

DAY 7 - RETAIL GROCERY MARKET STUDY CONFERENCE

2 November 2021

**Session 10: Facilitation of entry and expansion; and
Is there any other strategic behaviour that may restrict new entry and access and how
might it be addressed?**

Ms Rawlings: Kia ora, mōrena tatou, welcome back for the last day of the Commission's conference into our draft report on our market study into the grocery sector. Ko Anna Rawlings tōku ingoa I'm Anna Rawlings, the Chair of the Commerce Commission.

For those joining for the first time today I'm going to summarise what we're going to cover off today and then just recap some really brief comments about the conduct of the session, primarily for the benefit of those joining for the first time. Again, with me today are familiar faces Dr Derek Johnston, Dr John Small and Associate Commissioner Vhari McWha. A number of Commission staff are also joining us online and in our room in Wellington this morning.

So far we've discussed the Commission's identification of factors affecting competition for the supply or acquisition of groceries in New Zealand, and today we're going to continue with a short final session to round out our discussion of some of the options for recommendations that we identified for improving competition in the sector if we consider ultimately that competition isn't working as well as it could in our final analysis and in our final report.

Derek is going to chair that session, and then I've got some questions just relating to strategic conditions for entry and expansion which we didn't get to cover earlier in the conference at the end of last week. I don't envisage that that will take us too long. We'll run the first session until 10.45, break for half an hour and return at 11.15. And when we return we will finish off those matters that might be left from the first session, but otherwise I'll invite a number of key attendees from the conference over recent days to provide some closing comments or observations.

It's an opportunity just to pull together in one place to recap what we've covered and any additional final thoughts that occur to you for now and we're scheduled again to conclude that session at 12.30.

We've emphasised throughout that your submissions and your input into this conference is really important in assisting us to reach our final conclusions. If you leave the conference and think about something else you haven't covered or that you'd like to cover though, we are still calling for written submissions prior to the 23rd of November and we're also open to meeting to discuss any matters that haven't been already discussed with parties as well. The conference therefore isn't the last chance to have your say. Our final report will be available no later than the 8th of March next year and that's a final deadline for us.

1 Finally, for those joining for the first time today, you'll see that the conference is
 2 run in a webinar format. You should feel free to contact our team at any time on our
 3 conference email address marketstudies@comcom.govt.nz and that includes for the
 4 purpose of providing any additional written information or documents relating to the
 5 matters that you cover in the sessions today.

6 Derek and I will chair the sessions and once again will lead the discussion and the
 7 questioning and conduct the conversation through us so that we can keep things moving
 8 in an orderly way. Whether you're a panellist, because you indicated that you'd like to be
 9 heard in the session today, or whether you're attending just as an attendee or observer at
 10 the conference, if you'd like to comment on any of the matters under discussion just use
 11 the hands up Zoom function. If you're an attendee and not on the panel where you can
 12 readily provide your comments, our team will contact you and enable you to join the
 13 panel so that you can be heard.

14 When you're on the panel please just minimise background noise by keeping
 15 yourself on mute when you're not speaking. Whether you have your video on or off is up
 16 to you. When you are speaking it is helpful if you can ensure that you're unmuted and that
 17 your video is turned on. Feel free also if there are matters that come up in the session that
 18 you'd rather reserve for private discussion because they're confidential or commercially
 19 sensitive; you can just flag those to come back to the Commission at a later point.

20 Finally, just a reminder that the session is being recorded and that's for
 21 transcription purposes. We're loading transcripts of the conference sessions on our
 22 website as they become available, and you can access them there. We won't be loading
 23 copies of the live sessions and we've also asked that third parties, such as media who have
 24 been coming and going from the conference, don't record the sessions either.

25 Thanks very much, I think those are our introductory comments. We're looking
 26 forward to getting into today's sessions for our final day, over to you Derek.

27 **Dr Johnston:** Thank you Anna and good morning everyone. I want to pick up this morning with
 28 the topic of facilitation of entry and expansion that we didn't get to yesterday afternoon.
 29 The Commission's draft report noted that while it was possible that the focus of our study
 30 on the sector might encourage entry into the wholesale grocery market, it was difficult to
 31 see where that entry might come from. Consequently, as an alternative to waiting to see
 32 where entry might come from, we raised the possibility that the government might seek
 33 to facilitate entry or expansion in the sector.

34 Our draft report noted that there were a range of options available if the
 35 government wished to facilitate entry into the sector. It could provide financial support
 36 following a contestable procurement process. Alternatively, the government could invest
 37 in a joint venture partner with a view to exiting once competition was established, or
 38 alternatively retaining a longer-term interest in the venture using a mixed ownership
 39 model.

40 Our draft report noted that facilitation of entry or expansion was likely to be costly
 41 and that care would need to be taken to ensure it didn't unfairly distort market outcomes

1 in the long term. The submissions in this area have been modest, but there are important
2 issues we want to canvass today, both issues of principle and also issues of practicality.

3 As we did with investment or divestment yesterday, I'd like to start the question by
4 looking at general principles which should be applied when considering a
5 recommendation to facilitate entry or expansion before moving into a more focused
6 discussion on whether a recommendation of facilitation of entry or expansion in relation
7 to the grocery sector might be appropriate, if the Commission would conclude that
8 competition wasn't working well in the sector.

9 So against that background, I'd like to come to the first question for us to focus on
10 this morning. That is, in what circumstances might it be appropriate for the Commission to
11 recommend to the Government that it considers the possibility of taking steps to facilitate
12 entry or expansion in the grocery sector. Would that require the same preconditions or
13 criteria to be met as for a divestment, as we discussed yesterday, or might some lower
14 threshold or different criteria be appropriate?

15 Again, this morning I'd like to go to Josh Gluckman and put a question to him to
16 start proceedings. Josh, in our discussion yesterday regarding the circumstances in which
17 it might be appropriate for the Commission to recommend a divestment remedy in the
18 context of a market study, you were proposing that the bar be set reasonably high with
19 the key focus being on what impacts the divestment would have on the ongoing
20 operational efficiency that the party being required to make the divestment.

21 When we come to your submission in relation to the question of facilitation of
22 entry and expansion, you've suggested that government intervention to facilitate entry
23 would be preferable to divestment. Presumably, that's because you consider there'd be
24 less direct intervention or disruption by the Government facilitating entry or expansion
25 than a divestment option.

26 Given this, does this mean you would see a lower or different threshold being
27 appropriate when the Commission considers recommending the government look to
28 facilitate entry or expansion?

29 **Mr Gluckman:** Thank you Commissioner, mōrena, kia ora koutou katoa, Josh Gluckman from
30 Woolworths New Zealand. I'll provide a response to that question Commissioner, I might
31 also just provide some comments in relation to the grocery market. I know that the
32 questions kind of straddle both of those worlds.

33 I guess, up front, we should make the comment from Woolworth New Zealand's
34 perspective that we don't think facilitated entry of any nature is required given we don't
35 observe a competition issue that requires that level of intervention. I think that's
36 obviously context in terms of our views and we certainly still think it makes sense to
37 implement a number of the other proposed options and giving time for those to take
38 effect before one would entertain anything of this nature.

39 But certainly, it is our view that if the government wanted to establish a new
40 competitor, in our view facilitated entry or expansion would be better for consumers than

an intervention that undermined existing sector efficiencies or risks to end-to-end supply chain effectiveness.

So, in that context I suppose many of the same principles would apply, and those principles would include undertaking a full cost-benefit analysis, of course; avoiding unintended consequences; preserving investment incentives and New Zealand's standing as a place to do business; and of course working through an appropriate intervention hierarchy before even getting to that point.

So, we think that the principles would be reasonably consistent, it's just that in relation to the application of those principles, when considered against some of the downside options of some of the more extreme divestment or structural separation options traversed over the last day or so, facilitated entry in our view may not carry, or would not carry, a number of those downside risks.

For example, scale efficiencies of the sector would be less impacted, vertical integration benefits would be preserved, the unworkable complexities of access regulation would be avoided, and the significant negative precedent of forced divestment or structural separation wouldn't also exist. Unlike some of those other options, we also note that there's arguably a precedent there for example in terms of Kiwibank although I don't profess to be a banking expert.

Obviously, it would be for the government to decide if it was the best use of public funds, and in some respects, it would also depend on the nature of any competition that was being sought or that parties were looking to precipitate. For example, I think if we think about price competition, if that was a specific focus, recognising that grocery competition occurs on many dimensions, it's hard to see how a new entrant would be able to compete on price with a PAK'nSAVE, let alone a process below a PAK'nSAVE, if for example they didn't come with global buying scale such as the Costco example, or didn't have an operating model that had a number of trade-offs as we see with a PAK'nSAVE, or a Costco, or an Aldi. So, I think that's probably a comment that traverses a number of topics Commissioner, but it's hopefully helpful.

Dr Johnston: Thank you for that, you did go right to the heart of what I was thinking that because of the loss of vertical efficiencies and other things that it was perhaps a slightly different threshold notwithstanding that some of the underlying principles were the same when one comes to think about this. Perhaps if we go to Foodstuffs North Island, Chris Quin, do you want to make a comment on the question of threshold or criteria before the Commission should think about a facilitated entry or expansion option?

Mr Quin: Mōrena Commissioner, and thank you, I will. So look, a couple of the build-up points that we think go with this. The first one is that we think entry of competition is happening, so the statement that it's difficult to see where it would come from we would have a different starting view on. Costco, Circle K, has been mentioned plenty of times.

I know that even overnight, there's been an announcement from a new grocery retailer called Geezy Go who will have dark stores open in Auckland in January and if you read the media release some pretty interesting statements in there around "We own our

own direct supply chain for the brand, it means reduction in cost.” Is one of the lead statements that caught our eyes. With a commitment to Auckland and Wellington commencement and so on. So, another example of a competitive market working just in the last 24 hours.

We do refer briefly back to the fact that for forced divestment and confiscation of private property rights there would have to be a high threshold, so we think that starts the conversation with reference to this. And there would need to be a demonstrable net benefit for consumers. Of course, government can choose to be involved in any industry at any time, that is Government policy choice, hopefully without compromising existing rights. And part of what would be compromised is the evenness of the playing field and the normalcy of competition.

It is our view, Government’s focus is best placed on removing barriers to entry, and enabling free trade and enabling commerce in the simplest, most trusted environment it can. One of the things we haven’t done any work on, but I wonder about is in our recent UK Free Trade Agreement, what sort of commitments have we made to our environment and infrastructure. We then go to our belief that there isn’t barrier to competition and arriving competition proves that relatively often, so then what is the case?

And the last comment I’d make is we think the bar for this sort of action or remedy would be higher than the bar for some of the divestment or separation conversations that have been had, and that our case that that bar in itself hasn’t yet been met, seems like this is some distance away. But we think for a non-commercial non-normally structured response the bar would have to be the highest of all. Thank you.

Dr Johnston: Can you expand on that a bit please Chris, I’m sort of interested in that in the sense that there’s less disruption to your business by a government-facilitated entry. It’s hard from my perspective to see the harm that occurs directly as a result of the Government entry so why should the bar be higher than with a divestment, which I could understand some of the arguments you were making yesterday for a reasonably high bar.

Mr Quin: I think Commissioner, it’s potentially about evenness of playing field and conditions under which Government entry might be created. So, what would be the access to capital cost compared to everybody else, what would be the conditions under which the operation would. I think it would need a lot more detail potentially, I think it’s a reasonable question, but on the basis that potentially it creates other advantages that wouldn’t be available to all competitors, that would be the question.

Dr Johnston: Thank you Chris. Foodstuffs South Island, do you have anything you want to add on this question of threshold? Tim Donaldson?

Mr Donaldson: Thank you, Tim Donaldson, Foodstuffs South Island. Well, it’s not for Foodstuffs to tell the Government what to get involved in. We assume considerations would include whether a new grocery retailer would increase competition or bring down prices, so that’s important. Today we operate as though there’s a strong prospect of new entry at all times, so we doubt that this threshold’s met.

1 You'd also need to consider if there were commercial opportunity due to high
2 prices or profits whether a private solution exists or whether the Government needs to
3 subsidise an entrant or get involved itself. And we'd suggest the imminent entry of Costco
4 and Circle K and the ongoing entry of disruptive market participants such as Supie, Farro,
5 Hello Fresh suggests there is a real question as to whether this is the case.

6 I think something that's really important is that Government facilitation would also
7 need to benefit all New Zealanders equally. They should equally subsidise consumers in
8 Westport to the same extent as Auckland. Thank you.

9 **Dr Johnston:** Thank you Tim. Are there other parties here today that want to make some
10 comment on what the appropriate threshold for the Commission to recommend
11 facilitation of entry or expansion should be? Whether it's at the level that's been
12 proposed by the major grocery retailers or whether some lower or different threshold is
13 appropriate. I can see both Tex Edwards and Eric Crampton with their hands up. Tex, I'll
14 come to you first.

15 **Mr Edwards:** Thank you Commissioner Johnston, good morning. We agree with Foodstuffs
16 wholeheartedly. Foodstuffs made a very good point here, and their point was that the bar
17 should be high. The bar for entry and the bar for Government intervention should be high,
18 we agree with that. The bar was created when Foodstuffs and Countdown bought 20% of
19 the Warehouse to clear and presently block The Warehouse from being a third operator.
20 That was where the bar of entry was met. That was, I'm going to say 15 years ago, and
21 since that we've seen nothing but investment in barriers to entry. So, we agree with
22 Foodstuffs, the bar should be high, and we think that high bar has been met several times
23 over. We'll pass on that some other time.

