

Submission:

Wholesale Supply Inquiry

Introduction

1. Fonterra Brands (New Zealand) Limited, trading as Fonterra Oceania (**Fonterra Oceania**), welcomes the opportunity to comment on the Commerce Commission's Wholesale Supply Inquiry (**Inquiry**) – Preliminary Issues Paper (**Issues Paper**). We value the chance to engage with the Commission at this early stage, and look forward to further consultation.
2. Fonterra Oceania includes both the New Zealand and Australian consumer-facing arm of Fonterra Co-operative Group Limited. In New Zealand, this business employs approximately 1,100 people and has a portfolio of 15 well-known consumer brands.
3. Fonterra Oceania also has a significant chilled foods distribution network across New Zealand, helping to service over 22,000 domestic wholesale customers including supermarkets, independent retailers, dairies, cafes, service stations and bakeries. The Anchor Franchise network is owned and operated by 42 Anchor Franchisees, which are predominantly small NZ owned businesses run by individual owner-operators. Fonterra Oceania has 36 distribution depots that are the collection points for these Anchor Franchises. Our Anchor Franchise network predominantly distributes consumer format milk and cream, along with smaller volumes of dairy foods (butter, yoghurt, cream cheese, sour cream, etc).
4. We pride ourselves on our ability, through partnering with our franchises, to service (both directly and indirectly) a wide range of New Zealand customers, giving domestic consumers access to dairy nutrition. Food affordability, including for dairy products, remains an issue in New Zealand and we are proactively seeking to improve accessibility of high-quality dairy products for the most vulnerable consumers through our Doing Good Together initiatives including KickStart Breakfasts and our partnership with the New Zealand Food Network.
5. Fonterra Oceania welcomes efforts to improve grocery competition. We have consistently engaged in the Government's efforts to stimulate competition in the grocery sector – including development of the Grocery Supply Code (**Supply Code**). We continue to work with a range of new and emerging grocery retailers to ensure New Zealand consumers have a range of cost-effective purchasing options for high-quality dairy nutrition.

General Comments

6. As the Commission continues to explore how it might support competition in the New Zealand grocery market, we agree that keeping the purpose of Grocery Industry Competition Act 2023 (**GICA**) at the heart of considering whether further regulatory interventions are required in respect of wholesale supply is important. In particular, we note that the Part 3 Purpose of GICA is agnostic as to whether facilitation of competitive wholesale supply to independent grocery retailers (**IGRs**) is achieved through Regulated Grocery Retailer (RGR) wholesaling, improved direct supplier terms, or other wholesale channels, which will include independent grocery wholesalers (**IGWs**), such as Bidfood or Service Foods for example.
7. We see some risk that the proposed regulatory interventions contemplated by the Issues Paper could prove counterproductive, and lead to unintended consequences that might result in detrimental consumer outcomes. We consider that any further regulatory intervention with

respect to wholesale supply, through mandating participation of suppliers, would be premature. The September 2025 Review would provide a more substantive body of evidence on which to consider additional regulation and the likely consequences of such regulation (including allowing the provisions to the Supply Code to properly embed). If at that point, the decision is made that additional regulation is necessary, such regulation should be focused on the RGRs; and regardless, suppliers' participation in any RGR wholesale access regime should remain voluntary.

8. We suggest the Inquiry should remain focused on how to achieve optimal outcomes for consumers, and carefully work through whether the proposed regulatory interventions will achieve this. We see value in strengthening suppliers' ability to support and foster the entry and expansion of new and existing independent wholesale and retail grocery competitors. This could be promoted through various means, including the Supply Code, increased enforcement activity in relation to the Supply Code, or by prohibiting supplier terms that limit competition (e.g. exclusivity and best price clauses). The grocery market should be one where different business models compete on different attributes across the price/quality spectrum, service a range of customer groups, and are appropriate for the small size of the New Zealand market and its particular geographic demands.

Unintended consequences of more intrusive regulatory intervention

9. Fonterra Oceania's key concerns are that there is a very real risk that expanding and enhancing wholesaling by RGRs, through mandating participation of suppliers, will lead to unintended consequences that will likely result in detrimental consumer outcomes. We have summarised these below:

