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Public version

Wholesale Supply Inquiry

Under section 55 of the Grocery Industry Competition Act 2023

Preliminary Issues Paper

Date of publication: 24 September 2024

Glossary

Term	Definition
Act	Grocery Industry Competition Act 2023
Banner	Grocery store brands/names a retailer sells under (eg, New World, Pak'nSave, Four Square, Raeward Fresh, Woolworths, FreshChoice).
Commission	Commerce Commission
Fresh categories	Refers to products in bakery, butchery, produce, seafood and service deli categories.
Gilmours	Gilmours Wholesale Limited
Groceries	Defined in the Act as goods in any of the following categories: fresh produce; dairy products; bakery products; chilled or frozen food; pantry goods or dry goods; manufacturer-packaged food; non-alcoholic drinks; personal care products; household consumables; and pet care products.
FSNI	Foodstuffs North Island
FSSI	Foodstuffs South Island
Main shop	A shop typically happening weekly or at another regular interval based on the convenience of using one grocery store to get all necessities in one place.
Market Study	Market study into the retail grocery sector conducted by the Commerce Commission under the Commerce Act 1986. The Market Study final report was published 8 March 2022.
MBIE	Ministry of Business, Innovation and Employment
Minister	Minister of Commerce and Consumer Affairs
Private label	Also known as home brands, own brands, store brands or generic products. These are products that are manufactured for sale under a retailer's brand.
Other retailers	Other grocery retailers that are not regulated grocery retailers.
RDP	Supplier rebates, discounts or payments.
RGR	Regulated grocery retailer. Currently defined in the Act as Foodstuffs North Island Limited; Foodstuffs South Island Limited; and Woolworths New Zealand (including all franchises and interconnected bodies corporate of the listed companies).
Secondary shop	A visit to one or more store(s), other than the store the main shop is carried out at, to shop for specific products.

Top-up shop	A quick shop for a small number of items that can be conducted for a range of reasons at one of a range of retailers.
Trents	Trents Wholesale Limited
Wholesale customer	Any person that receives the wholesale supply, or want to obtain the wholesale supply, of groceries from a regulated grocery retailer for the purpose of supplying groceries, directly or indirectly at retail to consumers.
WWNZ	Woolworths New Zealand Limited

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Foreword from the Grocery Commissioner

When the Grocery Industry Competition Act 2023 commenced in 2023, it introduced a new wholesale regime. Part 3 is intended to enable wholesale customers to have "reliable and cost-effective wholesale supplies of groceries" and "have reasonable access to the benefits of the scale, and the efficiency, of operations of regulated grocery retailers."

The ability for grocery retailers to buy a range of wholesale goods at competitive prices is important as it helps other retailers to compete with the major supermarkets.

However, our First Annual Grocery Report showed that the wholesale regime is working for only a small group of grocery retailers, and that there are some fundamental issues in the wholesale market that cannot be addressed under the regime's current settings. Our current understanding of these issues, as well as the opportunities we see to address them, are summarised in this paper.

Further intervention may be necessary to achieve the intended benefits of the wholesale regime, for both the wider grocery industry and New Zealand consumers. This is why we are undertaking this Inquiry – to enable us to consider if stronger regulatory tools are needed and if the legal requirements for additional regulatory intervention are met, to confirm what that intervention should look like. It will also help us to identify issues that could be addressed sooner through the introduction of a Wholesale Code or Framework.

We now invite your feedback on the issues affecting the wholesale supply of groceries and the opportunities we have to address them. If you have questions, you can also contact my team at grocery.regulation@comcom.govt.nz.

I look forward to hearing your views.

Pierre van Heerden
Grocery Commissioner

Introduction

Purpose of this paper

1. Following our progress assessment of the first year of the grocery wholesale regime, we have decided to carry out an inquiry (**the Inquiry**) under section 55 of the Grocery Industry Competition Act 2023 (**the Act**) to consider whether the wholesale supply of groceries and any ancillary services should be subject to additional regulation, and, if so, what additional regulation should apply.

2. This paper is one of the key steps in the Inquiry process. It:

   2.1 provides an overview of our current understanding of the issues that affect wholesale supply and competition in the grocery industry;

   2.2 provides an overview of the proposed focus areas for the Inquiry, including the potential solutions to the issues; and

   2.3 invites feedback from all interested parties on the issues and proposed focus areas to further our understanding, refine this Inquiry's scope and help us to decide where to focus our efforts during the Inquiry.

Structure of this paper

3. This paper has six main sections:

   3.1 **The Commission's role and the legal framework** describes the Commission's monitoring and regulatory role under the Act, the wholesale regime and what the Commission must or may consider for an inquiry under the Act.

   3.2 **The process for this Inquiry** describes the Inquiry's Terms of Reference, the key milestones and how you can be involved in the Inquiry process.

   3.3 **Summary of progress assessment of wholesale regime** describes our key findings regarding how the wholesale regime is progressing under the current regulatory settings, and whether it is meeting expectations.

   3.4 **Proposed focus areas for this Inquiry** provides our initial views about the key issues that we intend to focus our efforts on throughout the Inquiry, including the analysis we intend to undertake.

   3.5 **Potential solutions/options to address the issues** provides our initial views on the options we have to address the key issues, including the further regulatory interventions that are available in the Act.

   3.6 **Next steps** sets out the key upcoming milestones, and describes how interested parties can have their say.

4. We note that the proposed focus areas for this Inquiry may develop as our understanding of the wholesale regime is refined. In particular, feedback provided on this Preliminary Issues paper, and throughout the duration of the Inquiry, will help us to refine these focus areas.

Section 1: The Commission's role and the legal framework

Our role

5. Under the Act the Commission has a role in monitoring competition and efficiency in the grocery industry.[1] As part of this role we monitor and assess the progress of the wholesale regime, which is set out in Part 3 of the Act and came into force upon the Act's commencement on 10 July 2023.

6. In mid-2024 we undertook a progress assessment of the wholesale regime, to consider whether the Regulated Grocery Retailers' (**RGRs**) wholesale offers were contributing to the purpose of the Act and of Part 3.[2]

7. In addition, one of the Commission's functions under the Act is to carry out inquiries in connection with the grocery industry.[3] Following the completion of our progress assessment of the wholesale regime in mid-2024, the Commission decided to undertake this Inquiry into the wholesale supply of groceries on its own initiative, as provided for under s 55(1)(b) of the Act.

