haven't formed a final view. We would support and like to be involved with any
22 discussions that either facilitated by the Commission, or anyone else in terms of how a
23 final code would be formulated and what the appropriate dispute resolution mechanism
24 would be. Thank you.

25 **Dr Johnston:** Thank you for that James. And perhaps if we were to come to Foodstuffs, Mike,
26 have you got some thoughts from your end on that, Mike Brooker?

27 **Mr Brooker:** Yes, thank you Commissioner Johnston. Look appreciate that discussion, I'd just like
28 to reiterate that we absolutely commit to the formation of a code on a whole of business
29 basis. So I think I've said that, but I'm just going to repeat it because we do commit to a
30 code on a whole of business basis. But how it actually works mechanically, we're
31 obviously unsure of yet because we don't know the content of the code.

32 So what I would say is that we're up for a mandatory code, its an enforceable code,
33 its going to have consequences and its going to have independent dispute resolution
34 processes. That is utterly accepted.

35 From there, the mechanics of how it unfolds take some work and consideration
36 and I would just acknowledge that having spent a bit of time with Christine's staff
37 member, Matthew in the UK in 2015 in talking through how their code works and then
38 learning a lot about the Australian code through people that have worked on both
39 supplier side and retailer side there, I'm not sure that either of them have got it
40 completely right at this stage, with the greatest respect.

1 So, what we need is a system that works and a system that's trusted. And I think
2 that's the main thing and trusted from a supplier perspective. Cause what we're hearing
3 is that the suppliers don't want to come forth and we've certainly invited them to come
4 forth and we've agreed a process with the FGC in the past and said, "Come to us, give us
5 the evidence and we'll sort it out". That hasn't happened. Well it did happen initially, but
6 it hasn't happened recently.

7 So, we need a system that works. We need a system that's trusted. We need
8 suppliers to come forward. We want to operate in an ethical environment where these
9 issues are stamped out, because we don't believe in them. So, that's what we're up for
10 and that's what we'll work toward, thank you.

11 **Dr Johnston:** Thank you for that Mike. If can ask whether Tim Donaldson from Foodstuffs SI's
12 perspective, have you got anything to add to what Mike has said around dispute
13 resolution?

14 **Mr Sullivan:** Mark Sullivan from Foodstuffs SI.

15 **Dr Johnston:** Sorry Mark.

16 **Mr Sullivan:** Thank you Commissioner. No, we're comfortable with the positions outlined. We
17 don't have a firm view on how dispute resolution would work, but again as I said earlier,
18 we're keen for a speedy and robust process and one that actually reflects NZ conditions
19 and to Mike's point, there are good and bad things probably in both codes in Australia and
20 the UK and we're really keen to work in the industry to make sure that we get a code that
21 works for us. Thank you.

22 **Dr Johnston:** Thank you Mark. As I said when we started this sessions this morning, it seemed
23 that in the discussion on Friday there might still be some issues which some concerns on
24 the part of suppliers that haven't really been properly ventilated to the Commission as yet
25 and we wanted to provide an opportunity at this point in the discussion if there are
26 parties that want to come forward or have things they wish to say that they don't think we
27 are aware of at the moment, to have an opportunity to express those views or let us hear
28 about them.

29 I'd like to emphasise that our focus in our enquiry is on issues associated with the
30 way that competition is working in the grocery sector. I therefore ask that people limit
31 any comments on issues that they want to raise to issues that arise because of a perceived
32 lack of competition or competition not working properly in the market. So we are keen to
33 learn about issues that we're not already aware of and it wouldn't satisfactorily be
34 addressed by a code in your view.

35 So if there's anyone who wants to raise those now, we'd be keen to hear them.
36 Giles Barker, I'm not sure whether we fully heard the issues you wanted to raise on Friday
37 or whether you want to raise anything at this point?

38 Okay, if there are other suppliers who are keen to raise issues but would rather not
39 do them at this point, we're certainly keen to hear about them and we'd ask that you drop
40 us note on those either by email, or if you want to meet with us to talk about them, we'd

1 be keen to do so. So again, please email us at marketstudies@comcom.govt.nz to see if
2 we can tee something up. So again, as I say we're very keen to hear any issues that you
3 don't think we're already across.

4 I can see two people with their hand up but I can't see who it is. Oh, Nick, perhaps
5 we start with Nick.

6 **Mr Hogendijk** Good morning, thank you for having me. I think just in response to your question
7 about suppliers not wanting to be publicised in some of their complaints, I have the better
8 part of just looking at my other screen right now, six emails this morning regarding
9 suppliers and conducts they would deem as unbecoming. The challenge that is a
10 consistent theme from members of Horticulture NZ, members of FGC, and people that are
11 members of neither of those parties who are suppliers to the grocery and wholesale and
12 majors, is that they are genuinely concerned for the repercussions. It is a consistent
13 theme that is coming through, it is something that I deal with on a daily and weekly basis
14 and have now for the last 2-years.

15 We won't go into the details of it at the moment, but I suggest we probably need
16 to have a conversation outside of this session where some of these people's views and
17 their communications and documents on their letterheads that include members of
18 different retailers, are actually shared in a confidential environment. Because the
19 repercussions that they're concerned about are quite real for them and the fear that they
20 have for any such repercussions, is genuinely palpable when you're speaking to them, and
21 having, you know, grown men in tears about the repercussions of their business and the
22 letting people go in their teams because they cannot, if they succumb to the pressures
23 remain to keep these people in gainful employment which is a societal impact, not just an
24 industry impact. Thank you.

25 **Dr Johnston:** Thank you for that Nick, I'll ask our team to pick that up offline with you after this
26 session, we can talk about how that's best facilitated.

27 I think Christine Tacon, you also had your hand up wanting to add to the
28 discussion.

29 **Ms Tacon:** Indeed and I'm actually adding to Nick's point which is the fear that people have or
30 suppliers have on raising issues. And that was why it helped having my position as an
31 adjudicator that I could listen to them, look for themes of issues that were coming up
32 across many sectors of groceries and then take them up with the retailers, explain to them
33 why this practice that I was hearing about, probably from a large number of them, why I
34 felt it was a breach of the code and giving them the opportunity to work within their
35 businesses to put things right. And that's how the survey helped as well, so I didn't
36 necessarily, I actually didn't have enough evidence in many cases to launch an
37 investigation, but I had enough evidence to raise it as an issue and give these code
38 compliance officers within the organisations the opportunity to solve them.