24 The entry principles for us are really a very healthy discussion and thank you
25 Commissioners for cataloguing this on the agenda. Meaningful competition, like for like, is
26 the principle here. We need a dividend to the consumer, we need a dividend to the
27 suppliers. We need a like for like dividend, we don't need a bespoke, niche competitive
28 outcome here, we need a like for like. I almost get stressed when I hear that Farro, Supie,
29 Night 'n Day, and all these little sub-200 million dollar businesses are actually competing
30 on a like for like basis. Or even have a clear and present embryo to compete with this 20
31 billion dollar sector where there are two giants owning 90%.

32 First principle is like for like, second principle is disruption inside the incumbents
33 must be created so they can't attack embryos. Now, I respected and acknowledged
34 industry colleague Josh Gluckman's comment that if there were to be new entry then
35 maybe the Government would finance a new entrant. Without some type of divestment in
36 both distribution centres and the retail, essentially government money would be financing
37 monopoly club. Because we would be having the Government enter an industry that
38 already had high barriers to entry and inevitably fertilising higher capital costs. So, I urge
39 the Commission in its discussion of what a sensible solution is, I urge the Commission to
40 look at what type of disruption should take place in the incumbents so they can't attack
41 the embryo of a like for like competitor.

The third principle is access to capital markets, it's a very bizarre economist's challenge that we have a queue of people wanting to buy supermarkets in New Zealand but there are barriers to entry. So, I'd just urge the Commission to consider the third principle of barriers to entry.

And the fourth principle is requirement to serve rural and marginalised communities with healthy food options. I really appreciated my colleague Sarah Balle's comments about what bespoke segmentation options are available to serve marginal communities through the use of the internet. So, moving on, the other two principles are, just closing out on the other last two principles is, distribution should possibly be independently owned because that's the gatekeeper to scale, and that actually resolves one of Countdown's concerns that scale is disrupted. So, if there's a substantial ownership change up at the distribution centre then in the pathway of going from two distribution centre ecosystems in New Zealand, to three, possibly four, then you can preserve scale, you're just changing ownership. It actually is a risk mitigant in a concern that prices might rise.

Just also the last principle is just be mindful that divestment might not, every divested supermarket or pocket of power or every divested suburban monopoly might not necessarily have to go to a challenger. There could be some reorganisation of the market where actually a Countdown supermarket went to a Foodstuffs ecosystem and a Foodstuffs ecosystem went to a Countdown. Thank you very much.

Dr Johnston: Thank you for that, I'll come to Eric Crampton.

Mr Crampton: Thank you Commissioner. When I think back to the 2017 election and the Labour Party having promised that we were going to get a whole pile more houses, they were thinking about a facilitated entry option, the same kind of deal that you've been thinking about or considering here. Backing new entrants, financing them, maybe setting up a Kiwibuild alternative that would get a whole pile of houses build.

That initiative really didn't work because it didn't solve the underlying problem. Kiwibuild hit all of the other problems that every developer trying to build houses wound up hitting. That not enough land is zoned for housing, that there are supply chain constraints, partially regulatory, around building material supply. They just couldn't get the consents to be able to build the houses to solve the problem because they hadn't solved the problem, right? They facilitated entry, they developed a new entrant, but it didn't get the job done.

I wonder if that might help us in thinking about different ways of facilitating entry. I love to imagine this as an option, I don't know whether you'd consider it or not, but I think it could be great fun and it would help to get a better understanding of what's really going on here. So, the Commission could get a list of all the large-scale international grocers, Lidl, Aldi, Whole Foods, Kroger, Sobeys, Loblaw, Trade Joe's, just the big list and send each of them a note or just phone them up.

"Hello international grocer,

1 New Zealand may not have featured in any plans you may have had for
2 international expansion. Small markets at the far end of the world beset by regulatory
3 impossibilities that make it hard for new entrants to set up shop are not the most enticing
4 proposition.

5 We at the Commerce Commission are writing you today to ask that you reconsider
6 New Zealand, or to think about us for the first time. Or at least tell us why you might not
7 want to.

8 Our market study into grocery retail concluded that a new entrant would be in the
9 national interest. Consequently, the Government has instructed the Overseas Investment
10 Office that no application for OIO approval is necessary for overseas persons purchasing
11 land for grocery stores. This waiver is broad. If a new-entrant grocer proposes an
12 apartment or commercial tower above their new supermarket, that's great too.

13 We have also instructed councils that they must issue zoning variations and
14 consents for new grocers, and that grocers have recourse to the Commerce Commission if
15 zoning or consenting processes are hindering the establishment of a new entrant in
16 grocery retail.

17 New Zealand is open for business. For too long, regulatory impediments have
18 stood in the way of new entry. Those impediments are now gone. Please consider New
19 Zealand in any plans for future expansion or tell us why you would prefer not to."

20 That's a really nice way of facilitating entry because it gets rid of the underlying
21 barriers. If you just go and set up some new Kiwigrocer it's going to have to go and find
22 the land that's zoned to possibly allow a new grocery store, it's going to have to talk with
23 Councils about it and go through multi-year processes in figuring out whether you're going
24 to get consent to do it or not.

25 They'll raise some possibly self-serving objections around wastewater supply and
26 whether you need to pay for decades of trunk infrastructure degradation as part of your
27 consent application. You will hit all of the same problems Kiwibuild hit and that's why
28 Kiwibuild failed and that's why Kiwigrocer will fail on the same grounds. You have to go to
29 this underlying problem and then invite the entry.

30 If they tell you that New Zealand is just a small market at the far end of the world
31 and none of those really are the real barriers and that there are just no profits to be had
32 here, that also would tell you something about whether there are supernormal profits for
33 you to be chasing or whether this is all a little misguided. Thank you.

34 **Dr Johnston:** Thank you Eric, I think underlying the question was an assumption that some of the
35 other barriers that had been identified were being addressed alongside the option of
36 entry.

37 **Mr Crampton:** Make it explicit, send the letters out.

Dr Johnston: Coming on to another question in terms of when government intervention may be appropriate. I'd like to just throw out the question of where there are barriers to entry that the Government is better able to overcome than private enterprise. I just wonder if anyone's got any thoughts on that question. If so, could you put your hands up. Tex, then I'll come to Sarah at Supie and then Eric.

Mr Edwards: I promised myself I wouldn't mention this at this conference, but section 36 of the Commerce Act, is still in the process of being reformed. But essentially in New Zealand because we do sometimes hide behind this low population base as competition not being able to be facilitated, I think the Government's participation removes some of the nastier barriers to entry and competitive responses and I think the Government's participation in an industry. Chorus is a good example of that, it actually fertilised a whole series of smaller players. It's unique because governments often have blunt sticks and governments can only do some things in an economy and can't do everything. But in this particular instance, Government participation would fertilise a whole series of small innovative players before the industry moved on to a period of consolidation.

Dr Johnston: Thank you for that, Sarah.

Ms Balle: Good morning, I just want to touch on a couple of things that's kind of being asked in this topic from a Supie perspective. So we believe that it is appropriate for the government to support the expansion of an existing retailer such as ourselves to provide the meaningful competition for all of New Zealand. We do have the ability to reach consumers across all areas of the country from downtown Auckland to those in Westport or those in Northland, and we don't need the bricks and mortar in small rural towns or in Auckland to be able to provide this effective competition here, and our aim is to soon be like for like on product range and pricing as well.

But we do need scale to achieve our aims which requires funding. And this is not an unreasonable request for Government support. We've seen the government invest more than \$400 million in the rural broadband initiative to ensure that internet poverty doesn't exist. We've seen it in the banking sector with the Super Fund and ACC's investment in Kiwibank to deliver better outcomes for Kiwis which has already been mentioned. And we need better outcomes from the grocery sector, and this is why our recommendation is that there should be a facilitation of entry as appropriate in its case.

I do urge absolute caution in incentivising an international retailer for the reasons that I've detailed in my written submission. But it includes bringing in international supply chains and products that are sourced from inferior regulatory environments. We have the opportunity to support NZ Inc., we simply need to unlock local capital and the current situation is so dire that I believe this can only be done through regulatory investment and/or Government investment. The design thinking has been done, but we are so constrained by the status quo and constrained by scale. We know the majors have deep pockets, and we know they'll protect their patch. And what this means is that the sector has become unattractive for private investment, until Government intervention occurs. Thank you.

Dr Johnston: Sarah, can I just follow up on that. Certainly, just reflecting back on your experience of where Supie has come from and the journey it's been on for the last few years and the point of expansion it's on now, thinking about other people who might be in your shoes looking at a similar journey, what would be the right time for Government intervention? Is it early on when it's green fields, or is it the stage now when it's expansion? At what point would Government-facilitated assistance be of most value?

Ms Balle: Yeah, that's a great question. And it depends on what sort of government intervention is going to happen. From a wholesale supply perspective, that type of intervention could encourage and promote 3, 4, 5, and 6 players to come into the market being able to get access to that not having to set up supply chains. It's taken us two years to develop our vertical integration to get direct supply because it's simply not possible to do it without it. And that's not because it's unviable to buy from a wholesaler, it's just there is no opportunity to get access to wholesale supply at reasonable prices to be able to retail them to consumers.

But there should be, definitely be a process of assessment as to what are the benefits of government intervention and when. And we definitely think that Supie has the business model in being purpose-led to drive better outcomes for all Kiwis and being able to reach them across all of NZ. It's definitely something that hasn't been done before but it's innovative and we need innovative encouragement and promotion because the industry has been so starved of it for so long. And that's why we do require what may be considered drastic action.

Dr Johnston: Thank you for that. I'll come to Chris Quin, Eric Crampton, and then, well perhaps Chris Quin, Tim Donaldson and then Eric Crampton and then might move on to the next question I've got.

Mr Quin: Thank you Commissioner. Look, very briefly, given that no monopoly facility exists in the industry, the place where the government are better able to support would be legislative barriers such as OIA, RMA and zoning issues. It's been well discussed and mentioned for the reasons why. They don't require it to become directly involved in retailing, there is opportunity there to encourage and make entry simpler. Thank you.

Dr Johnston: Thank you. Tim Donaldson?

Mr Donaldson: Thank you Commissioner. We don't believe government would need to spend taxpayers' money on subsidising private enterprise in the grocery industry. As has already been shared with the Commission, access to capital in New Zealand is not an issue.

Dr Johnston: Thank you. Eric?

Mr Crampton: Thank you, the question had been what barriers to entry are government better placed to solve than business themselves. Obviously, business can do nothing to get rid of the constraints posed by the Overseas Investment Office, business can do nothing to get rid of the constraints that are imposed by Council zoning rules, and business can do nothing to get rid of the constraints and uncertainties that are caused by Council consenting processes.

1 All of those demand a role for Government, especially Central Government in
 2 instructing Local Councils in the same way that they did recently for up-zoning for
 3 residential purposes that zoning for grocery purposes should also be allowed. Access to
 4 capital does not seem to be that great of, we're in some of the most benign credit
 5 conditions that have ever been around, it seems odd that there'd be credit constraints or
 6 capital raising constraints but for those that are imposed by the Overseas Investment
 7 Office and then require a host of complexity once you've got foreign funding in the mix.
 8 Thank you.

9 **Dr Johnston:** Thank you. I'd like to come to Matthew Lane, who's got his hand up. I'd like to hear
 10 your views on this Matthew, and again, keen to hear from your perspective the role that
 11 you see Government can play for organisations such as yours in terms of possible
 12 facilitation of expansion, in terms of becoming a more viable competitor in the sector.

13 **Mr Lane:** Yeah, absolutely. Thank you, good morning, Matthew Lane from Night 'n Day. Look, for
 14 us, the wholesale facilitation of government intervention is a good outcome. I don't think
 15 they need to play in the retail space, but I think they need to create a non-conflicted
 16 ability for those competitors to obtain supply. The other thing that the Government does
 17 hold is the best interests of the consumers or taxpayers. So, the focus is around providing
 18 affordable products to then being able to be passed on to the end consumer rather than
 19 having a very narrow approach where at the moment only Woolworths and Foodstuffs
 20 can sell those low prices. If they aren't present in a rural town, and it's an independent
 21 retailer, they can't access viable supply, they can't pass on appropriate prices to the
 22 consumer.

23 The other part there is it does remove that conflict of supply versus retail which
 24 I've highlighted as incredibly important. It gives a fair opportunity if it's a single retailer, if
 25 it's a retailer with 10 or 50, it actually provides the opportunity for people to grow with
 26 confidence, invest in the infrastructure needed to retail to the end consumer, rather than
 27 the hesitation with the current wholesale supply channels. Thank you.

28 **Dr Johnston:** Thank you for that. Mark Fort, I see you've got your hand up. I'd be interested in
 29 your contribution on this aspect.

30 **Mr Fort:** Thank you Commissioner. I'd like to sort of, this is a bit of a wrap. The situation New
 31 Zealand has found itself in is a unique one. We just don't have the quite right mix of
 32 population geography to attract a major operator to correct the balance. So, we have to
 33 look for another method. We don't like change, none of these companies would like to
 34 accept that they must, but we do.