The wholesale regime

8. The Commission's 2022 Market Study into the Retail Grocery Sector (**Market Study**) identified wholesale access to grocery products as one of the factors that was likely to be preventing or slowing the entry and expansion of other retailers into the retail grocery industry.[4]

9. Competition for grocery retail may be improved if other existing or new grocery retailers are better able to leverage the scale and efficiency advantages of major grocery retailers. For example:

   9.1 if smaller customers (eg, independent dairies and smaller chains) can access wholesale supply in the long-term to provide a wider selection or products at prices that are more attractive to consumers, they could be more competitive with the major grocery retailers; and

   9.2 larger grocery retailers (eg, national or regional chains) could view wholesale access as a springboard to grow volume and develop their own direct relationships with suppliers.[5]

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1 Section 4(1)(a) of the Act.

2 Sections 3 and 21 of the Act.

3 Section 4(1)(b) of the Act.

4 Commerce Commission "Market study into the retail grocery sector – final report (8 March 2022) at p. 190, https://comcom.govt.nz/__data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf. Note: The Market Study did not explicitly recommend a wholesale regulatory regime.

5 Minister for Commerce and Consumer Affairs / MBIE "Regulatory Impact Statement: grocery sector regulatory backstop to the quasi-regulated wholesale access regime" (28 July 2022), at p. 7-10 available at: https://www.mbie.govt.nz/dmsdocument/25463-regulatory-impact-statement-addendum-grocery-sector-regulatory-backstop-to-the-quasi-regulated-wholesale-access-regime-proactiverelease-pdf

10. The purpose of the wholesale provisions, which are set out in Part 3 of the Act, are to promote the purpose of the Act (refer s 3 of the Act, to promote competition and efficiency in the grocery industry for the long-term benefit of New Zealand consumers) by enabling wholesale customers to have:

    10.1 reliable and cost-effective wholesale supplies of groceries through RGRs, direct supply and/or any other channel; and

    10.2 reasonable access to the benefits of the scale and efficiency of operations of RGRs.[6]

11. The wholesale regime is intended to address a lack of wholesale supply options in New Zealand to enable potential competitors to improve their retail offering and compete more vigorously with the RGRs. It enables wholesale customers to make supply requests from RGRs, requires RGRs to consider all wholesale supply requests in good faith, and requires RGRs to comply with other requirements for facilitating commercial agreements for wholesale grocery supply.[7]

12. If the wholesale regime is not contributing to achieving the purpose of the Act of Part 3, the Act provides for additional regulation, subject to legal requirements being met. This includes a Wholesale Framework, Wholesale Code, Non-discriminatory terms and Specified Access terms.[8]

13. Following the introduction of the Act's wholesale regime, as part of our grocery responsibilities we monitor and assess the progress of the wholesale regime. To date, this has focused on the commercial wholesale offers of the RGRs, and we have used a range of information to do this, including:

    13.1 information reported (under sections 40 and 41 of the Act) and requested from RGRs;

    13.2 engagement with a range of wholesale customers (including potential wholesale customers); and

    13.3 engagement with suppliers and other industry participants.

[6] Section 21 of the Act.
[7] Sections 34, 35 and Subpart 2 of Part 3 of the Act.
[8] Subparts 4, 5 and 6 of Part 3 of the Act.

14. As part of our role, we undertook an assessment of the wholesale regime in mid-2024. This assessment identified several concerns with the commercial wholesale grocery offers of the RGRs and how the wholesale regime was progressing under the current regulatory settings. A summary of the key findings of this progress assessment is provided in Chapter 7 of the First Annual Grocery Report,[9] and in Section 3 of this paper.

Inquiries under the Act

15. As set out in s 56 of the Act, the purpose of an inquiry under this section is to consider whether the wholesale supply of groceries (and ancillary services) should be subject to additional regulation, and, if so, what additional regulation should apply, and whether any other regulation or action may be necessary or desirable to promote the purpose of the Act.

16. In accordance with s 57 of the Act, in carrying out an inquiry, the Commission may have regard to any matters it considers necessary or desirable for the purpose of the inquiry,[10] and must also:

    16.1 Consider whether any of the tests in s 65(1) or 82(1) are satisfied;[11] and

    16.2 If the test or tests are satisfied, whether the wholesale supply of groceries and any ancillary services should be subject to (or should continue to be subject to) additional regulation;[12] and

    16.3 if so, consider what type/s of regulation should apply and who it should apply to;[13] and

    16.4 assess the benefits of applying different types of additional regulation and consider what would be the most cost-effective type in the circumstances.[14]

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9 A copy of the First Annual Grocery Report is available at: https://comcom.govt.nz/regulated-industries/grocery/annual-grocery-report.

10 Section 57(4) of the Act.

11 Section 57(1)(a) of the Act.

12 Section 57(1)(b) of the Act.

13 Section 57(1)(c) of the Act.

14 Section 57(3) of the Act.

Section 2: The process for this Inquiry

Terms of Reference

17. The scope of this Inquiry is set out in the Terms of Reference (**Attachment A**).[15]

18. Regarding the scope, the Terms of Reference state:

> **Scope of the Inquiry**
>
> 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.
>
> In relation to the wholesale regime, we will assess:
>
> - why the current regime is not achieving its purpose, as set out at paragraphs 6.1 and 6.2;
> - the incentives of the RGRs to create a compelling wholesale offer and support the entry or expansion of retail competitors;
> - the incentives of suppliers to participate in the wholesale regime, and whether more participation is needed;
> - whether the retailers that are wholesale customers of the RGRs are incentivised or able to compete vigorously with the RGRs;
> - issues with the RGRs' current offerings, such as price, range (including private label), and the availability of rebates, discounts and promotions;
> - the size and scale of potential wholesale customers; and
> - whether the statutory tests for additional regulation are satisfied and whether additional regulation is needed (including the regulatory backstops in the Act, or otherwise).
>
> In relation to direct supply between suppliers and the RGRs' retail competitors, we will assess:
>
> - issues with the terms that suppliers offer non-RGRs, and how this impacts their ability to compete with the RGRs;

15 A copy of the Terms of Reference is available at: https://comcom.govt.nz/__data/assets/pdf_file/0021/362307/Terms-of-Reference-Wholesale-Supply-Inquiry.pdf.

- whether the RGRs' relationships with suppliers impede suppliers' incentives to supply other retailers;
- whether suppliers are incentivised to support new retail entry or expansion;
- the relative availability of rebates, discounts and promotional payments to RGRs and non-RGRs;
- 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
- whether any regulation or other action would address issues with direct supply and better promote the purpose of Part 3.

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.

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 regulation prior to the completion of the Inquiry if necessary.

Key milestones

19. This paper is one of the early milestones in the Inquiry process. The key milestones are:

Indicative date	Milestone
25 October 2024	Submissions due on Preliminary Issues Paper
31 March 2025	Draft report published
30 June 2025	Final report published and provided to the Minister

20. Under the Act, we must consult on the draft report and have regard to any comments made.[16] The draft report will likely include draft recommendations about any additional regulation that may be required to achieve the purpose of Part 3 of the Act, subject to legal requirements being met.