39 And it's a nice idea to have an external arbiter that people can go to, but really, by
40 the time somebody is raising an arbitration, they have probably had their whole business
41 delisted from a retailer and they have got nothing more to lose. And you need that

1 backstop. As I said, I had eight arbitrations in 7-years. All of the rest of it was being used
2 listening to suppliers and helping change things. And I said if you want to resolve your
3 specific issue today, by far the quickest way to do it is to do it within the retailer. And
4 there was an escalation from buyer to senior buyer to code compliance officer, but I used
5 to say to suppliers, "Pick your battles", you know, "Decide if this is going to be worth
6 escalating or not". They knew and I knew that there was a risk in them doing so.

7 So I would try and resolve the whole issue across all the retailers, if they wanted
8 something resolved, by far the quickest way to do it, is to resolve it within the retailer and
9 to point out why they thought it was a breach of the code.

10 So training suppliers to learn how to raise things with retailers, how to use the
11 code, was an important part of getting it all to work. Thank you.

12 **Ms Rawlings:** I just had a follow-up question for Christine on that. So, it sounds like a lot of that
13 work is in a facilitation type role, but in many respects, I think what you've mentioned is
14 advocacy then on behalf of those suppliers with the retailers that you were dealing with.

15 What is it that made those discussions and that process more effective do you
16 think than the type of FGC or other kind of group advocacy? Is it just the potential in the
17 background of a binding arbitration or sanction that you might impose or something else?

18 **Ms Taccon:** I actually made it clear to all of code compliance officers when I first met them,
19 because they were all worried that as a regulator they had significant powers. We were
20 both sort of, I suppose, slightly nervous of each other and I made it very clear that I will
21 never investigate something without first telling you what I think the issue is and giving
22 you time to put it right. And only if I feel that you're not making progress, will it then be
23 investigated. So they all knew that by cooperating with me, coming to my quarterly
24 progress meetings, responding to the issues I was raising, they were protecting their
25 businesses from huge reputational damage from an investigation and potential of a big
26 fine.

27 I did actually find that many of the, at least there were not many trade associations
28 in the UK that really knew chapter and verse what was going on with their members in
29 these areas. And I found that by going to where suppliers were, having confidential one-
30 to-ones, listening to them, sometimes just 10-minute meetings, I was picking up what all
31 of their issues were.

32 **Dr Johnston:** Thank you for that Christine. I'll come now to Mike Chapman.

33 **Mr Chapman:** Thank you. Look, two quick points. Strong support for the code from our
34 members but that support is around having a flexible code that will respond quickly. And
35 the process that we've been hearing about in the UK is certainly one which would really fit
36 well. And you know, often there isn't the evidence there for a full investigation, but there
37 is a systemic practice that can be curbed with a proactive approach. And that's certainly
38 what we would support.

1 As, you know, going back and dredging over – my second point is going back and
2 dredging over what might have happened in the past, perhaps isn't that useful. If we have
3 a flexible and very able code which will help us into the future.

4 **Dr Johnston:** Thank you for that. Graeme Samuel, I see you've got your hand up, we really sort of
5 running out of time on this topic and need to move on so if you could just keep your
6 comments brief.

7 **Mr Samuel:** Very brief Commissioner. I think it's important to note the most recent comments
8 by Christine. Christine, I don't want to verbal you, but I know that in the conversation we
9 had with you, you effectively said that you had (I'm going to use your words) priced
10 yourself out of the arbitration process. You actually didn't want to be the arbiter of
11 disputes and what you worked on was changing the culture and ensuring that the
12 processes were right and that the real operatives in terms of determining disputes, were
13 what, in your jurisdiction, the code of compliance managers, we call them the code
14 arbiters.

15 So we followed in the review that I did, the practice that I think is developed in the
16 UK. And so I thought that needed to be clarified, maybe Christine, I didn't want to verbal
17 you, you might want to clarify that you got involved in very, very few arbitrations, you left
18 that to the individual code compliance managers, (code arbiters as far as we're
19 concerned) but that your real role is to change culture and ensure that what the
20 compliance managers and others did was appropriate and correct.

21 **Ms Tacon:** Absolutely Graeme and I think your word pricing me out of it is apt because my office
22 was paid for by a levy on the retailers which I have to say, never cost more than £650,000
23 a year in the whole time was in office. But I did vary the levy, so if I had had an
24 investigation, or a case study, or I had an arbitration, then those retailers had to pay more.
25 So there was not only they had to pay my costs of arbitration so long as it wasn't
26 vexatious, they had to contribute more of the levy and they clearly also have the risk that I
27 might determine against them and award compensation. So that was a huge incentive for
28 the code compliance officers (you call them code arbiters) to actually resolve things and to
29 get them sorted.

30 **Dr Johnston:** Thank you Christine. I think that actually rounds out nicely the discussion we've
31 had on the adoption of a code and how we might think about the Australian Code or the
32 UK Code, for that matter, as a base for NZ. So I thank everybody for their contribution, its
33 been a very valuable and an insightful session or topic.

34 I think now I'd like to move onto the next topic which was private label products
35 and what effect they're having on competition and whether there's a necessity to do
36 anything about them in relation to the NZ market. As I said earlier, our draft report was a
37 little bit equivocal in terms of the impact they're having on competition and we're keen to
38 explore that further and there's been views expressed both ways on both the pros and
39 cons of private label products.

40 In terms of this topic, where I'd like to start is that the FGC has submitted a report
41 by Castalia regarding the effects of private labels on consumer outcomes in the retail

1 grocery market. And the thesis in that report was that concentration in the retail market
2 plays a significant role in determining whether a private label is likely to have a
3 detrimental effect on outcomes from a private label strategy. The Castalia finding was
4 that given the high concentration of the retail grocery market in NZ, private labels are
5 likely to accentuate and entrench the strong imbalance of bargaining power held by
6 retailers for many grocery suppliers.