- It will consolidate and strengthen the market power of the RGRs by requiring them to act as a collective monopoly to expand their wholesale function under a guarantee that they will receive full recovery of their costs on that new investment, with a margin. It is unclear how that leads to lower profit margins for RGRs, lower prices for consumers, or the development of effective competition at the retail level. Whilst wholesale access regulation may result in RGRs sharing the economies of scale they enjoy with IGRs, by virtue of enabling RGRs to be a single point of access for wholesale supply, this will likely reinforce, rather than disperse, RGRs market power. It follows that this will exacerbate and compound the RGR's "must deal" status in the supply chain, by expanding that status from the retail channel to the wholesale channel. There is a very real risk that this will undermine the network of small businesses across regional New Zealand who play a critical role in distribution of dairy nutrition (further information on our franchise network below). Furthermore, it will facilitate only limited retail competition occurring above a price floor set by the RGRs' wholesale prices.
- The RGRs' wholesale prices are likely to increase, due to their requirement to invest in wholesale functionality and chilled supply chain, increased costs to serve (including build out of a new chilled wholesale distribution network), and additional regulatory compliance costs. However, if non-discrimination obligations apply, all retail market participants will know the price floor will be the same across RGR and IGR competitors, leading to oligopolistic price matching behaviour by a now wider group of RGRs and IGRs. This would simply:
 - shift supplier and independent grocery wholesaler margins to the RGRs, with no material or sustainable improvement in consumer retail prices and could have the converse effect of increased consumer retail prices; and
 - facilitate limited retail competition above a price floor set by the RGRs' wholesale prices.
- It will hinder or obstruct new and existing independent entry and/or expansion of IGWs in the wholesale supply markets in New Zealand, by depriving competing IGWs of scale and revenue opportunities necessary to compete effectively with the RGRs wholesale businesses.

- Specifically in the case of milk and cream products, it will undermine Fonterra Oceania's ability to efficiently operate its chilled supply chain and route to market (via the Anchor Franchise Network) over the longer term, stranding sunk costs in distribution hubs and depots. This may also add additional cost into the supply chain as RGRs replicate this investment in chilled distribution networks. This would have value-destructive implications for the 42 small NZ owned businesses that operate the Anchor franchise distribution network, and that service over 22,000 domestic wholesale customers including supermarkets, independent retailers, dairies, cafes, service stations and bakeries across New Zealand.

10. For those suppliers that have existing competing independent wholesale distribution networks, we see a risk that the interventions outlined in the Issues Paper could have a market distorting effect, by:

- Compounding the recent trend of RGRs requiring that suppliers deliver to RGR distribution centres as opposed to using supplier or independent competing distribution networks. This provides RGRs' with an enhanced ability to capture margins available through transport and logistics efficiencies, often to the detriment of more efficient distribution structures, thereby consolidating and strengthening the market power of the RGRs.
- Providing RGRs with an enhanced ability to influence prices across a greater proportion of the grocery retail market, effectively setting a "price floor" that naturally arises from setting a common input cost (being the RGR's wholesale price) for their own operations and those IGRs and IGWs alike.

Rebates, discounts and promotional spend (RDPs)

11. Suppliers' freedom to contract with customers on the payment of rebates, discounts and promotional spend (**RDPs**) is an important part of driving an efficient market in the grocery sector. It is important in this context to differentiate between fixed and discretionary RDPs.¹

12. Promotional spend is a type of discretionary RDP that suppliers pay to customers to carry out certain marketing and promotional activities for them. This Promotional spend gives a return on investment to the supplier, usually through an increase in the volume of sales. The issue with making the Promotional spend component of RDPs available to wholesale customers of RGRs under a wholesale access regime is that suppliers would have no control or ability to monitor whether they are getting the services they are paying for. When these types of RDPs are provided to high-volume retail outlets (such as RGRs), suppliers are able to track the return on that investment in marketing and promotion of their products. If these RDPs were passed through to IGRs in pricing, suppliers would not get the same benefits or return on investment and would likely be less willing to fund that Promotional spend.

13. Any regulatory intervention that requires suppliers to provide RDPs but without receiving the corresponding benefits, would in effect represent a tax on suppliers' businesses – they would be deprived of the benefit of investments made by them, and those investments (or payments) would be redistributed to IGRs, subject to the terms of the regulatory intervention. Promotional spend should be negotiated as between a supplier and IGR directly like any other contract for services.

¹ For the purposes of this submission, we note Fixed RDPs are related to volume or supply chain efficiencies. If the RGRs choose to do so, these could be made available to wholesale customers under a wholesale access regime. Discretionary, or promotional, RDPs (Promotional spend) are in a different category. This is generally marketing and promotional spend that is funded by the supplier and which forms part of a supplier's wider marketing program for its products. They are carefully scrutinised as to their return on investment.

² Circana Grocery, New Zealand, MAT Data to 06/10/24

³ Nielsen Total Dairy MAT to 16/10/2024

14. We also see a risk that effective setting of a price for a good may not reflect differentials in economic costs of that good. The reality is that it costs more to serve customers inefficiently (i.e. small volumes and wide range) and any intervention in relation to wholesale pricing runs the risk of distorting wholesale price signals, which may have flow on negative pricing effects for consumers.