[16] Section 59 of the Act.

21. We are also required to provide the final report to the Minister of Commerce and Consumer Affairs and then publish it.[17] The Minister must have regard to any recommendation made to the Minister in the final report, and may accept, reject or request the Commission to reconsider or clarify any recommendations (in whole or part).[18]

Feedback is encouraged from grocery industry participants and the wider public

22. We are seeking your views on the issues and questions raised in this paper, or on any other issues that you consider important. Your views will help us to further develop our understanding of the issues affecting the wholesale regime and will help to decide where to focus our efforts during the Inquiry.

23. You do not need to respond to all the issues or questions raised – you are welcome to respond to a single issue or question, or address just the issues or questions that relate to your experience.

24. You are welcome to provide your views to us by uploading your submission via our website or via email at: grocery.regulation@comcom.govt.nz with the subject line "Wholesale Supply Inquiry: Issues Paper Submission".

25. To ensure your views can be taken into account, please provide these to us **by 5pm, Friday 25 October 2024**.

26. A list of the questions asked throughout the paper is included in **Attachment B** for ease of reference. **Attachment C** also provides further details on how to provide your views on this paper, including what to do if you are providing us with confidential information, or wish to remain anonymous.

27. To ensure we consider a wide range of views we will also be undertaking targeted engagement with some grocery industry participants over the next several months.

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[17] Section 60 of the Act.

[18] Section 62 of the Act.

Section 3: Summary of progress assessment of the wholesale supply regime

28. In mid-2024, as part of our role to monitor the grocery industry, we undertook an assessment of how the RGRs' wholesale offers under the wholesale regime were progressing under the current regulatory settings. A summary of the key findings of this progress assessment is set out in Chapter 7 of the Annual Grocery Report 2024 and summarised below.

29. Based on the principles[19] and requirements in Part 3 of the Act, we determined that the following are the most relevant considerations in assessing whether the wholesale regime is meeting its purpose:

    29.1 quantity and frequency of supply;

    29.2 wholesale pricing;

    29.3 range of products;

    29.4 systems and processes; and

    29.5 terms and conditions.[20]

Conclusions

30. Based on our assessment we identified that while the wholesale regime may be working well for some grocery retailers, there are several fundamental issues with the RGRs' wholesale offerings. At a high level, these relate to:

    30.1 The low volume of sales through the RGRs' wholesale offerings;

    30.2 The RGRs' wholesale pricing models;

    30.3 Other grocery retailers' access to rebates, discounts and payments (**RDPs**), including trade/promotional spend;

    30.4 Other grocery retailers' access to top-selling retail products; and

    30.5 The effectiveness of RGRs' systems and processes for wholesale supply.

31. We are concerned that in its current form the wholesale regime is not working well for the broader grocery industry and is unlikely to be promoting the purpose of the Act by fulfilling the purpose of Part 3 of the Act. This is because:

    31.1 Wholesale offerings by RGRs do not appear to be consistent with a competitive wholesale market;

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[19] Sections 23 and 24 of the Act.

[20] These considerations were determined based on the following specific clauses of the Act: sections 24(1)(a), 24(1)(c), 38 and 44 of the Act.

31.2 Wholesale customers do not appear to have reasonable access to the benefits of the scale and efficiency of the RGRs, including via trade/promotional spend; and

31.3 Wholesale customers do not appear to have reliable and cost-effective access to wholesale supplies of groceries from RGRs or via direct supply.

32. Overall, based on the evidence currently before us, the wholesale regime is not improving competition and efficiency in the grocery industry for the long-term benefit of New Zealand consumers, and in its current form seems unlikely to do so even with more time.

33. This means that additional regulation may be necessary to achieve the intended benefits of the wholesale regime, for both the wider grocery industry and New Zealand consumers.

34. This is why we have decided to carry out this Inquiry – to consider whether the wholesale supply of groceries and any ancillary services should be subject to additional regulation and, if so, what additional regulation should apply. More detail about the potential additional regulation that could apply is provided in Section 5 of this paper.

35. More detail about our progress assessment's findings are described below.

Quantity and frequency of supply

36. If the wholesale regime was working as intended and achieving its purpose, the volume of groceries being supplied via the regime by RGRs should reflect what is likely to be demanded by wholesale customers in a workably competitive market, and should service a diverse range of customers/grocery retailers.[21]

37. We would also expect to see the RGRs' wholesale offers facilitating competition for the main shop, the secondary shop and the top-up shop, by providing wholesale groceries to other retailers servicing these shopping missions. Facilitating competition for the main shop would most likely support entry of a national competitor, which is most likely to promote competition in the grocery industry.

38. However, our progress assessment found that there was overall a low volume of sales through the wholesale regime to a small number of wholesale customers.

Main, secondary and top-up shops

39. Regarding the diversity of the RGRs' wholesale customers, based on our analysis of industry information our progress assessment found:

[21] Sections 24(1)(c) and 24(1)(i) of the Act.

39.1 WWNZ has the largest number of wholesale customers and by far the highest sales through its wholesale offering. Its customer base ranges from national franchises to small convenience retailers. Many of its customers cater to the secondary shop.

39.2 FSNI's wholesale offerings facilitate some supply to other retailers, providing a range of shopping missions. More than half of FSNI's wholesale customers are smaller retailers with a convenience offering alongside specialist online retailers and independent supermarkets.

39.3 FSSI's wholesale offer facilitates a very small amount of supply to other retailers providing top-up and secondary shops (eg, specialty supermarkets).

40. These findings do not reflect the level of diversity or number of customers we would expect to see in a workably competitive wholesale market.

The total volume of sales via the RGRs commercial wholesale offers are low

41. Based on our analysis of industry information, our progress assessment found:

41.1 The conversion rate from enquiries to RGRs about wholesale supply to orders is low (510 enquiries from potential customers and 88 signed wholesale agreements). This demonstrates that many potential customers, including some large ones, have enquired about the RGRs' wholesale offers but have not signed wholesale agreements. In addition, many who have signed wholesale agreements have not ordered any groceries.

41.2 The total number of wholesale customers who are actively ordering from RGRs is small (49 between July 2023 and June 2024). Around 10 retailers account for most of the total wholesale sales, who are typically grocery retailers that operate multiple stores. These retailers seem to be integrating the RGRs' wholesale offers into their business strategies (eg, to source new products), demonstrating the potential benefits the wholesale regime can provide to other retailers.

