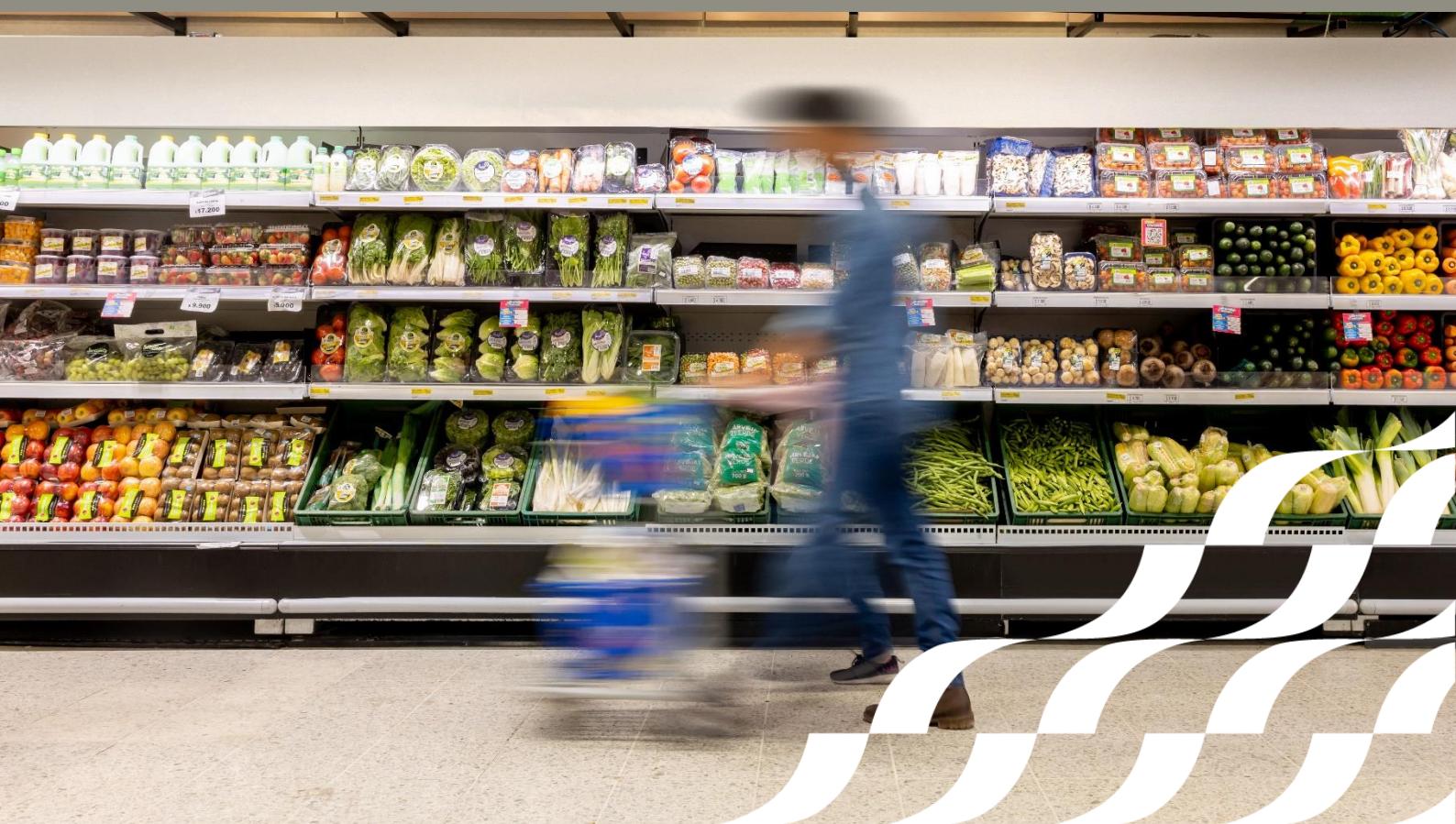


# Wholesale Supply Inquiry

Under section 55 of the Grocery Industry Competition Act 2023

## Preliminary Findings Paper

5 June 2025



## Executive summary

X1. This paper sets out the preliminary findings of our inquiry into the wholesale supply of groceries in New Zealand (**Inquiry**). We commenced this Inquiry under the Grocery Industry Competition Act 2023 (the **Act**) to address a key barrier to stronger competition in the grocery industry: the difficulty faced by retailers seeking to compete with Foodstuffs (North and South Island) and Woolworths in trying to cost-effectively buy groceries for subsequent resale.

## Foodstuffs and Woolworths' greater scale and buyer power limits wholesale competition

X2. Foodstuffs North Island Limited (**FSNI**), Foodstuffs South Island Limited (**FSSI**) and Woolworths New Zealand Limited (**WWNZ**) (together the regulated grocery retailers (**RGRs**)) dominate the New Zealand supermarket sector and the grocery supply chain. They have significant advantages over competing retailers when acquiring groceries from suppliers.

X3. With combined annual purchases of around \$18 billion and representing 82% of the New Zealand retail grocery market, the RGRs are the largest customers for most suppliers. The RGRs decide which of each supplier's products will be on supermarket shelves, and which will not. Most suppliers must sell to RGRs to get reasonable volumes of their products to market. This greater buyer power enables the RGRs to buy groceries on terms which other, smaller, retailers cannot match.

X4. The RGRs receive over \$5 billion annually in rebates, discounts and payments (RDP) from suppliers to promote sales and cover various risks and expenses. Rival retailers cannot access similar support from suppliers because they lack the RGRs' scale. There is a myriad of RDP; we have identified over 50 types. This adds complexity and administrative cost, with many suppliers telling us that they do not understand and are often confused by what the various payments are for. We are proposing amendments to the Grocery Supply Code to simplify and increase transparency over the terms of business between RGRs and their suppliers, including over RDPs. These proposed changes are detailed in the Draft Report for the Review of the Grocery Supply Code.<sup>1</sup>

X5. The RGRs closely monitor other retailers' retail prices and engage frequently with suppliers over prices and product ranges to ensure they are getting the best possible purchase terms. This discourages suppliers from supporting other retailers with better priced offers, since the larger player would soon demand even better offers from the supplier.

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<sup>1</sup> Commerce Commission "Review of the Grocery Supply Code – Draft Report, Decisions and Reasons (5 June 2025), <https://comcom.govt.nz/regulated-industries/grocery/review-of-the-grocery-supply-code>.

## **Weak competition in the wholesale market harms consumers**

X6. The RGRs' exercise of buyer power can adversely impact retail consumers.

X7. The largest single component of RDP is promotional funding which suppliers pay to RGRs. In the year to October 2024 we estimated that the levels of promotional funding ranged between 10% to 20% of revenue across the RGRs. The RGRs use that funding to promote sales of the suppliers' products. This often occurs through temporary price reductions on those products resulting in a high-low pattern of retail pricing over time. This is not unique to New Zealand, but here it is more pronounced, and there appears to be fewer everyday low price offers in New Zealand. Another price-based promotion typically funded by suppliers are discounts for RGR loyalty club members.

X8. The cumulative impact of these promotional practices is to add complexity on consumers' purchase decisions and disadvantage to some groups of consumers (such as the time poor, those with limited access to supermarkets, or those who cannot afford to stock up at promotional prices). With limited or no access to promotional funding from suppliers, competing retailers cannot match the promotional offers made by the RGRs. This makes it difficult to compete on price and reinforces retail grocery sector concentration.

X9. The example below shows how supplier's provision of promotional funding to a RGR can enable the RGR to offer a special promotional price and still earn the same margin as it would when selling goods for the normal price. A retailer not receiving promotional funding would suffer reduced margins if it matched the RGR's special price.