35 Since Aldi arrived in Australia, both Coles and Woolworths have lowered their
 36 prices. That was in a 2017 report, so it's not affected by Covid. That is why we need to
 37 look at either separating the wholesale from the retail or some sort of divestment process
 38 or a government intervention that has precedent set in other countries, in particular Latin
 39 America and in Asia, they looked at that and they said we've got to change things, so does
 40 the government.

If the Countdown and Foodstuffs staff on this meeting were asked which they would prefer between these two options, we might get into some serious discussion. We have to do that. Is it right that the Government continues to subsidise the supermarket duopoly by increasingly handing out greater benefits so that the recipients can buy their weekly groceries? Consumers are being held to ransom by the supermarkets, there is no choice for the most vulnerable. Thank you.

Dr Johnston: Thank you for that, Mark. I'd like to ask if any of the other Commissioners have any questions they want to ask on this facilitation of entry or expansion question.

Dr Small: Not for me, thanks Derek.

Dr Johnston: Does anyone else have particular comments they want to make on facilitation of entry and expansion before I pass back to Anna to pick up on the other topic we're going to discuss this morning? No hands up, I'll pass back to Anna.

Ms Rawlings: Thanks Derek. So, we're going to turn now to talk about issues of strategic conditions and by strategic conditions for entry or expansion we mean behavioural types of barriers that might exist. We talked about some of this on Thursday, but from time to time throughout the conference the discussions also included a reference to what we refer to as strategic conditions. In our draft report we described these as arising when incumbent firms take action to discourage prospective entry or expansion or to make it more difficult. So we just want to round out that discussion.

We noted in the draft report that arrangements that affect the ability of suppliers to supply a new entrant could affect conditions for entry and expansion, and we noted in particular two kinds of contractual provisions that might have this effect. The first type were best price clauses or most-favoured nation clauses which ensure that a particular buyer obtains products from a supplier on terms which are at least as good as, or in some cases better than, those provided to other buyers. And for ease of reference, we'll refer to those as best price clauses. The second type of contractual provisions were exclusivity clauses that require a supplier to supply products or certain brands of products exclusively to a certain grocery retailer and by implication not to supply competitors.

So, we acknowledged that contractual provisions of this nature can be justified in some circumstances, for example there might be some efficiencies underlying the use of these types of provisions. And we also noted that they didn't appear to be all that common in the sector and were therefore unlikely to have a significant impact on entry or expansion. But we did note that if they were more common than we'd thought, or they become more common, then they would likely have a more significant impact.

Following the draft we received some submissions that suggested that these types of clauses should be prohibited outright and so we wanted to explore further both our underlying view that the clauses were not widespread but also explore their use just a little bit more and that submission that they should be prohibited.

I might start with the Food and Grocery Council if I could, and just start with that submission. So, your submission raises concerns relating to strategic behaviour, and in particular exclusivity and best price types of clauses and their impact on entry and

expansion. And you've referred to some types of conduct. I wondered if we have Katherine with us, whether you could elaborate a little bit on the extent to which you think strategic behaviour is impacting entry and expansion potentially, and is it just best price and exclusivity type arrangements. Is there other types of conduct that is concerning you whether contractual or otherwise as well?

Ms Rich: Thank you madam Chair. Yes, we do have concerns about pressure put on suppliers which act as barriers to entry for other retailers. And that can happen in many forms, whether the threat of supplying other retailers is either veiled or in some cases, direct. And a really good example of that was quite some time ago when Countdown was wanting to put in place exclusive packs, and an exclusive pack is a different format of either known brands or brands that are special to them. The retaliation as a result of that strategy was, in my view, very extreme, and ended up resulting in that strategy not being used here in New Zealand when it is commonplace around the world to offer different retailers different formats, different types of products, and at different prices.

Certainly, I think a very strong code would deal to some of those behaviours because we maintain that it's not one retailer's business what a supplier does with another retailer. Those relationships are between the supplier and the retailer and one retailer can't say I don't like what you're doing with that retailer over there. The problem arises particularly for new entrants where the environment is such that even without a retailer directly saying to a supplier, I don't want you to supply that new entrant, suppliers know that to be seen as a good supplier by the duopoly that they should not, in many cases, supply a new entrant. And sometimes suppliers will make the decision themselves understanding the ecosystem that they are involved in.

The other thing that we think with price guarantees or most-favoured nation clauses or exclusive supply arrangements, yes if the supplier agrees to it and sees it as an opportunity, but they should not be coerced or put in a position where they are forced to accept such provisions and clauses. So, thank you for the opportunity.

Ms Rawlings: Thanks for that. So, I think what you're describing is a conduct-related issue rather than just the contractual provisions themselves. And you've advocated a code of conduct, obviously. How would that need to be framed though in order to address the types of implied understandings or conduct that you're speaking about.

Ms Rich: Yes, it's not just a code. I suppose what I'm talking about is a cultural change within our industry. I think changes to section 36 and changes to the Fair Trading Act in terms of unconscionable conduct were also part of a suite of changes to make a difference. But it needs to be made clear whether it's in the law or reviewing contracts to make sure they're not one-sided (which many of them are) that there is a clear designation of the retailers and an understanding that it's just not their business, they should have no view on the business relationship that a supplier has with another retailer who may be a new entrant or a current competitor.

Ms Rawlings: And is that something, a requirement relating to that, that you would see going into the code to supplement the other types of legal protections that you've described?

1 **Ms Rich:** Yes, it could. But if it's okay with you madam chair, I would ask Andy Matthews to
2 comment on the legal aspects because that's his area of expertise.

3 **Ms Rawlings:** Sure.

4 **Mr Matthews:** I think the answer is that a lot of these things are addressed by the codes through
5 the principles of fair dealings and also in terms of the variations that Katherine's
6 mentioned.

7 **Ms Rawlings:** I guess what I'm sort of struggling with a bit is the degree of precision required to
8 come at these things. So, in some respects, and I'll come to Woolworths and Foodstuffs,
9 but there's a degree of reliance that can be placed on an amended section 36 and on an
10 unconscionability provision in respect of small trade contracts, in respect of new unfair
11 contract terms provisions. I guess what we're considering is whether there is some other
12 body of conduct not captured within that framework that would be addressed within the
13 code and how that might look, as well.

14 **Ms Rich:** I think that's a very good question, and that if you have a code that is principle-based
15 and retailers are required to reflect the spirit of the code then it comes down to what the
16 ombudsman, adjudicator, commissioner might have on his or her table from suppliers to
17 be able to have that ongoing discussion. While we welcome some of the more substantive
18 law changes that have been before the House recently, that of course requires going to
19 court and that will never happen. A supplier will be out of business by the time those sorts
20 of issues are dealt with in that lengthy manner. That's why an ombudsman I think has
21 shown in the UK to be a really smart, timely, way of having those conversations as they
22 happen and being able to deal with behaviours as they arise in a way that's safe for
23 suppliers.

24 **Ms Rawlings:** Thanks, I think that's really helpful. And just before we move on, perhaps to
25 Woolworths, in respect of the submission that Woolworths has made that some of these
26 provisions could be made unenforceable by law, do you support that, or are there
27 circumstances in which you consider that some greater freedom ought to be allowed to
28 retain some best price or exclusivity types of arrangements?

29 **Ms Rich:** Look, sometimes suppliers may determine as part of their own strategies that it is
30 something that they want to offer a retailer. They might want to do a controlled brand or
31 they might want to offer a retailer, or particularly a new entrant if they're trying to assist
32 them to compete, offer that new retailer something that can be differentiated from the
33 rest of the market. And I think suppliers have to be able to retain the right to do that and
34 run their businesses in a commercial way. I'm not sure, I don't understand the law as to
35 why that would be unenforceable, but I can see reasons why a supplier would like to be
36 able to retain that right to put things in front of retailers that are both innovative and
37 competitive.

38 **Ms Rawlings:** Thank you, perhaps we'll go to Woolworths then, in respect, perhaps should we
39 start with best price provisions. You've told us that you don't monitor or enforce those
40 provisions and you're not including them in new terms and conditions, but that you would
41 support them being made unenforceable. I just wondered if you could elaborate a little bit

1 more on your view of that, perhaps first of all why you've taken the view that they have
2 been in the past something that was included in contractual terms but are no longer.
3 Should we start with that?

4 **Mr Gluckman:** Thank you Commissioner, and I'll pass to Andrew Dixon from our buying team to
5 provide some of our detailed response, I suppose. But my first comments on the topic
6 would obviously be that I think it's well-traversed that we are very supportive of a
7 mandatory grocery code and a well-constructed mandatory grocery code. And obviously
8 keen to participate in the detailed development of that code. We've placed a lot of effort
9 on our fair dealings and our relationship with our suppliers and that's well-recognised in
10 terms of Woolworths NZ being recognised as the number one retailer in the marketplace
11 to deal with by suppliers, including for a couple of years in a row. We also are very
12 supportive of a grocery ombudsman or something similar to oversee such a code. So, I
13 think that's probably important context up front. But in relation to best price clauses etc.,
14 I'll pass to Andrew Dixon to provide more comment.

15 **Ms Rawlings:** Thanks, Andrew.

16 **Mr Dixon:** Good morning, Andrew Dixon, Woolworths New Zealand. Look, as we've already
17 submitted, we're absolutely supportive of changes to remove best price provisions in
18 supplier contracts. I think these are largely historical, I'm not aware that we have ever
19 attempted to enforce any of these, we've removed them from our standard terms. We
20 don't see a need for them, hence we're happy for them to I guess be neutralised,
21 whatever the best method for doing that may be.

22 **Ms Rawlings:** And why would, in your view, it be useful to render them unenforceable across the
23 board rather than leaving it to a voluntary consideration of the kind that you've clearly
24 made.

25 **Mr Dixon:** I guess we just don't see a need for them. We don't see why they would be useful in a
26 market. Obviously, we believe it's appropriate for suppliers and retailers to negotiate
27 together to achieve prices that work for both parties. We don't actually see how it could
28 actually be applied in practice even if they did exist.

29 **Ms Rawlings:** Okay, and in relation to exclusivity types of arrangements, you've got a similar
30 position I think, that they could also be rendered unenforceable perhaps by some legal
31 provision, but that you retain some kind of ability to apply them in circumstances you've
32 described, something like a reasonable necessity for a legitimate business purpose,
33 something like that. One example that you've referred to is a co-investment kind of
34 scenario, but I just wondered if there were other examples or situations where you think
35 that your underpinning rationale for rendering these things unenforceable might be
36 overridden by some commercial imperative.

37 **Mr Dixon:** Yeah, look, I think we're happy in terms of standard supply contracts for exclusivity
38 arrangements to not exist. I think, as Katherine outlined, there are many examples where
39 a retailer and supplier may want to work collaboratively on an initiative, whether that's
40 supply of a product or that's manufacturing facilities.

1 A good example for us would be the partnership with Hilton Foods Group, where
 2 we've co-invested in a hundred million dollar meat plant based in Auckland to supply
 3 Kiwis. I think there are legitimate business reasons that are pro-competitive, pro-
 4 innovation and will deliver great results for Kiwis. And it would be a shame if we were
 5 unable to enter into those kinds of agreements. But I think that's quite different from
 6 some kind of coerced exclusivity arrangement which we don't support.

7 **Ms Rawlings:** And how frequent would those kinds of exception-type arrangements be, do you
 8 think?

9 **Mr Dixon:** I'd say they're quite rare. We certainly would have very small numbers of agreements
 10 like that, and normally they would relate to some kind of co-investment. But I think
 11 without sort of referencing specifics, these are agreements that are entered into mutually
 12 with our supplier partners or manufacturing partners, these aren't unilateral coerced
 13 contracts, these are mutually beneficial arrangements that we've entered into.

14 **Ms Rawlings:** And I guess, just while I've got you, and then we'll move to some hands up
 15 potentially. If in respect of these two types of contractual provisions there were steps to
 16 be taken to be clearer about their use or ruling out their use, is it your view that that
 17 would be best done through legislation or through the code that you've supported, and
 18 the FGC has advocated (or some other means).

19 **Mr Dixon:** We would probably agree that the grocery code is the best place to address these
 20 issues. I think, as already discussed, with the right principles in place, as we've seen in the
 21 Australian market, we think that's the right way to introduce perhaps some of the cultural
 22 changes that have been alluded to. We're happy to work with the Commission or the
 23 relevant party on drafting a code that's suitable for New Zealand.

24 **Ms Rawlings:** Thank you. I might go to you, Andy Matthews, for your comment with your hand up
 25 there. But I also just wanted to go back to the FGC on the question of exclusivity
 26 arrangements and whether, like Katherine's comments in relation to best price, you'd
 27 envisage a situation where if exclusivity arrangements were not enforceable there ought
 28 to be some exemption for circumstances like legitimate business purpose or something
 29 else. But did you want to address your comment first Andy. Just on mute, on mute still
 30 there.

31 **Mr Matthews:** Sorry. Was just going to say, I think you're right. It ties into the concept everyone's
 32 discussing, which is if you have a principles-based code that seems to provide greater
 33 flexibility for these sorts of things, and I think we heard from the UK and Australia that
 34 that's the approach they've taken and I think that's why the FGC is quite keen to advance
 35 with that sort of thinking, because we're not just talking about written contracts, we're
 36 talking about other conduct as well and I think a code provides that flexibility. So that was
 37 sort of point one. But there was a related point just simply because section 36 has been
 38 discussed a couple of times and I think the FGC's position has been that the supermarkets
 39 should be designated as having substantial market power for the purposes of that which
 40 ties in a bit to the question of other steps the government could take.