41.3 Total sales through the RGRs' wholesale offers was approximately $7.4m (between July 2023 and June 2024), which represents only 0.03% of total supermarket and grocery retail sales in New Zealand.[22] Compared to FSNI and WWNZ, the volume of FSSI's wholesale sales was very low.

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22 Total revenues of supermarket and grocery sector were reported as $25b in the 12 months to 30 June 2023. Statistics New Zealand "Retail trade survey: June 2023 quarter" at table 1 available at: https://www.stats.govt.nz/assets/Uploads/Retail-trade-survey/Retail-trade-survey-June-2023-quarter/Download-data/ retail-trade-survey-June-2023-quarter.xlsx.

42. These figures do not reflect the level of activity we would expect to see in a competitive wholesale market. The low number of actively ordering wholesale customers, and low level of overall wholesale sales, means the impact of the RGRs' wholesale offers on competition to date is negligible.

43. We are also aware of some wholesale arrangements with RGRs that occur outside of the wholesale regime. For example, FSSI has been supplying a group of "non-banner members", including some grocery retailers, as wholesale customers of Trents. FSNI also has the wholesale business of Gilmours. While Trents and Gilmours are focused on supplying restaurants and other foodservice customers, they do supply some convenience stores and other grocery retailers.

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

Wholesale pricing

44. In a competitive wholesale market, we expect a sufficient margin between wholesale and retail prices, to allow wholesale customers to compete at the retail level. We also expect the benefits of the RGRs' scale and efficiency of operations to be passed through to wholesale customers, as required by the Act.[23]

45. However, based on our analysis of industry information, our progress assessment found that in many cases the RGRs' wholesale grocery prices did not leave sufficient margin for competition at retail. Given the points that follow, it is also not clear whether (or highly unlikely that) the benefits of the RGRs' scale and efficiency (including in the form of RDPs) were being appropriately passed on.

RGRs' wholesale grocery prices are higher than RGRs' retail prices for many products

46. We have heard from some wholesale customers and access seekers that retail pricing at Pak'nSave could be more competitive than the RGRs' wholesale offers, resulting in retailers supplying their stores 'off the retail shelf'.

47. In our analysis of industry information, we found that as many as 54% of the products offered by RGRs in wholesale could be purchased cheaper at retail. This situation worsens when the additional costs to wholesale customers of retailing the products are taken into account, which could be equivalent to at least 15% of the price of the goods.

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[23] Section 24(1)(a) of the Act.

48. For example, if a margin of 15% between retail and wholesale prices is required to cover downstream costs of retailing, our analysis of industry information indicated that up to 89% of products offered by the RGRs would not allow for the recovery of retail costs (if the retailers priced the goods consistently with the RGR's retail price). We understand that a margin of 15% is likely to be conservative and we intend to explore this further.

49. The RGRs have indicated the cost of the goods from suppliers and the other transactions (eg, the pass through of RDP between the suppliers and RGRs) limit the RGRs' ability to provide competitive wholesale pricing.

RDPs from suppliers enable RGRs to price cheaper in retail than competitors

50. We have assessed the extent to which RDP benefits (including promotional spend) are passed on to wholesale customers through pricing.

51. Based on industry information, we understand there are many types of RDPs in active use between RGRs and suppliers and these represent a significant proportion of supplier invoice list price and/or turnover for each RGR. This means that RDPs significantly reduce the final prices paid by RGRs to suppliers, which subsequently impacts other retailers' ability to compete on price with the RGRs if they do not receive the same level of RDPs from suppliers.

52. The Act requires that the RGRs give their wholesale customers reasonable access to the benefits of scale and efficiency that their operations offer, including RDPs.[24] However, based on our analysis of industry information it is not clear whether, and appears highly unlikely, that these are being appropriately passed on by RGRs, or whether customers have access to RDPs via direct supply.

#	Question
3	Please describe your experiences of wholesale pricing in the grocery industry.
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.
5	Please describe your experience and awareness of the types and value of RDPs. How does this affect you as a wholesale customer (eg, 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.
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?

[24] Section 21(b) of the Act.

53. As part of this Inquiry, we are exploring the impact RDPs have on the grocery supply chain further.

Range of products

54. In a competitive wholesale market, we expect the available wholesale range to reasonably meet the demands of consumers and their shopping missions (main, secondary and top-up).

55. For other retailers to compete with RGRs for consumers' main shop, we anticipate wholesale offerings would include a high proportion of top-selling retail products, eg, milk, bread, eggs and notable branded products.

56. When assessing the range in the RGRs' wholesale offerings, we considered whether wholesale customers can purchase substitute items and the availability of alternative channels of supply, including direct supply arrangements with suppliers.

57. Our analysis of industry information found that the RGRs seem to have limited the range of products they offer via wholesale to products that go through their distribution centres, and to suppliers who have agreed to participate/'opt in'.

Many top-selling retail products are unavailable via RGRs' wholesale offers

58. The current range available in each wholesale offer does not meet our expectations of an offering in a competitive wholesale market. This is because, in our analysis of industry information, the availability of the RGRs' top-selling products in FY2023 was limited.[25]

    58.1 Of the top 100 selling products for FSNI at Pak'nSave, only 14% are available through FSNI's wholesale offer. Of the top 500 selling products, 25.6% are available.

    58.2 Of the top 100 selling products for FSSI at Pak'nSave, only 11% are available through FSSI's wholesale offer. Of the top 500 selling products, 27.8% are available.

    58.3 Of the top 100 selling products for WWNZ at Woolworths, only 5% are available through WWNZ's wholesale offer. Of the top 500 selling products, 14.8% are available.

59. In addition, within this limited range, many of the products that were the highest revenue earners for RGRs were not included in the RGRs' wholesale offerings, eg, milk, bread and bananas.[26]

[25] Note liquor and tobacco departments were excluded from this analysis.
[26] FSSI includes most, but not all bananas from their top 500 highest revenue earning retail products.

60. This means that wholesale customers cannot use the RGRs' wholesale offers to stock a range that would enable them to compete with RGRs on a broad range of products.

Factors that limit the availability of top-selling retail products

61. Based on our analysis of industry information and our assessment of the RGRs' wholesale offers, there appear to be three key factors that limit the availability of top-selling retail products:

61.1 **Supplier opt outs** – as at February 2024 at least 155 suppliers had actively opted to take their products out of at least one RGR's wholesale regime.[27] This has a material impact on product availability, especially among top-selling products we expect to be available via a main shop.

61.2 **Private label exclusions** – RGRs have mostly excluded their own private label products from their wholesale offerings, which is effectively a supplier opt out. FSNI and FSSI do not include their private labels in their offerings, including Pam's – which is advertised as "the most popular grocery brand in the land".[28] WWNZ includes a limited range of private label products (which excludes Woolworths branded products). Based on our engagement with RGRs, wholesale customers and other retailers, we understand there is a high demand for private label products from wholesale customers, primarily because these are generally cheaper products.