Private label products

15. Private label products represent an increasing proportion of the goods sold by RGRs. As at 6 October 2024, private label products (+5.4%) are growing at 5 times the rate of branded products (0.0%) in NZ Supermarkets.² The increased development and sales of private label products by RGRs have already impacted suppliers' ability to invest in innovation in the New Zealand grocery market, as suppliers see volumes of branded sales decline.
16. For dairy specifically, we have seen the private label share of category dramatically increase from 27.0% to 32.8% in the last 5 years³, which is above average when compared with private label penetration in NZ overall. We agree with the Market Study, that this "crowding out" of supplier-branded products due to a growth in private label products may ultimately lead to a loss of consumer choice and higher prices over the long term.
17. Contracts with RGRs for private label products are already critical for suppliers' ongoing profitability, given the volumes that these contracts guarantee. Loss of or inability to secure a RGR private label contract has significant impacts on a supplier's business and financial performance, particularly suppliers in the dairy category given the high private label penetration levels.
18. We see a risk that the imbalance in contracting power may be exacerbated if private label products are required to be included in any compulsory RGR wholesale access regime, such that the volumes of private label products are likely to further increase, and supplier-branded products are further undermined.

Specific concerns relating to milk and cream

19. Fonterra Oceania's distribution channels for perishable short shelf-life chilled dairy products (particularly milk and cream) are unique and would be significantly compromised if the Commission was to mandate wholesale supply to RGRs. Anchor Franchises are a critical part of Fonterra Oceania's current route to market, and distribution network across NZ.
20. The type of regulatory tools proposed in the Issues Paper could challenge and fundamentally undermine the Anchor Franchises' proven ability to consistently, reliably, and equitably service a diverse range of IGRs and RGRs in the market. In particular, mandating wholesale supply of milk and cream to RGRs would:
- in substance require Fonterra to support RGRs' wholesale businesses in preference to the existing Anchor Franchise distribution network, which is an IGW already operating efficiently in market;
 - undermine the scale benefits and viability of Fonterra's existing route to market;
 - adversely impact the significant investment Fonterra has made in the Anchor Franchise distribution depots (and would run the risk of stranding those assets);
 - significantly impact the value and ongoing viability of the 42 owner-operated Anchor franchises, all of which are privately owned and are integrated into and contribute to the communities they serve; and
 - potentially detrimentally impact on product freshness, and the integrity of the cool supply chain for milk and cream.

21. Paragraph 55 of the Issues Paper records that the Commission would expect wholesale offerings to include milk. Milk sold by Fonterra is readily available to IGRs (both directly and via the Anchor distribution network) and IGWs (e.g. Bidfood and Service Foods). The non-

inclusion of milk in RGRs' wholesale offerings is not an impediment to competition in the retail grocery market. If the decision is made that additional regulation is necessary, we strongly suggest that milk and cream remain outside any mandated wholesale access regime for the reasons outlined in this submission.

Timing of regulation of supply terms

22. The Grocery Code is still relatively new, and many suppliers have not yet managed to agree grocery supply agreements with the RGRs. We understand the imperatives the Commission feels to intervene, and the challenge of stimulating competition in a small grocery market like New Zealand. However, intervention should come from a strong evidentiary base. We recommend that if further regulatory interventions are considered, they be focussed on RGRs. Suppliers' participation in any enhanced RGR wholesale access regime should continue to remain voluntary.
23. The risk of mandating participation of suppliers, before there has been a proper opportunity for the benefits of the Supply Code to be realised, is that it could move IGR volumes away from suppliers to the RGRs, reducing suppliers' ability to offer better terms to IGRs, and ultimately deliver better prices to consumers.

Other Issues

24. Further commentary on the scope of the GICA and whether it extends jurisdiction of secondary legislation to regulate the conduct of suppliers is attached in the legal opinion from Webb Henderson.

Conclusion

25. We appreciate the opportunity to provide these submissions to the Commission. We are available to discuss them further as needed.

Appendix 1 - Specific responses to questions in preliminary Issues Paper

1. Who do you think the wholesale regime should service? For example, what types of customers and what market share?

There are a number of small suppliers in the industry. Their ability to service IGRs has perhaps been impeded by having no network for “the last mile”. Fonterra Oceania understands that the wholesale regime may well prove beneficial to the IGRs, who for this reason, have not been able to access full range of products from certain large scale suppliers. Refer paragraph 7 re suggestion that participation remains voluntary to meet the varying levels of maturity of distribution networks in the industry.

2. Please describe any experiences you have had regarding different forms of wholesale supply, inside or outside of the wholesale regime. We are interested in the experiences of both wholesale customers and suppliers.

Alongside our Anchor Franchise network (refer paragraph 3 & 4), Fonterra Oceania has relationships with a number of existing distributors and wholesalers. It is a combination of these routes to market that allow us to service a wide range of RGRs and IGRs today. There are no customers we are aware of that could not access our products through one of these existing routes to markets.

3. Please describe your experiences of wholesale pricing in the grocery industry.

See further comments at paragraphs 11 - 14 of our substantive submission.

4. Please describe your views and provide evidence on the costs to wholesale customers of retailing grocery products. For example, what margin between wholesale and retail prices is required to recover the costs of retail activities.

Not applicable.

