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Commerce Commission
P O Box 2351
Wellington 6140

By email: marketstudies@comcom.govt.nz

**SUBMISSION on "Market study into the retail grocery sector:
Preliminary issues paper"**

Introduction

Thank you for the opportunity to make a submission on the "Market study into the retail grocery sector: Preliminary issues paper". This submission is from Consumer NZ, New Zealand's leading consumer organisation. It has an acknowledged and respected reputation for independence and fairness as a provider of impartial and comprehensive consumer information and advice.

Contact: Aneise Gawn
Consumer NZ
Private Bag 6996
Wellington 6141
Phone: 04 384 7963
Email: aneise@consumer.org.nz

General comments

Consumer NZ welcomes the commission's market study into the retail grocery sector. We have major concerns about the high level of concentration in the sector and risks this has for consumers. We're therefore pleased the commission is investigating competition issues in this market.

Given the time available for making submissions, we've focused comments on key questions in the paper. We will be undertaking additional research on several issues raised in the paper and will be happy to share our results with the commission in due course.

Response to questions

Question 1: Do you agree with our preliminary view on the grocery products to be considered in the study, as described in paragraph 29 and Table 1?

1. We agree the grocery products identified are appropriate to be considered in the study. We suggest the commission may also need to consider alcohol as an additional product, given the growth of sales in this category and the frequent promotion of "specials" on alcohol.

Question 4: Are there any product categories we should consider in greater detail than others?

Perishable agricultural goods

2. We strongly recommend the commission's market study considers in greater detail the fruit and vegetables product category, as well as other perishable agricultural goods (e.g., eggs, dairy products).
3. Recent research by the Australian Competition and Consumer Commission (ACCC) shows supply chains for these goods have features that make them more open to abuse by dominant retailers.¹ As ACCC deputy chair Mike Keogh notes:

In most perishable agricultural goods markets, there are many farmers, but few processors or wholesalers, and even fewer major retailers. This makes farmers particularly vulnerable to issues stemming from limited competition at the wholesale or retail level. In addition, the more perishable a product is, the weaker the farmer's bargaining power often is.²

4. These features are present in New Zealand's market and their effects are likely to be exacerbated by the high degree of concentration in our supermarket sector. Not only are there adverse effects for suppliers, but there are also negative outcomes for consumers, who may face higher prices and reduced product choice.
5. In a product category such as fruit and vegetables, there are also wider societal issues to be considered if artificially high prices are constraining consumers' ability to buy fresh produce, which is essential to healthy diets.
6. In the past few years, food prices have been rising faster than the rate of general inflation. Statistics NZ's Food Price Index shows fruit and vegetable prices increased 8.9 percent last year, while general inflation sat at 1.4 percent.³
7. Our latest consumer issues survey found food and grocery costs are a key concern (Figure 1).
8. Sixty-three percent of consumers identified food and grocery costs as their main worry in relation to everyday household expenses, ahead of fuel (55 percent) and power costs (53 percent).⁴ Fuel costs have previously been the number one concern.

¹ Australian Competition and Consumer Commission. November 2020. *Perishable agricultural goods inquiry*. Canberra. Retrieved 28/1/21 from <https://www.accc.gov.au/system/files/Perishable%20Agricultural%20Goods%20Inquiry%20-%20Final%20Report%20-%20December%202020.pdf>

² Australian Competition and Consumer Commission. Media release, 10/10/20. "New fair trading law needed to enhance Australia's perishable agricultural markets." Retrieved 28/1/21 from <https://www.accc.gov.au/media-release/new-fair-trading-law-needed-to-enhance-australias-perishable-agricultural-markets>

³ Statistics NZ. Food price index: December 2020. Retrieved 28/1/21 from <https://www.stats.govt.nz/information-releases/food-price-index-december-2020>

⁴ Consumer NZ. 19 January 2021. "Grocery costs top shoppers' concerns." Retrieved 28/1/21 from <https://www.consumer.org.nz/articles/grocery-costs-top-shoppers-concerns>