**Table X1: The impact of promotional funding on margins and competitors**

|   | <b>Normal price</b> | <b>Special price with promotional funding (RGR)</b> | <b>Special price with NO promotional funding (other retailer)</b> |
|---|---------------------|---|---|
| Shelf price \$                              | 4                   | 3   | 3   |
| Cost of goods \$                            | 3                   | 3   | 3   |
| Promotional funding provided by supplier \$ | -                   | 1   | -   |
| Retailer's margin \$                        | 1                   | 1   | 0   |

X10. Consumer grocery choices are also limited by the range of products stocked by the RGRs, and their store and channel choices. While other retailers are unable to compete effectively on price – a particularly important consideration for many consumers, especially on their main shop – the RGRs will continue to dominate the retail market and limit the options available to consumers.

## **The Act introduced a wholesale access regime to enable greater competition in wholesale and then in retail**

X11. The Act requires the RGRs to make offers for the wholesale supply of groceries to wholesale customers which provides another channel for rival retailers to acquire groceries. In effect, the Act requires wholesale offers from RGRs to supplement the option of directly arranging supply with the supplier.

X12. The intended purpose of this wholesale access regime is to enable reliable and cost-effective access to groceries for competing retailers who can then share the benefits of the RGRs' scale and efficiency. With improved access to grocery products and improved buying terms and access to promotional funding, competing retailers can be more effective and vigorous competitors. Consumers will benefit from more choices, with more competitive prices at more stores.

## **The wholesale access regime is not having any material impact at present**

X13. This wholesale access regime to date is not providing material benefits. Total sales reported under the new regime were \$15.3 million from July 2023 to February 2025. Reported sales in the year to February 2025 were \$11.5 million. Woolworths, through its new wholesale business NZ Grocery Wholesalers (**NZGW**), accounts for approximately 80% of sales reported under the Act. The total reported sales represent less than 0.03% of retail grocery sales. Substantial change and acceleration of progress will be required if the wholesale regime is to deliver benefits to consumers.

## **Behaviour change is required to enable an effective wholesale access regime**

X14. The fundamental problem is that promotional funding provided by suppliers to retailers is prevalent and the most important factor in a retailer acquiring groceries at competitive prices. However, there is no effective mechanism through which smaller or new retailers can get reasonable access to it. Other retailers do not get the benefit of the promotional funding from suppliers through the RGRs wholesale offers (and frequently do not from direct supply deals either). This is leading to market outcomes where, in many cases, the RGRs' wholesale offers under the Act are not made at commercially viable prices, resulting in low take-up and no material impact on the retail market. The statutory purpose of wholesale customers having reasonable access to scale (and efficiency) of the operations of the RGRs is

not being satisfied. In some instances, it may be cheaper for smaller retailers to buy products on special at the RGRs' retail store than through the wholesale regime.

X15. A secondary limitation is that there are significant gaps in the range of products being included in the RGRs' current wholesale offers and these goods may not be competitively purchased through an alternative channel.

X16. The wholesale access regime is premised on giving the industry early opportunity and incentive to achieve outcomes consistent with those sought by the Act. Behaviour change is required from the RGRs and by suppliers if this approach to wholesale access is to work.

> RGRs need to:

- make wholesale offers that pass on promotional funding. This could involve developing systems (akin to scan back in a retail context) that assure suppliers that wholesale customers will use that promotional funding to reduce prices to their retail consumers (and not for other purposes); and
- expand the product ranges of their wholesale offers to include more of the most frequently bought products in their own stores, including low-priced products like private label products (or generic equivalents).

> Suppliers need to:

- allocate more of their RDP funding to smaller retailers either directly or working with RGRs in getting systems in place to pass on promotional investment to wholesale customers; and/or
- reduce their use of promotional funding in favour of average pricing that is stable over time, which should encourage more everyday low pricing of products for retail customers.

## **Our preliminary view is we have sufficient evidence to impose or recommend additional regulation**

X17. Our preliminary view is that we have enough evidence to meet the threshold required by the Act to impose or recommend additional regulation to promote the purpose of the wholesale regime. This is because the current wholesale offers are not materially contributing to achieving that purpose. There are shortcomings in the RGRs' wholesale offers, most significantly in terms of pricing and range, and they are not consistent with wholesale offerings provided in a competitive wholesale market.

## **There is a window for suppliers and RGRs to effect necessary changes**

- X18. We have looked at the various tools that enable us to impose or recommend additional regulation. That additional regulation could require a wider range of products to be offered for sale at the wholesale level and specify how the prices, including promotional funding, for those products must be determined. Suppliers, as well as the RGRs, could be made subject to this regulation.
- X19. However, at this stage we consider the least cost alternative is for the parties to change their behaviour, as just described, by changing their wholesale offerings to meet the expectations that we set out in the next section. Both suppliers and RGRs have incentives to do so. Suppliers will ultimately benefit from having a greater range and type of retailer to sell to, and RGRs can retain more flexibility in how they deliver better competition.
- X20. We propose to extend the Inquiry timeframes by a year to give participants more time to address these recommendations. We propose this because imposing further regulation at this stage will restrict parties' ability to develop their own solutions, will impose costs and may have unintended consequences. These issues can be avoided if parties can make effective change by themselves.

## **We will then assess whether further regulation needs to be imposed or recommended**

- X21. If we do not see effective progress, we propose to conclude our assessment of the wholesale market and issue a draft report. That draft report would consider which forms of additional regulation could be imposed or recommended in order to facilitate a more effective wholesale access regime that promotes long-term benefits of competition to New Zealand grocery consumers. Following consultation, our Inquiry report, recommendations, and next steps would be finalised.
- X22. Separately, we will continue to progress investigations into possible breaches of the relevant legislation and regulations and proceed with enforcement actions.

## **Our expectations of behaviour changes required in the wholesale market**

### **Our expectations on competitive wholesale pricing**

We expect to see the following improvements in the pricing of products offered for sale to wholesale customers.

Sharper pricing by RGRs of products in their wholesale offers by:

- negotiating the pass through of additional promotional funding to wholesale customers; and
- establishing mechanisms (akin to scan back for retail sales) to give suppliers assurance that promotional funding is being passed to consumers by wholesale customers in the form of lower prices.

Suppliers develop ways to reduce price discrimination either though:

- enabling RGRs to make wholesale offers that include enhanced promotional funding; or
- offering lower net prices to wholesale customers in direct supply relationships reflecting either the provision of additional promotional funding or specifically lower prices for customers who do not receive promotional funding.

### **Our expectations on a comprehensive range of products for wholesale**

We would expect RGRs' wholesale offers to provide wholesale customers with the comprehensive range of products they need, and at the volumes they require, to meet consumers' demands. We expect suppliers to support this by allowing their most purchased products to be included in RGR wholesale offers.

- The range of products included in wholesale offers should represent all the product categories and provide sufficient choices within each category given the wholesale customer's target market could range from convenience offerings through to main shops.
- There should be a variety and a range of products with different price points within each category (ie, including both notable branded products and low-cost options, the latter of which may have private or generic brand labelling).
- Wholesale offers from RGRs should include products also supplied directly to other retailers by suppliers using their own distribution channels, as this will pass on the scale benefits of the RGRs. To the extent that there are differences in the costs of serving different wholesale customers, this could be reflected in the total price to each wholesale customer. Accordingly, the offers from the RGRs should not undermine the viability of the suppliers' existing distribution model so long as they offer competitive pricing.