5. Please describe your experience and awareness of the types and value of RDPs. How does this affect you as a wholesale customer (e.g., retail pricing) or supplier? For example, what types of RDP between suppliers and wholesale customers have you used, and what impact did this have on margins? Please provide evidence if available.

Please refer to paragraphs 11-14 of this submission.

6. What is your view on the types of RDP that should be passed on to wholesale customers to reflect the RGRs' benefits of scale and efficiency?

Please refer to paragraphs 11-14 of this submission.

7. Please describe your experience of accessing popular retail grocery products (or appropriate substitutes), including via RGRs and through direct supply.

Not applicable.

8. Please describe your experience of using alternative channels of supply.

Not applicable.

9. Please describe your experience of supplying wholesale groceries to retailers.

Fonterra Oceania has the largest chilled foods distribution network in the country, helping to service over 22,000 domestic wholesale customers including supermarkets, independent retailers, dairies, cafes, service stations and bakeries across New Zealand. The network is owned and operated by 42 Anchor Franchises, which are predominantly small businesses owned by individual owner-operators and their families. We have invested in 36 distribution depots that are the collection points for these Anchor Franchises.

Our Anchor Franchise network predominantly distributes consumer format milk and cream, along with smaller volumes of dairy foods (butter, yoghurt, cream cheese, sour cream, etc). We use this “direct to store” franchise distribution model for the vast majority of our consumer milk and cream in New Zealand because it provides the fastest route to shelf and ultimately to the consumer, which is important for ensuring product safety and quality.

See also further comments at paragraphs [9, bullet 4] of our substantive submission.

10. Please describe your experiences/relationships with suppliers and/or retailers as a wholesale customer.

Not applicable.

11. Please describe your experience regarding the effectiveness of systems and processes for wholesale grocery supply.

Given the reach and importance of our Anchor Franchise network, Fonterra Oceania has recently invested in technology and tools. These tools have allowed a range of wholesale customers to access Fonterra's product range in a simple and accessible way. One of those tools is our Retail Self Service tool (RSS) which is our online ordering system & customer service portal. It is available to the majority of wholesale customers delivered to via our Anchor Franchise network.

12. Please describe whether you have experienced differences between the RGRs' and alternative channels' systems and processes? If yes, please comment on the effect of these differences.

Not applicable.

13. Please describe your experience of terms and conditions for wholesale grocery supply.

Not applicable.

14. Please describe whether you have experienced differences between the RGRs' and alternative channels' terms and conditions. If yes, please comment on the impact of these differences.

Not applicable.

15. What is your opinion on the findings of this progress assessment? Is there anything we have not mentioned in this paper that you consider is relevant? Please explain.

Not applicable.

16. Do you consider we have identified the most important issues affecting the RGRs' wholesale offers? Is there anything we have not mentioned in this paper? If yes, please identify and explain.

We do not agree that the product range included in RGRs' wholesale offerings is, on its own, a particularly useful metric of whether the regulatory regime is achieving its purpose. The more important question is whether wholesale customers can readily access a supply of a reasonable range of products – whether through RGRs' wholesale supply arrangements or outside them.

Where there are existing efficient avenues for wholesale customers to access particular product categories, mandating the inclusion of those product categories in RGRs' wholesale offerings would be likely to be counterproductive and detrimental to competition, in that it would further concentrate market power in the hands of RGRs. See further comments at paragraph 9-10 of our substantive submission.

17. Is there any information or analysis that we have not mentioned in this paper that you consider relevant? If yes, please identify and explain.

The additional information and analysis that we consider relevant is outlined in our substantive submission.

18. Do you consider we have identified the most important issues affecting the direct supply of wholesale groceries? Is there anything we have not mentioned in this paper? If yes, please identify and explain.

In addition, as noted above, Fonterra Oceania has a wide-reaching and efficient distribution network in place that directly supplies 22,000 wholesale customers directly. It would be counterproductive if the unintended consequence of regulatory intervention was to undermine the direct supply of wholesale groceries to IGRs, by promoting RGRs' wholesale arms and undermining the economics of direct supply. The majority of these franchised businesses are run by family owner-operators. There is a very real risk that forcing volume through a wholesale supply network ultimately run by RGRs could result in many of these

small businesses becoming unsustainable, shifting profits away from the local communities that these businesses are a part of.

19. Is there any information or analysis that we have not mentioned in this paper that you consider relevant? If yes, please identify and explain.

The additional information and analysis that we consider relevant is outlined in our substantive submission.

20. Please describe your views on the additional regulatory options.

We have no concerns with the introduction of a wholesale framework that is only binding on RGRs. The other regulatory options should be limited such that they do not mandate participation in the wholesale access regime on the part of suppliers, or cut across suppliers' ability to determine their own contractual terms with RGRs. Our reasons for these views are outlined in paragraphs 9 and 10 of our substantive submission – in essence, we are concerned that the other regulatory options would concentrate market power in the hands of RGRs' wholesale arms, enable them to capture additional margins, increase overall costs in the supply chain, and give them the ability to influence prices in a greater proportion of the grocery retail market.