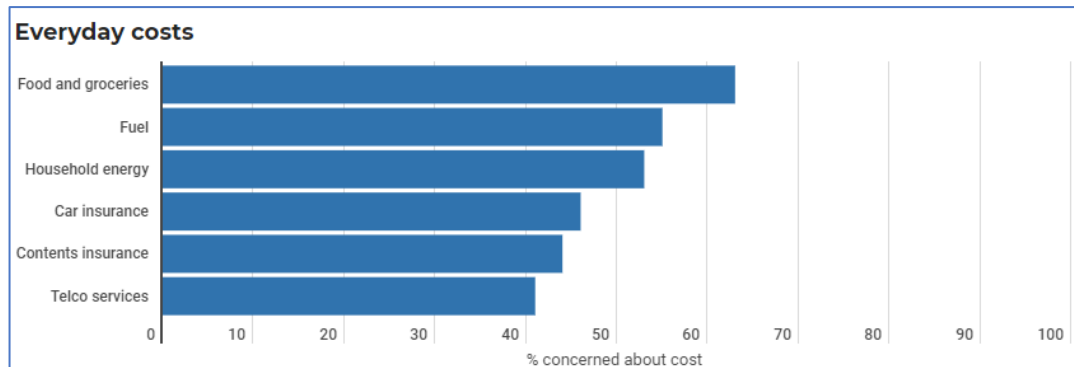


Figure 1: Consumer concerns about everyday household costs. Results based on a nationally representative survey of 1002 New Zealanders, aged 18 and over.

Private label/own brand products

9. We also recommend the commission give particular attention to product categories where supermarkets' own brands are growing. Based on our in-store observations, the only choice for a consumer purchasing certain product types may be to buy the store's own brand.
10. This applies to both perishable goods (e.g., one store brand of a vegetable) and other grocery types (e.g., one store brand of a baking paper). We have significant concerns about the increasing role supermarkets are playing in the supply chain through the rise of private labels and the potential impacts of this trend for both suppliers and consumers.
10. Supermarkets' own brand products may benefit consumers in the short term if they offer lower prices. However, consumer harm is likely to result if there is less choice because other brands have been squeezed out. In the long term, there's also a risk prices will rise if supply is reduced due to suppliers exiting the market. The potential for adverse effects is heightened in our market, given its concentration.
11. Private labels used to be the "no-frills" option – low-priced plain-packaged versions of basic foods. However, that has changed as supermarkets have looked to improve their margins. Private labels can now resemble mainstream brands and occupy the same shelf.
12. This trend isn't unique to New Zealand. The term ROB+1 – short for retailer's own brand plus one other brand – has been used internationally to describe private label growth. Where categories are reduced to ROB+1, the potential increases for the surviving independent supplier to accept oppressive terms of trade to maintain its access to the supermarket.
13. Both major New Zealand supermarket chains have programmes to increase their own brands. For example, Foodstuffs North Island 2019 annual report states its private labels have seen "record" growth, up eight percent for the year.⁵

⁵ Foodstuffs North Island. 2019. *Concise annual report for Foodstuffs North Island Limited: Year ended 31 March 2019*, p48. Retrieved 28/1/21 from <https://www.foodstuffs.co.nz/media/168201/fsni-annual-report-2019.pdf>

14. Similarly, Woolworths Group 2019 annual report highlights the 640 new products launched for the year with “double-digit growth” across its “Macro” and “Free from” private-labels.⁶

Question 5: If we do focus on certain product categories, are the factors set out in paragraph 34 appropriate to guide our focus?

15. In addition to the factors in paragraph 34, we recommend the commission consider the importance of the product in meeting consumers’ basic dietary requirements. This is particularly relevant to fruit and vegetables.

Question 12: Are there any other key steps or participants in the supply chain which should be included?