1 **Ms Rawlings:** Thank you, I might go now to Tex, you've got your hand up there, and then that will
2 give Foodstuffs an opportunity also to respond.

3 **Mr Matthews:** Sorry, just one other point because if Mike's going to talk. There's an exclusive
4 pack statement on Foodstuffs' website which he might sort of cover as part of his thing so
5 I just thought I'd mention that.

6 **Ms Rawlings:** Thanks Andy. Tex, should we go to you.

7 **Mr Edwards:** Thanks madam Chair. I just wanted to – I had a catalogue of barriers to entry which
8 is possibly in the next session of is "there strategic behaviour that may restrict entry and
9 expansion", so I've got a long list of that. But on this particular topic Commissioners, I'd
10 just like to share my absolute endorsement and urge the Commission to think very
11 carefully about designating the incumbents with significant market power. It would enable
12 section 36 to work more effectively, and essentially I thought that the colleague from
13 Woolworths made a good comment about pro-innovation, pro-outcome for Kiwis.

14 The moment there's asymmetric behaviours as a consequence of somebody having
15 significant market power, say for ease of conversation above 25% market share
16 nationwide, it really enables asymmetric behaviours to occur and it fertilises innovation
17 and this is a true and tried and tested regulatory solution that's reasonable and rational.
18 Because in previous regimes, we've had dominant players, particularly dare I say at the
19 telecommunications industry the moment that challengers were able to do something
20 differently from incumbents, it fertilised competition. So, I just, in this point Commission, I
21 urge a designation of significant market power and asymmetric behaviours. Thank you.

22 **Ms Rawlings:** Well, we might actually, it's a slight segue into something I was going to come to
23 later, but it might be useful to deal with it now. Because Allan Botica also suggested
24 earlier or mentioned this concept of a declaration of substantial market power. Can you
25 just explain a little bit more about what you mean by that and what you're advocating, or
26 how that might be done.

27 **Mr Edwards:** Certainly Commissioner, thank you. In other markets, particularly Europe, in the EU
28 context of competition law in the EU, industries that need competition and need healthy
29 minor operators, and I'm thinking of Supie here, I'm thinking of Farro particularly, I'm
30 thinking of absolutely Night 'n Day (whose business I've understood better in this
31 conference) is that the moment that a big large dominant player who is a big corporate
32 who has a lower cost of capital, who has free cash flow of 100 million quid a week. These
33 operators, the moment they have a designation of significant market power, there's
34 things that they can't do to respond to competition.

35 We saw this in some of the European telecommunication markets in the late 90s
36 where a challenger could do something but an incumbent couldn't. And I refer to a very
37 important direct New Zealand example on this matter, and in the 29 competitive reactions
38 I wanted to share in a later part of the conference, if I was only able to mention one
39 competitive reaction in this context, it's called pocket pricing. In many markets where if
40 you have a designation of significant market power and you have a challenger who is just

operating in Hamilton or Tauranga, an incumbent can't pocket price them out of that embryo of competition that they've started in Tauranga and Hamilton.

And there's a very famous New Zealand legal precedent here when Saturn Networks built telecommunications infrastructure in Christchurch and Wellington in the 90s, and the then Telecom pocket priced Saturn Network infrastructure in Christchurch and in Wellington. And in the time that they did this, the international company Saturn that built infrastructure and spent hundreds of millions of dollars on an incredible embryo of competition, the pocket pricing was essentially illegal everywhere else in the world.

And in terms of the finer detail, and obviously this is more of an off-piece conversation because it's detailed legalese, but the principle of making a statement that anybody who has over 25% market share in retail distribution of food groceries has SMP means that it will fertilise competition and it will be one of several legal tools to help it.

Ms Rawlings: But are you seeing it primarily as a designation that would get you over the first hurdle into a section 36 type analysis of misuse of that market power, or does it have some other function as well?

Mr Edwards: It has some other function because you can do things that somebody else can't, because if a new operator comes and they have to take on Tauranga and Hamilton, then the incumbent who has market power can't pocket price them out of that particular region.

Ms Rawlings: But are you advocating something more, so I think first of all we're just talking about a designation, so I take that to be a statement of some kind somewhere that these parties are deemed to hold substantial market power. And then the kind of conduct that you're trying to prevent like pocket pricing, where would that be dealt with? In a standard Commerce Act type analysis or there would be more rules around, are you advocating some further rules around what is permitted by a party designated to have that substantial market power?

Mr Edwards: I think that is a sensible way of handling things, that that party would only be able to do certain things. It might sit in the supermarket code, it might sit in with the supermarket commissioner or ombudsman person or it might sit back up in the Commerce Act. I just think it's a tremendous step forward for competition behaviours in New Zealand, but I think it's actually a tremendous step forward for innovation in New Zealand because it creates this asymmetry which fertilises innovation and competition.

Ms Rawlings: That's helpful, thank you. That was a slight segue away from our discussion about contractual provisions, but just [inaudible] of that issue a little bit in the meantime. If we come back for now to Foodstuffs and just pick up this question of the use of exclusivity and best price provisions, I think Foodstuffs North Island has suggested that best price clauses are also relatively rare and that the Commerce Act is something taken into account when entering into arrangements of this nature which is good for us to hear and also when entering into exclusivity arrangements.

So that's sort of the status quo consideration for these provisions. But I just wondered if you had some further comment on how common these actually are, so it's

probably Mike Brooker with your hand up, I suspect this is maybe you. How common and what, in a related sort of conversation really to the one about providing legitimate business purposes or however you might like to frame it, other pro-competitive type purposes that you might consider when you say that you're thinking about section 27 of the Commerce Act when using exclusivity provisions.

Mr Brooker: Thank you Commissioner Rawlings, and mōrena everyone, my name is Mike Brooker, I'm the General Counsel for Foodstuffs North Island. Thank you for the opportunity to speak on this topic, yes, you're absolutely right. So, I'll start with best price clauses, so very very rarely used by us, certainly not in any form of standard terms or conditions. Freely negotiated, not with small suppliers as far as I'm aware, and most often exchanged for say a volume commitment in a fluctuating price market (ie, we'll commit to buying a very large amount off you, and we'd like your best price).

So that's the context, you may have a supplier with a short shelf-life product, they want a volume commitment from us. If you get a volume commitment and we need to sell the goods and we're out of price in market, we can't meet that volume commitment. So that's the context, they are very very rarely used, we certainly have no interest in and we're very happy to commit to preserving suppliers' freedom to contract with others. That's been talked about in a code context, we have no interest in what the terms are that they deal with other businesses. But it just comes back to that context, if you're wanting large volume, and we're taking the risk on that, then there's a balance to be had to make sure that we're not out of market on price.

So that's where they're used, but very occasionally, freely negotiated, mutually beneficial. Wouldn't like to see them banned entirely, we think the combination of section 36, which we've talked about, and the new changes that are coming there to give an effects test, and the code of conduct, can deal with these issues. I mean, they're not actually dealt with in the Australian code, but look, we're very happy if that's seen as a problem in our market, we're very happy to commit to that. I'm happy to go on to exclusive arrangements, but you may want to frame that question?

Ms Rawlings: Yeah, go ahead. No, let's deal with those together.

Mr Brooker: Thank you. So, exclusivity arrangements, again, very rare, not in standard contracts, we would use them in what we would consider a partnership type arrangement. I would make the point that, and Katherine Rich has made this point, that they go both ways, so suppliers ask us for exclusivity and we're open to negotiating that in the right context.

Again, we think that the code can deal with this issue and that these are consensual exclusive deals and would not consider them in any way anti-competitive. We are very aware of the provisions of the Commerce Act, and then if it's a conduct issue that we're trying to address here, then absolutely happy to see whatever appropriate provisions in the code.

What I would say is that the issue, as I see it, seems to be around conduct. We've done our best in that space around having a process, so we do have a supplier relationship charter and we've put in place a dispute resolution provision which the FGC worked with

us on. It obviously isn't working, and we accept that, and we're prepared to go into a more formal regime with a code that's mandatory and that can sort this out. Because it comes down to dialogue doesn't it, I mean this is the issue, if we can talk about these things then we can resolve them because we're very keen to resolve them.

Ms Rawlings: Thanks Mike, I guess just in relation to the Woolworths suggestion, or support of a more express prohibition of provisions but perhaps with some exemption, what is your view on that?

Mr Brooker: Yeah, I'd just caution a little bit there. I think that is broadly similar to how some provisions in the Australian code work, so the Australian code for instance will say you can't do this unless and then they set out a framework in which you can do it, and that's usually that it's mutually agreed to and often recorded in a grocery supply agreement. So the code starts often on a basis that it's prohibited which would stop it being used against a particular supplier but then in certain circumstances that are described it can work. So, I think there is room for those sorts of arrangements, and we'd just need to go through them and make sure that they're workable rather than having a blanket ban across these because suppliers want them in many cases. So, it's just making it workable.

Ms Rawlings: Thank you, perhaps we'll go to Tim Donaldson just on this issue. This is one of the areas I think where your position might be a bit different from Foodstuffs North Island and you've indicated that you generally don't seek to limit the terms on which suppliers may supply other retailers and generally don't include best price clauses. I just wondered if you could comment on how common they are for you and your views on them.

Mr Donaldson: Thank you Commissioner. Yeah, so the best price guarantees are very rare for Foodstuffs South Island. In our submission, we stated that we currently have two, so not used very often at all. And we would agree with the Commission that both best price guarantees and exclusive supply arrangements are unlikely to have a significant impact on any entry and expansion in the retail grocery sector.

And as pointed out by the FGC, exclusive supply arrangements are often driven by the supplier. And that's certainly been my experience. We would be concerned if parties were restricted from negotiating genuine commercial terms in good faith for the benefit of the consumers, obviously unless they're breaching existing competition laws. And we would expect a mandatory grocery code to address any matters of conduct thereby ensuring good faith negotiations in this area. Thank you.

Ms Rawlings: It sounds like perhaps then you're supportive of the sort of concept that I think Andy Matthews really summed up well, and that is a principle-based set of requirements around good faith and fairness contained perhaps in a code as being sufficient to regulate this kind of issue. Is that where you are?

Mr Donaldson: Yes, we would agree that that's the right place to have it, in the grocery code, and it would be sufficient at a principle level.

Ms Rawlings: Thank you. Was there anyone else that wanted to comment on the use of specifically these types of contractual provisions, best price and exclusivity-type

1 arrangements? Supie or Night 'n Day, do you have a view on that? I think we've got one
2 hand up from Mark Johnson. Can I invite you to provide some comments Mark?

3 **Mr Johnson:** Yeah, thanks for this opportunity, it's Mark Johnson from Springbrook Foods in
4 Blenheim. Very little known in New Zealand, but we do 300-400 tons of foodstuffs to a lot
5 of customers in NZ and Australia, including Woolworths, Foodstuffs, Night 'n Day, and
6 working with Hilton Food group, Woolworths Australia.

7 And I'd just like to, from a supplier's point of view, say with every customer we've
8 dealt with in New Zealand both Foodstuffs and Countdown is we've never had any
9 pressure put on us for exclusivity. They've never pressured us to ask who we're dealing
10 with other companies. I'm just worried there may be a bit of a storm in a teacup here by
11 some of the major suppliers because I'd really like to see New Zealand suppliers' voice
12 being heard more. I'm really concerned about a third party coming in and all the supply
13 going overseas. The likes of Aldi, we tried to get into there in Australia, there's no way we
14 can match the prices they're bringing product in from Asia and other parts of the world.
15 So, I think it could be very detrimental if there's still a big push to – it may drop the prices
16 of groceries in New Zealand a little, but I think there'd be more money going offshore to
17 suppliers from other countries.

18 So, I'd just like to put my hand up for that we're also dealing with Supie, we're
19 offering some products in there. Just from a New Zealand Kiwi manufacturer point of
20 view, I'm sorry I can't stay on this, I'm hard at work in other areas. But just I'd love to have
21 my voice heard, I didn't know this was on until I was looking on LinkedIn this morning and
22 saw it, so I thought I'd try and jump in and just voice from here. We've got over 50 staff
23 here that are reliant on us, we're a Kiwi business, all our money goes back into local
24 pockets and all the companies in New Zealand I've dealt with are brilliant. So, we just
25 don't want to jeopardise it by putting laws in place that will restrict them in how they can
26 deal with New Zealand suppliers. Sorry it's probably quite out of.

27 **Ms Rawlings:** No, thanks very much Mark, thanks so much for joining us. And I think the more
28 suppliers that we can speak with the better, and I appreciate your time. This issue of local
29 supply has come through a little later in the piece as an issue for a range of different
30 parties and one that we'll consider further. So, thanks so much for joining us, and it's
31 really great to hear from you.

32 **Mr Johnson:** Thanks very much, I'll look into it online now and see when I should be jumping in
33 [inaudible] just from a supplier's point of view and thanks very much everyone for their
34 time.

35 **Ms Rawlings:** Thank you. Now also joining us on the panel is David Cunliffe, I think you had your
36 hand up with some comment to make.