The other regulatory options should also be limited so that they do not include liquid milk or cream (for the reasons set out in paragraphs 19 - 21 of our substantive submission) and do not include private label products (for the reasons set out in paragraphs 15 to **Error! Reference source not found.** of our substantive submission).

21. Are there other actions not described in this paper that you think would help? If yes, please identify and explain.

We are more than happy to continue to engage in this process if further information would be helpful.

Appendix 2: Memo from Webb Henderson

To Fonterra Brands (New Zealand) Limited
From Webb Henderson
Date 8 November 2024
Subject Commerce Commission Wholesale Inquiry – Regulatory Interventions Limitations

Introduction

1. The Commerce Commission (**Commission**) is currently carrying out an inquiry into the wholesale supply of groceries (**Inquiry**) under section 55 of the Grocery Industry Competition Act 2023 (**GICA**).
2. As part of its Inquiry, the Commission is considering:
 - (a) whether the wholesale supply of groceries by Regulated Grocery Retailers (**RGRs**) (**Wholesale Regime**) should be subject to additional regulation, and if so, what regulation should apply; and
 - (b) whether any other regulation or action may be necessary or desirable to promote competition in the markets in which retailers acquire groceries.²
3. Regulatory intervention options relating to the wholesale supply of groceries are set out in Part 3 of GICA. Part 3 of GICA provides for the introduction of a number of additional regulation options in relation to the RGRs' Wholesale Regime (**Regulatory Interventions**). These Regulatory Interventions include the possible introduction of:
 - (a) a wholesale framework, effectively a manual that sets out how certain decisions will be made by the RGR in relation to its wholesale regime (**Wholesale Framework**);
 - (b) a wholesale industry participation code (**Wholesale Code**);
 - (c) requirements that RGRs supply on non-discriminatory terms to their wholesale customers (**Non-discriminatory Terms**); and
 - (d) requirements that RGRs supply wholesale customers on terms specified by the Commission (**Specified Access Terms**).
4. Regulatory Interventions (a) and (b) can be introduced by a determination of the Commission and without the need for a section 55 Inquiry to be completed. Regulatory Interventions (c) and (d) require the Minister of Commerce and Consumer Affairs, following an Inquiry and recommendation from the Commission, to seek an Order in Council from the Governor-General to require RGRs to supply on Non-discriminatory Terms or Specified Access Terms.
5. We have concerns that if the Regulatory Interventions have the effect of:

² New Zealand Commerce Commission Terms of Reference – Wholesale Supply Inquiry 4 September 2024.

- (a) requiring suppliers to supply RGRs for the purpose of distribution through the RGRs' wholesale functions (creating a "must-deal" obligation in respect of the RGR's Wholesale Regime);
- (b) requiring the pass-through of ranging and other discounts that are directly and voluntarily funded by suppliers, and measured for their return on investment (**ROI**) in respect of such funding; or
- (c) requiring suppliers to supply additional volumes of product for sale through RGRs that would otherwise be supplied by them directly to independent retailers (**IGRs**) or independent grocery wholesalers (**IGWs**), in respect of such supply,

their implementation would give rise to issues regarding the jurisdiction of the Commission to make such determinations and recommendations, and the Minister to seek such regulations under GICA, in light of GICA's purpose and context.

Purpose of GICA and Part 3

6. The overarching purpose of GICA (section 3) is:
 - ... to promote competition and efficiency in the grocery industry for the long-term benefit of consumers in New Zealand.
7. The purpose of Part 3 of GICA, as set out in section 21, relates to wholesale supply and provides:
 - ... to promote the purpose of this Act by enabling wholesale customers to:
 - (a) have reliable and cost-effective wholesale supplies of groceries (either through wholesale supply provided by regulated grocery retailers, directly arranging supply from suppliers, or other channels, or any combination of those channels); and
 - (b) have reasonable access to the benefits of the scale, and the efficiency, of operations of regulated grocery retailers and their associated persons.
8. The overriding mandate for the Commission in undertaking an Inquiry under Part 3 is therefore to promote competition and efficiency in the grocery industry, by enabling wholesale customers to obtain competitive supply, both through the RGRs and through other channels.
9. It is recognised that suppliers play an important role in facilitating this outcome. However, it is not clear that it is appropriate or consistent with the scheme of GICA for suppliers' businesses to become partly or fully regulated, including through an obligation to deal, through the auspices of regulation of RGRs.