16. We note Figure 3 on page 15 does not reference the supply chain relating to supermarkets’ own brand products. Given the risks to supply-side diversity posed by the increasing role of private labels, we consider this is an area deserving specific attention in the commission’s inquiry.

Question 13: In your view, what impact (if any) have online shopping and meal kits had on the New Zealand grocery sector? What impact do you think these trends will have in the future?

17. Online shopping and meal kit services offer convenience. However, this convenience generally comes at a cost, either in delivery fees or premium prices (in respect of meal kit services). These options are therefore likely to be more accessible to higher income households than to others.

18. Meal kit services may have supply agreements with selected supermarkets, providing the stores with an additional revenue stream. From our knowledge of these services, we don’t see them as providing a major source of competition to the two main supermarket chains.

19. There is a range of small food retailers that provide online shopping and delivery. However, our 2020 survey of 825 consumers who use grocery delivery services found most use the supermarkets’ services. Other retailers used by shoppers included specialist stores (e.g., bakeries, butchers). These retailers may offer some competition to supermarkets for certain goods but this is likely to be at the margins.⁷

Question 15: Do you agree that the study should primarily focus on traditional retail grocery stores?

20. We agree the primary focus of the study should be on “traditional retail grocery stores”.

⁶ Woolworths Group. 2019. *Better together: 2019 Annual report*. Retrieved 1/2/21 from https://www.woolworthsgroup.com.au/icms_docs/195582_annual-report-2019.pdf

⁷ Consumer NZ. 10 July 2020. “Grocery delivery services compared.” Retrieved 1/2/21 from <https://www.consumer.org.nz/articles/food-delivery-services>

Question 16: Are there any changes to the New Zealand grocery sector due to Covid-19 that we should consider in our study? If so, what are these changes and what effect, if any, are they likely to have in the future?

21. As the issues paper notes, supermarkets were one of the few retailers able to open during the Covid-19 lockdown. Since the end of the lockdown, there have been anecdotal reports that brand availability has reduced in some categories in favour of the supermarkets' own private label offerings.
22. While overseas supply chain interruptions may have affected brand availability in some cases, we recommend the commission investigate whether supermarkets have exploited this situation to increase shelf space for their own brands. As private labels increase, the ability of other brands to get into stores will be reduced.
23. We also note Countdown suspended discounting activity during the Covid-19 lockdown. It's unclear why this was necessary, given the normal frequency and duration of discounts across many categories. We recommend the commission examine the overall impact on the average price for a basket of goods for the period to consider whether supermarket revenues exceeded what would be considered normal for similar time periods.

Question 27: To what extent do you think there is accommodating behaviour between retailers in the New Zealand grocery sector? Please explain.

24. In our view, accommodating behaviour is a major risk in our market, particularly in regard to pricing.
25. We've previously compared prices for Woolworths' private label brands sold at Countdown here and Woolworths in Australia. The products compared were identical in formulation and manufacture. However, even with identical products, we found the prices we pay can be significantly higher.
26. The comparison included 20 "Homebrand" and "Woolworths Select" products and found New Zealand consumers paid 30 percent more for the same basket of items. Half the items we compared cost at least a third more here. For some products, the price difference was higher (Figure 2).
27. While we found Countdown's prices could differ significantly from its Australian parent, the products in our basket were often a close match with Foodstuffs' private label brands. This type of price convergence raises the question of whether stores are "pricing to match".
28. Products with close prices included Homebrand Rolled Oats. This product sold for \$1.02 in Australia. At Countdown here, it was priced at \$2, a near match for Pams Rolled Oats, which retailed for \$1.99 at Pak'nSave. We found a similar pattern for other goods.
29. The risk of stores pricing to match was considered by the commission itself when it originally declined clearance for the merger of Woolworths and supermarkets then in the Progressive Enterprises stable (Foodtown,

Countdown and 3 Guys).

