

Wholesale Supply Inquiry

Under section 55 of the Grocery Industry Competition Act 2023

Terms of Reference

Date of publication: 4 September 2024



Purpose of Wholesale Supply Inquiry

1. We are undertaking an Inquiry under section 55 of the Grocery Industry Competition Act 2023 (the **Act**).¹ We will look into the markets in which New Zealand grocery retailers acquire groceries, and assess whether additional regulation or other actions are needed to make them more competitive or more efficient for the long-term benefit of Kiwi consumers.
2. The purpose of the Inquiry is to consider:
 - 2.1 whether the wholesale supply of groceries and any ancillary services by Regulated Grocery Retailers (**RGRs**) should be subject to additional regulation, and if so, what additional regulation should apply; and
 - 2.2 whether any other regulation or action may be necessary or desirable to promote competition in the markets in which retailers acquire groceries.²

Context for our Inquiry

3. The Act came into force on 10 July 2023. It contained a set of measures to improve competition in the grocery sector, and gave the Commerce Commission new powers to monitor and regulate the grocery sector.
4. In particular, the Act established a new wholesale supply regime. This created obligations on the RGRs to set up systems to facilitate wholesale supply to other grocery retailers. The three RGRs are Foodstuffs North Island, Foodstuffs South Island, and Woolworths New Zealand.
5. The Act requires that the RGRs' wholesale offerings are consistent with what would be expected in a competitive market, and that their wholesale supply makes a material contribution to improving competition in the sector. If these thresholds are not met, the Act requires us to consider 'back stop' provisions that have been built into the Act to further regulate the RGRs' wholesale supply of groceries.
6. The wholesale regime was introduced to address one of the key barriers to entry and expansion in the retail grocery market in New Zealand.³ The purpose of the wholesale regime is to promote competition by enabling retail competitors of the RGRs to have:⁴
 - 6.1 reliable and cost-effective wholesale supplies of groceries (either through wholesale supply provided by RGRs, directly arranging supply from suppliers, or other channels, or any combination of those channels); and

¹ A copy of the Act is available at:
<https://www.legislation.govt.nz/act/public/2023/0031/latest/LMS743553.html?src=qs>.

² Section 56 of the Act.

³ The Commission's market study into the retail grocery sector identified a number of key barriers faced by rivals trying to enter and expand in the retail market. One of these were difficulties in obtaining competitively priced wholesale supply of groceries.

⁴ Section 21 of the Act.

- 6.2 reasonable access to the benefits of the scale, and the efficiency, of operations of RGRs and their associated persons.
7. However, as set out in our First Annual Grocery Report,⁵ in its current form the wholesale regime is not helping to improve competition and efficiency in the New Zealand grocery sector, or benefitting New Zealand consumers, and seems unlikely to do so in its current form.
8. The wholesale offers that have been made by the RGRs under the current wholesale regime are having a limited impact on the sector and the range and price of goods offered at wholesale are not consistent with what we would expect to see in a competitive wholesale market. The issues may not be confined to the RGRs, as suppliers who opt out of the wholesale regime (including RGRs withholding their own private label products from their wholesale offers) and the common practice of suppliers and RGRs agreeing significant payments or discounts on products in association with promotions (“trade spend”) that are generally not being offered to wholesale customers, are parts of the problem that may need to be addressed.

Scope of the Inquiry

9. The Inquiry seeks to address the fundamental issues limiting the RGRs’ retail competitors from acquiring the range of groceries, at competitive prices, in order to compete with the RGRs. We want to ensure we identify all the issues and their potential scale and impact, and recommend solutions (including additional regulation or other actions) to address these issues.
10. In relation to the wholesale regime, we will assess:
- 10.1 why the current regime is not achieving its purpose, as set out at paragraphs 6.1 and 6.2;
 - 10.2 the incentives of the RGRs to create a compelling wholesale offer and support the entry or expansion of retail competitors;
 - 10.3 the incentives of suppliers to participate in the wholesale regime, and whether more participation is needed;
 - 10.4 whether the retailers that are wholesale customers of the RGRs are incentivised or able to compete vigorously with the RGRs;
 - 10.5 issues with the RGRs’ current offerings, such as price, range (including private label), and the availability of rebates, discounts and promotions;
 - 10.6 the size and scale of potential wholesale customers; and
 - 10.7 whether the statutory tests for additional regulation are satisfied and whether additional regulation is needed (including the regulatory backstops in the Act, or otherwise).