Background to GICA

10. GICA was the culmination of the government's response to the Commission's Market Study into the Retail Grocery Sector dated 8 March 2022 (**Market Study**). In its Market Study the Commission ultimately recommended a range of measures,

including implementing a Supplier Code of Conduct,³ but it did not recommend price or access terms regulation.⁴

Regulatory Impact Statement (RIS)

11. In its original Regulatory Impact Statement: Government response to the Commerce Commission Grocery Sector Market Study – Policy decisions dated 6 May 2022 (**Original RIS**), Hikina Whakatutuki / the Ministry of Business, Innovation and Employment (**MBIE**) identified its preferred approach to improving grocery retail outcomes by improving conditions for entry and expansion through access to groceries.⁵
12. The Original RIS identified that the benefit of this approach was that if commercial wholesale arrangements do not develop in reasonable timeframes, the transparency mechanisms outlined should alert Government to this outcome and allow it to consider further regulation if wholesale offerings by the major grocery retailers are uncompetitive and/or there is high incidence of refusals to supply or disputes.⁶
13. The Original RIS noted that “Applying access regulation to ‘wholesale supply of groceries’ would raise the risk of overriding suppliers’ freedom to contract and their own promotional and marketing arrangements”.⁷ Further, MBIE observed that “Significant intervention could disrupt existing efficient vertical integration efficiencies, operational efficiencies, efficiencies of scale and scope, dynamic efficiency, and introduce significant additional costs which could be passed on to consumers in higher grocery prices”.⁸
14. MBIE assessed the cost impact on suppliers of its preferred option as “low” and the benefits as “high”, as it commented:⁹

Suppliers will have a stronger ability to negotiate with retailers and have recourse to resolution when disputes arise and be provided with a more balanced negotiating position by the code of conduct.
15. The Original RIS specifically discussed the potential to impose a compulsory access regime and noted the view of IGRs that it would be “second best” to development of a structural solution (increased competition) in the grocery sector.¹⁰ Specifically, this was because:
 - (a) it would require IGRs to deal with, and be reliant upon, their major competitors to gain access to groceries; and
 - (b) the RGRs would benefit from the additional volume of wholesale supply going through their supply chains, further increasing their economies of scale and cost advantage in the sector.

³ Market Study at [9.148].

⁴ Market Study at [9.119].

⁵ Original RIS at [294].

⁶ Original RIS at [153].

⁷ Original RIS at [157].

⁸ Original RIS at [158].

⁹ Original RIS at Figure 16, p 68.

¹⁰ Original RIS at [168].

16. MBIE also noted that it was not aware of major suppliers' views on the option of imposing a regulated wholesale access regime.¹¹

Updated RIS

17. On 28 July 2022 an updated RIS, entitled Regulatory Impact Statement Addendum: Grocery Sector Regulatory Backstop to the Quasi-regulated Wholesale Access Regime, was issued (**Updated RIS**). MBIE acknowledged the effects of time pressure on the extent of consultation on the Updated RIS and specifically noted that MBIE had not publicly consulted or tested its analysis with interested parties, and had only limited targeted engagement with RGRs and a "very limited" number of wholesale customers and suppliers following Cabinet's 23 May 2022 decisions.¹²
18. The Updated RIS also characterised immediate implementation of a mandatory wholesale access regime as "not recommended", as a "disproportionate intervention with highly uncertain consequences, including the risk of disrupting significant efficiencies and introducing costs that could be passed onto consumers",¹³ although it noted that could be revisited in future.
19. The proposal was for a mandatory wholesale grocery access regime designed to provide a 'regulatory backstop' to the quasi-regulatory access scheme. MBIE described its understanding that Cabinet's decision "to pre-emptively make further regulatory responses possible [...] was motivated by the risk that incentives to negotiate the kind of wholesale arrangements Cabinet is seeking under the quasi-regulatory regime will be limited in the absence of this threat."¹⁴ It noted:¹⁵

We agree with the Commerce Commission's characterisation of that mandatory wholesale access regulation as significant, unprecedented and exposed to considerable risks, including possible harm to consumers from disrupting vertical supply efficiencies. We note that access regulation is typically reserved for markets where there is an essential facility or natural monopoly.

20. In respect of suppliers specifically, the Updated RIS identified the right for suppliers to opt out of any mandatory wholesale access regime, if one were implemented, noting that "There are no restrictions stopping an independent supplier from opting out."¹⁶ In relation to suppliers' pricing options, it noted:¹⁷

There would appear to be three choices available to the supplier under Option 1 (whatever the degree of regulation involved in facilitating wholesale access):

- (a) allow the promotional funding they have negotiated with the major grocery retailer to be passed through to wholesale customers,
- (b) enter into promotional funding relationships with the wholesale customer directly and remove this from the component of the wholesale price, or

¹¹ Original RIS at [169].

¹² Updated RIS at page 4.

¹³ Updated RIS at page 2.

¹⁴ Updated RIS at [12].

¹⁵ Updated RIS at [47].

¹⁶ Updated RIS at [39].

¹⁷ Updated RIS at [62].

- (c) opt out of the wholesale access arrangements and rely solely on their relationship(s) with the major grocery retailer(s).

21. In its description of the impacts on “regulated groups”¹⁸, MBIE did not include suppliers. Finally, in evaluating the options, MBIE observed:¹⁹

The best-case scenario under any option is therefore that the quasi-regulatory regime will produce competitive wholesale offers. We think that outcome is slightly more likely under this option because it strengthens incentives *[sic]* to avoid further regulation.