30. At the time, the commission considered the merger could result in a substantial lessening of competition and facilitate “leader-follower” pricing behaviour, where stores focus on maintaining price relativity rather than pricing on the basis of costs.

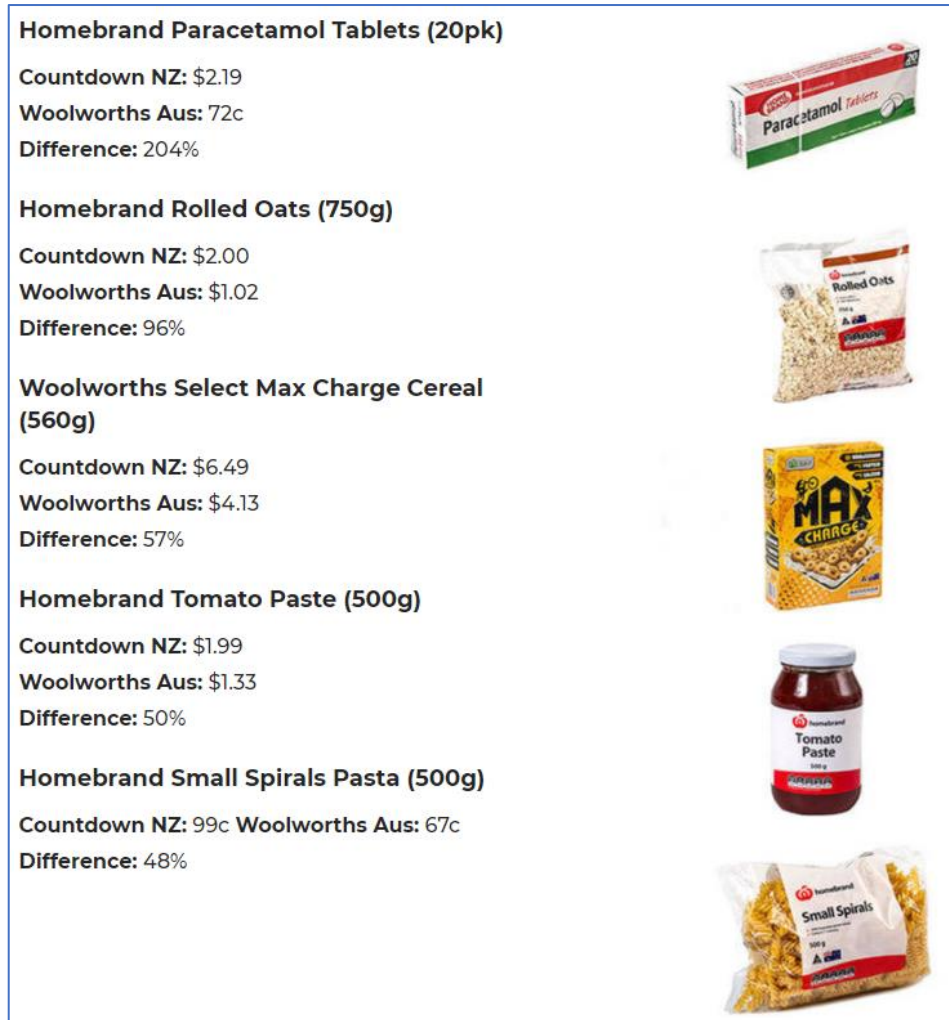


Figure 2: Comparison of Woolworths’ private label brands in Australia and New Zealand. Data published June 2015.

31. During our supermarket price surveys, we have also observed stores appear to have “turns” offering specials on the same products. For example, if one supermarket has a special on a particular brand of cheese, the same brand may be on special the following week at the rival chain.
32. This behaviour may stem from a supermarket requiring suppliers to offer goods on no less favourable terms than those offered to a rival store. This practice has been observed in other countries where concentrated supermarket sectors have been the subject of investigations.
33. Supermarkets are also highly likely to monitor each others’ behaviour through other means. There are various ways this can be done, ranging from sending shoppers to monitor prices in-store to using more sophisticated online tracking to collect prices listed on supermarkets’

websites.