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## Associated documents

| Publication date  | Reference         | Title   |
|-------------------|-------------------|---|
| 4 September 2024  | n/a               | <a href="#">Wholesale Supply Inquiry – Terms of Reference</a>                           |
| 4 September 2024  | 3021-3037         | <a href="#">First Annual Grocery Report</a>   |
| 24 September 2024 | 978-1-991287-86-1 | <a href="#">Wholesale Supply Inquiry – Preliminary Issues Paper</a>                     |
| 2 October 2024    | n/a               | <a href="#">Wholesale Supply Inquiry – Stronger regulation options factsheet</a>        |
| 5 June 2025       | 978-1-99-133253-0 | <a href="#">Review of the Grocery Supply Code – Draft Report, Decisions and Reasons</a> |

## Glossary

| Term/Abbreviation       | Definition  |
|-------------------------|---|
| <b>Act</b>              | Grocery Industry Competition Act 2023   |
| <b>AGR1</b>             | The Commission’s First Annual Grocery Report, published 4 September 2024  |
| <b>ART</b>              | Anonymous Reporting Tool  |
| <b>Banner</b>           | Grocery store brands/names under which a retailer sells (eg, New World, Pak’nSave, Four Square, Raeward Fresh, Woolworths, FreshChoice).  |
| <b>Commission</b>       | Commerce Commission   |
| <b>DC</b>               | Distribution centre   |
| <b>EBIT</b>             | Earnings Before Interest and Taxes  |
| <b>Fresh categories</b> | Refers to products in bakery, butchery, produce, seafood and service deli categories.   |
| <b>Gilmours</b>         | Gilmours Wholesale Limited  |
| <b>Groceries</b>        | Defined in the Act as goods in any of the following categories: fresh produce; meat, seafood or meat substitutes; 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. |
| <b>GSC</b>              | Grocery Supply Code   |
| <b>FSNI</b>             | Foodstuffs North Island Limited   |
| <b>FSSI</b>             | Foodstuffs South Island Limited   |
| <b>Main shop</b>        | 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.   |
| <b>Market Study</b>     | 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.   |
| <b>MBIE</b>             | Ministry of Business, Innovation and Employment   |
| <b>Minister</b>         | Associate Minister of Commerce and Consumer Affairs   |
| <b>NDA</b>              | Non-disclosure agreement  |
| <b>NZFGC</b>            | New Zealand Food and Grocery Council  |
| <b>NZGW</b>             | NZ Grocery Wholesalers  |
| <b>Other retailers</b>  | Grocery retailers that are not regulated grocery retailers.   |
| <b>PFP</b>              | Wholesale Supply Inquiry Preliminary Findings Paper   |
| <b>PIP</b>              | The Commission’s Wholesale Supply Inquiry Preliminary Issues Paper, published 24 September 2024   |

|                            |   |
|----------------------------|---|
| <b>Private label</b>       | Products manufactured for sale under a retailer's brand. Also known as home brands, own brands, store brands or generic products.   |
| <b>Promotional funding</b> | A major type of RDP that is paid by suppliers to the RGRs. (Also referred to as "Trade spend" by industry participants). We define promotional spend as rebates, discounts and payments for advertising/marketing, merchandising (including shelf space), data, and promotional activities. This interpretation may not align with suppliers' interpretation of these rebates, discounts or payments. |
| <b>RDP</b>                 | Rebates, discounts or payments provided by suppliers.   |
| <b>RGR</b>                 | Regulated Grocery Retailer. Currently defined in the Act as Foodstuffs North Island Limited; Foodstuffs South Island Limited; and Woolworths New Zealand Limited (including all franchises, transacting shareholders and interconnected bodies corporate of the listed companies).  |
| <b>Scan back</b>           | Scan back is a promotional discount offered by a supplier based on sales recorded via the retail grocery till. It is sometimes referred to as retail scan funding. Scan back data can also be used for other purposes.  |
| <b>Secondary shop</b>      | A visit to one or more stores, other than the store used for the main shop, to shop for specific products.  |
| <b>SKU</b>                 | Stock keeping units   |
| <b>Top-up shop</b>         | 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.   |
| <b>Trents</b>              | Trents Wholesale Limited  |
| <b>Wholesale customer</b>  | Defined in the Act as any person that receives the wholesale supply, or wants 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.  |
| <b>WWNZ</b>                | Woolworths New Zealand Limited  |

# Chapter 1: Introduction

## Wholesale Supply Inquiry

1. We want New Zealanders to benefit from a more competitive grocery sector that delivers greater choice and fairer prices. The ability for other retailers to buy a comprehensive range of wholesale goods at competitive prices is important as it helps other retailers to compete with the major supermarkets.
2. Until recently, grocery retailers could acquire groceries through two main avenues – directly from suppliers ('direct supply'), and through a wholesaler ('wholesale supply'). When the Grocery Industry Competition Act 2023 (**the Act**) commenced, it introduced a wholesale access regime (under Part 3 of the Act) to support other retailers' access to groceries. It also introduced measures to protect other retailers' ability to transact directly with suppliers.
3. Part 3 of the Act 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."<sup>2</sup> In turn, those wholesale customers can improve their offers into the retail markets and New Zealand consumers will benefit from better choices, and more competitive prices on a comprehensive range of products at more stores and locations.
4. Our First Annual Grocery Report (**AGR1**) summarised our initial assessment of the progress of the wholesale regime and found that while it appeared to be working for a small group of grocery retailers, there were some fundamental issues in the wholesale market.<sup>3</sup>
5. We therefore commenced an inquiry under s 55 of the Act (**Inquiry**) to:
  - 5.1. gain a more in-depth picture of how the wholesale market is operating;<sup>4</sup> and
  - 5.2. 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.
6. There are a range of possible outcomes from the Inquiry – including the imposition of stronger wholesale regulation, and recommendations that industry participants change their behaviour in order to improve competition.<sup>5</sup>

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<sup>2</sup> Section 21 of the Act.

<sup>3</sup> Commerce Commission "First Annual Grocery Report" (4 September 2024), [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362305/Annual-Grocery-Report-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362305/Annual-Grocery-Report-2024.pdf).

<sup>4</sup> We use 'wholesale market' as shorthand for the market for the acquisition of groceries by grocery retailers – whether via a wholesale offer or by direct supply.

<sup>5</sup> Sections 58, 64 and 81 of the Act.

## This paper

7. This Preliminary Findings Paper (**PFP**) presents the findings from the Inquiry so far. It reflects our review of the submissions and cross-submissions on the Preliminary Issues Paper (**PIP**) and meetings with over 60 stakeholders including suppliers, wholesale customers, as well as the RGRs. We have received and assessed a large volume of information and data from the RGRs and suppliers. In relation to RGRs, this information and our subsequent analysis has been focused on the wholesale offers developed in response to the Act and which have been reported to us under the Act.
8. This paper sets out the following:
  - 8.1. the role of the wholesale regulatory regime and our preliminary findings on the wholesale market;
  - 8.2. our expectations about what needs to change to improve the wholesale market; and
  - 8.3. options for delivering that change.
9. The legal and economic framework we are following can be found in **Attachment A**.
10. Supporting information including a more detailed assessment of issues with the wholesale options available to wholesale customers can be found in **Attachment B**.
11. **Attachment C** provides further discussion of the additional regulatory options available to us under the Act.

## Process update

12. To give industry time to meet the expectations set out in this PFP, we intend to extend the timeframes for the Inquiry by one year. However, we may bring the timing for concluding the Inquiry forward if it becomes clear that sufficient progress is not being made by industry.
13. If the timing is to be brought forward, or in around a year if it is not, we will issue a process and timing update which will set out the timetable to conclude the Inquiry. This new timetable will allow consultation on a draft report, which will include our updated findings and any specific recommendations for further regulation that we propose.