Select Committee Amendments

22. The Select Committee reported on the Bill on 22 March 2023 (**SC Report**) and expressed the view that wholesale customers should get the benefit of the scale benefits of the discounts RGRs receive from suppliers, and recommended consequential amendments to the sections relating to the wholesale code.²⁰ The SC Report was clear in its view that suppliers should have control over where their products are sold,²¹ noting:

The bill as introduced would protect the right of independent suppliers... to ultimately control where their products went to market...

We also recommend amending clauses 82, 84, and 92(1)(g) to ensure that suppliers may maintain reasonable control of where their products are sold in all regulatory contexts.

23. The SC Report then added a limited ability to regulate supplier conduct in the following terms:

We were concerned that the wholesale supply regime may not be effective if suppliers use their control to avoid selling their goods through an RGR’s wholesale offering. We recommend amending clause 70, the wholesale code, to allow the Commission to regulate conduct of RGRs and suppliers, or terms or conditions in supply agreements. The Commission would only be able to implement this regulation if the conditions in clause 70(2) are met – including consideration of whether the conduct of suppliers lessens competition.

24. It is possible that the Select Committee did not recognise the risk that this would create a “must deal” obligation, potentially other than when the conduct of suppliers has the effect of lessening competition. The updated provisions were not consulted on, nor was there consideration of their potential inconsistency with the requirement that suppliers maintain reasonable control of where their products were sold, “in all regulatory contexts”, which was included in the very same Report.

Suppliers’ obligations under GICA

25. The Supreme Court in *Fonterra Co-operative Group Ltd v The Grate Kiwi Cheese Co Ltd*,²² was clear that interpretation of a statute needs to be undertaken in the context of the statute’s text and in light of its purpose, even where there is no ambiguity in the

¹⁸ Updated RIS at page 19.

¹⁹ Updated RIS at [46].

²⁰ SC Report, pages 9-10.

²¹ SC Report, page 10.

²² [2012] 2 NZLR 184 (NZSC).

language of a provision and the meaning appears to be clear. When ascertaining the meaning of an Act, decision makers must look at its language and have regard to the Act's purpose and context.²³

26. To understand an Act's purpose and context, it is now well-accepted that the courts may look at parliamentary history, including regulatory impact statements and Select Committee reports. The exclusionary rule, which formerly tightly restricted references to parliamentary history, has been "abandoned"²⁴ and it is now "standard practice" to refer to these materials regardless of whether there is an ambiguity in the text of the Act.²⁵
27. The Original RIS, Updated RIS and SC Report represent important context for the interpretation of the Regulatory Intervention options in the context of the current Inquiry. In our view, interpreting and exercising discretions under GICA consistent with its legislative intent implies that:
 - (a) facilitating competition for wholesale supply, by suppliers and IGWs as well as RGRs, would encourage the "best case" outcome and be consistent with the express purpose of Part 3 as provided in section 21(a);
 - (b) wholesale access regulation should be treated as a "second best" "regulatory backstop" and last resort;
 - (c) any consideration of Regulatory Intervention should specifically assess and evaluate in a careful and structured way the risk of any recommended approach:
 - (i) disrupting other efficiencies in the supply chain; and
 - (ii) introducing costs that could be passed on to consumers.

This analysis must be regarded as a critical feature of any Regulatory Intervention. In principle it would require a structured economic cost-benefit analysis, with full information of the economic consequences of the proposed Regulatory Intervention for wholesale customers' likely pricing to IGRs or consumers, for suppliers' economies of scope and scale, and for innovation, to adequately inform the Minister of the potential unintended consequences, risks and costs to the industry of the proposed intervention, beyond the Commission's own costs of monitoring and enforcement; and

 - (d) the scope of what can be achieved by any Regulatory Intervention (the "factual" in any cost/benefit analysis) needs to be calibrated to, and specifically accommodate, each supplier's ability to choose not to participate in the RGR's wholesale supply arrangements, unless to do so amounts to conduct that lessens competition, but otherwise suppliers have the freedom to adopt any of the pricing approaches set out at paragraph 20 above.
28. In respect of suppliers' ability to decide not to participate in the Wholesale Regime, GICA, as passed into law, provides:

²³ Legislation Act 2019, section 10.

²⁴ JF Burrows and RI Carter, *Statute Law in New Zealand*, 4th Ed, 2009, page 263.

²⁵ JF Burrows and RI Carter, *Statute Law in New Zealand*, 4th Ed, 2009, page 265.