7 So I'd like to start with Foodstuffs NI and ask what their response to that analysis
8 and conclusions is?

9 **Mr Stewart:** Thank you Commissioner Johnston. I think, firstly our response would be, that we
10 believe that private label offers choice to our customers and in particular plays a critical
11 role in meeting the needs of our budget conscious consumers. So a constraint on private
12 label or the proposal from the FGC, we think would be an remedy, it would lead to an
13 unworkable position for private label and we think it is critical that we focus on the
14 benefits of private label. We see it as pro-competitive and highly valued by our
15 customers.

16 Private Label from our perspective is something that is driven by customer
17 preferences. It enable us to provide quality products, particularly commodity type
18 products and pass these through to the customers at lower prices so enables customers to
19 have choice and it enables products to be cheaper for customers on the shelf.

20 We think that private label is critical to keep NZ grocery prices lower when you
21 consider that 68c of Foodstuffs NI cost is in the cost of the product, and so again, its really
22 important from a consumer perspective to ensure that we are able to offer those prices.

23 We also think that a number of private label products in NZ are manufactured by
24 local brand suppliers and this actually provides economies of scale to local brand suppliers
25 and enables them to offer better branded offers and to innovate in the branded space, so
26 it really supports their position.

27 We would see that to not have private label would result in a key risk of higher
28 prices to consumers. And a most important factor is that it enables us to ensure the
29 customers have products that meet their needs at an affordable price. Thank you
30 Commissioner.

31 **Dr Johnston:** While we're on that subject, I think we'd accept that in a competitive market where
32 there are lots of retailers operating, all those benefits that you've outlined are apparent
33 but what Castalia is saying is that in a market where there are only two retailers, the way
34 that the dynamic of the market operates changes and that in fact enhances the market
35 power of the major retailers. Are you able to express a view on that David?

36 **Mr Stewart:** Yes. From our perspective, we would turn to the level of penetration that's in the
37 market and the level of private level penetration in the NZ market is low. And therefore
38 we wouldn't support or our experience is what Castalia are saying is not consistent with
39 what we experience. We actually think that there is a strong brand, or supplier bargaining
40 power and that the introduction of private labels an important lever to ensure that we are

1 able to compete particularly with the major grocery suppliers and provide a competitive
2 offer for our customers. Thank you Commissioner.

3 **Dr Johnston:** Thank you and if I perhaps come to Woolworths with the same question as to what
4 their view of the Castalia report was, Josh, I don't know if you want to pick that up or have
5 another member of your team?

6 **Mr Gluckman:** Happy to, Commissioner. I think from the outset it's worth noting that we
7 obviously don't support that characterisation of the market put forward by Castalia or put
8 forward by others. We similarly note the relatively low levels of private label penetration
9 but equally we could be observing the very high levels of concentration on a number of
10 our categories between one or two typically large multinational suppliers. So Coke or
11 Pepsi and drinks could be a very tangible example of that.

12 We also think that there are a number of many other channels that exist for
13 grocery retail suppliers outside of major grocery retailers, to use the Commission's
14 language. You know, whether that's the fact that for most large multinationals, NZ is
15 actually only a very, very small part of their global supply market, whether its in the case
16 of fresh obviously, there are very sizable export channels that we actually have to
17 compete with, or whether it's the case that, you know, through The Warehouse, through
18 the Chemist Warehouse, through other retailers, through Costco's entry to market, there
19 will be an increasing array of channels that the suppliers can supply through.

20 But if I just make some comments around private label more broadly.

21 I mean, certainly its Woolworths NZ's view that private label is a healthy part of
22 retail competition in NZ, just as it is in every other market around the world. And even
23 though penetration is relatively small, Kiwis clearly love private label products and they're
24 very clearly in our view, and very clearly objectively, we consider in the interests of Kiwis
25 through delivering lower prices, increased choice, competition on quality, variety and
26 innovation and you know, for some large branded suppliers, particularly if they're large
27 multinational incumbents, that might mean more competition for them. But the reality is
28 for many other suppliers, private label provides a really important avenue for growth and
29 that could be, for example, increase volume in manufacturing efficiencies through their
30 facilities. It could be the ability for commercial hedges, for example, through long-term
31 supply contracts. Or it could be the opportunity to turbocharge growth and we have
32 plenty of examples that we're again comfortable to share with the Commission around
33 small Kiwi suppliers who have come to scale through their private label relationship with
34 Woolworths in NZ and in some cases, also into Woolworths Group in Australia to achieve
35 even more scale.

36 So we don't think that some of the posture being adopted towards private label by
37 some of the submitters is in the interests of Kiwis and we certainly don't think it's in the
38 interests of lower prices, if that's something that we're looking to see achieved.

39 We've also seen quite a few other claims made in relation to private label and that
40 we don't consider to be correct or appear to be anecdotal in nature and we don't think its
41 supported by the facts. You know, we're not in the business of favouring private label

1 products and we've got no issues with a mandatory grocery code that similar to Australia
2 includes provisions precluding that. You know, our private label team's already a separate
3 part of our business, that has to pitch for supply into categories the same way that
4 branded suppliers do. In the last few months alone, we would have rejected literally
5 hundreds of private labelled products from ranging into categories because we didn't
6 consider that they would meet the needs as well as available branded product alternatives
7 might or do.

8 We frequently promote branded products below private label prices. We're very
9 happy to share the facts on that with the Commission. We have a number of recent
10 category examples as well that very clearly demonstrate that. And to the extent that
11 private label is growing, albeit off a small base, that simply reflects the fact that it provides
12 an affordable, high quality option for Kiwis. So its customer demand and positive
13 outcomes that is driving that growth.

14 You know, we're also very clear in relation to our obligations around IP (or
15 intellectual property). We reject any suggestions of appropriation of IP. We're not aware
16 of any claims against us as a business. And we've got no objection, no issues with any
17 protections being further codified by a mandatory grocery code, again, as we note, along
18 the lines of as the case of some of the provisions in the Australian Code that exists.

19 And in our view in fact private label is often a source of innovation into the market.
20 If I can share some Woolworths NZ examples, you know, if I start with eggs. All of our
21 private label eggs will be, free range or barn eggs by the end of 2022. And that
22 commitment by Woolworths NZ is precipitated industrywide change for the betterment of
23 Kiwis and for the betterment of chickens.