## We invite submissions

14. We invite submissions on this PFP **by 5pm Friday 18 July 2025**.
15. In particular, we invite your submissions on our preliminary findings in relation to:
  - 15.1. how the wholesale market is operating;

- 15.2. what needs to change to improve the wholesale market; and
- 15.3. the options for delivering that change.
16. We also invite industry participants to confirm their commitment to meeting the expectations set out in Chapter 3 of this paper. Or, to specify what they instead consider is required by the Act, and what they will do to progress toward that.
17. Submissions should be provided to us either via email or an online form available on our website at <https://comcom.govt.nz/regulated-industries/grocery/wholesale-supply-inquiry2>. Please email submissions to [grocery.regulation@comcom.govt.nz](mailto:grocery.regulation@comcom.govt.nz) with the subject line “Submission: Wholesale Supply Inquiry – Preliminary Findings Paper”.
18. We acknowledge the sensitive nature of the matters covered by the Inquiry and that some submitters may prefer to provide their views confidentially. There are several ways to do this.
19. If you wish to provide commercially sensitive information in your submission, we request that you provide confidential and public versions of your submission.
20. When including commercially sensitive or confidential information in your submission, we offer the following guidance:
  - 20.1. please provide a clearly labelled confidential version and public version;
  - 20.2. please provide reasons alongside any information in the confidential version as to why it is commercially sensitive or confidential information; and
  - 20.3. the responsibility for ensuring confidential information is not included in a public version of a submission rests entirely with the party making the submission.
21. We intend to publish all public versions of submissions received on our website.
22. If you would like to meet to provide feedback, which we can summarise and publish without disclosing your identity, please contact [grocery.regulation@comcom.govt.nz](mailto:grocery.regulation@comcom.govt.nz).
23. If you would like to put forward views anonymously you can do this through the Anonymous Reporting Tool (**ART**) at <https://report.whistleb.com/en/comcom-grocery>. These views will be summarised and considered as part of the review report.. If you include the words “wholesale supply inquiry” and “for final report” (or similar), we will summarise your views (with no identifying features) in the final report.
24. If we consider disclosure of information for which confidentiality is claimed to be in the public interest, we will consult with the party who provided the information before any decision on the public disclosure of that information is made.
25. A two-week cross-submission period will occur shortly after submissions close.

## Chapter 2: Summary observations on the current wholesale market

26. This chapter introduces the role of the wholesale market and reports our findings from examining the wholesale market.

### Other retailers need a reliable and cost-effective supply of groceries in order to compete with the RGRs

27. The New Zealand grocery sector has insufficient competition to provide consumers with the benefits from effective competition. AGR1 noted that:<sup>6</sup>

- 27.1. The regulated grocery retailers (RGRs) continue to maintain high market share despite changes amongst competitors.
- 27.2. Price competition between the RGR banners has weakened.
- 27.3. Retail margins of major supermarket brands increased.
- 27.4. RGR profitability remains high.
- 27.5. In 2022, New Zealand had the fourth highest per capita expenditure on groceries in the OECD. New Zealand consumers are spending more on groceries than their Australian and UK counterparts.<sup>7</sup>

28. A core part of the problem is that the current wholesale market does not provide a reliable supply of competitively priced groceries that would enable other retailers to compete with the RGRs. Relative to the RGRs, those other retailers lack scale, and this places them at a significant competitive disadvantage when they are acquiring groceries for resale.

29. The wholesale access regime is intended to address a lack of wholesale supply options in New Zealand to enable existing and 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.<sup>8</sup>

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<sup>6</sup> Commerce Commission “First Annual Grocery Report” (4 September 2024) at p. 41, 48, 58 and 66, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362305/Annual-Grocery-Report-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362305/Annual-Grocery-Report-2024.pdf).

<sup>7</sup> Preliminary analysis states New Zealand remained in fourth place using 2023 OECD data. Full OECD dataset is not available as of publication.

<sup>8</sup> Sections 34, 35 and Subpart 2 of Part 3 of the Act.

30. The wholesale access regime was intended to enable stronger competition from both smaller retailers (eg, independent dairies and smaller chains), and larger retailers (eg, national or regional chains) who might use it as a springboard to grow volume and develop their own direct relationships with suppliers.<sup>9</sup>

## The RGRs' current wholesale offers in response to the Act

31. RGRs have taken different approaches to developing their wholesale offers under the Act.

32. Woolworths New Zealand Limited (**WWNZ**) has established a stand-alone business unit, New Zealand Grocery Wholesalers (**NZGW**), and is enthusiastic about its prospects. WNZ's approach is similar in a number of respects to that taken by its Australian parent company, which established a wholesaling subsidiary, Australian Grocery Wholesalers.<sup>10</sup> NZGW focused initially on gaining the support of suppliers, before turning to attract customers. NZGW has achieved the bulk (around 80%) of the wholesale sales reported under the Act.<sup>11</sup> NZGW has also been seeking to pass on some promotional funding to wholesale customers, with some success.<sup>12</sup>

33. Foodstuffs South Island (**FSSI**) has an existing foodservice wholesale business, Trents Wholesale Limited (**Trents**), which has historically supplied some other retailers. FSSI has used Trents as the vehicle for wholesale offers to satisfy the new requirements under the Act. Of the three RGRs, FSSI has reported the lowest sales under that new regime, which it says is because it is already active in supplying groceries to smaller retailers in the South Island.<sup>13, 14</sup>

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<sup>9</sup> Minister for Commerce and Consumer Affairs “Regulatory Impact Statement: grocery sector regulatory backstop to the quasi-regulated wholesale access regime” (28 July 2022) at paras 7-10, <https://www.mbie.govt.nz/dmsdocument/25463-regulatory-impact-statement-addendum-grocery-sector-regulatory-backstop-to-the-quasi-regulated-wholesale-access-regime-proactive-release-pdf>.

<sup>10</sup> Woolworths New Zealand “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (8 November 2024) at para 1.5, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>11</sup> Commerce Commission analysis of industry information.

<sup>12</sup> Woolworths New Zealand “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (8 November 2024) at paras 10.5-10.6 [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf);

Commerce Commission engagement with RGRs.

<sup>13</sup> Foodstuffs North Island and Foodstuffs South Island “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (8 November 2024) at para 44, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf).

<sup>14</sup> We note that Foodstuffs North Island and Foodstuffs South Island have provided some data relating to their Gilmours and Trents wholesale banners respectively. However, this data set is incomplete and therefore has not been used in our analysis, unless otherwise stated.

34. To date, Foodstuffs North Island (**FSNI**) has reported a minimal level of wholesale sales under the Act.<sup>15</sup> Like FSSI, FSNI's offering covers only part of the country. It submits this may be inherently less appealing to prospective larger national customers and that it is unable to provide a seamless national offering.<sup>16</sup> FSNI considers it has made good progress to date, securing material sales and customer numbers. It submits that its results show the scaling up and increased momentum of its wholesale offering.<sup>17</sup> Confidential parts of FSNI's submission on the PIP highlight the steps FSNI has taken with respect to its wholesale pricing.<sup>18</sup>

## **The wholesale regime is having minimal impact**

35. Other retailers are diverse businesses and range in size from small players operating only a small single store to those with a network of large stores. To date the wholesale access regime has only been used by smaller grocery retailers or retailers extending their core range with a few additional grocery products. For example, Mad Butcher stores now offer some grocery products, Reduced to Clear has increased the range of its grocery offer, as have Circle K. But, currently, none of the businesses using the wholesale regime seem likely to develop into mainstream grocery retailers that compete with the RGRs.