Question 30: What factors affect entry and expansion in the New Zealand retail grocery sector? How significant are these factors in affecting the entry and expansion from retailers?

34. New Zealand has a small, isolated economy with a high degree of market concentration in the grocery sector. These factors provide significant barriers for new entrants. The existing duopoly of Foodstuffs and Woolworths has been in place for 20 years with no credible challenger emerging.
35. The Warehouse's previous attempt to establish a rival offering through its "Warehouse Extra" brand shows the difficulties facing potential entrants, even where those entrants have a well-established national presence in providing other consumer goods.
36. In addition to structural factors, such as economies of scale needed to establish a supermarket chain serving New Zealand's geographically dispersed population, the practices that incumbent retailers may use to discourage new entrants are likely to create other significant barriers.
37. These practices include land-banking, buying up land to prevent potential rivals establishing a presence. Terms and conditions imposed in the contracts supermarkets have with their suppliers may also create *de facto* barriers by effectively preventing suppliers offering more favourable terms to others.

Question 39: What are your views on the relative bargaining power of retailers and suppliers in the New Zealand grocery sector?

38. There is a significant imbalance in bargaining power between supermarkets and suppliers, particularly small suppliers.
39. Many food and grocery suppliers in the New Zealand market depend on being able to get products onto supermarket shelves. With only two supermarket chains, suppliers' ability to negotiate is significantly constrained.
40. Supermarkets have the power to set the terms of supply. If a supplier considers those terms unfair, there's often no practical option to challenge them without risking the agreement being terminated and product being removed from the store.
41. In the course of our research, we've received reports from suppliers alleging unfair behaviour by supermarkets. However, suppliers are typically unwilling to raise these matters in public for fear of losing access to the stores.
42. These issues have been found in other markets where supermarkets' behaviour has been investigated. In both Australia and the UK, codes of conduct have been introduced to provide some protection for suppliers. No such protection exists for suppliers in New Zealand's market.
43. Proposed changes to the Fair Trading Act extending the ban on unfair contract terms to small business contracts (worth less than \$250,000

annually) will provide some safeguards. However, they're unlikely to be sufficient on their own and suppliers may be reluctant to complain to the Commerce Commission about unfair terms for fear of retaliation by supermarkets.

44. As the proposal stands, a court declaration that a term is unfair can only be sought by the Commerce Commission. Neither individual businesses nor consumers can take action against companies using unfair terms, significantly limiting the effectiveness of the provisions.

Question 42: How relevant do you consider consumers' access to information is to our study?

45. We consider this to be of major relevance to the commission's study. Consumers' ability to make informed purchasing decisions is essential to a well-functioning market. We believe supermarkets' pricing and promotional strategies are a major barrier to informed consumer choice. We discuss these strategies in more detail below.

Question 43: How do consumers compare offerings across grocery retailers? Where do consumers access the information they need to make these comparisons (for example, advertising by grocery retailers, price comparison websites)?

46. Informed comparisons of supermarket offerings rely on consumers' ability to navigate the market and evaluate price representations.
47. For some consumers, there may be effectively no choice of store if there is only one grocery outlet in their vicinity. This includes consumers living in some rural areas and those in urban areas with limited transport or where the distance between stores makes travel too time consuming.
48. While supermarkets' advertising and websites provide some information, comparisons can be hindered by supermarkets' use of confusing pricing and promotion strategies (see responses to questions 45 to 46).
49. Inconsistent use of unit pricing also hinders comparisons. For example, in our 2020 supermarket price survey we found New World and Pak'nSave websites don't provide unit prices for products on "special".
50. Our supermarket price surveys provide one independent source of information for consumers. However, these surveys are costly to run and we don't have sufficient resources to monitor prices on a weekly or monthly basis.