⁵ The First Annual Grocery Report is available at: <https://comcom.govt.nz/regulated-industries/grocery>.

11. In relation to direct supply between suppliers and the RGRs' retail competitors, we will assess:
 - 11.1 the terms that suppliers offer non-RGRs, and how this impacts their ability to compete with the RGRs;
 - 11.2 whether the RGRs' relationships with suppliers impede suppliers' incentives to supply other retailers;
 - 11.3 whether suppliers are incentivised to support new retail entry or expansion;
 - 11.4 the relative availability of rebates, discounts and promotional payments to RGRs and non-RGRs;
 - 11.5 the impact that the wholesale regime is having on direct supply and vice versa, including when customers switch away from direct supply to wholesale; and
 - 11.6 whether any regulation or other action would address issues with direct supply and better promote the purpose of Part 3.
12. As we progress the Inquiry, we will have regard to any other matters or factors that we consider relevant to the purpose of the Inquiry.
13. The Act enables us to implement some types of additional regulation without an inquiry (in particular, a wholesale code and/or to require a RGR to prepare a wholesale framework), while other interventions (in particular, non-discriminatory terms and specified access terms for wholesale supply), require completion of the Inquiry in order to be considered. Therefore, we may decide to quickly implement additional regulations prior to the completion of the Inquiry if necessary.

This Inquiry is separate to our review of the Supply Code

14. The Grocery Supply Code (the **Code**) is a set of rules about the agreements and conduct between RGRs and grocery suppliers.⁶ The Commission is required to complete a review of the Code's operation and effectiveness by September 2025. More information on the review of the Grocery Supply Code is available at <https://comcom.govt.nz/regulated-industries/grocery/review-of-the-grocery-supply-code>.
15. Although this Inquiry will not review the Code, it is possible that any issues with the way the Code is currently operating may be relevant to matters that are in scope in this Inquiry.

⁶ A fact sheet on the Grocery Supply Code is available at: https://comcom.govt.nz/data/assets/pdf_file/0022/329710/Commerce-Commission-Grocery-supply-code-factsheet-28-September-2023.pdf.

The Inquiry is independent of the Commission’s review of the proposed Foodstuffs North Island and Foodstuffs South Island merger

16. On 14 December 2023, the Commerce Commission received a merger clearance application from Foodstuffs North Island Limited and Foodstuffs South Island Limited. The Commission is still considering this application, under s 37 of the Commerce Act 1986, with a final decision due on 1 October 2024.⁷
17. This Inquiry is independent of the Commission’s upcoming decision in relation to the merger. The issues we will consider as part of the Inquiry (both in relation to wholesale access regulation and direct supply to retailers) are important irrespective of whether the merger proceeds.

Process for completion of this Inquiry

18. As the Inquiry progresses, the Commission will publish further information with confirmed dates on our website.

Indicative date	Stage in Inquiry processes
4 September 2024	Commencement date
October 2024	Release of Issues paper for consultation
November 2024	Closing date for submissions on the Issues paper
Q1 2025	Draft report
Q2 2025	Final report

19. As noted earlier, we may decide to quickly implement additional regulations (such as a wholesale code) prior to the final report if necessary.

We are interested in your views

20. We welcome any views or questions from stakeholders on the scope of this Inquiry. Please address your questions to the email address below. There will be opportunities to contribute throughout this Inquiry so please let us know if you wish to be engaged as part of the process.
21. Any views or questions on this paper should be provided as an electronic copy in an accessible form. Please email your feedback to grocery.regulation@comcom.govt.nz with the subject line “Wholesale Supply Inquiry: Terms of Reference feedback”.

⁷ More information on the merger is available at: <https://comcom.govt.nz/case-register/case-register-entries/foodstuffs-north-island-limited-and-foodstuffs-south-island-limited>.