37 **Mr Cunliffe:** Thank you madam Chair, and great to see everybody and our firm Polis Consulting
38 has been following all of the online hearings and just an opportunity I've had to join
39 specifically. I thought I'd just contribute a quick comment on the basis of a former role as
40 a regulatory Minister and as a co-drafter of the various Commerce Amendment Acts and
41 Telco Acts that went through Parliament when I was an MP. Most relevant experience is

probably the operational separation and re-regulation of the telecommunications market and also some work developing a voluntary code for the fisheries industry which of course is a very different situation but provided experience with voluntary codes.

I guess the first point I would make is that we've heard a lot of genuine commitments towards good faith negotiation between suppliers and vertically integrated supermarket organisations. It seems to me that the issue is not primarily an issue of good or bad faith, but an issue of the commercial incentives and therefore the commercial strategy which a rational player in the industry whether they're a supplier or a retailer, a vertically integrated retailer would pursue.

If you take a rational actor model, a rational actor would comply with a code up to the point where the cost breaching the code was less than the cost of following it. And that was certainly the case in the telecommunications industry where the structural advantages of dominance were such that the incumbents used a range of tactics, behavioural, consumer marketing, structural, to retain their position. And in fact, probably, may have thought that they would have not been acting in the fiduciary responsibilities to their shareholders if they had not.

Of course, there comes a point, and it may be that we're at this point now, where the interests of the shareholders are actually to participate and reform rather than have it done to them which is a very real counterfactual I would have thought based on these proceedings. In the telecommunications example, no let me start with the fisheries example. In the fisheries example, there were all sorts of bad practices in the industry some of which continue, and a voluntary code was entered into to do things like pay minimum wages, pay tax, have a regulatory regime for foreign fishing crews coming in. The moral of the story is that it only worked as long as regulators were able to enforce it, and when they took their eyes off it, it didn't work.

Ms Rawlings: Thanks, I think that's useful comment in relation to the indication that parties are in agreement on, that we have a code and look to some means of oversight and enforcement of that. I'm conscious that we've eaten in a little bit into our morning break, so if you don't mind, we'll leave it there I think for the morning break now and come back at 11.15. We'll just pick up a few final comments just on this issue, I'd just like to check across the group of contributors as to whether there's any other specifics in relation to the kinds of strategic conduct that people wanted to make us aware of but then we'll move to closing comments. Thanks very much, we'll break now and see you back at 11.15.

Ms Rawlings: Kia ora, I think we're all back following our break. We were talking before the break about strategic conditions or conduct that might hamper entry or expansion in these markets and I think we've probably explored as far as Commissioners wanted to the question of contractual provisions relating to best price and exclusivity arrangements and also the tools that could be used if needed to address those kinds of contractual provisions and potentially other types of conduct that come outside of a contract that might be affecting entry or expansion through some principles-based reflection in a code or otherwise.

I did want though, to just round out that discussion by coming back to other parties if they have comments. So perhaps Sarah, Supie, or Matt, Night 'n Day, Nick Hogendijk, not sure if you have comments on this discussion, just also from a retailer perspective. On the question of whether this type of strategic conduct is creating a condition that makes entry or expansion difficult and secondly, if that is the case whether the right tool for addressing that type of conduct is a code or some other legislative mechanism. Did anyone else have any comments on that discussion?

Mr Hogendijk: Nick Hogendijk here, I'd be happy to speak up just on that. First of all, I think a code is a good outcome in terms of putting some rules of engagement between retailers and manufacturers or vendors. I don't think it's a panacea and it certainly doesn't negate fair trading between both parties. So, I think it's great to see and hear that the retailers are talking about a mandatory code, I do think it needs to be remembered that a code is actually about conduct (when you look at the Australian and UK markets) by the retailers, it's not a consumer-led code as such. It's actually got to do with the rules of engagement between the vendor and the retailer.

I also think what we need to be careful of here is you've got a situation where there's almost becoming a phobia or a fear of outsiders and there's a fear of change that is being driven through the messaging that's come through over the last seven days. I fear that that's quite dangerous, fear of change should not exist. My thirteen year old daughter says "oh nah" when she doesn't want to do something, that's not an answer and it's not an excuse. So, I think this rhetoric that is all around scaremongering, a lot of white noise, a lot of distortion of what change will bring to the market including prices going up, I'd like to know when that ever happened in a grocery market. I'm open to being challenged on that, but it's not adding up.

Even Mark Johnson's comment today from a private label manufacturer, ingredients manufacturer, I found that rather interesting that he's frightened of Aldi as an example because they don't actually drive prices up, they also seek to source locally from local manufacturers, so just for a bit of clarity around that. But to get back to the point, there's a very real need for change that's appearing in the marketplace. It is the sentiment of the society and the economy that is begging for it, consumers are suffering at the end of the day, and change is required.

I think any change is good change at this particular point in time, I think it will need to be radical and I think being frightened of the change and just having the defence strategy (which if I was Woolworths or Foodstuffs in those two ecosystems I would be taking a "nothing to see here" attitude because it's in my best interests) but it's not in the social responsibility piece. Tex talked about social governance and responsibility the other day, and I think it's quite important to think there are protocols that these businesses have that gives them a social conscience and a responsibility and changes need to be brought in.

I don't know that necessarily addresses your point specifically, but I think a code is relevant, I think it's very much needed, but it is not a panacea for suppliers and it doesn't mean that you can hide behind it. It is simply a rule that lets you get into the game and it enables people like Supie, like Night 'n Day, hopefully to get into the game as well but it

1 still doesn't address the wholesale issue and getting clear wholesale pricing and access to
 2 wholesale pricing and environments for the likes of Night 'n Day, Supie, The Honest
 3 Grocer, Farro Fresh and new entrants whether they be domestic or foreign into the
 4 marketplace and at the moment that's a very real challenge.

5 **Ms Rawlings:** Thanks Nick. Matthew or Sarah did you want to comment on this particular topic
 6 before we move on?

7 **Ms Balle:** Thanks, we have comments more widely on strategic behaviour that may restrict new
 8 entry or expansion, so we'll leave it for that topic.

9 **Ms Rawlings:** So we can take those comments now, let's talk more broadly about other factors as
 10 well that could be affecting entry and expansion relating to conduct and we'll deal with
 11 that topic as the final topic in this session. So if you wanted to address that now that
 12 would be fine.

13 **Ms Balle:** Thanks. So I mentioned earlier that the majors have deep pockets and they'll protect
 14 their patch. And it's difficult as a new entrant to go up as a duopoly. Supie plays in the
 15 digital space, it's where our customers are. But we find it hard to bid against Woolworths
 16 for digital ad space, particularly when they buy all of the digital ad space on major media
 17 sites for the entire month of October. Is that strategic behaviour in blocking, or is that
 18 simply a response to being competitive?

19 And as mentioned earlier, there are products and pack sizes that are part of a
 20 consumer's main shop that are exclusive with the duopoly. And in our experience, this is
 21 more common than rare. Again, is this strategic behaviour in blocking, or simply part of a
 22 commercial business? And we know from the two years of talking with suppliers that they
 23 are nervous supplying to a new entrant for the risk of being cut by one or both of the
 24 majors, the consequences of which are devastating for their food businesses. We've had
 25 to provide suppliers with assurances that we'll not undercut the duopoly's retail prices so
 26 that we're protecting our suppliers from any tricky conversations. And it's obviously a grey
 27 area of what constitutes strategic behaviour that may restrict us as a new entrant in the
 28 argument that the behaviour is just a competitive response to protect market share.

29 It is a real risk though, that Supie could be squashed by the majors, not because we
 30 don't have a viable business model, but because of the current market structure. So we
 31 and other new entrants do need protection in some way. Our question is could this be
 32 included in a mandate for a grocery ombudsman who can supervise the industry for a
 33 period of say five years as we go through a period of being a new entrant.

34 **Ms Rawlings:** Thank you. Matthew, did you also have comment on this topic, I think your hand
 35 up?

36 **Mr Lane:** Yes, thank you. Look, certainly for us we've seen many strategic decisions. I think the
 37 ultimate statement comes down to that neither duopoly participant has any incentive
 38 whatsoever to see competitors grow. We rely on them for wholesale, and as a result
 39 there's no priority, nothing, no favours given in terms of wholesale supply. We have been
 40 subject to suppression tactics which date back over a number of years, particularly
 41 accessing basic staple products. Economic supply removed concurrently with attempting

1 to acquire, so simultaneously we had our economical supply removed, so our ability to
 2 access it at reasonable prices, and that coincided with an attempt to acquire our brand,
 3 Night 'n Day as a whole.

4 In this market, you haven't seen divestment of banners to enable growth, which is
 5 problematic. They are accumulators of brands, they don't divest. And I look at the
 6 petroleum sector where there has been large market shakeup. We've seen Gull sold once
 7 in the last 5 years, with it likely to be sold again, we've seen Z purchased and Z now under
 8 offer again, we've seen Caltex sold and Challenge sold. So when you've got divestment of
 9 brands, brand movements, it gives opportunities to grow to the market. When you've got
 10 a duopoly what tends to happen is they hold that market share because the divestment,
 11 even of smaller brands. just gives an opportunity for people to grow.

12 We're also seeing the strategic decision now to move down into the smaller
 13 format, that's traditionally been an area where Night 'n Day have competed very heavily.
 14 But it's not just individual brands we're competing against, we're not competing with
 15 another network of 50 or 100 small-format retail stores, we're competing with small
 16 format retail stores that now have leveraging ability of the overall buying power of that 18
 17 or so billion dollars that they hold today.

18 **Ms Rawlings:** Thanks Matthew. I think Mark Fort, I see you've put a hand up there, then we'll go
 19 to Tex and that might conclude this topic I think. Mark.

20 **Mr Fort:** Yes, thanks Commissioner. I'm just really going to hit on the code, some comments
 21 around the code. The duopoly has readily accepted this because they know from
 22 experience of overseas use of the code it's quite complex to establish and slow to advance
 23 to a satisfactory level, so got to be careful with that one. A code may work, and I'm not
 24 sure about this, but where there are a number of alternative options for a supplier to go
 25 to, but I question whether it will work with a duopoly. And of course, it's surely a very
 26 brave person to make a claim that exposes them to the power and vindictiveness of a
 27 duopoly.

28 There's some other comments I can make on what the code must have and must
 29 prohibit but I think the examples that were discussed by the Australian guy that had done
 30 a report and he referred to the Kennett review I think or the options that were included
 31 there and using an independent arbiter who can quickly act to resolve problems. So I think
 32 all those things are important. Thanks very much.

33 **Ms Rawlings:** Thank you. Tex, I'll come to you but just if we can focus on these questions about
 34 the conduct that might be engaged in as an incumbent type response or general
 35 commercial conduct that is perceived to be providing an impediment to entry or
 36 expansion that would be great and then we can close out this session and come back to
 37 more general closing comments. Tex?

38 **Mr Edwards:** Thank you Commissioner Rawlings. I urge the Commission to publish a list of all
 39 these downstream behaviours that would constrict and restrict expansion and stall and
 40 stutter a scalable challenger on a like for like basis. And I just reiterate Sarah Balle's
 41 comments about the Google Ads digital destruction of a competition embryo there. But

essentially, I'd like the Commission to consider almost 25 competitive reactions that – some are okay, we need competition, yes the incumbents should be able to react and participate in a vibrant market and an industry reset.

But pocket pricing, infrastructure cost increasing, self-regulation, victory disease, bundling, data asymmetry, preventing government contracts, cherry-picking your team, increasing your cost of capital, demonising your infrastructure, cutting regulatory support, lobbyist nonsense, supplier beat-up, credit arbitrage, partner demonisation, Māori attack, spectrum interference, flank brands, the list goes on, data portability, game theory play, health and safety asymmetric behaviours, pallet alienation is a good one in supermarkets, swamping yourself with Shortland Street lawyers, poisoning your PR. It's out of context today Commissioner Rawlings to go through every competitive reaction but I just urge the Commission to publish a sensible list in the final report, thank you.

Ms Rawlings: Well that probably is quite a good point to head off into some summaries and final comments. So I guess I would put back in here though that what we're really looking for is the input to provide that list, so to speak, and to in turn grapple with the matters that could be dealt with through some mechanism including the code which we discussed in more detail earlier in the week, and I think there's a high degree of consensus in relation to that which is encouraging to see I think, between Food and Grocery Council, the major grocery retailers and others.

So thank you for that, I think that will be focused on specifically in relation to finalising the report where we've talked about a couple of types of contractual provision in particular, we're open to bolstering that with consideration of other types of conduct that may be providing conditions of entry and expansion that are limiting for competitors and we focus on those types of conduct we really welcome more information about that from all parties and, in particular, suppliers and those smaller competitors in the market.

If we move now to some concluding comments that really brings an end to the sessions that we wanted to conduct focused on the matters that have been discussed in our draft report and we've heard a number of themes throughout the sessions in the last seven days or so and a lot of summary of those issues as well. But what I'd like to do now is just invite a few parties just to provide some final observations and summaries less in the form of submissions, where we've heard some of the comments, but over to you. We might just start given the content of the last few days by returning to Consumer NZ if we could and just hear a few minutes and then we'll run through a few parties just in conclusion. So, if you could keep it to just a few minutes that would be great, thank you Jon and Analeise.

Mr Duffy: Thanks Commissioner, and we'll keep our comments brief. I think everyone who's participated in this conference would agree that this is one of the more important pieces of work that the Commerce Commission has ever undertaken. And at Consumer NZ, we really appreciate the opportunity that the Commission has afforded us to represent (with other stakeholders) the interests of ordinary New Zealand shoppers as the Commission has looked into the dynamics of this industry. It's really important that those interests are represented here, because the market is failing consumers, and left alone, we take the

view that it will continue to do so. And I think it's important for all parties to note that from what we're seeing, consumers have lost patience, and rightly so.