Question 44: How easy is it for consumers to compare product offerings once in store? What factors influence this?

51. Product comparisons in store are complicated by several factors. Inconsistent unit pricing is one of these. While both supermarket chains have voluntarily introduced unit pricing, our surveys have found its display is variable.
52. Unit pricing isn't shown for all products, particularly for "specials". Where the unit price is displayed, it's often shown in very small font, much

smaller than the retail price. Unless shoppers make an effort to look for the information, they may not know it's there.

53. We've also found unit prices can be displayed in different measures. While they're usually shown per 100g or per 100ml, this isn't always the case. Some products (e.g., cheese) have a unit price per kg. Fruit and vegetables can also be shown with unit prices based on different measures.
54. For some products, a measure may not be given at all. For example, we found a 25g packet of Continental Onion Gravy with a retail price of \$0.83 and a unit price of \$0.33. We calculated \$0.33 was the price per 10g. However, this measure wasn't shown on the shelf label.
55. Confusing multibuy offers are another barrier to product comparisons. We recently reported on New World's multibuy special for Griffins biscuits. The offer included two packs of gingernuts for \$5. However, this was more expensive than buying a double pack on special for \$3.99 (Figure 3).

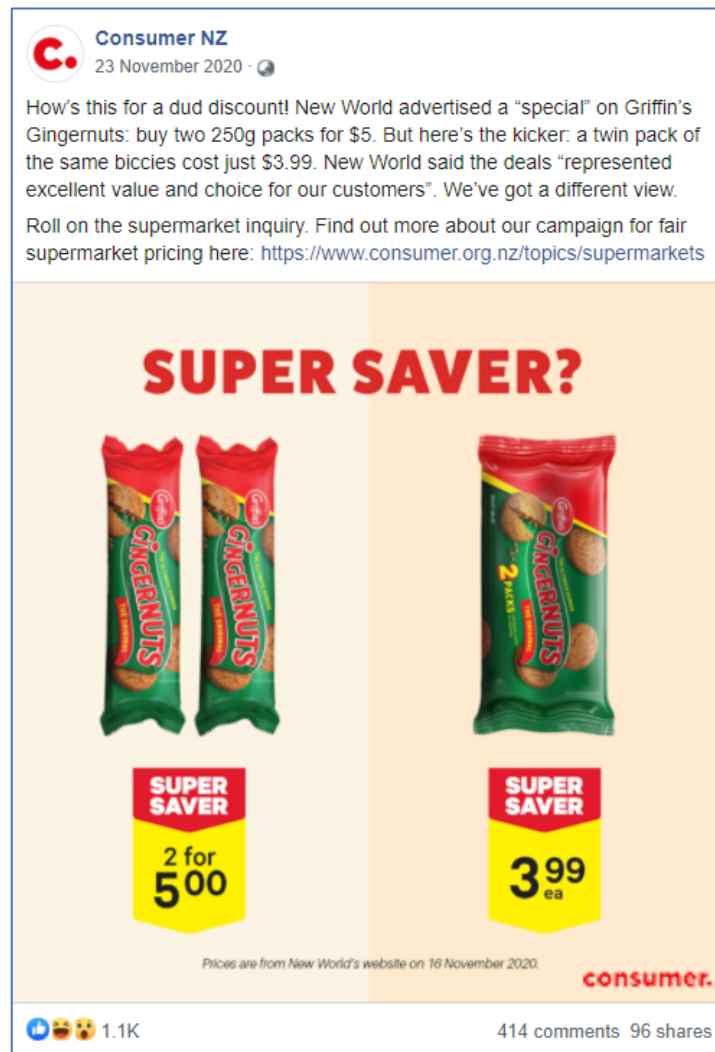


Figure 3: Consumer NZ Facebook post of New World "super-saver" special for biscuits.