36. Large other retailers are not using the wholesale regime, and there are no signs that the regime is likely to facilitate large-scale entry or large-scale expansion in the near-term.

37. The volume and value of reported transactions under the new wholesale access regime are very small. Sales were around \$11.5 million in the year to February 2025, while retail sales for all grocery retailers were \$27.1 billion in the year to December 2024.<sup>19</sup> At current levels the regime is having a negligible impact on either wholesale or retail competition.

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<sup>15</sup> Foodstuffs North Island and Foodstuffs South Island "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at para 43, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf).

<sup>16</sup> Foodstuffs North Island and Foodstuffs South Island "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at para 18, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf).

<sup>17</sup> Foodstuffs North Island and Foodstuffs South Island "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at para 43, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf).

<sup>18</sup> Foodstuffs North Island and Foodstuffs South Island "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at para 58, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf).

<sup>19</sup> Commerce Commission analysis of RGR information; Statistics NZ "Retail trade survey: December 2024 quarter" at Table 1, <https://www.stats.govt.nz/assets/Uploads/Retail-trade-survey/Retail-trade-survey-December-2024-quarter/Download-data/retail-trade-survey-december-2024-quarter.xlsx>.

## **Near-term prospects for a material step-change in the wholesale market appear small**

38. It is still early in the development of a wholesale access regime, but the near-term prospects for a material step-change in the wholesale market appear limited without a change in behaviour.
39. To date, we see a lack of demand for wholesale supply from large wholesale customers. While this partly reflects the preference for direct supply arrangements described above, we have yet to see RGRs develop offers that combine:
  - 39.1. Comprehensive product ranges, including low-cost products that compete at low price points;
  - 39.2. Prices that reasonably reflect the scale of the RGR's own operations; and
  - 39.3. pass through of an equivalent level of promotional funding to that enjoyed by the RGRs in their own retail operations.
40. Offers that do not combine these features are unlikely to be consistent with wholesale offerings provided in a competitive wholesale market. They are also unlikely to promote the outcomes sought in the Act as they are unlikely to be sufficiently attractive to larger scale retailers to enable them to meaningfully grow their business and provide more effective retail competition.
41. Suppliers also have a role in enabling the most significant component of RDP that they provide to the RGRs - promotional funding - to be passed on to other retailers either when they directly supply them or via the RGRs' wholesale offers. For this to change, suppliers may require processes to be developed that assure them that the promotional funding has been used as intended (ie, to promote greater retail sales).

## **The potential size and benefits of an effective wholesale market**

42. Some submissions on our PIP asked us to estimate the size of the potential wholesale market and to right-size our expectations of the new wholesale regime accordingly. Foodstuffs submitted:<sup>20</sup>

...FSNI and FSSI are supplying products to a material number of retailers, and we are unclear on what number of customers or volume of sales the Commission expects to observe (including because, to our knowledge, no analysis on the total or potential market size, or current market dynamics, has been carried out). This issue highlights that the progress of the regime must be measured against realistic and proportionate (and transparent) expectations, based on the total size of the “addressable market”.

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<sup>20</sup> Foodstuffs North Island and Foodstuffs South Island “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (8 November 2024) at para 5.1, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf).

- 43. We have not sought to estimate the potential size of the new wholesale regime, as with all developing markets there is a wide range of potential outcomes which have been suggested to us in submissions and meetings to date.
- 44. Experiences in other countries provide some indications of the potential size of an effective wholesale market.
  - 44.1. Metcash Limited (**Metcash**), a wholesaler to independent supermarkets, has around 7% market share in Australia and provides some scale and scope efficiencies to its customers:<sup>21</sup>
  - 44.2. Superunie, which buys on behalf of ten independent retail organisations, claims a 26% share of the Dutch wholesale grocery acquisition market;<sup>22</sup>
  - 44.3. Australia's Statewide Independent Wholesalers (SIW), which buys and distributes on behalf of Woolworths Supermarkets and 170 independent retailers,<sup>23</sup> claims an approximate 70% share of the Tasmanian grocery market.<sup>24, 25</sup> Each retailer negotiates promotional funding direct with the supplier.
- 45. While there are a number of differences between these models, each appears to effectively assist independent retailers to aggregate their buying power to achieve improved buying terms.
- 46. There are also wider benefits, including to suppliers, from a more effective wholesale market.
  - 46.1. The wholesaler represents an alternate channel to market giving suppliers more choice including suppliers which do not sell much, or any, grocery product through the RGRs.
  - 46.2. There is an opportunity for suppliers to sell a broader range of the supplier's products than an RGR might be willing to stock.
  - 46.3. The wholesale channel represents another option for suppliers to test new products and for new suppliers to seek to enter the market.

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<sup>21</sup> Australian Competition & Consumer Commission “Supermarket inquiry – Final report” (February 2025) at pp. 1-2, [https://www.accc.gov.au/system/files/supermarkets-inquiry\\_1.pdf](https://www.accc.gov.au/system/files/supermarkets-inquiry_1.pdf).

<sup>22</sup> Superunie (accessed 30 April 2025), <https://www.superunie.nl/en/>.

<sup>23</sup> Woolworths Supermarkets is the Australian supermarket chain of Woolworths Group Limited.

<sup>24</sup> Statewide Independent Wholesalers “Our History” (accessed 30 April 2025), <https://siw.com.au/history/>.

<sup>25</sup> Statewide Independent Wholesalers “About SIW” (accessed 30 April 2025), <https://siw.com.au/about/>.

## **Chapter 3: Assessment of current wholesale offers and our expectations for change**

47. This chapter summarises our assessment of the current offers available to wholesale customers relative to what would be expected in a competitive wholesale market. We look, in turn, at each of the following aspects of the wholesale offers:
  - 47.1. pricing and promotional funding;
  - 47.2. range;
  - 47.3. ease of access; and
  - 47.4. other issues.
48. We explain what we would expect to see in a competitive market in relation to each aspect of the wholesale offer and our expectations of what needs to change to improve that aspect.
49. To be consistent with the offers provided in a competitive market all (or most) of these features should be present. For example, even if a full range of products were offered, this would not be impactful in the absence of competitive pricing.

### **Current pricing and promotional funding settings are an impediment to effective competition**

50. Acquiring product at a competitive price from the wholesale market is critical to retailers' ability to compete in the downstream market. Groceries are a significant and ongoing item of household expenditure and value is a key consideration for consumers.
51. The inability of other retailers to acquire groceries at prices similar to those available to RGRs was highlighted by the Market Study as one of the key barriers to more effective competition in the retail market.<sup>26</sup>

### **Wholesale pricing we would expect to see in a competitive market**

52. In a workably competitive market for the wholesale supply of groceries, we would expect to see:
  - 52.1. prices that reflect efficient costs (including the costs of goods purchased from their suppliers) and are therefore cost-effective and allow the efficient wholesale customer to compete in retail markets;

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<sup>26</sup> Commerce Commission “Market Study into the retail grocery sector – Final report” (8 March 2022), [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf).

- 52.2. prices that reflect the scale and efficiency of the RGRs; and
- 52.3. the passing on of items that have a material impact on prices, such as promotional funding.