- (a) a list of mandatory relevant considerations that the Commission must take into account when exercising its discretion to perform or exercise powers or functions under GICA (section 24), which include the desirability:
 - (i) of suppliers retaining reasonable control over the channels for the retail sale of their own products and brands;
 - (ii) that wholesale customers have reasonable access to any discounts, payments, or rebates made available to a RGR by, or on behalf of, a supplier; and
 - (iii) that RGRs' wholesale offers include the range, quantity and frequency of supply that wholesale customers demand;
- (b) that, in respect of the content of a wholesale code (section 75), a wholesale code may:
 - (i) contain provisions that specify the terms or conditions that must or must not be included in a supply agreement; and
 - (ii) impose any other duty on a supplier to ensure that they act in a manner that is consistent with the desirability that wholesale customers have access to the same discounts as RGRs, and the RGRs' wholesale offers include the range, quantity and frequency of supply that wholesale customers demand (which the supplier must comply with under section 76(2));

but the Commission can only include provisions in its Wholesale Code relating to suppliers (section 75(2)) if it is satisfied that:

 - (iii) it is desirable to promote wholesale customer access to RGRs' discounts (section 75(2)(a)); or
 - (iv) if suppliers' conduct is lessening competition in a wholesale or retail grocery market and it is desirable to promote the RGRs' wholesale offers to include the range, quantity and frequency of supply that wholesale customers demand (section 75(2)(b)); and
- (c) if a Regulatory Intervention is imposed to require Non-discriminatory Terms or Specified Access Terms, the Commission's Determination which implements that Regulatory Intervention may specify the grounds on which suppliers may opt out of those Regulatory Interventions, and any terms and conditions of that power to opt out.²⁶ Suppliers may only opt out in accordance with the Determination.²⁷

29. In our view, a Court would look to interpret those provisions in a way that did not create a "must-deal" obligation for suppliers, unless it could be demonstrated that suppliers inappropriately use their control to engage in conduct that lessens competition, and would set a materiality threshold for the extent of lessening of competition that would create such an obligation to deal. This is consistent with the express obligation in section 75(2)(b), which applies only to Wholesale Codes. It is clear from the SC Report that the obligation in section 75(2)(b) for the Commission to

²⁶ GICA, s 88(3)(e) with respect to Non-discriminatory Terms; s 95(1)(g) with respect to Specified Access Terms.

²⁷ GICA, s 87.

consider whether suppliers had lessened competition is similarly relevant for the Commission to consider in relation to the other three possible Regulatory Interventions. The relevant portion in the SC Report refers to a concern of supplier conduct affecting “the wholesale supply regime” (i.e., the regime as a whole, not just the regime if a Wholesale Code is in place). In that context, the Court, when considering section 75(2)(a), consistent with the mandate in *Fonterra v Grate Kiwi Cheese*, and the mandatory relevant consideration that suppliers have reasonable control over the “channels for the retail sale of their own products”, ought to regard the Commission’s discretion for all Regulatory Interventions as being limited to being satisfied that it is desirable to include such provisions only where such a lessening of competition can be demonstrated.

30. A “must deal” obligation is an extremely onerous regulatory intervention. In the context of the extensive formal process for designation of RGRs, the lengthy and consultation- and evidence-heavy Market Study, and the MBIE consultation process that has led to the specific obligations imposed on RGRs in GICA, the Court would be reluctant to interpret GICA to impose an equivalent ability to regulate suppliers’ businesses without any of the same evidential basis, formal process, or underlying consultation process.
31. In our view, the Commission is also obliged to provide a process for suppliers to elect not to be the subject of any Regulatory Intervention, in order for GICA to be read consistently with its legislative intent, and with the New Zealand Bill of Rights Act 1990.²⁸
32. The Commission would accordingly be required to accommodate, in any determination relating to Regulatory Intervention, the option for suppliers not to support the Wholesale Regime, including for reasons of economic efficiency and promotion of pro-competitive consumer outcomes, for example if the supplier can show that participation in the Wholesale Regime would involve:
 - (a) a loss in value for those suppliers’ or their distributors’ existing businesses, or other diseconomies of scale;
 - (b) stranded assets arising from sunk costs of investment in alternative distribution; or
 - (c) in the supplier’s view, as the Commission itself identified in its submissions recorded in the Original and Updated RIS, concentrating wholesale supply in the hands of the RGRs in a manner that is not likely to lead to better outcomes for consumers.
33. As set out in Fonterra’s submission on the Inquiry consultation, these are not academic concerns. They present real challenges for suppliers in the face of the proposed Regulatory Interventions.

Webb Henderson

²⁸ New Zealand Bill of Rights Act 1990, section 6, requires an interpretation consistent with the New Zealand Bill of Rights Act 1990 to be preferred. Section 21 provides for the right to be free of unreasonable search and seizure, which includes unreasonable taking of property, including company value. The “reasonable limits justified in a fair and democratic society” test in section 5 is unlikely to be met in respect of an Order in Council, made under primary legislation that was not clear as to its intention to capture and provide for specific regulation of suppliers and was limited in its consultation process in the way described in the Updated RIS. The New Zealand Bill of Rights Act 1990 applies for the benefit of all legal persons, not just natural persons: section 29.