24 If I talk about Macro, we have a product range through our private label
25 proposition in the hundreds of SKUs, often affordable, healthy organic options, that brand
26 has been awarded NZ's organic brand of the year and is often leading first to market with
27 healthy and affordable options into NZ. We've removed artificial flavourings and
28 colourings from all of our instore bake lines and we've now seen many suppliers follow
29 suit.

30 We've been first to market with products such as frozen cauliflower rice, (very on
31 trend, I highly recommend it) with our private label lines. But we've actually seen
32 branded suppliers come to market with those products as well and we range both private
33 label and branded options in that case.

34 We've been first to market with recycled plastics in some of our drinks categories.
35 And again, we see more suppliers heading down that path.

36 We've introduced odd bunch with our growers, which is a true win/win where
37 through direct relationships with our farmers and our supplier partners, we're able to
38 deliver to customers effectively a tier 2 or "ugly fruit and veg" proposition which reduces
39 food waste, it's good for the environment and provides value for Kiwis at the grocery
40 shelf. Again, driven through private label innovation.

1 With Hilton Meat, we've introduced sealed air fresh packaging which will improve
2 product quality and shelf life in meat into the NZ marketplace. And again, I could go on
3 and on and I won't, but you know, and I suppose I should note, as I mentioned earlier,
4 over 70% of our private label products are NZ supplied. So we consider private label to be
5 a very positive force of innovation in a grocery sector such as NZ, as it is all around the
6 world.

7 There's also, in our view, simply no evidence to suggest that the growth of private
8 label, again, albeit off a low base, is actually leading to any impacts on levels of investment
9 or innovation by branded product suppliers. In fact, we see extensive levels of ongoing
10 investment.

11 Just if I take a quick skim of the last month, just the last month we've seen
12 LeaderBrand announce they'll be putting millions into new growing pilots. We've seen the
13 Tasman Bay Food Company expanding into supplying 900 Woolworth stores in Australia
14 on the back of production and automation in manufacturing investment in Nelson. We've
15 seen Zeffer the Hawkes Bay cider company completing multimillion-dollar investment into
16 a new canning line and pasteuriser. We've seen Blue Frog Breakfast planning to expand
17 its East Tamaki production facility. We've seen Pure Oil invest millions into building a new
18 factory at its Rolleston site. This is just a skim of the last month, it won't be exhaustive, I
19 could go on.

20 So from our advantage point, you know, private label, whilst still relatively small, is
21 very clearly a positive feature of grocery retail competition in NZ, just as it is in every other
22 market around the world, thank you.

23 **Dr Johnston:** Thank you Josh, well there's a few people with their hands up so first of all I'll come
24 to Greg Houston and then Hans Maurer and then Tex Edwards.

25 **Mr Houston:** Thank you Commissioner Johnston. Greg Houston from Houston Kemp, assisting
26 Foodstuffs. I just want to make a brief comment about the Castalia report which is where
27 this discussion set out and look, the thesis of the Castalia report is that the private label is
28 exacerbating an imbalance of bargaining power in a situation where there's two
29 supermarket majors and thousands of suppliers and what that sort of fundamental
30 premise misses is that in any particular product category, there are not thousands of
31 suppliers.

32 So Castalia doesn't undertake any analysis of the degree of concentration in the
33 particular categories or circumstances where private label is prevalent. And we know
34 from the theory and the practice that private label is most likely in commodity type items,
35 flour, milk, eggs, and what have you, where there is a very strong brand power. And so
36 the imbalance of bargaining power that the Castalia reports sets as its foundation, doesn't
37 necessarily apply in those commodity products.

38 So the real important thing to focus on here is not just the concentration of the
39 supermarkets, but also what's the degree of concentration on the other side of the private
40 label equation.

1 **Dr Johnston:** Thank you for that Greg. John, did you want to pick up on any of those issues at
2 all?

3 **Dr Small:** Just a brief one if I may Greg, so I understand you're saying that private labels mostly in
4 commodity type categories where brands are strong and so therefore its pro-competitive,
5 have I got that right?

6 **Mr Houston:** Well that's certainly what the principles you would expect. So a supermarket is
7 more likely be interested in private label where they've, to give them an outside option in
8 negotiating with a strong brand. And they're also much more amenable to products
9 where there is less innovation and so the more commodity type products. And I think
10 that's actually what you see in NZ anyway where actually the penetration of private labels
11 is quite low by any international standards.

12 **Dr Small:** Okay, I was just trying to reconcile that a little bit with what Josh just told us, which
13 was that there's an awful lot that he sees private label as a source of innovation rather
14 than as being something that happens where there's not much innovation and he's cited
15 frozen cauliflower rice and organic ranges of canned food amongst other things. But
16 anyway I think you're talking at the level of principle here and that's fine and we can go
17 away and have a think about that. Thanks for that anyway.

18 **Dr Johnston:** Thank you, well we've got a lot of people with their hands up so I'll come to Hans
19 Maurer as I indicated earlier.

20 **Mr Maurer:** I was around in Foodtown in the 1990s when the range, in a general sense, moved
21 into the produce department. And I'm not just talking private label, but I'm talking about
22 supplier brands in the first instance. And the reason why we encouraged it at the time
23 was that - and that's the irony of this whole process here at the moment - is that the
24 supermarkets were actually under pressure from brand owners in the grocery area trying
25 to do product extensions into the perishable areas.

26 In the biggest case we had people like Watties assuming that they knew how to
27 actually put the [inaudible] just because they put peaches into cans. And so we go
28 together with our key suppliers and said, "Look, you need to actually grow up and start
29 branding because quality associations are made through brands in the consumers' minds".
30 And part of the strategy over the last 30-years in terms of retail, has been to make sure
31 that the perishable areas, which are part of the entire earnings mix of a supermarket
32 model, because if the entire store were running on grocery margins for nappies and there
33 wouldn't be stores, that there is a degree of protection to make sure that the brand
34 recognition in the perishable departments actually relates to people who understand to
35 run that business.

36 That's my five pence worth.

37 **Dr Johnston:** Thank you Hans. Tex.