So over the course of the conference we've heard the two major players tell us that they face competition in many shapes and sizes. We disagree with that point, and that's probably been clear in our submission throughout. We've heard a lot made of fringe competitors like Costco, Farro Fresh, Supie, The Chemist Warehouse multiple times, Circle K and Animates. But these players are literally competing at the fringes of the market, they're not providing any real competition in the sector in our view, and this lack of competition is resulting in Kiwi consumers paying higher prices at the checkout. In fact, 81% of the consumers we've surveyed agree that supermarket prices are too high. Our supermarket prices shock international visitors when they come to New Zealand and they should be seen as a national embarrassment. The lack of competition is also resulting in a range of other issues for consumers which we've outlined in our submissions and in some of the earlier sessions.

It is clear overall that something needs to change, we've called for (and along with others) a variety of changes to address the problems with a highly concentrated market and we're pleased to hear that the supermarkets have agreed to make some of those changes. However, the changes the supermarkets are willing to make will not, in our view, be sufficient to bring about the changes required in the industry. Supermarkets have committed to simplifying and clarifying their pricing and promotional practices, but to ensure this is effective, any changes need to be mandatory and backed by legislation. Offers to voluntarily fix misleading and confusing pricing practices are really simply just offers to comply with the existing law. The fact that these offers are being put forward as pro-consumer developments should be seen for what they are, a concession that the game is up.

Supermarkets have also said that they're open to a unit pricing standard and a code of conduct, but have argued their loyalty programmes offer great value for customers, and that private labels don't have a detrimental effect on competition, and that collective bargaining isn't in the best interests of consumers. We disagree. We're not convinced that private labels are pro-competitive, they offer higher margins for supermarkets and they're increasing in number. They could be setting price floors and are likely to be reducing consumer choice. We therefore support the inclusion of rules around private labels in any code of conduct. We dispute loyalty programmes offer significant or genuine value for consumers. When we last looked at loyalty programmes, you need to spend two grand at Countdown to get a \$15 voucher and \$2125 to get 15 New World Dollars. Less than half of the consumers we surveyed were satisfied with supermarket loyalty programmes. Why should customers have to give up their personal data to access discounts?

The two major supermarkets have made it clear that they're not keen on the idea of structural separation or divestment, and that's understandable. They've said they're willing to consider operational separation on a voluntary commercial basis, but consider other options to be extreme and unwarranted. We don't think the evidence presented supports this, and we consider intervention by the Commerce Commission is necessary and justified. Without this intervention, consumers will continue to struggle to feed their

families or continue paying more for groceries than they should be. They'll struggle to understand the complex pricing promotions used by supermarkets, be charged more at the till than the advertised price, and have to give up their data to access loyalty programmes and continue to be held to ransom.

In conclusion, the Commission's decisions on the best form of intervention should not be driven by the risk to the supermarkets' bottom lines if they were to intervene. They should be driven by a desire to improve competition and outcomes for consumers, and only intervention will achieve this. We urge the Commission and Parliament subsequently to be determined in the months that follow and take bold action to ensure the status quo will not win the day and continue to fail consumers. Thank you.

Ms Rawlings: Thank you, Jon. Can I go to Katherine Rich and the Food and Grocery Council, please.

Ms Rich: Thank you madam Chair. Katherine Rich, Chief Executive of the NZ Food and Grocery Council, I'd like to thank the Commission and the Commissioners for hosting the conference in trying circumstances. I believe you've done an excellent job in facilitating thought-provoking discussion. I'd also like to thank the other conference participants for sharing their perspectives and insights. The grocery sector is of fundamental importance to every New Zealander. It provides for the necessities of life and a productive and secure economy. This study is of fundamental importance. I hope it will bring about a more competitive grocery retail market that benefits not only consumers by way of quality, price, choice and innovation, but also improve treatment of growers, farmers and manufacturers who produce those food and groceries.

One of the promises in the Hippocratic Oath about first doing no harm has been mentioned during the conference. Based on my experiences leading the industry body for nearly 13 years, I would say to Commissioners that harm will continue if you do not act to introduce competition. This market study happened because of ongoing concern from many parts of New Zealand society. While as an individual citizen I support many of the consumer and NGO groups' views put forward, my role in this process has been to advocate for suppliers and their treatment. It's been a long journey since the last major supermarket merger in 2002, and the imbalance of power between retailers and suppliers has only grown since then.

As far as suppliers are concerned, each retailer has their own monopsony, and this has enabled unacceptable conduct such as payment demands, IP appropriation and coercion. Market power also influences the treatment of people, and appalling treatment of some supplier merchandisers and sales representatives in certain stores has been tolerated for far too long. These behaviours need to change, and improving competition is a big part in giving suppliers choices.

I would like to pay tribute to the many suppliers who have courageously told their stories to the Commission, despite fear and risk of punishment. Also, to former suppliers who have spoken during this conference. I'm sure the Commissioners have noticed that not one current supplier has contributed during this process to air concerns. We have heard from a Pams private label manufacturer who spoke today about how dealing with

1 the supermarkets is wonderful and he's never had a problem. The FGC has always
 2 recognised that some suppliers do have close and rewarding relationships, and I can
 3 assure that contract manufacturer nothing proposed in this process will change already
 4 positive business relationships.

5 But that is not why we're here advocating for change. The lack of preparedness by
 6 suppliers with concerns to speak up for fear of retribution speaks volumes and should be
 7 viewed as evidence of the power of a duopoly. The consultation conference has reinforced
 8 that the major retailers are not constrained in the prices they charge, the profits they
 9 make, and nor are they pressured to innovate or compete. We've heard the arguments
 10 from the major retailers on mission shopping and competition from other sources, but
 11 thus far we have failed to see any evidence showing mission shopping or other fringe
 12 providers materially constrain them. Instead, stable market shares support the existence
 13 of a steady, stable duopoly.

14 We've heard major retailers repeat their self-assessed, unaudited profitability
 15 figures. We remain sceptical about many of the calculated averages put forward, and
 16 wonder whether they're useful. Claims of 4 cents in the dollar would be unlikely to hold if
 17 solely assessing the profitability of New Worlds and PAK'nSAVEs. The high proportion that
 18 goes to suppliers has been repeated as if that's an indication that suppliers are raking in
 19 the cash. Continually saying 68 cents goes to suppliers overlooks the fact that someone
 20 has to farm and grow the ingredients, or actually manufacture the products to fill the
 21 shelves. Of course costs matter, but the relevant debate is about the share of margin, and
 22 the retailer is often making three times what the supplier makes due to the imbalance of
 23 market power and lack of the ability to truly negotiate.

24 Over time, retailers have moved many genuine costs and risks back onto suppliers
 25 and they've used their market power to enforce margin demands and arrangements that
 26 would not be accepted by suppliers in a market with greater competition. Most suppliers
 27 have little choice, and the negotiation for smaller suppliers is perfunctory. As one FGC
 28 member told me on being sent a one-sided contract, "I was told to sign it, don't sign it, up
 29 to you". That was the extent of the negotiation. This process has ensured many grocery
 30 categories have become highly concentrated on the supply side too and retailers have
 31 pointed the finger at certain categories. But rather than be the fault of suppliers, I'd argue
 32 it's once again symptomatic of the duopoly where suppliers are played off against one
 33 another to such a degree that 10 suppliers can become two plus private label. So yes,
 34 duopolistic market power is concentrating on the supply side as well.

35 Private labels and their role are worth additional consideration by Commissioners.
 36 We have said private label is a ubiquitous offering around the world, but in a highly
 37 concentrated market like New Zealand's, there is harm that arises from the inherent
 38 conflict of interest where suppliers deal with their customer who is also a competitor.
 39 They have provided examples to the Commission where private labels have blocked lower
 40 priced, better quality offerings for consumers.

41 We have heard the major retailers support and accept a mandatory code of
 42 conduct. A reasonable person would interpret from what the supermarkets have said on
 43 the record to Commissioners that they will accept and abide by a code similar to those in

Australia and the UK. This is a step forward. Those codes include principles of fair dealing, no payments for shelf position or theft or shrinkage, no obligation to pay for marketing costs, no deletions on commercial grounds, and no pressure to hand over intellectual property amongst others. The FGC has said all aspects of those two codes are relevant, and we see nothing particular about the New Zealand market that would warrant years of delay or MBIE starting from scratch. A code could be developed and launched within a year given the work that has already been done.

I cannot emphasise enough to Commissioners that they must recommend the work on a code be independently managed and not become a negotiation resulting in something that's diluted or innocuous. A code plan must include the appointment of someone to oversee it, whether it's an ombudsman, an adjudicator, a commissioner, the name is not as important as the ability to deal with complaints fairly and within a reasonable timeframe. A watchdog role might be useful to ensure fair dealings for independent grocers too, if the duopoly provides wholesaling services to ensure pick costs, logistics movement and other costs are fair and appropriate. The watchdog would be a champion for the code and the benefits that flow from it.

As a final comment, while this discussion has been robust, I think it is important that the supermarkets confirm publicly their intention to continue working constructively with the FGC and its members on day-to-day industry issues. Withdrawing engagement has previously been used as a punishment when FGC speaks out and there's been little recognition of FGC's important role as being a voice for members. Working with retailers on issues is very important to my members and during this process there have been veiled threats to stop working with our various interest groups. We cannot have a repeat of the behaviour after the last Commerce Commission inquiry in 2014, where the supermarket involved refused to engage in a material way with FGC for nearly 5 years, and at one point said re-engagement required a new FGC Chair, a new FGC CEO, and a seat on our board. That sort of behaviour will not be tolerated this time.

Finally, to the Commissioners. The grocery sector is long overdue for change, innovation and competition. Real competition that can bring better pricing and choice and drive innovation and efficiency and to make sure retailers cannot coerce suppliers without consequence. We look forward to your final report and recommendations. We thank you for your work and thank you for the opportunity to speak.

Ms Rawlings: Thank you Katherine, and thank you for your contributions in the last few days. I'm going to go to Tex now. Tex, if you have some final comments that you wanted to round out your contribution that would be useful, and you'll forgive me if I interrupt as we go through these final comments, I'm going to police the time a little.

Mr Edwards: Certainly, thank you. Thank you Commissioner Rawlings and thank you Commissioner for a very successful conference and thank you to the technology provider which has really floated everybody's boat. Fantastic use of the internet here on this occasion. Monopoly Watch is a group that has 20 million touchpoints every day, there are an estimated 20 million consumer interfaces with private sector monopolies every day.

1 Why are we here? Why are we having a conference about supermarket
 2 competition? Simply put, Foodstuffs and Woolworths have begged the Commission to
 3 have this conference. There's been crying in the hallways of Foodstuffs and Woolworths
 4 and Countdown offices – please may we have a conference. Initially, a 3 to 2 merger,
 5 unheard of anywhere in the world. Secondly, a raid on the Warehouse shares? A nice
 6 enough bloke decides to transit his red sheds into a few initial vibrant competitive
 7 supermarket offering and he gets squashed, a 20% raid on his shares? We then have the
 8 covenants drama, we then have Wairau Road, then we have something else which I've
 9 only really only captured in this conference which is the Night 'n Day. How nasty can two
 10 8-billion organisations be to a sub 200-million dollar competitor. Off the charts.

11 Contracts have been discussed in this conference, contracts have been discussed
 12 all over the place. The legal architecture of the supermarket industry is very complex –
 13 supply contracts, property contracts, covenants, employment contracts. My summary
 14 position here in the summary, is the social contract is what is broken here. The
 15 supermarkets, in their infinite wisdom, have broken the social contract that they have
 16 with people. Passthrough on foreign exchange, WACC rates, property covenants, nothing
 17 is more important than this broken social contract with the consumers, with suppliers. It's
 18 not just about price, of course price matters, of course consumers matter. It is about the
 19 environment, and I think we'll see more of that in submissions. But it's also about the
 20 productivity dividend for consumers in New Zealand who can expect better internet
 21 services and less time in the supermarket and more time on the sports field. We can
 22 expect better responses for suppliers, better responses for exporters. It really is mind-
 23 boggling to me to have Farro continually described as a like-for-like competitor with two
 24 8-billion dollar giants. They're a sub 200-million dollar organisation. But when we examine
 25 what that organisation does, it's an export turbocharger.

26 My final two points – governments aren't perfect, nobody's perfect. The private
 27 sector isn't perfect. But on this occasion, the Government needs to wander into the
 28 industry and give it a reset. Monopoly Watch is a new organisation, we were going to
 29 discuss another industry. The supermarket industry is fascinating. We close our summary
 30 by being very proud of the Monopoly Watch strapline. The Monopoly Watch strapline is
 31 market structure matters. Thank you Commissioner.

32 **Ms Rawlings:** Thank you Tex and thanks for being with us in recent days, been useful
 33 contributions. Matthew Lane, I think we've had a little bit of a summary from you just on
 34 that previous topic, but did you have some other comments that you wanted to make in
 35 closing?