56. Frequent "specials" are a third major factor, hindering shoppers' ability to make informed choices. Our surveys have found products can be on

special so often, consumers risk being misled about the savings they're getting (see questions 45 to 46).

Question 45: What strategies do New Zealand grocery retailers use when setting prices for their products, including promotional prices? What are the benefits and potential harms to consumers of these strategies?

57. As the commission notes, promotional pricing is a significant feature of our market. We've regularly observed this in our supermarket price surveys. In our 2020 survey, many of the 22 items in our basket were routinely on special during the 12 weeks we monitored prices.⁸
58. At Pak'nSave, the majority of the 22 products were on special six or more times. At New World, half the items were on special on six or more occasions. Countdown's specials varied: anywhere from two to 10 items in our basket were on special each week.⁹
59. Where specials are genuine, they offer consumers savings. However, the frequency with which products are advertised at a discounted price risks misleading consumers about the savings they're getting. Where a product is routinely on special, the special price is the actual selling price.
60. Supermarkets' promotional pricing strategies appear designed to cause confusion, making it difficult for consumers to assess the value of a "special" offer. These tactics result in consumers spending more to buy "discounted" products that they would not otherwise have purchased.
61. Confusion is also created by the terminology stores use in their promotions. Each supermarket has developed its own terminology:
- Countdown has "Specials", "Great Price" (a long-term everyday price) and deals available only for Onecard members.
 - New World has "Saver", "Super-Saver" and "Club Deal" discounts as well as "Everyday Value" items.
 - Pak'nSave has "Extra-low" and "Everyday-low" prices.
- In addition, all stores offer multibuys.
62. We've found products can switch from being called a "Saver" one week to a "Club Deal" the next, even though the price hasn't changed.
63. These promotional strategies clearly benefit the supermarkets by creating the impression the customer is getting a discount and encouraging additional spending. However, the discount is illusionary when products are frequently on special.

Question 46: Why is the percentage of grocery products sold on promotion so high in New Zealand relative to other countries? Does this benefit or harm New Zealand consumers?

64. Despite the high degree of market concentration, the supermarket sector has not been subject to regular monitoring by regulators. This has left

⁸ Consumer NZ. 5 August 2020. "Supermarket price survey." Retrieved 30/1/21 from <https://www.consumer.org.nz/articles/supermarket-price-survey>

⁹ Ibid.

stores' largely free to adopt promotional strategies with little risk they will come under scrutiny.

65. Even where a store is found to be using strategies that mislead consumers and breach the Fair Trading Act, penalties are low. The maximum fine under the act, per offence, is \$600,000. In our view, this is not a major disincentive to offending.
66. In the commission's recent prosecution of Pak'nSave Mangere, the court imposed a fine of only \$78,000 for the store's misleading pricing practices. It's possible the supermarket earned more than this in sales from the items it misleadingly promoted.
67. Retailers know that shoppers are more likely to buy if it looks like they're getting a discount. As past research by the UK Office of Fair Trading found, "was/now" pricing is effective at encouraging consumers to make a purchase they may not otherwise have made.
68. Special offers also increase the perceived value of a product and make consumers less likely to shop around.
69. The consumer detriment from these tactics can be significant. For individual households, there are direct financial costs from the extra spent on "discounted" goods that might not have otherwise been purchased, as well as the costs of buying goods at an inflated "usual" price when products are briefly taken off promotion.
70. These tactics also have an adverse effect on the operation of the market. By making it more difficult for consumers to make informed purchasing decisions, they reduce competitive pressures on the market and entrench the position of the dominant participants.

Question 47: How are pricing promotions funded? Do these typically result in lower margins to retailers or suppliers?

71. Based on our knowledge of the market, pricing promotions are typically funded by suppliers. Contracts between retailers and suppliers may require the supplier to offer regular discounts on its products. This may be a requirement to get access to the store.

Question 48: How important are loyalty programmes in New Zealand's retail grocery sector? What impact, if any, are grocery retailers' loyalty programmes having on the sector?