61.3 **Fresh product exclusions** – Products in fresh categories, especially produce, make up a significant number of top-selling products for all RGRs. However, FSNI and WWNZ do not currently offer fresh produce at wholesale, while FSSI offers some fresh products including fresh produce, meat and seafood. We recognise there is mixed demand for fresh products through regulated wholesale and fresh products are often available through specialty wholesalers. However, given the inclusion of fresh products in a main shop and the available of fresh products via other wholesalers (eg, Metcash in Australia and Bidfoods in New Zealand)[29] we consider fresh products to be a crucial part of the range we would expect to be available in a competitive wholesale offer.

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27 In addition, eight suppliers had opted out a portion of products or for specific wholesale customers.

28 Pam's "Terms and Conditions" (16 September 2024) available at: https://www.pams.co.nz/terms-and-conditions/The-most-popular-grocery-brand-in-the-land.

29 Bidfood "Fresh fruit and vegetables" available at: https://www.bidfood.co.nz/fresh-fruit-and-vegetables; Metcash "Submission to ACCC Supermarkets Inquiry 2024-25 Issues Paper" (19 April 2024) at p. 13 available at: https://www.accc.gov.au/system/files/Metcash.pdf?ref=0&download=y.

Alternative channels of supply and substitutes

62. Alternative channels of grocery supply include: wholesalers for specific grocery products (including general grocery, fresh produce, fresh meat and foodservice providers); direct supply; and 'off the retail shelf'.

62.1 Wholesalers (such as Bidfood, Gilmours and Trents) tend to sell in bulk formats not suitable for a retail grocer. We're not aware of such wholesalers supplying to retail grocers on a significant scale.

62.2 We understand that consumers value specific recognised brands, and that other retailers struggle to access specific desirable products directly from suppliers.[30]

62.3 Where a retailer ends up purchasing groceries 'off the retail shelf' (as consumers do) in order to try and compete with the RGR (for those consumers), this is not an outcome that we would expect to occur if the RGRs' wholesale offerings were provided in a competitive wholesale market.

63. The Market Study found that the above alternative channels of supply do not enable existing retailers or potential new entrants to compete effectively with RGRs. There appears to be little change to the benefits these alternative channels provide since the Market Study was published in 2022.[31]

64. In addition, through our engagement with RGRs, wholesale customers and other retailers, we have seen limited evidence of RGRs providing appropriate substitutes for unavailable products.

Power imbalances between retailers and suppliers

65. The Market Study also reported that smaller retailers are impacted by a power imbalance with suppliers, and based on our analysis of industry information we have no indication this has changed.[32] However, during our engagement with wholesale customers for the progress assessment, we found that the RGR wholesale offerings appear to mitigate some of these power imbalances with large suppliers, eg, by enabling access to some products (including notable brands) other retailers could not negotiate for directly due to their small scale.

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30 Commerce Commission "Market study into the retail grocery sector – final report" (8 March 2022) at p. 239 available at: https://comcom.govt.nz/data/assets/pdf__file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf.

31 Commerce Commission "Market study into the retail grocery sector – final report" (8 March 2022) at p. 234 available at: https://comcom.govt.nz/__data/assets/pdf__file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf.

32 Commerce Commission "Market study into the retail grocery sector – final report" (8 March 2022) at pp. 395-396 available at: https://comcom.govt.nz/__data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf.

66. In our engagement some wholesale customers also identified benefits from direct supply, including equipment installation and volume-based discounts and access to products that are unavailable through the RGR wholesale offerings. Some wholesale customers also cultivate direct supply with smaller and local suppliers, to provide a point of difference. Some suppliers also use, or require, direct supply as a way of managing potential product safety and quality issues.

#	Question
7	Please describe your experience of accessing popular retail grocery products (or appropriate substitutes), including via RGRs and through direct supply.
8	Please describe your experience of using alternative channels of supply.
9	Please describe your experience of supplying wholesale groceries to retailers.
10	Please describe your experiences/relationships with suppliers and/or retailers as a wholesale customer.

Systems and processes

67. The RGRs must have effective systems and processes in place to enable the supply of groceries to wholesale customers.[33]

68. Within six months of the Act being in place, all RGRs had delivered some groceries to wholesale customers, with the volume of sales and number of wholesale customers differing significantly between the RGRs.

69. However, our progress assessment found that RGRs' systems and processes do not appear to be functioning effectively, and that improvements are required.

The need for better ordering portals and pricing

70. Our engagement with actual and potential wholesale customers highlighted the need for better ordering portals and pricing.

71. Based on our engagement, the WWNZ wholesale card has been seen as a positive step from a convenience perspective (as it has allowed for a store collection option, rather than delivery).[34] However, given the relatively low value of the wholesale discount (5%) it does not appear to present a cost-effective option for most wholesale customers.

[33] Section 44 of the Act.
[34] More information on the wholesale card can be found at: https://www.nzgrocerywholesalers.co.nz/wholesale-card-application

72. From what we have seen to date, improvements are needed before the RGRs' systems and processes are consistent with a competitive wholesale offering. This includes for ordering processes (portals), developments to delivery systems and processes, developments in prepayment options, and access to a greater range of products and more competitive prices.

73. Similarly, the development of systems and processes that enable wholesale customers to have appropriate access to the RDPs that the RGRs currently benefit from would also be an improvement.

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

Terms and conditions

74. The Act requires RGRs to establish and implement standard terms and conditions and principles for wholesale supply. RGRs have implemented standard terms and conditions for wholesale supply.[35]

75. These are accessible on the RGRs' websites and include: minimum order requirements, delivery requirements, non-exclusivity agreements, pricing methodologies and payment terms.[36]

76. Our engagement with wholesale customers has indicated that the minimum order requirements and delivery requirements are reducing the viability of the offerings for smaller retailers.

77. An independent dispute resolution scheme for wholesale customers is currently in the process of being established. We will be working with the scheme's provider to promote the scheme and gain insights on any disputes raised in relation to the terms and conditions for wholesale supply.

35 Sections 38 and 39 of the Act.

36 New Zealand Grocery Wholesalers, "DRAFT Wholesale Agreement" available at: https://nzgrocerywholesalers.co.nz/supply_agreement.pdf '; Foodstuffs North Island, "Wholesale terms of trade" available at: https://www.foodstuffs.co.nz/-/media/Project/Sitecore/Corporate/Corporate-North-Island/100th-birthday/ SONIFSWholesaleLegaltermsofTrade.pdf; Foodstuffs South Island, "Non-Member Wholesale Customer Pack" available at: https://www.foodstuffs-si.co.nz/-/media/ Project/Sitecore/Corporate/Corporate-South-Island/wholesale/Non-Member-Wholesale-Customer-Information-Pack_0124.pdf.