36 **Mr Lane:** Certainly, Commissioner. Look, I would like to highlight to the Commerce Commission
 37 that this market is currently David vs Goliath. This is the chance to fix many wrongs, an
 38 opportunity to allow competition to flourish, to bring new retailers into the sector, and
 39 provide a mechanism to allow any retailers a chance to compete through an independent
 40 wholesaler. Foodstuffs' previous actions speak volumes that the status quo cannot
 41 remain.

42 10 years ago we had access to competitive dry grocery, and they retracted that.
 43 We were given two options – direct all of our purchases through their network to further

enhance their buying power, or be cut off from purchasing entirely. The facts were, we did not want to put further undue pressure on suppliers funnelling yet another banner through one of two options of scale. We did not want to further financially support a direct competitor, we did not want to gift data that allows a competitor's banner to open next to our most successful store. The list goes on. Those concerns remain. These are resolved with independent wholesale supply. Night 'n Day's dry grocery has been in hibernation for 10 years waiting for change that meant we could be competitive again. The selection is still available, but the value we can provide to the consumer is not. There's talk of efficiencies, but if only two players can access efficiencies it does not do justice to any consumer who does not have access to their stores or who wish to shop elsewhere.

We've seen in the petroleum industry the likes of Waitomo, Gull and NPD drive down fuel prices. Would they have been able to do this and commit the investment if BP had control of supply? Charged wholesale prices 40% higher than their retail list price and be able to turn the tap off at their own discretion? Our hope was an international player such as Metcash would enter the market and value the millions we channel through the duopoly, as there is no other choice. Neither major retailer can claim any outcome from this Commerce Commission review, no matter how extreme it may perceived to be, as unfair. Unfairness is reserved for the independent dairy owner who they know shop at the local supermarket in the weekend and purchase at the same rates as the consumer next to them while the duopoly withholds New Zealand's wholesale market, who has been squeezed out and forced to close their business as supply becomes uneconomical.

Splitting some retail stores to establish an independent supply chain is a small step backwards for two businesses who continue to grow rapidly. It will not put them out of business, it will not make them unprofitable, it will not make the market less competitive. It is ultimately a small price to pay to restore competition that benefits consumers in one of the most essential markets in New Zealand.

I applaud the Commerce Commission for the review to date, the findings from the draft report, and the range of options that are being considered. As a retailer, I ask that any final recommendations do not rely on trust nor voluntary measures from the major grocery retailers. Woolworths have provided supply, but it is not sustainable business practice to rely on one of your greatest competitors to grow in a market they control. We have no security of supply, and our limited position of negotiation to achieve basic outcomes normally provided by an independent wholesaler. Foodstuffs have plenty of time and opportunity to act in good faith or put voluntary measures in place. It is our experience with Foodstuffs that time and time again, this is not the case, and they do not hesitate suppressing independent retailers to push them out of the market or meet their next KPI. Thank you.

Ms Rawlings: Trouble with my own unmute button there. Thanks very much Matthew, and Supie I think might be a natural follow on there.

Ms Balle: Thank you. This may be a study to see if competition is working well in the grocery sector, but it's actually much more than that. I'm here today to fight for New Zealand's food future, for consumers, for suppliers, for the environment, for our food future. The

status quo say that change is coming. Just wait and see! Where is the change they're speaking of? Costco may be in the process of building one store, but Aldi sure aren't. Circle K has been mentioned more than once during this conference. There are 5000 convenience stores in NZ, and Circle K are hoping for a 2% market share in this space. And I'm still shocked that the duopoly even consider convenience stores as direct or meaningful competition.

But setting that aside, we don't have time to wait and see what may happen in the next 5 or 10 years. We know today that meaningful and effective competition does not exist in all parts of the country or in all shopping missions, in particular the main shop. So, we need change, we need a full reset, and the industry needs support. We need to ensure that the reset facilitates and delivers rapid innovation in a sector that has been starved of this for decades. I mean, only in July this year did Foodstuffs introduce online delivery in the South Island. It's 2021! And Woolworths closed its Grey Lynn store to create a dark store for online order fulfilment. This isn't innovation, it's not even close!

Importantly, we need to consider improvements in climate change, the household productivity dividend, food poverty, the health of our population, food security and food waste. If food waste was a country, it would be the third largest producer of carbon emissions behind China and the US. So, this market study is an opportunity for the Government to make a change that will truly deliver better outcomes for Kiwis and of course it's one of the five necessities of life being food.

So how do we do this? Here are our three key points. Firstly, we believe access to independent wholesale supply will deliver positive outcomes for new entrants and expansion of existing retailers. This could be done through structural separation, divestment, or funding of a whole new wholesale business. The options would need to be assessed, and we have some ideas on how this can happen. But in principle, this has been done before in telecommunications with the likes of Chorus. And to reiterate, wholesale supply needs to be independent. The outcome of this is that the market could see not just a third or fourth player but encourage the entry of five or six players. And we know that when regulatory intervention occurs, capital investment will flow.

Secondly, and as mentioned earlier this morning, we believe it is appropriate for the Government to support the expansion of an existing retailer such as Supie to provide the meaningful competition for the main shop and to all of NZ consumers. By no stretch of the imagination does Supie provide meaningful competition today. What Woolworths turns over in New Zealand in an hour is what we do in 6 months. We need scale to provide meaningful competition, and to get scale we need funding. And we believe there is an opportunity for a Kiwibank style ownership model to enable Supie to be an effective competitor and operating in the best interests of New Zealand. As an online-only retailer that is purpose-led, Supie ticks all of the boxes in terms of improving food waste, improving household productivity, improving the health of the population, protecting food security and reducing food poverty.

Imagine what could be achieved if the 500 million in profit that gets sent offshore each year by Woolworths NZ gets re-invested in better outcomes for Kiwis. The Government, through funds like Callaghan Innovation, has invested in significant projects

to make New Zealand world-leading. We lead the world in exporting food and our food innovation here is unmatched. But providing food to our own population? No. We have a market structure that is dominated by the power of two, and this has stifled innovation and retailing food to our own consumers. Supie's two year goal is to build New Zealand's first fully automated robotic fulfilment centre, a first of its kind right here in New Zealand. And this is just one of many innovative projects we're working on. So New Zealand can be aspirational and world-leading, we simply need change to occur to make this happen.

So lastly, let's chat consequences. The majors have mentioned many negative consequences for their businesses, consumers and suppliers. And while I totally agree that their businesses will be negatively impacted and thus, they'll need to rethink their bottom line, the Government actually needs to focus on the positive outcomes that will be achieved for all New Zealand. Fundamentally, the Government is here to protect consumers, the climate and improve access to affordable food for their population. They are not here to protect the profits of a few. Yesterday, Troy Pilkington from Russell McVeagh mentioned the first principle of do no harm, while each day, each month, each year, that there isn't meaningful competition in the grocery sector, there is harm being done to all Kiwis. So now it's up to the government to do something about it. Thank you.

Ms Rawlings: Thanks Sarah. And thank you to both you and Matthew for your strong contributions through recent days, it's been really important in the context of talking about competition that we have a presence from other retailers who are operating in the sector and having that presence at the conference as well as in written submissions has been really helpful. So, thanks very much for that. We'll just turn now to Foodstuffs North Island, I think. Chris Quin, were you going to provide some comments in closing for Foodstuffs North Island?

Mr Quin: Thank you Commissioner, and thanks for the opportunity, and I'll just try and stick to the guided time. So kia ora, e ngā mana, e ngā reo, e rau rangatira ma. Tēnā koutou, tēnā koutou, tēnā koutou katoa.

We're optimistic that the significant investment in this conference will assist the Commission's final report. As you know, Foodstuffs North Island has taken up the challenge presented in the draft report for the grocery industry to do better for customers. We've presented and we've begun to implement the action plan to remove barriers to market entry that are within our control and deliver better competition for the benefit of New Zealanders.

We consider that that action plan we have started implementing addresses the changes that are warranted. We know from our own customer survey on our plan that a little bit over 70% of our customers say simplifying pricing and promotions is the action that will make the biggest difference, and a little bit over two-thirds said consistent use of unit pricing was the next most important issue.

We're a customer-driven business, and innovation is one of the key ways we can enhance our customers' experience, and ensure our supply chain is efficient, resilient and up to date. We're investing approximately 50 million dollars annually in innovation, and already have, or are planning to implement all of the international innovations cited in the

1 draft report from the Commission, with the only exceptions being Amazon Go style
 2 checkouts and grocery robots. In addition, and I don't know whether this is innovation or
 3 regional commitment, but when we list off recent store commitments or current builds in
 4 Flaxmere, Taumarunui, Mangawhai, Te Kauwhata and Putāruru stores we regard that as
 5 part of the commitment to those communities.

6 The Commission has committed to take the submissions as read, so I'll try and
 7 focus my closing remarks on the last few days. We've committed not to use this time to
 8 address a number of factual inaccuracies from other parties, but will do that in cross-
 9 submission or confidential sessions to respect Commissioners' time.

10 First, we welcome the Commission's acknowledgement that we are constrained by
 11 existing competitors for the many missions that customers choose to shop, in addition to
 12 the direct national competition we face from Woolworths. We look forward to discussing
 13 the real scope of market share further in the confidential sessions, and continue to
 14 welcome the challenge of competition, it just makes us better for customers.

15 Secondly, we often see new entry with respect to all different missions. That entry
 16 constrains our prices, keeps us on our toes with innovation, and with our quality, range
 17 and service. As we know, Supie developed an online main shop offering in 18 months,
 18 Costco and Circle K are real and the new Geezy Go that we talked about earlier today are
 19 all material entrants, both with very different business models to ours. These unlikely to
 20 look like us – and they demonstrate that barriers to entry are surmountable. Nevertheless,
 21 we appreciate that restrictive land covenants and exclusivity provisions in leases are in our
 22 control, and we have started the process of removing all of those.

23 Thirdly, we have presented additional information, with support from expert
 24 economists, to demonstrate that our returns are approximately half of the Commission's
 25 draft calculations. In the session in the conference, we discussed a lot of economic theory
 26 in the profitability section, but this is less relevant to Foodstuffs North Island as we own
 27 most of our retail land and buildings. We are simply asking that we include these assets
 28 when determining our return on capital employed. In our case the draft report omitted a
 29 little more than \$2 billion in retail land and buildings and that doesn't seem right to us. If
 30 you add these the correct calculation for returns is somewhere between 9% and 12%
 31 which also is normal compared to the Commission's international comparator set. And we
 32 have shared our audited results that go with that.

33 Fourthly, we are cautious about drawing conclusions about the strength of
 34 competition from international price comparisons. But the work of our economists shows
 35 that New Zealand's prices fall in the mid-range of the OECD countries. And by far the
 36 largest component (approximately 68%) of customer shelf price is the cost paid to
 37 suppliers.

38 Fifth, we deliver for our customers in partnership with suppliers. We have positive
 39 relationships with the vast majority our suppliers, and we value those relationships. We
 40 agree that a well-designed mandatory code of conduct could have benefits for retailers,
 41 suppliers and most importantly customers. And importantly, it would require that there is
 42 a fact and evidence base for issues to be raised and to be resolved. We look forward to

1 the continued constructive engagement on this with the Commerce Commission and with
 2 the supplier industry and the invites to engage as we have been doing all along will
 3 continue to be extended.

4 We work hard to deliver value to our customers through our promotions, our
 5 Clubcard programme, and our use of data. And we are committed to improvement of
 6 terms and conditions in there, and we are working closely with the Commission to ensure
 7 we have got the right input and the right issues identified to ensure we deal with the right
 8 things. So based on the development of the Commission's draft findings suggested by
 9 both our submission and the discussion over the last few days, we don't see that further
 10 changes are warranted. And it's consistent with our understanding that the final report
 11 will be likely to provide more targeted recommendations.

12 But we have also done a lot of work on, and engaged with, the Commission's other
 13 draft recommendations, so I will try and briefly address those. Firstly, the options to
 14 improve access to wholesale supply of grocery products. The key points we have made in
 15 the conference are to identify that access seekers all have different wants to improve their
 16 businesses, some of which are simply lower prices from suppliers. It has also drawn
 17 attention to the fact that a number of competitors – Costco, Farro Fresh, Circle K – are not
 18 present at this conference and seem not to feel they need anything more to compete.
 19 And, it has been validated that there are no elements of our supply chain that have
 20 essential facility characteristics. In fact, all elements of our supply chain have been
 21 replicated by market participants. As mentioned, Supie for example, have explained they
 22 developed supplier relationships and established distribution capability for a main shop
 23 offering in 18 months. So, in the sessions, we presented on commercial wholesale access,
 24 which we believe is achievable subject to building the right capability and resolving a
 25 number of issues, and thinking about issues that we have identified around supplier
 26 marketing costs.

27 The options to directly improve retail competition. We'd just restate it's important
 28 to recognise that options that involve forced divestment or separation of existing market
 29 participants are unprecedented in our economic history. So, to be justified, the
 30 competition problem these remedies would be designed to solve would need to be of
 31 unprecedented severity, and could only be turned to when other, lesser remedies have
 32 been tried and not made the difference. We've already explained why we are nowhere
 33 near that threshold, and confiscation of private property rights from individual family
 34 owners in New Zealand communities, without prior warning of the type of conduct that
 35 would give rise to the outcome, and without any suggestion that we have breached the
 36 law, would be an alarming message to business owners and investors.