72. Supermarket loyalty programmes are heavily promoted. While they're advertised to consumers as a way to get extra discounts, their main purpose is to provide supermarkets with data on their customers' shopping behaviour.
73. The programmes have gained wide penetration. Our January 2020 review of loyalty programmes found Countdown's Onecard programme had two million members while New World's Clubcard had 1.6 million.¹⁰ We expect the latter figure has grown as New World now requires customers to have

¹⁰ Consumer NZ. 28 January 2020. "How much are loyalty schemes earning from your data?" Retrieved 31/1/21 from <https://www.consumer.org.nz/articles/how-much-are-loyalty-schemes-earning-from-your-data>

a card to get "Club Deals". Previously, checkout staff passed on the deal price regardless of whether the customer had a card.¹¹

74. We have major concerns about these programmes, both in terms of their impacts on the market and the privacy issues they raise.
75. In our view, the programmes are resulting in price discrimination. Both Countdown and New World require customers to sign up to their loyalty programmes (Onecard and Clubcard respectively) to get access to certain prices. Customers without a card are charged a higher price.
76. There are valid reasons why consumers may not want to belong to the programmes, not least because they don't want to share their personal information with the stores. Consumers must agree to their data being collected, and also shared with third parties, when they sign up.
77. For example, New World reserves the right to collect a range of information about Clubcard customers, including their age, where they live, their mobile location data and purchasing preferences. This data can be shared with undisclosed third parties.
78. The Australian Competition and Consumer Commission's 2019 report noted the "power imbalance" between consumers and loyalty scheme operators. This imbalance can also be observed in our market: while schemes require consumers to give broad consent to the use of personal information, they provide hard-to-understand disclosures about how they use and share this data.
79. Any actual benefits to consumers of loyalty schemes are likely to be marginal at best. As with all loyalty programmes, the supermarkets' schemes cost money to administer. These costs will ultimately be passed on to customers, whether or not they belong to the loyalty programme.
80. The frequency with which Onecard and Clubcard discounts are advertised also brings into question whether these discounts offer genuine savings.

Question 49: To what extent do consumers base their purchasing decisions on the benefits associated with loyalty programmes? Do consumers typically participate in more than one loyalty programme?

81. The claimed benefits of loyalty programmes are likely to be influential in many consumers' purchasing decisions. For example, shoppers may spend more to get advertised Onecard or Clubcard discounts, or increase their spending to get other rewards associated with the programmes.
82. However, it's often difficult for consumers to make well-informed decisions about whether participation in the schemes is beneficial to them. Scheme costs are not transparent. As noted above, frequent discounts also risk misleading consumers about actual savings.

¹¹ Consumer NZ. 28 August 2020. "No card, no discount: New World limits 'Club Deals' to card-carrying customers." Retrieved 31/1/21 from <https://www.consumer.org.nz/articles/no-card-no-discount-new-world-limits-club-deals-to-card-carrying-customers>

83. We consider loyalty programmes are likely to be having a distortionary effect on the market, with the costs of administering the schemes leading to higher prices for all consumers.

Question 50: Are there any specific features of loyalty programmes offered by grocery retailers we should consider in our study?

84. We recommend the commission also look specifically at in-store promotion of New World's Clubcard deals. In September 2020, we made a complaint to the commission raising our concerns that New World's promotion of "Club Deals" in-store is potentially misleading.

85. Price labels we've observed for "Club Deals" prominently display one price: the Clubcard price. The "regular" price is shown on the label but in much smaller font.

86. "Club Deal" price labels are also very similar to the store's "Saver" and "Super-saver" labels, with the same red background. Without looking closely at the shelf label, the difference in wording between them can easily be missed.

87. As a result, we continue to receive complaints from shoppers who have reasonably assumed the prominent price is what they'll be charged at the checkout. However, this is not the case when the shopper doesn't have a Clubcard.

ENDS