53. Further discussion of these competitive wholesale market features is included in **Attachment A**.

## **Wholesale pricing is frequently uncompetitive under current settings**

54. Our analyses, both for AGR1 and for this report, indicate that the wholesale pricing of many stock keeping units (**SKUs**) are at uncompetitive levels. **Attachment B** outlines our analysis in detail including the data used, our assumptions and a discussion of the findings. Key findings are that:
  - 54.1. Across the three RGRs, between 8% and 55% of the SKUs offered for wholesale sale are priced lower in the RGR's retail stores than at wholesale;
  - 54.2. Across the three RGRs, between 30% and 84% of the SKUs are offered for wholesale supply at a price that does not enable a retail markup of 20% or more, relative to the RGRs' retail average prices.
  - 54.3. Where a 25% markup is required by the other retailer, we estimate that between 39% and 88% of SKUs would not provide a sufficient markup under the wholesale offers.<sup>27</sup>
55. Based on this analysis, we do not consider that an efficient competitor could rely on the wholesale access regime to compete against the RGRs' own banners for a considerable number of products. A key factor driving this outcome concerns promotional funding.

## **Promotional funding is a fundamental issue**

56. Price-based promotions are a ubiquitous feature of grocery retailing in New Zealand. They attract customers and drive sales. The Market Study reported that a higher proportion of groceries were sold on promotion in New Zealand in 2017 than in any other country surveyed.<sup>28</sup>

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<sup>27</sup> A 20% mark-up is based on published WZNZ data on the direct costs of its store network whereas 25% mark-up allows for indirect costs.

<sup>28</sup> Commerce Commission “Market Study into the retail grocery sector – final report” (8 March 2022) at p. 35, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf).

- 57. Suppliers fund these promotions through the payment of rebates, discounts and payments (RDP) to the RGRs. The amount of RDP paid by suppliers to RGRs is a significant factor affecting the competitiveness of prices. On average, we estimate the value of RDP is approximately 24% of the RGRs' retail sales revenues.<sup>29</sup> For comparison, we note the net profit margins for the RGRs averaged between 2% and 4% of sales between 2015-2019.<sup>30</sup>
- 58. Many other retailers are not able to effectively access meaningful levels of RDP, and in particular promotional funding, in order to compete with the RGRs.<sup>31</sup> This reflects that:
  - 58.1. Due to their significantly smaller size, they have limited individual bargaining power, and are a limited sales opportunity, when negotiating directly with suppliers; and
  - 58.2. New Zealand lacks wholesale options that support smaller retailers by aggregating their demand to achieve collective buying power and collective access to promotional funding.

### **We expect to see improved pass through of promotional funding**

- 59. An effective RGR wholesale service would buy for its own large retail arm and its third party wholesale customers. This would give the wholesale customers reasonable access to the scale-based discounts the RGR's own retail banners enjoy.
- 60. Wholesale customers can be provided improved buying terms:
  - 60.1. By the wholesaler negotiating to secure promotional funding from suppliers on behalf of its wholesale customers, which the wholesaler then passes on to its wholesale customers; or
  - 60.2. By simply negotiating a lower effective price as an alternative to agreeing a slightly higher price but with some associated promotional funding.

### **Promotional funding should be passed on**

- 61. In their joint submission on the PIP, FSNI and FSSI disagreed that promotional funding (referred to as “trade spend” by the parties) should be passed on to other retailers.<sup>32</sup>

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<sup>29</sup> Commerce Commission analysis of industry information.

<sup>30</sup> Commerce Commission “Market Study into the retail grocery sector – final report” (8 March 2022) at p. 62-63, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf).

<sup>31</sup> This is discussed further in Attachment B at paragraph B65.

<sup>32</sup> Foodstuffs North Island and Foodstuffs South Island “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (8 November 2024) at para 5.3, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf).

Trade spend is not a scale and efficiency benefit and is therefore not required to be passed on under the Act. It has always been understood that trade spend is separate from this requirement – this separation was a deliberate policy choice that is reflected in the Act.

62. We disagree with FSNI and FSSI that promotional funding is not a scale benefit. Promotional funding is the major type of RDP that is paid by suppliers to the RGRs. Promotional funding, in its various forms, make up almost two-thirds of the approximately \$5 billion in RDP paid by suppliers to the RGRs.<sup>33</sup>
63. The sheer volume of these payments underscores their importance to the RGRs. No other retailer gets proportionate support. That the RGRs are able to negotiate such support for their stores – and FSNI is likely able to secure a promotional rebate for its wholesale foodservice operation Gilmours,<sup>34</sup> – is unquestionably a benefit of the scale of operations of the RGRs. Absent that scale, we doubt the RGRs would have any claim to superior promotional funding than any other wholesale customer or competing retailer.
64. As such, promotional funding, along with other types of RDP, should be passed on to wholesale customers. Further, in a competitive wholesale market, a wholesaler would pass promotional funding on to the extent received even if it was not a scale benefit.
65. In a retail setting, scan back is used to assure suppliers that promotional funding is being passed on to consumers through lower prices.<sup>35</sup> Processes and systems may need to be developed to provide suppliers with corresponding assurance in a wholesale setting. Developing this capability would support efforts to improve an increasing flow of promotional funding to other retailers.

#### **Passing on promotional spend will require actions by RGRs and suppliers**

66. In its submission on the PIP, WWNZ provides a different explanation for why promotional funding was not being passed on to wholesale customers by NZGW:<sup>36</sup>

NZGW cannot provide suppliers' Retail Scan Funding ... to wholesale customers due to the decisions of suppliers ... [this is] because suppliers' Retail Scan Funding is: (i) only provided as goods are "scanned out" at retail (i.e. it is provided in recognition of retail sales); and (ii) provided by suppliers for the purposes of funding retail promotions (which means both contractually, and due [to] WWNZ's obligations under the Grocery Supply Code, WWNZ could not pass such funding to wholesale customers).

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<sup>33</sup> Commerce Commission analysis of RGR information.

<sup>34</sup> Gilmours "Promotions" (accessed 20 May 2025), <https://www.gilmours.co.nz/promotions/>.

<sup>35</sup> Scan back is a promotional discount offered by a supplier based on sales recorded via the retail grocery till. It is sometimes referred to as retail scan funding. Scan back data can also be used for other purposes.

<sup>36</sup> Woolworths New Zealand "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at para 10.3(b), [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

67. We agree with WWNZ's point (i). Suppliers link material amounts of RDP to the volume or sales recorded through the retail till as they want assurance that the payment they make to the RGRs is indeed being used to promote sales by reducing their effective retail price rather than for other purposes, such as bolstering retailers' own retail margins.

68. We also agree with WWNZ's point (ii). The challenge for RGRs – who need to offer competitively priced groceries to their wholesale customers – is to negotiate arrangements with their suppliers that:

- 68.1. enable the RGRs' wholesale offer to reflect some promotional funding; and possibly
- 68.2. include a mechanism that performs a similar assurance function to scan back, so that suppliers have sufficient assurance that the wholesale customer will in turn pass the payment on to its customers through reduced prices.

69. WWNZ's submission continues:<sup>37</sup>

if the Commission's fundamental concern is the passing on of suppliers' Retail Scan Funding to wholesale customers (as appears to be the case), then ultimately the Inquiry ... should be transparent that the Commission's focus needs to be on considering recommendations in relation to suppliers (under s 58(2) of the GICA), not RGRs.

70. WWNZ's submission correctly states our fundamental concern. Addressing this concern will, as WWNZ notes, require a recommendation - under the powers WWNZ identifies - to suppliers and especially large suppliers to change their behaviour. However, we consider that the RGRs also have an essential role. Indeed, the Act imposes the obligation to establishing a wholesale channel onto the RGRs. Wholesalers in competitive markets that operate without statutory mandate engage with suppliers to find ways to achieve lower prices for their wholesale customers. An example is Australia's Metcash, which has had some success in securing supplier funding support for long-term price promotions for its wholesale customers.<sup>38</sup>

71. The RGRs receive groceries from many suppliers and we acknowledge that negotiating the pass through of promotional funding to wholesale customers will take time and effort. Logically, this would focus initially on the largest providers of promotional funding (so as to be efficient). Depending on the extent of success, this could be consistent with the requirement in the Act that wholesale customers receive reasonable access to the scale and efficiency benefits of the RGRs.