38 **Mr Edwards:** Thank you Commissioner Johnston. The Monopoly Watch's contribution here is
39 essentially using the bottleneck comments in the Commission's report, essentially the
40 dynamic of private labels is completely different in a four-operator market or five-

1 operator market to a two-operator market. We urge the Commission to understand the
2 difference in game theory applications here. We specifically have sympathy for fresh,
3 where we feel that the consumer's interests are harmed because you haven't got
4 passthrough if you've got a proliferation of private labels.

5 Occasionally suppliers make mistakes. Occasionally chaos emerges in the fresh
6 food veg market as a consequence of seasonal issues and storage issues. A vibrant
7 market without a proliferation of private labels enables the suppliers to have push-
8 through and pass-through of cheaper prices.

9 And my closing comment on this matter is that private labels are increasingly an
10 area where supermarkets are communicating to their customers. It's important that the
11 perceived health benefits, sustained ability benefits, carbon footprint benefits are
12 articulated through this. But also it's our hypothesis that private labels might be used for
13 the incumbents [inaudible] more egregious behaviours, it's just an important
14 communication step. Thank you.

15 **Dr Johnston:** Thank you Tex and I'll now come to Matthew Lane and then Katherine Rich.

16 **Mr Lane:** So I just thought I'd give a retailer's viewpoint on private labels because I think that's
17 important to take into consideration. It is widely accepted that private labels do have a
18 lower price point. But as other grocery retailer, we are unable to obtain such brands such
19 as Pams without being full members of, say, the Foodstuffs brand. And what that does is
20 it lowers the ability for us to compete in the main or top-up shop. What this does it
21 further increases the retail price gap for say, sugar or flour, between other grocery
22 retailers and the main grocery retailers. It reduces the ability for other retailers to be able
23 to build volume because it's already been housed with those major retailers at a lower
24 retail price and I suspect a lower cost price in most occasions than the branded products.

25 It's our view that private labels work well when there is competition and it is
26 diverse. But it doesn't work when its closely held as it prohibits other people from
27 competing with core stables.

28 **Dr Johnston:** Thank you for that Matthew, that's very helpful to have that insight. If I can now
29 come to Katherine Rich, you've got your hand up and keen to hear what you've got to say,
30 but also keen to explore with you, you know, the range of solutions from your perspective
31 on dealing with private labels.

32 **Ms Rich:** Thank you Mr Chairman. Look, we'll be quite clear, we completely understand that
33 there are some benefits to private label and that they are widely used. But the point
34 we're trying to emphasise is that in a highly concentrated market, you have to be very
35 careful about the harms. And relatively regularly, members will report to me that they are
36 viewed as being a good supplier if they do not present to the supermarkets anything that
37 might affect or undermine private label. And a bad supplier, if they present to
38 supermarket buyers, products that could be cheaper and actually be a higher quality.

39 And when you have a highly concentrated market, the conflict of interest between
40 being the retailer and the manufacturer at the same time, becomes very amplified and
41 while the point is being made about innovation being in the private label space, from the

1 FGC perspective, we see a different side to that in that if there is a flicker of innovation or
2 some intellectual property that a grower, a farmer, or a manufacturer may have
3 developed, there are too many anecdotes (and remember abuse is always anecdotal
4 cause there's no official register), will be asked to put that over into the private label
5 offering. And that's why we say we have concerns about the stifling of innovation.

6 The final point I'd make, Mr Chairman, is that the multinationals have been
7 referenced in quite a few discussions in terms of their power. Yes, in some categories
8 some suppliers do hold market power, but I would say that it is systemic of the current
9 duopoly we have because when supermarkets decide they're only going to have two or
10 three brands plus a private label, that makes the category very, very narrow and most of
11 your artisan craft and smaller NZ manufacturers fall by the way.

12 This issue is an issue for six generation farmers and growers, more than pretending
13 that this is somehow to keep the multinationals at bay. That's why we've raised it.

14 **Dr Johnston:** Thank you for that Katherine. I see Emma Ihaia's got her hand up, I'd be keen to
15 get her view and then I might come back to Katherine because I've got a few more
16 questions in terms of some of the proposals she's put forward, but Emma I'd be interested
17 to hear your perspective.

18 **Ms Ihaia's:** Tēnā koutou katoa, I'm Emma Ihaia from Castalia. Interesting to hear the feedback
19 from various parties on the report that we prepared. Look, clearly there are going to be
20 different situations across different suppliers. There'll be different situations in terms of
21 whether private label is an adequate substitute and what the dynamics of the bargaining
22 power are between the supplier and the retailer. However, that's not to say that there
23 isn't a number of categories where there are a large number of suppliers and where
24 private labels do just further entrench that buyer power.

25 And again, coming back to sort of the points around below private label use
26 relative to other countries, that's an aggregate figure and it's really important to sort of
27 drill down into what it looks like by product category and of course that information isn't
28 available to us, I understand that the Commission has it. I guess it's moving into remedies
29 that's something that the Commission could obviously monitor over time as well. But you
30 need to look in a really granular fashion, I guess, is what some of those comments is
31 saying because simply looking at average figures, it doesn't tell us the full story.

32 **Dr Johnston:** Thank you for that Emma. Before coming back to Katherine, I see Sarah Balle has
33 got her hand up from Supie, so Sarah, I'd like to hear your views then I'll come back to
34 Katherine.

35 **Ms Balle:** Sure, just really quickly, our experience as a new retailer in the sector that there is a
36 level of confusion by consumers is to what or who owns the private labels and this is
37 difficult for us as a new retailer or entrant into the sector that consumers are unsure as to
38 why we can't access supply of, for example, Pams products, and therefore don't have
39 access to that level of pricing in the market. So that's something that I want to contribute
40 as well to this.

1 **Dr Johnston:** That's very helpful to understand that, so thank you for that Sarah. Now I'd like to
2 come back to Katherine Rich and explore, there was a proposal in your submission where
3 you were proposing the structural separation of the Woolworths and Foodstuffs private
4 label businesses and I wonder if you could elaborate for us on your rationale for that and
5 how it would actually work in practice, what that actually means when you talk about the
6 structural separation of their private brand operations.