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

Section 4: Proposed focus of the Inquiry

78. Based on the findings of our progress assessment, and as set out in the Inquiry's Terms of Reference, through this Inquiry we want to understand and address the fundamental issues that are limiting the RGRs' retail competitors from acquiring the range of groceries, at competitive prices, that enable them to compete with the RGRs.

79. We want to ensure we identify the most important issues and understand their scale and impact, so that we can recommend the best solutions that address these issues.

80. With this in mind, we are proposing the Inquiry comprises two key focus areas: (1) the RGRs' wholesale offers, and (2) direct supply. We are proposing to investigate a range of specific issues for each of these focus areas, which are set out below.

RGRs' wholesale offers

81. To ensure we understand why RGRs' wholesale offers are not achieving the purpose of the wholesale regime, specific issues we intend to focus on in the Inquiry include:

    81.1 scale and efficiency benefits – whether the RGRs' benefits of scale and efficiency are being passed on;

    81.2 wholesale pricing – whether the pricing model is competitive and enables wholesale products to be priced sufficiently below the RGRs' retail prices (where these retail prices are the effective prices paid by consumers, including promotions and discounts at the retail level), to allow for the recovery of downstream retail costs, thereby allowing wholesale customers to compete against the RGRs at retail;

    81.3 RDPs – why RGRs have extensive access to RDPs but access is limited for wholesale customers, why this allows RGRs to offer lower actual/effective retail prices for some products, and how access to RDPs can be improved for wholesale customers;

    81.4 range – why the available range in RGRs' wholesale offers is lacking top retailing items, including private label, the effect of supplier 'opt outs' and how the available range can be improved;

    81.5 private label – what the implications are for excluding private label products/brands from RGRs' wholesale offers, eg, on wholesale customers' ability to compete against RGRs and/or whether there is an effect on RGRs' incentives to invest in private label products; and

    81.6 systems and processes – what systems and processes need development to improve RGRs' wholesale offers.

#	Question
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.

82. To further investigate these issues and the factors affecting competition, we will need to gather a range of information. This includes information about:

82.1 the incentives for RGRs to create compelling wholesale offers, including about how they have set up their wholesale businesses and any food service offerings (eg, performance targets/incentives), the available range (eg, private label), pricing models and RDP access;

82.2 downstream retail costs for RGRs and how this affects margins, including;

82.2.1 what happens to RDP that is paid on products that are passed on at wholesale;

82.2.2 what incentives are there for suppliers to pass on RDP (including trade/promotional spend) to wholesale customers of RGRs;

82.2.3 what the incentives are (if any) for suppliers to participate in the RGRs' wholesale regimes (including from RGRs and within their own businesses); and

82.2.4 the size and scale of potential wholesale customers for RGRs' offers; and

82.3 whether further intervention under the Act (or other action) would help the wholesale regime to achieve its purpose.

#	Question
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.

Direct supply

83. To ensure we understand why direct supply does not provide other grocery retailers with a range of products at prices that allow them to compete with the RGRs, specific issues we intend to focus on in the Inquiry include:

83.1 range – why access to some products (including RGRs' private label) is limited for other grocery retailers and how this access can be improved;

83.2 pricing – how wholesale pricing models are established by suppliers for other grocery retailers and how we can incentivise suppliers to provide trade spend to wholesale customers; and

83.3 RDPs – how access to RDPs is determined by suppliers for rival grocery retailers to RGRs, and whether this access can be improved.

#	Question
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.

84. To further investigate these issues and the factors affecting competition, we will need to gather a range of information. This includes information about:

84.1 whether suppliers are free to support entry or expansion of other grocery retailers, and whether existing relationships (and terms) with RGRs may impede this (eg, whether it affects the range of products or wholesale prices that are offered to other grocery retailers);

84.2 the size and scale of potential wholesale customers for direct supply; and

84.3 whether further intervention under the Act (or other action) would help.

#	Question
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.

Section 5: Potential solutions to the issues

85. In a competitive grocery wholesale market, we would expect the following:

    85.1 RGRs and suppliers to vigorously compete for wholesale customers;

    85.2 wholesale customers have choices when buying products for retail, for example, they have access to top-selling retail products (including RGRs' private label and notable branded products);

    85.3 wholesale pricing is based on actual costs to provide products to wholesale customers;

    85.4 wholesale pricing reflects a sufficient margin between wholesale (via both RGRs and direct supply channels) and RGR retail prices to enable wholesale customers to compete with RGRs on price;

    85.5 the RGRs' benefits of scale and efficiency (including via RDPs) are appropriately passed on;

    85.6 RDPs (including trade/promotional spend) are provided at the same level and frequency to other retailers as is provided to the RGRs on a yearly basis;

    85.7 over time, downward pressure on retail pricing; and

    85.8 wholesale customers can obtain goods on similar non-price terms to RGRs' retail stores.

86. This means we would not expect to see, via the RGRs' wholesale offerings or direct supply, issues relating to wholesale pricing models, access to RDPs or product exclusions in a competitive grocery wholesale market.

87. If the wholesale regime's current settings are not promoting the purpose of the Act, and we are not achieving the outcomes we expect to see (described in paragraphs 85-86), Part 3 of the Act provides for several escalating additional regulatory tools, subject to legal requirements being met.

88. The escalating tools include establishing: a Wholesale Framework, Wholesale Code, non-discriminatory terms and/or specified access terms. The Act also enables the Commission to establish disclosure standards.[37]

89. These tools have the power to formally require and set the parameters for the operational separation of RGRs at the wholesale level. They enable us to:

[37] Subparts 4, 5 and 6 of Part 3 and subpart 3 of Part 5 of the Act. Any additional regulation would not necessarily be permanent and would be reviewed after three years. Additional regulation would be maintained only where it is necessary to achieve the purpose of the wholesale regime and the Act.

89.1 set requirements for RGRs to supply like wholesale customers on a like basis;

89.2 set requirements for RGRs to supply wholesale customers on the same terms as their own downstream units; and/or

89.3 regulate prices.

90. If we consider that these tools have not been, or will not be, effective in achieving the purpose of Part 3, then further structural remedies may need to be considered. Any policy decisions about further structural remedies would be a matter for the Minister of Commerce and Consumer Affairs and the Government to consider.

91. More detail about how the regulatory tools under Part 3 of the Act could function is set out below.

Wholesale Framework

92. The Commission can make a determination, subject to legal requirements being met (including consultation), requiring a RGR to establish, implement, and maintain a Wholesale Framework for the wholesale supply of a comprehensive range of groceries at competitive prices (**Wholesale Framework**).[38]

How could a Wholesale Framework be used?