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<sup>37</sup> Woolworths New Zealand "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at para 10.6, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>38</sup> Australian Competition & Consumer Commission "Supermarket inquiry – Final report" (February 2025) at p.142, [https://www.accc.gov.au/system/files/supermarkets-inquiry\\_1.pdf](https://www.accc.gov.au/system/files/supermarkets-inquiry_1.pdf).

### **Our expectations on progress toward competitive wholesale pricing**

72. In summary, we would expect to see the following improvements in the pricing of products offered for sale to wholesale customers.
  - 72.1. Sharper pricing by RGRs of products in their wholesale offers to customers reflecting their success in:
    - 72.1.1. negotiating for the pass through of additional promotional funding; and
    - 72.1.2. establishing mechanisms (akin to scan back in a retail sales context) to give suppliers' assurance that such funding is being passed to consumers by wholesale customers in the form of lower prices;
  - 72.2. Suppliers developing ways to allocate additional support to wholesale customers either through:
    - 72.2.1. RGRs' wholesale offers (including enhanced promotional funding); or
    - 72.2.2. lower net prices to wholesale customers in direct supply relationships reflecting either the provision of some promotional funding or specifically lower prices for customers not receiving promotional funding.

### **Many popular products are excluded from the range of products offered at wholesale**

73. Consumers buy groceries by undertaking a range of shopping missions. These missions include the main shop, a secondary shop and top-up shops.
74. Each retailer must have sufficiently large and diverse range of products to satisfy the needs of its target consumers. Some retailers mainly seek to serve top-up missions, others the main shop, but the wholesale market should be capable of reliably and cost-effectively serving retailers targeting all or any type of customer and of their varied grocery shopping missions.

### **The range we would expect to see offered in a competitive market**

75. In a workably competitive wholesale market, we would expect to see the following:
  - 75.1. Greater choice to wholesale customers, in terms of the products which are available to them, but also over the channel by which they can purchase, and receive supply of, those products. Such choices may entail different costs to serve, and the price the wholesale customer pays would need to reflect that.

- 75.2. A comprehensive product range offered to wholesale customers. Any gaps in the range would be temporary and quickly filled.
- 75.3. The inclusion of products within a category spanning a range of price points, including low-cost products at low price points (which could include private labels or generic brands).
76. We discuss these features of a competitive wholesale market further in **Attachment A**.

## **The range of products under the RGRs' current wholesale offers has significant gaps**

77. We have had feedback from wholesale customers that the product range in the RGRs' wholesale offers to customers is limited. In regard to range, there are numerous gaps. Based on the 500 products most frequently bought by retail consumers,<sup>39</sup> we estimate:
  - 77.1. Only 18% are included in FSNI's wholesale offer;
  - 77.2. Only 22% are included in WNZ's wholesale offer; and
  - 77.3. Only 27% are included in FSSI's wholesale offer.
78. The RGRs have given a range of reasons why so many popular products are excluded from the wholesale offers:
  - 78.1. Fresh produce is excluded as it has a short shelf life, has particular transport requirements and there are other channels to efficiently purchase fresh produce;<sup>40, 41</sup>
  - 78.2. A number of key suppliers have opted out of the wholesale access regime, reducing the products that are available at wholesale;<sup>42, 43</sup>

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<sup>39</sup> See Attachment B at paragraphs B86-B89.

<sup>40</sup> Foodstuffs North Island and Foodstuffs South Island "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at paras 62-63, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf).

<sup>41</sup> Woolworths New Zealand "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at para 3.6(b)(ii), [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>42</sup> Foodstuffs North Island and Foodstuffs South Island "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at paras 40 and 60-61, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf).

<sup>43</sup> Woolworths New Zealand "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at para 3.6(d), [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

- 78.3. RGRs are reluctant to include their own private label products in wholesale offers;<sup>44, 45</sup> and
- 78.4. RGRs are excluding the significant number of products delivered directly to their bannered stores (rather than via their distribution centre (**DC**) from their wholesale offer.<sup>46, 47</sup>

79. We discuss these points in greater detail in **Attachment B**.

## **Suppliers' control over the distribution of product in a competitive market**

80. Some suppliers of popular products have opted not to have their products included in the RGRs' wholesale offers. In some cases this is because they operate their own distribution networks (for example Coca-Cola or Fonterra).<sup>48, 49, 50</sup> The cumulative impact of supplier opt out means many frequently purchased products are only available to other retailers via direct supply, such that no benefit from the scale of the RGRs' operations will be realised (contrary to s 21(b) of the Act). Specific details of the practical impact of supplier opt out are explained in **Attachment B** Error! Bookmark not defined..

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<sup>44</sup> Foodstuffs North Island and Foodstuffs South Island "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at para 40, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf).

<sup>45</sup> Woolworths New Zealand "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at para 3.6(e)(iii), [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>46</sup> Foodstuffs North Island and Foodstuffs South Island "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at para 60, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf).

<sup>47</sup> Woolworths New Zealand "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at para 3.6(d), [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>48</sup> Foodstuffs North Island and Foodstuffs South Island, Submission on Wholesale Supply Inquiry Preliminary Issues Paper (8 November 2024) paras 20-22, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf)

<sup>49</sup> Woolworths New Zealand "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at paras 3.6(b) and 3.6(d)(i), [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>50</sup> Fonterra Brands (New Zealand) Limited "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at paras 3 and 10, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/363322/Fonterra-Brands-New-Zealand-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/363322/Fonterra-Brands-New-Zealand-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

81. In submissions on our PIP, some suppliers highlighted the principle in s 24(1)(h) of the Act that they should have reasonable control over the channels for the retail sale of their own products and brands.<sup>51, 52, 53</sup> However, this is just one of the principles we are required to consider. We consider that the restricted product range currently being offered to wholesale customers is not consistent with several other principles the Act requires us to take into account.
82. In our view, each RGR's wholesale offering does not provide reliable and cost-effective access to the range of wholesale groceries that are likely to be demanded by wholesale customers if suppliers withhold many popular products. Taking account of the other channels available to wholesale customers does not alter this conclusion. Doing so only adds one additional channel (being direct supply from a supplier that itself may not face significant competition in its operations and may not be offering prices, or reflecting the levels of RDP, an RGR might receive).<sup>54</sup>

#### **Supplier opt out is also inconsistent with other principles in Part 3 of the Act**

83. The effect of multiple suppliers opting out of the wholesale access regime is also not consistent with some other principles we must consider under the Act. For a number of products, wholesale customers do not have reasonable access to any RDPs made available to a RGR and in particular promotional funding. This appears contrary to the pricing principle.<sup>55</sup>
84. Further, the current wholesale offers favour the RGRs and do not facilitate a grocery industry operating with a range of wholesale customers, contrary to the diversity principle.<sup>56</sup>
85. As a result, we do not consider that the current wholesale offerings to wholesale customers (including by RGRs) are consistent with wholesale offerings provided in a workably competitive wholesale market, contrary to the main principle of the Act.<sup>57</sup>

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<sup>51</sup> New Zealand Food and Grocery Council “Wholesale Supply Inquiry Preliminary Issues Paper Submission” (8 November 2024) at para 4.4,  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0025/363328/New-Zealand-Food-and-Grocery-Council-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0025/363328/New-Zealand-Food-and-Grocery-Council-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>52</sup> Fonterra Brands (New Zealand) Limited “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (8 November 2024) at paras 28-29,  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/363322/Fonterra-Brands-New-Zealand-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/363322/Fonterra-Brands-New-Zealand-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>53</sup> Foodstuffs North Island and Foodstuffs South Island “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (8 November 2024) at para 40,  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf).