7 **Ms Rich:** Yes, this is a very complex issue because private label and the rest of the business is
8 completely interwoven. But we do think that there are opportunities to have separation
9 in terms of teams that deal with private label, genuine separation, that there is written
10 into contracts the equivalence of brands versus private label, there has to be a more
11 transparent rollout of the way private label is dealt with in terms of the supermarkets.

12 By equivalence I mean not continually self-preferencing the private label on shelf
13 in terms of promotions, in terms of every aspect of the business. And it's because of our
14 highly concentrated market, the Commission could actually consider having levels of
15 private label rules, so that you can't have this continued growth of private labels which
16 create concerns for us about them creating a price floor for consumers. Because if you're
17 not able to offer products which are potentially cheaper, then you've got that artificial
18 barrier to better offerings for consumers.

19 I know the retailers will say that they do have different teams. But the reality for
20 suppliers when they're working with the supermarkets, you are expected to take into
21 account the retailer's private label when you're offering new products, to take into
22 account when you're pricing right across the range, to almost second guess what the
23 retailer's trying to achieve with their own private label products, which just lays bare the
24 conflict of interest in a highly concentrated market of being able to offer these sorts of
25 products at the same time as retailers are doing the rest of their, other parts of their
26 business.

27 So, it's not easy to do, it's not like telecommunications where you can say, sell off
28 that bit, etc. Private label is an integral part of the offering, but I'm confident that
29 certainly when it comes to demanding access to intellectual property, requiring suppliers
30 to handover their innovation for no compensation, and ensure giving suppliers' economies
31 of scale through their manufacturing but then deleting their main brands, could be dealt
32 with.

33 **Dr Johnston:** Thank you for that Katherine, John, Vhari, do you have any questions on that?

34 **Dr Small:** Perhaps if we could just pick up on this question about separation, I mean it did seem,
35 well, I mean the FGC proposal was, maybe we could describe it as a concept, it's not well
36 developed and Katherine said it will be very hard to do. But I'm just struck by the fact that
37 when Josh, you were talking a little earlier, you did emphasise that your private label team
38 is internally separate, has to pitch for shelf space and that you often reject those pitches.
39 Would you mind to just talk to us a little bit about how separate it is and whether that has
40 any implications for what FGC has outlined.

1 **Mr Gluckman:** Thank you Commissioner Small, Andrew Dixon will talk to the FGC's proposal in
2 the topic of separation, thank you.

3 **Mr Dixon:** Thanks Josh, yeah. Look, I think it's clear that private label businesses are a feature of
4 retailers all around the world and across most retail formats and industries and as I
5 bought my MacPac tee-shirt online over the weekend, I was reminded of that and I think
6 we've articulated that we think private labels generating good outcomes for Kiwis.

7 Look, we regularly range branded products in favour of private label options.
8 Simply because we make customer led decisions and not every private label product is
9 necessarily a leader when it comes to price or quality.

10 We think structural separation of a retailer's private label business is unnecessary
11 and certainly a step too far and we believe the risk of discriminatory behaviour by retailers
12 in favour of private label brands, can be addressed in a mandatory grocery code, as it is in
13 Australia.

14 Some of the features of the Australian Code, I guess, is worth calling out the fact
15 that retailers must be clear and transparent with their ranging principles and how shelf
16 space is allocated. And of course, retailers must apply those principles to all their ranging
17 decisions including private label and cannot discriminate in favour of their private label
18 products. The code also prevents a retailer from requiring a supplier or manufacturer to
19 transfer their intellectual property rights, as a private label supply condition.

20 I guess also just sort of call out that many of the world's price leading retailers are
21 predominantly private label retailers, including Costco, which is about to launch in NZ, and
22 Aldi, who we believe is not far away. So, with private label embedded within the
23 merchandise functions of these businesses, I'm sure that it would not be desirable to
24 increase the barriers to entry for these retailers through overly prescriptive private label
25 controls or the structural separation of their private label operations. Thank you.

26 **Dr Small:** Thank you very much for that. Just for my own understanding of it, this business
27 about, you know, how your private label ranges internally can sometimes be turned down
28 by the ranging team. So I presume the concept is, there's a timing issue in there, the
29 private label people are arranging or thinking of arranging private label supply, there's not
30 actually one there, and then they come to the rangers and the rangers say, no, we prefer
31 this one and so they don't go ahead manufacturing the private label, have I got that
32 sequence right just for my own understanding?

33 **Mr Dixon:** Yeah, I think so. I mean it's not a case that we would develop and bring to market a
34 private label product and then reject it. Normally in that case we would develop bespoke
35 briefs, obviously to perhaps capture a niche in the market and work perhaps with the
36 category manager in that instance. But we have access to a large number of private label
37 products and those products are pitched to our category managers every week and
38 regularly rejected. Sometimes to the frustration of our private label team, I should say.

39 **Dr Small:** Yeah, I'm sure, okay thanks for that.

1 **Dr Johnston:** Thank you, we've got hands up from David Stewart and Sue Kedgley so I'll go to
2 them in that order and then I think we'll have to bring the private label discussion to a
3 close in terms of the time we've got, so David if you could let us have your comments
4 please.

5 **Mr Stewart:** Thank you Commissioner. Yes, from Foodstuffs NI perspective, I really would like to
6 outline that we operate our private label team as a separate division in the business. The
7 private label team actively goes out to the market and seeks products and then is
8 presented to our merchandise team, merchandise managers and category managers.

9 The private label product has to compete with branded products for the position
10 on shelf. Its evaluated based on customer insights, the needs that it covers, the quality of
11 the product and the price associated with the product.

12 We reject many products in the process and we also welcome that being covered
13 in the Grocery Code of Conduct and we're happy to work through that as part of the
14 grocery code.

15 We' make note that there are a number of very larger suppliers, large retailers and
16 smaller retailers that have a presence with private label, Aldi, Walmart, Tesco, all have
17 significant private label ranges that they offer and that it promotes the competition. I
18 think it certainly is a feature of competitive environments globally. The proposal we
19 would see to be quite extreme and we would see it as unworkable in the local market.

20 **Dr Johnston:** Thank you David, just before I come to Sue Kedgley, I'd just like to check whether
21 Foodstuffs SI has any comments on the private label issue?