93. The Wholesale Framework would be a manual or rule book that sets out how pricing and ranging decisions will be made by the executives responsible for the RGRs' wholesale offering. This would include the basis for all costs that they are including in their wholesale prices, including servicing charges.

94. A Wholesale Framework would create additional transparency for all parties about how a RGR will make decisions about price, range, quantity, frequency, and terms and conditions in connection with the wholesale supply of groceries, and would increase the incentives for RGRs to develop and offer competitive wholesale supply arrangements.

95. Wholesale frameworks have been effective in other markets, and are intended to give the regulator the independence and flexibility to guide the emerging behaviours of market participants towards public interest outcomes, with the least interference with commercial arrangements and least regulatory costs.

[38] Subpart 4 of Part 3 of the Act.

Wholesale Code

96. The Commission can make a determination, subject to legal requirements being met (including consultation), setting out a grocery wholesale industry participation code (**Wholesale Code**) that would provide rules in connection with the wholesale supply of groceries.[39] It could apply to RGRs, suppliers and wholesale customers.

97. The Wholesale Code may contain any provisions that are necessary or desirable to achieve the overall purpose of the wholesale regime under the Act.[40]

How could a Wholesale Code be used?

98. By including provisions that improve or clarify the requirements for the wholesale regime's operations, a Wholesale Code could help to address some of the issues that we are seeing, eg, regarding wholesale customers' access to top-selling retail products (including suppliers who are opting out of the wholesale regime) and wholesale pricing (including the passing on of trade/promotional spend). To address these issues the Code could include specific provisions regarding:

    98.1 the range of products available for wholesale supply; and

    98.2 wholesale pricing models.

99. There may also be opportunities to use the Wholesale Code to clarify concepts in the Act, how some of the existing rules are being applied and the Commission's expectations regarding behaviours. For example, regarding the RGRs treatment of ancillary services, consideration and classification of wholesale requests, payment terms for wholesale customers, and/or the passing on of the benefits of scale and efficiency from RGRs to wholesale customers (including via RDPs).

100. Wholesale codes have been effective in other markets, and are intended to give the regulator the independence and flexibility to guide the emerging behaviours of market participants towards public interest outcomes, with less interference with commercial arrangements and lower regulatory costs than other interventions provided for in Part 3.

101. Subject to legal requirements being met (including consultation), imposing a Wholesale Code swiftly may reduce the need to implement further regulatory intervention. This is being considered in parallel with this Inquiry.

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[39] Subpart 4 of Part 3 of the Act.

[40] Under s 21 of the Act, the purpose of the wholesale regime is to promote competition and efficiency in the grocery industry, by enabling wholesale customers to have reliable and cost effective wholesale supply of groceries, and have reasonable access to the benefits of scale and efficiency of RGRs.

Non-discriminatory terms

102. Subject to legal requirements being met (including consultation), the Minister, following a recommendation from the Commission, could seek an Order in Council from the Governor-General to require RGRs to supply wholesale customers on non-discriminatory terms.[41] Once the Order in Council is made, the Commission would make one or more determinations specifying how that requirement applies.[42]

103. Non-discrimination, in relation to the supply of wholesale groceries, means that the supplier must not treat access seekers differently, or, where the supplier supplies itself with groceries, must not treat itself differently from other access seekers, except to the extent that a particular difference in treatment is objectively justifiable and does not harm, and is unlikely to harm, competition in the grocery market.

104. Non-discriminatory terms envisage terms that are no less favourable to wholesale customers as the terms on which the RGRs supply their own retail businesses.

How could non-discriminatory terms be used?

105. The determination may cover a wide range of matters to ensure the non-discriminatory terms will be met, including:[43]

105.1 operational separation – requiring a RGR to establish and maintain one or more business units with particular functions, and/or providing for how those business units should operate (eg, accounting separation);

105.2 terms and conditions – requiring a RGR to supply groceries on terms that are transparent and equivalent to the terms it supplies itself; and

105.3 systems, procedures and processes – requiring the RGR to have in place systems, procedures and processes to ensure compliance with the Order in Council, compliance monitoring and reporting processes, development of performance measures, and/or audit/checks for compliance.

106. Non-discriminatory terms would ensure that a RGR does not treat wholesale customers differently from how it treats itself or its associated persons or any other wholesale customer, except in limited circumstances.

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[41] Subpart 5 of Part 3 of the Act.

[42] Subpart 6 of Part 3 of the Act.

[43] Section 88(3) of the Act.

Specified access terms

107. Subject to legal requirements being met (including consultation), the Minister, following a recommendation from the Commission, could seek an Order in Council from the Governor-General to require RGRs to supply wholesale customers on specified access terms.[44] Once the Order in Council is made, the Commission would make one or more determinations specifying how that requirement applies.[45]

108. Specified access terms would ensure that a RGR supplies groceries at wholesale on regulated terms and conditions (whether relating to price, range, quantity, frequency, or any other matter).

How could specified access terms be used?

109. The Commission must specify sufficient terms to ensure an RGR makes a wholesale supply of groceries available within a specified timeframe and the terms and conditions of the supply without the need for the wholesale customer to enter into an agreement.

110. The determination may deal with a range of matters, including:

   110.1 maximum prices, wholesale margins and/or revenues that RGRs may charge, recover and/or derive;

   110.2 principles for determining prices, wholesale margins or revenues;

   110.3 quality standards (eg, delivery timeframes);

   110.4 terms and conditions for wholesale supply (eg, related to payment, credit, minimum order quantities and demand forecasting);

   110.5 systems, procedures and processes related to compliance and compliance monitoring; and

   110.6 any other duties to ensure the parties reflect wholesale offerings provided in a competitive wholesale market.[46]

111. The matters in the determination could also vary depending on factors such as wholesale customer type, different products lines, and/or geographic location.

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[44] Subpart 5 of Part 3 of the Act.

[45] Subpart 6 of Part 3 of the Act.

[46] Section 95 of the Act.

Disclosure standards

112. Subject to legal requirements being met (including consultation with any persons who will be substantially affected), under the Act the Commission may issue disclosure standards.[47]

113. Issue of additional disclosure standards could incentivise more competitive wholesale offers by increasing transparency about matters related to wholesale supply.

How could disclosure standards be used?