37 Overall, we want to keep delivering for customers, and we want to make sure the
 38 market study does that for the future. We are optimistic that the conference has been
 39 valuable in developing the final report and we look forward to continuing to engage with
 40 the Commission during the confidential sessions and our final submissions. It's really
 41 important the recommendations that are finalised from this process focus on the future of
 42 retail, the customer needs and the efficiency and agility that this industry will need to
 43 meet those.

We have customer promises by brand that we measure monthly for every store, and they focus on value, experience and solutions. We are committed to becoming one of the most customer-driven retailers in the world, we are not there yet but are committed to getting there. In Foodstuffs North Island this week, roughly 2.1 million shopping missions were safely completed with the best value, experience and solutions we could offer. Each week we work to improve on those metrics for customers, and I'd like to finish by reiterating we are up for the challenge, we are committed to delivering better value for customers, improving outcomes for suppliers and removing competition barriers within our control. Ngā mihi mahana. Thank you.

Ms Rawlings: Thanks Chris for that, and Tim Donaldson, Foodstuffs South Island. Ah Steve, welcome back.

Mr Anderson: Thanks, I opened so I think I should close. I'm Steve Anderson, I'm the CEO of Foodstuffs South Island. Thank you for giving me the opportunity on behalf of Foodstuffs South Island to contribute some closing comments. I'm extremely proud of how Foodstuffs South Island and the wider industry has performed over many years during a number of adverse events and in particular, continuing to feed the South Island through earthquakes, floods and lockdowns. This has been achieved through having robust systems that have been developed over many years with a great deal of money and sweat equity invested into them. Our success has been further ensured by having a collaborative and positive relationship with our suppliers. Good relationships pay dividends during adversity, and this was never truer than after the 2010 Christchurch quakes.

Covid has had similar challenges, but one of the major differences in regards to the national response to Covid has been the significant increase in competition in the total market where in particular, online offers have enabled customers more choice. This has been shown through the increased turnover of online main order shopping as well as category-based offers and meal kits. We compete with all of these and are constrained by all of these offers every day, not just adversity. The world has changed, and it continues to do so. It is for this reason that I believe that we are trading in a very competitive market with more competition on its way. A very good example, being the imminent launch of Costco in both islands as well as the rapid growth of specialist retailers such as the Chemist Warehouse and multiple online businesses.

During my opening at this conference two weeks ago, I raised our significant difference in the calculation of our profitability versus the draft report. I was very pleased that our economists were able to confirm our views, and I was also pleased that during the conference this analysis was not challenged. As the profitability and price comparisons were a foundational aspect of the draft report's recommendations, it is my belief that given the fact that Foodstuffs South Island's Return on Capital Employed is around the 11% mark, which is consistent with international benchmarks, and that international price comparisons do not put us out of kilter with the rest of the world, then the Commerce Commission must re-appraise these recommendations.

It is also my belief that some of the more extreme interventions are not justified based on the competitive nature of the market or the profitability of the parties and could have significant negative impacts in terms of supply of product to customers particularly in

1 rural areas, as well as the potential to increase the price to consumers. The New Zealand
2 grocery industry is not the place to be experimental with unproven or unprecedented
3 interventions.

4 We have been very open with the Commission around a number of initiatives
5 which we believe will significantly improve what is clearly a fractious situation with some
6 suppliers and retailers currently. We are very supportive of a well-drafted, mandatory
7 grocery code of conduct which we are keen to contribute to the drafting of. Given my
8 previous comments and the fact that the collaboration and cooperation between
9 suppliers and retailers enabled a very professional response to earthquakes for
10 consumers' benefits, it is important that we ensure that future collaboration and
11 cooperation is enhanced in this code. Additionally, we have undertaken not to enforce
12 covenants on land we have sold or to register new ones. We fully support changes to the
13 planning law to encourage competition in the industry, and we are also keen to work on
14 simplification of our promotions and clarity of loyalty terms of trade.

15 I strongly believe that these initiatives will give real benefit to consumers and will
16 be an opportunity to further build the relationships between suppliers and retailers for
17 everybody's benefit. As I stated in my opening, we will work with the industry, we will
18 listen to our suppliers, and we will listen to our consumers, and we will also do what we
19 say we will do. Thank you.

20 **Ms Rawlings:** Thank you Steve and thanks very much to you and Chris for Foodstuffs'
21 contributions on a national and regional level throughout the conference. I also just
22 wanted to acknowledge, Steve, your impending retirement and contribution over a huge
23 number of years to grocery retail in New Zealand as well, whilst we are in a forum where I
24 think others will agree it's been longstanding and large contribution that you've made.
25 Josh Gluckman, I can't see you on the screen there but I'm sure that you're there. Would
26 you like to make some closing comments for Woolworths please?

27 **Mr Gluckman:** Thank you Commissioners and thank you again for the opportunity to engage
28 constructively in this conference just as we've sought to engage constructively throughout
29 the process of the market study to date and will continue to do so. We, like you, and I
30 think like everyone here, want to see a thriving grocery sector for New Zealand. We know
31 this market study is important to get right. It's important because the outcome will
32 matter. It will be significant for shoppers, for our business, for our team and for New
33 Zealand. Some of the options the Commission has included in its draft report are
34 unprecedented and the risks of unintended consequences are high.

35 We also don't envy the Commission's task. This is a very complex sector with many
36 moving parts. The Commission has not had much time and there are many vocal parties
37 with strongly held views and different motivations, and in some cases, overt opportunism.
38 There are also many players who aren't here today and haven't been here throughout the
39 conference, whether they be other active competitors or whether they be the many
40 hundreds of small suppliers like Mark Johnson who we deal with every single day. It's now
41 the job of the Commission to weight all of this up. From our vantage point, the most
42 important thing is that this market study continues to be based on facts. Not on
43 anecdotes, and not on opinions. And we know that the Commission takes this obligation

seriously, and we repeat our offer to provide the Commission with whatever help that it needs.

And while I won't repeat all of our perspectives here, we note there are a number of important facts and outcomes that we look forward to seeing have due consideration in the final report, and that's because market outcomes matter. These facts and outcomes include the fact that competition in New Zealand is high, as demonstrated by grocery prices that have fallen in real terms, as demonstrated by the high levels of cross-shopping that exist, as demonstrated by the high levels of pricing and promotional activity that have been noted, including in our case up against PAK'nSAVE, which is one of the most unique, no-frills, discount operating players in the world. The fact that our returns are less than half of what the Commission has calculated, thoroughly audited, and entirely consistent with a competitive market and likely in the order of 8-9%.

The fact that if prices in New Zealand are high, then clearly this is not unique to food, nor a function of lack of competition, nor a function of our margins which are low. There are clearly many other factors at play. The fact that innovation levels are high, that SKU count has increased, that customer satisfaction is improving, all of these things we are proud of. The fact that significant new entrants like Costco, one of the largest and most price-focused supermarket players in the world are very real and a very big deal. Or the fact that the market is clearly rapidly changing, with more and more players entering the fray and provided with a springboard whether this is enabled by the move away from the main shop, which is gathering more and more pace or the emergence of online as has been observed.

Nevertheless, equally importantly, and because we do agree that there is room for further improvement, we are proud to support many, if not most, of the Commission's proposals and we believe that these will make a significant and very positive difference. For example, we support a mandatory grocery code to ensure small suppliers in particular get a fair go, and to lift all participants in the markets to a high standard of fair dealings.

We support mandatory unit pricing to make things clearer for shoppers, we support clearer guidance on specials and promotions, we support removing property covenants and lease restraints to increase availability of sites, we support changes to planning laws, and we support oversight from a grocery ombudsman, watchdog, or something similar.

Crucially, we also have an open mind towards voluntary wholesale supply if required over time, and we would be extremely incentivised to make that work. These are some really big changes that will help the Commission and the Government to achieve their objectives, and that we believe should be enacted and given time to succeed. We also note that the areas where the consensus among the participants at this conference seems to be quite high, and where there are some tried and tested examples from abroad that can be applied in the New Zealand market.

What we don't support is adding cost, complexity or risk, or rushing into some of the more extreme options that have been entertained. In particular when this will almost certainly lead to reduced efficiencies, less investment, less innovation, and will ultimately

disadvantage a market already challenged by geography, by scale and by higher input prices from suppliers than in other parts of the world. The grocery sector is unlike telco and unlike electricity, and has many, many more moving parts. This includes tens of thousands of products, thousands of suppliers ranging from massive multinationals to small NZ start-ups, multi-dimensional customer needs and category dynamics, complicated and supplier-controlled promotional funding pools, multiple channels to market and ever-changing customer preferences. Put simply, radical surgery on the food supply chain is, in our view, not a good idea.

We've flexed every part of our integrated business and network over the past 18 months to manage Covid and to feed Kiwis safely in a time of need, and never has there been a better demonstration of the benefits that our vertical integration and our scale can provide. Internationally unprecedented regulation to force divestment, break up supply chains or to over-regulate access is a huge and serious risk, especially without having actually done any of the cost-benefit analysis which the Commission notes has not been done to date. To use the Commission's language, these options would be drastic, and they should genuinely be a last resort. We believe they're also likely to result in higher prices for Kiwis and a less stable food supply.

As such, we think it makes a lot of sense to implement those less extreme and more tried and tested options and for these to be given an opportunity to work. We raise these points not to defend the status quo, but because we know that the price of food and other groceries matters deeply to all New Zealanders so getting this market study right is extremely important.

We've welcomed the opportunity to engage with the Commission over the past few days, and we look forward to continuing to do so as you work towards your final report. We're extremely proud of the role that we play in contributing to New Zealand every single day, and I'm personally extremely proud to have had the opportunity to represent our amazing team and our business over the last few days. Thank you, and kia ora.

Ms Rawlings: Thank you very much Josh for those closing comments, and for all of your time over recent days. That brings to a close our session for today, and indeed to the entire conference discussing issues arising from our draft report and factors affecting competition in the grocery sector. For all of us, it's had to take place in an online format of course while New Zealand grapples with changing Covid-19 alert levels and a new normal of sorts moving forward. While we always knew that was a possibility, it wasn't quite the way of working that we would have preferred for the conference, and we thank you all for dialling in to join us from different locations facing different challenges as many of you work from home and to provide really valuable input into our work on the report.

It's always a real privilege for Commissioners and for our staff to spend time talking face to face with people about their industry sectors, and about their businesses, about why they do what they do, and their role in markets that serve New Zealanders. And this conference is one of those rare opportunities to spend an extended period of time doing that, and we also thank you for the opportunity to do that.

1 Over the past two weeks, we've held ten online sessions over seven mornings
2 covering a real range of topics and totalling over 16 hours of discussion of that type in
3 relation to our draft findings. And across those sessions we've had the opportunity to
4 speak with over 30 different speakers representing a really wide range of stakeholders
5 and interest groups. But in addition to that, there have been over 100 attendees on
6 average most days at the conference and we know that most of those attendees also have
7 other things to contribute, in written submissions or in other discussions with us, and their
8 interest in the study is also of value to everybody.

9 Most of you will have noted throughout as well that, as has often been the case
10 during the past year, there has been a high degree of public interest and media interest in
11 the market study and in the contributions of every party that has assisted us. And that is,
12 of course, as Josh has said, because we all shop for groceries and the sector that you
13 participate in is of such real relevance to New Zealanders. Alongside those who have
14 spoken, many in attendance who have been observers only have included consumers and
15 consumer advocacy groups. We've, throughout the process, valued the contributions of
16 consumers themselves through our survey and other work that we've done. Groups like
17 Consumer NZ but also other stakeholder groups with whom we often have less
18 opportunity to speak, and those comments have been most welcome and really gratefully
19 received alongside the comments of commercial industry participants.

20 I've already addressed the value that has been provided, as well, by a range of
21 other grocery retailers other than the major grocery retailers who have been a real focus
22 of this study. Regardless of the perspectives that have been addressed throughout the
23 study, and we have really welcomed that diversity of view, there is absolutely no doubt to
24 any of us who have been here across all of those sessions, I think, that all those working in
25 the sector have the interests of New Zealanders at heart, and all that you do, whatever
26 that might be or whatever your role – and Josh has really encapsulated that in his final
27 comments – your free and frank contributions in the face of sometimes, strong and
28 opposing views, is greatly appreciated and has really enabled the conference to run
29 smoothly, and again we thank you all for that.

30 The contributions and perspectives that we've heard will have supplemented our
31 other discussions and written submissions that we've received to date and of course, one
32 last time, a plug for our final submission process which closes on the 23 November, and
33 we really welcome any additional written submissions from those who have commented
34 during the conference but also the many of you who have attended in an observer
35 capacity only. We're also really happy to discuss the potential for further one-on-one
36 meetings or discussions in confidential or non-confidential sessions. Please contact our
37 team if you'd like to discuss any of that further.

38 But we've got a lot to think about, a lot more to think about still, and there's much
39 work to be done before we publish our final report. Our focus is very squarely on the
40 competitive dynamics in the supply and acquisition of groceries and the finalisation of our
41 findings and any recommendations that we consider could improve competition if we
42 consider that it's not working as well as it could.

1 Our final report will be published on the 8 March next year and we're really
2 looking forward to its presentation then, of course there may be a process that follows
3 after that as well but that will be a question for the Minister and for Government having
4 considered our report and our recommendations. So, thank you very much again to all of
5 you for your attendance from within New Zealand, from overseas, across the series of
6 sessions and in an online format, and to close out I'd just like to ask PJ to lead us in
7 karakia. Please, kia ora tatou, kia ora PJ.

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