22 **Mr Donaldson:** Thank you for the opportunity, I think it's been exceptionally well covered by
23 Foodstuffs NI and Woolworths NZ, so nothing further to add at this point, thank you.

24 **Dr Johnston:** Thank you for that, and now Sue Kedgley.

25 **Ms Kedgley:** Thank you Commissioner. Just wanted to make a brief point that in our view, there
26 are huge conflict of interest issues when you have a major retailer who's also a major
27 supplier and surely it is anticompetitive behaviour to preference your own supplier, which
28 of course is almost inevitable, if you, the retailer, are also a major supplier.

29 Now normally conflict of interest issue are handled by being very open and
30 transparent in having to declare them. So I'm interested in how, sort of where we can
31 bring more transparency and declaration into the public.

32 I note that someone has mentioned the Australian Code, says that retailers cannot
33 discriminate in favour of their own brands or favour them. But I thought it might be
34 interesting to hear from the adjudicators in Australia or England as to how they actually
35 ensure, how to you actually ensure that, how to you get transparency so that you can be
36 sure that the retailer is not engaging in anticompetitive behaviour by preferencing their
37 own supplier? Thank you.

1 **Dr Johnston:** Thank you Sue, I think that's an issue that we can pick up with the Australian and
2 the UK participants offline. That brings us to the end of our discussion on that topic. We
3 are reasonably short of time to spend a lot of time on the collective bargaining issue. We
4 have canvassed it in part already during our discussions this morning.

5 I'll just ask if FCG or any of the major grocery retailers has anything to add to what
6 they've already said this morning on the collective bargaining issue that they don't think
7 could be covered by way of cross-submissions? So perhaps you could put up your hands.
8 Katherine Rich.

9 **Ms Rich:** Thank you. We just want to reiterate that we do think collective bargaining could be
10 beneficial. It's one of those tools that might be good to have in the toolbox, but it's not a
11 hundred percent clear how it might be used in reality. But one thing is for sure, we
12 disagree that collective bargaining would be inefficient and we don't think it would
13 weaken competition, but it could certainly give suppliers just another opportunity to be
14 able to raise issues if they wish to collect together.

15 **Dr Johnston:** Thank you, Andrew Dixon.

16 **Mr Dixon:** Thanks Commissioner. Look, we believe a well drafted grocery code is the best way to
17 ensure supplier/retailer negotiations are conducted in good faith, as is the case with the
18 Australian Grocery Code, obviously we support a similar code here.

19 Look, we haven't seen any evidence to suggest that small suppliers are
20 disadvantaged in their dealings with Countdown, at least, and as such, we don't see the
21 need for collective bargaining to address any form of disadvantage. The truth is that we
22 actually love small suppliers and growing small suppliers is not only personally satisfying
23 for our team but it's also important, especially in categories dominated by multinational
24 brands, some of which, you know, have market power as has been outlined already.

25 Collective bargaining might sound attractive in principle, but we see many issues
26 that might not deliver good results for Kiwis and it's hard to see how it could actually work
27 practically.

28 For example, would competing suppliers or groups of suppliers submit cost prices
29 collectively? We note that suppliers banding together to negotiate cost is not a recipe for
30 lower prices. Would ranging new innovative products be contingent on ranging
31 obligations to a collective of suppliers with less appealing products, for example? Would
32 decisions to arrange a product in one category be contingent on ranging outcomes
33 relating to a supplier in another category due to a collective negotiation? Would it be
34 necessary to retain slow selling products due to range obligations to a collective of
35 suppliers of us disadvantaging and preventing other suppliers from accessing the shelf
36 space?

37 So we think an industry where decision making is dominated by obligations to
38 supply collectives instead of rapidly changing customers' needs is not one that will deliver
39 great results for Kiwis and as such, we don't support this.

1 **Dr Johnston:** Thank you Andrew and perhaps we can have some brief comments from each of
2 Mike Chapman and then Hans Maurer and then we'll have to bring this part of the
3 sessions to a close. Mike.

4 **Mr Chapman:** Yes, I'll be very quick. Look, we support Katherine, it's another tool in the toolbox.
5 We're quite clearly not sure how it would work, particularly with fresh. The limit is
6 actually too small, 10 million as we put in our written submission. But there could be an
7 option here around community supported agriculture where consumers and suppliers
8 team together to arrange supply over a sort of, perhaps a year or perhaps an extended
9 period of time where the price and quality and specs are agreed between the consumers
10 and suppliers and they're actually outside of the supermarket chains, etc.

11 So there could be an option here, where collective bargaining could be really
12 useful if it can fit into that concept and in our written submissions, we'll give you some
13 information about community supported agriculture.

14 **Dr Johnston:** Thank you for that, that would be most interesting, look forward to seeing those,
15 and Hans.

16 **Mr Maurer:** Thank you Commissioner. From United Fresh perspective, we can't see how
17 collective bargaining in a purest form can work without causing further disruption. We
18 have seen overseas some evidence that it can work for processed vegetables like canned
19 and frozen carrots, peas and potatoes, etc. But the industry overall, globally has looked at
20 this collective bargaining issues for many decades. And one of the classic papers coming
21 out of Michigan State University as early as 1968, found three critical elements that I just
22 want to quote.

23 One, the potential consequences of collective bargaining are extensive and difficult
24 to predict.

25 Two, collective bargaining may result in the less desirable allocation of resources.

26 And three, collective bargaining is not the solution to the low-income problem in
27 farming.

28 So, open to hear more as to where Horticulture NZ might want to go with that. But
29 in the current form, as people think about it, not an option from our perspective.

30 **Dr Johnston:** Thank you for that Hans. Well I think given time we're going to have to draw the
31 discussion about collective bargaining to a close. Certainly keen to hear people's views if
32 they haven't had a chance to express them in this session, in written submission.

33 One of the areas we're working to explore, we haven't had a chance to do, is what
34 the threshold should be for collective bargaining, what the dollar threshold should be, or
35 whether it should be applied to individual suppliers or whether it should be an aggregate
36 amount for a number of suppliers who are banding together. So welcome submissions on
37 that.