114. The disclosure standards may apply to any participants in the grocery industry and can cover a range of matters, including related to:

    114.1 agreements entered into or arrived at;

    114.2 prices, terms and conditions for the wholesale supply of groceries;

    114.3 financial statements;

    114.4 performance measures;

    114.5 costs, revenues and margins;

    114.6 quality;

    114.7 private label products;

    114.8 store details;

    114.9 retail sales; and

    114.10 details about complaints.[48]

Other actions

115. As part of the Inquiry we will also be considering whether any other regulation or action may be necessary or desirable to promote the purpose of the Act.[49]

116. This will include assessing whether new or amended legislation/regulation would help, as well as whether there are non-regulatory actions that would help. The outcome of this will likely be a recommendation to the Minister for their consideration.

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[47] Subpart 3 of Part 5 of the Act.

[48] Section 194 of the Act.

[49] Section 56(1)(c) of the Act.

#	Question
20	Please describe your views on the additional regulatory options.
21	Are there other actions not described in this paper that you think would help? If yes, please identify and explain.

Section 6: Next steps

117. The Commission is now focusing on developing the draft report, which will be published for consultation in the first quarter of 2025. This report will include draft recommendations about any additional regulation/s that we consider may be required to achieve the purpose of the Act.

118. In parallel, we are also considering whether it is appropriate to establish a Wholesale Code ahead of the Inquiry's completion.

119. Your feedback will help us to refine the focus areas of the draft report, and we encourage you to participate. To ensure your views can be taken into account, please provide these to us **by 5pm, Friday 25 October 2024**.

120. You are welcome to provide your views to us by uploading your submission via our website or via email at: grocery.regulation@comcom.govt.nz with the subject line "Wholesale Supply Inquiry: Issues Paper Submission".

121. To ensure we consider a wide range of views, over the next several months we will also be undertaking targeted engagement with grocery industry participants.

Attachment A: Wholesale Supply Inquiry Terms of Reference

Purpose of Wholesale Supply Inquiry

1. We are undertaking an Inquiry under section 55 of the Grocery Industry Competition Act 2023 (the **Act**).[50] 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.[51]

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.[52] The purpose of the wholesale regime is to promote competition by enabling retail competitors of the RGRs to have:[53]

   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

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

[51] Section 56 of the Act.

[52] 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.

[53] 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,[54] 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).

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54 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.[55] 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.

[55] 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.[56]

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".

[56] 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.

Attachment B: Summary of questions set out in preliminary issues paper

The following questions relate to Section 3 of this paper:

#	Question
1	Who do you think the wholesale regime should service? For example, what types of customers and what market share?
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.
3	Please describe your experiences of wholesale pricing in the grocery industry.
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.
5	Please describe your experience and awareness of the types and value of RDPs. How does this affect you as a wholesale customer (eg, 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.
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?
7	Please describe your experience of accessing popular retail grocery products (or appropriate substitutes), including via RGRs and through direct supply.
8	Please describe your experience of using alternative channels of supply.
9	Please describe your experience of supplying wholesale groceries to retailers.
10	Please describe your experiences/relationships with suppliers and/or retailers as a wholesale customer.
11	Please describe your experience regarding the effectiveness of systems and processes for wholesale grocery supply.
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.
13	Please describe your experience of terms and conditions for wholesale grocery supply.
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.
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.

These questions relate to Section 4 of this paper:

#	Question
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.
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.
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.
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 following questions relate to Section 5 of this paper:

#	Question
20	Please describe your views on the additional regulatory options.
21	Are there other actions not described in this paper that you think would help? If yes, please identify and explain.

Attachment C: How you can have your say

1. We are seeking your views on the content of this paper and the questions we have raised in it. We also welcome your views on any other matters you consider important within the context of the Terms of Reference for this Inquiry. Your views will help us to understand relevant factors affecting wholesale supply of groceries and help us decide where to focus our effort and analysis as we prepare the draft report for the Inquiry.

2. This document sets out how you can have your say on the paper and includes the full question list in one place to assist you when providing feedback.

3. You do not need to respond to all the contents of the paper, or all the questions raised – you can instead respond to just those that interest you, or relate to your business operations or experience.

4. Where possible, please reference the section heading and question number to which each aspect of your submission responds or relates.

5. You are welcome to provide views beyond the questions and topics we have highlighted for feedback. Where you do so it would be helpful if you could set these out under a heading of 'other issues'.

6. Please explain the reasoning behind your views, and if you include supporting materials, please reference these in your answer.

7. We encourage you to provide comments that are supported by evidence. Less weight may be given to a statement or submission that cannot be supported by evidence.

8. Please provide any feedback via our website or send your submission via email to: grocery.regulation@comcom.govt.nz with the subject line "Wholesale Supply Inquiry: Issues Paper Submission".

9. To ensure your views can be taken into account, please provide your feedback to us by 5pm, Friday 25 October 2024.

Format for written submissions

10. You can provide submissions via text in an email, Microsoft Word document, and/or a 'locked' format (eg, PDF).

Confidential information – disclosure of your submission

11. As part of running a transparent process, we will publish all submissions that we receive at different points in the process to the website landing page for this study.

12. We do, however, understand that it is important to parties that confidential, commercially sensitive or personal information (confidential information) is not disclosed because this could harm the provider of the information or a third party.

13. We recognise the need to ensure that you can have confidence in our use and retention of information, and we are committed to respecting any privacy, confidentiality, or commercial sensitivity attached to your information where possible.

14. Anyone who has information relevant to the study can ask the Commission to keep their identity and/or the information provided confidential. If confidentiality is a concern, it should be raised when you first contact the Commission so we can discuss your concerns and any available protections as soon as possible.

15. If your submission includes confidential information, we request that you provide us with a confidential and a public version of your submission. We intend to publish the public versions of submissions on our website. It is the responsibility of submitters to ensure that no confidential information is included in the public versions of submissions.

16. Where confidential information is included in submissions:

    16.1 the information should be clearly marked with brackets and highlighted in yellow [like this, for example]; and

    16.2 both confidential and public versions of submissions should be provided by the due date.

17. If your submission contains information which is considered confidential, a schedule must be provided which identifies each piece of information over which confidentiality is claimed and the reason why the information is confidential (preferably with reference to the Official Information Act 1982 (OIA)).

18. We will not disclose any confidential or commercially sensitive information in a media statement, public report, or in response to a request, unless there is a countervailing public interest in doing so in a particular case. Such cases are likely to be rare and will be discussed with you in advance of any publication.

19. We also recognise there are situations where someone who has knowledge or specific information about the conduct of a RGR or other grocery industry participant (eg, supplier or another retailer) might be reluctant to report it for fear of negative consequences or reprisals (such as being delisted from a retail store). The Commerce Commission's Anonymous Reporting Tool provides a secure channel to report information without disclosing your personal information.

20. There is more information about the Commission's Anonymous Reporting Tool and how to submit an anonymous report on our website here: https://report.whistleb.com/en/comcom-grocery.