1 So that brings this topic to a close. I now like to invite, first of all, Woolworths and
2 Foodstuffs NI, Foodstuffs SI and Food and Grocery Council to make some brief closing
3 comments in relation to today's session. So perhaps Josh, did you want to have any
4 particular thoughts.

5 **Mr Gluckman:** Thank you Commissioner, I will keep it brief. It's been some really important and
6 valuable discussion today as has been the case in all of the sessions to date. So thank you
7 again for the opportunity.

8 I think the discussion around the code, there appears to be a lot of alignment
9 which is good to see. It's certainly something that we support in terms of it enshrining,
10 you know, principles and practices we already adhere to and operate by. Obviously
11 there's some devil in the detail and I think that was very apparent and it's been very
12 valuable to have some of the global perspectives here with us today. So you know,
13 certainly there's a complex dynamic sector that we're talking about, many different
14 category distinctions between fresh, even distinctions within categories within fresh, you
15 know, lots of interactions, importance of speed, importance of efficiency. Constantly
16 changing ranges, lots of promotional activity and none of those features are unique to the
17 NZ grocery sector, but obviously why it's important to get something like a code right and
18 I think everyone's here with the right intent to engage in the crafting of that code from
19 here.

20 In relation to private label, I think our views have been put forward, reasonably
21 clearly. Certainly we don't consider that there's actually any evidence for any of the
22 theoretical harms that are being suggested as existing. You know, in fact, when we look at
23 SKU counts increasing not decreasing, when we look at the proportion of new products, so
24 20% of our new products being ranged from small suppliers. When we look at pricing
25 outcomes for Kiwis in terms of real prices having fallen in real terms and grown below
26 inflation despite rising input costs. And we look at the levels of branded supplier
27 investments and innovation that we continue to observe, we certainly think that the
28 evidence supports a highly competitive marketplace and we don't see any reason why
29 there can't be the same types of provisions and protections in relation to private label
30 dealings in any NZ Code as is the case in the current Australian Grocery Code and we're
31 supportive of that.

32 So I think that probably rounds out the Woolworths NZ perspective and thank you
33 again for the opportunity to join today.

34 **Dr Johnston:** Thank you Josh for your contribution today. We come to Foodstuffs NI, Mike
35 Brooker.

36 **Mr Brooker:** Thank you I'm going to hand to David Stewart, thank you.

37 **Mr Stewart:** Thank you Commissioner. Yes, we'd just like to reiterate that we're committed to
38 the steps set out in our action plan. We acknowledge there is more work for everyone to
39 do to deliver value and convenience for our customers as we set out in our action plan.
40 We support the development of a grocery code for the industry. We believe a well-
41 considered code will enable us to deliver for our customers as well as for suppliers. We're

1 comfortable that its mandatory, that it covers the whole of business, that it enables
2 consequences and has independence and we'll engage with the process to achieve what
3 we would like which is trusted and workable regime.

4 We'd also just endorse the comments that you made Commissioner Johnston to
5 invite other suppliers to share their information with the Commissioner if there are
6 instances out there and we would be welcome to follow-up on those, welcome the
7 opportunity to follow-up on those as well.

8 In terms of private label, our private label offering we think is highly valued by our
9 customers, its pro-competitive and delivers significant value to our budget conscious
10 customers. We don't see any evidence to support structural separation and indeed would
11 be concerned that this would mean the end of private label if there was.

12 With respect to collective bargaining, we're happy to deal with any supplier or
13 groups of suppliers, however, we believe change is unnecessary as the law already allows
14 authorised collective bargaining and anything further is likely to reduce competition and
15 not benefit consumers.

16 That would cover it from us, thank you very much Commissioner.

17 **Dr Johnston:** Thank you very much. Foodstuffs SI, Tim Donaldson or Mark, have you got
18 anything you want to add at this point?

19 **Mr Sullivan:** Yes, thank you Commissioner. Mark Sullivan, General Counsel, Foodstuffs SI. We
20 just like to say that with regards to our small suppliers, they are probably the fastest
21 growing part of our business. They're also certainly, we think, some of the most
22 innovative and we really look forward to seeing them grow and seeing them become big
23 suppliers.

24 I think the one thing that's come out of today, is there is a lot of challenges in a lot
25 of these areas that we're facing and we're really looking forward to working with the
26 industry to come up with a really good robust code and working with both suppliers and
27 other retailers in that respect. Thank you.

28 **Dr Johnston:** And Katherine Rich, have you got any closing comments?

29 **Ms Rich:** Yes, just three quick points. In terms of the code, it is about improving the
30 transparency of supplier/retailer relationships and improving business practices right
31 across the board in the grocery sector.

32 The development must be independent and overseen by an independent body.
33 This cannot become just another supermarket negotiation in terms of developing what
34 the code is, moving forward.

35 There's an upside to NZ being very late to this code party in that we can learn from
36 what has been done in Australia and in the UK and we can pick the very best of what
37 they've achieved so that we can start off implementing best practice straightaway. It

1 should take a lot of time. It shouldn't take 5-years of MBIE working on it. I think we know
2 what to do, we can get it done in a very quick manner.

3 But I would like to thank the Commission for the opportunity to speak today and
4 the opportunity for this discussion.

5 **Dr Johnston:** Thank you Katherine. Well I'd like to thank all the participants today on the
6 constructive approach they've taken to the topics. We've actually canvassed a number of
7 topics in some detail but the attitude that people have adopted and constructive way of
8 trying to work through these things and finds solutions is great to see. Certainly I found it
9 a very productive and thought provoking session and obviously there may have been
10 people that haven't had the opportunity to contribute to the topics to the extent they
11 would have liked to, so we certainly encourage you to put your further thoughts in writing
12 to us at our email address, marketstudies@comcom.govt.nz.

13 We request that all further materials or submission be with us by the 23rd of
14 November, which is the closing date for cross-submissions after the conference. We look
15 forward to seeing many of you back here from 9.30am tomorrow morning.

16 For tomorrow morning's session which we'll be discussing indicators of
17 competition, particularly international price comparisons, innovation, other non-price
18 indicators of competition, and principles underlying profitability analysis.

19 So thank you again for your contribution today and we look forward to seeing you
20 tomorrow, thank you.

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