<sup>54</sup> Sections 24(1)(c) and s.24(2) of the Act.

<sup>55</sup> Section 24(1)(b) of the Act.

<sup>56</sup> Section 24(1)(i) of the Act.

<sup>57</sup> Section 23(2) of the Act.

### **The inclusion of private label or equivalent product in wholesale offers**

86. Submissions from suppliers highlighted the risks or unintended consequences of requiring RGRs to offer private label products in their wholesale offers. New Zealand Food and Grocery Council (**NZFGC**) submitted that doing so is likely to impact commercial arrangements for these products and supplier incentives.<sup>58</sup> That may be right, but the Act's purpose is to promote more effective competition (and efficiency) for the long-term benefit of consumers. The RGR wholesale offers should include low-cost options (which could be the private label products or generic non-branded alternatives), since the ability for retailers to offer consumers products at the low price point end of the range is an important feature of being able to compete in the retail grocery market.
87. NZFGC was also concerned that such regulation could disincentivise future entry and expansion by overseas grocery retailers.<sup>59</sup> We consider that the claimed anti-competitive impact of including low-cost options on entry and expansion of the industry to overseas retailers is slight. We consider that if the conditions for competition improve this is more likely to entice entry than to discourage it. If competition becomes more effective, the case for regulation should reduce. The Request for Information process being undertaken by the Associate Minister of Commerce and Consumer Affairs (**Minister**) may provide additional insight into the prospects of entry by overseas grocery retailers and the key barriers such a party would consider in evaluating whether to enter.<sup>60</sup>
88. Fonterra Brands also opposed a requirement to include private label products in RGRs' wholesale offers. It saw a risk that the imbalance in contracting power may be exacerbated were private label products required to be included in the wholesale access regime, such that the volumes of private label products would likely further increase at the expense of supplier-branded products.<sup>61</sup>

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<sup>58</sup> New Zealand Food and Grocery Council "Wholesale Supply Inquiry Preliminary Issues Paper Submission" (8 November 2024) at para 4.9,  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0025/363328/New-Zealand-Food-and-Grocery-Council-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0025/363328/New-Zealand-Food-and-Grocery-Council-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>59</sup> New Zealand Food and Grocery Council "Wholesale Supply Inquiry Preliminary Issues Paper Submission" (8 November 2024) at para 4.9,  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0025/363328/New-Zealand-Food-and-Grocery-Council-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0025/363328/New-Zealand-Food-and-Grocery-Council-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>60</sup> Ministry of Business, Innovation & Employment "Request For Information opened for grocery sector competitors and investors" (accessed 31 March 2025),  
<https://www.mbie.govt.nz/about/news/request-for-information-opened-for-grocery-sector-competitors-and-investors>.

<sup>61</sup> Fonterra Brands (New Zealand) Limited "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at para 18,  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/363322/Fonterra-Brands-New-Zealand-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/363322/Fonterra-Brands-New-Zealand-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

89. In our view, consumer preferences for privately labelled or branded products are matters for consumers, who are better placed than us, RGRs or suppliers to weigh the respective merits of each offer for each product. Our key concern is that, currently, the offers wholesale customers make available to consumers are limited by the exclusion of private label products (or equivalent products) from wholesale offers and that as a result these products are not offered by competing retailers. This seems to further underscore the stronger market position of the RGRs' banners, to the detriment of competing retailers and consumers.

### **Charge through**

90. Some wholesalers offer a charge through invoicing system for wholesale customers.<sup>62</sup> If this was extended to wholesale customers this could improve those customers' access to a wider range of groceries, including by giving them access, probably on improved terms, to products that are not supplied through the RGRs' DCs and that are not included in their wholesale offers. We discuss this further in **Attachment B**.

### **Direct supply**

91. In assessing the range provided by RGRs' wholesale offers we have also considered the availability of other channels of supply of groceries to wholesale customers. In particular, we have considered wholesale customers ability to directly arrange supply from suppliers.<sup>63</sup>

92. We provide fuller discussion in **Attachment B** but, in short, we consider direct supply is frequently not an attractive alternative to wholesale supply as most wholesale customers, reflecting their lack of scale and buying power, are unable to negotiate competitive deals, including promotional funding.

93. As a result, many wholesale customers will not benefit from reasonable access to the benefits of the scale, and the efficiency, of operations of RGRs, by negotiating directly with suppliers.<sup>64</sup>

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<sup>62</sup> For example, Metcash and the Foodstuffs cooperatives for their members. Foodstuffs South Island "Supplier Terms of Trade" (accessed 14 May 2025), <https://www.foodstuffs-exchange.co.nz/assets/documents/Charge-Through-Account-Terms-of-Trade-FSSI.pdf>. Metcash Metconnect "Sorted ChargeThrough and Cross Dock" (accessed 21 May 2025), <https://metconnect.metcash.com/food/s/article/Sorted-ChargeThrough-Cross-Dock>.

<sup>63</sup> Section 24 (2) of the Act.

<sup>64</sup> Section 21(b) of the Act.

## Our expectations on progress toward a comprehensive range of products for wholesale

94. In summary, we would expect RGRs' wholesale offers to provide wholesale customers with the comprehensive range of products they need to meet consumers' demands. We also expect suppliers to support this by allowing their most purchased products to be included in RGR wholesale offers:

- 94.1. There should be a comprehensive range not just in terms of all the product categories being well represented (including the key categories discussed in **Attachment B**) but also sufficient choices within each category since the wholesale customer could target retail customers seeking offers to address convenience offerings through to full main shops.
- 94.2. There should be a variety and a range of product from different price points within each category (ie, including both notable branded products and low-cost options, which may have private or generic brand labelling).
- 94.3. Wholesale offers from RGRs should include products that may also be supplied direct by suppliers using their own distribution channels, as this will pass on the scale benefits of the RGRs. Where such offers provide a higher level of service (eg, delivery) and consequently have higher cost, the retailer should have the choice to buy the high or low service option.

## Ease of access to wholesale options

95. Beyond pricing and range, another aspect of the current wholesale offers that is of concern for smaller wholesale customers are some of the rules and requirements to obtain access to wholesale supply of groceries. In particular, minimum order quantities and delivery schedules are a barrier to access for some wholesale customers.

96. In a competitive wholesale market, we would expect wholesalers to produce innovations to enable access for customers facing these issues, such as: cross-docking, charge through or facilitating orders through third-party logistics.<sup>6566</sup>

97. We have seen WWNZ's development of a wholesale card that enables access through discounted retail purchasing although the discount is only 5%.<sup>67</sup> We understand that no RGR currently accommodates cross-docking or third-party logistics.

<sup>65</sup> Cross-docking is where goods are moved from inbound transportation directly to outbound transportation, eliminating the need for warehousing and storage. Charge through allows a customer to order and be billed centrally while receiving orders directly from suppliers.

<sup>66</sup> Metcash Metconnect "Sorted ChargeThrough and Cross Dock" (accessed 21 May 2025), <https://metconnect.metcash.com/food/s/article/Sorted-ChargeThrough-Cross-Dock>.

<sup>67</sup> Woolworths New Zealand, "Wholesale Card application"

98. **Attachment B** discusses these issues in further detail.

## **Other issues that may be affecting the take-up of wholesale offers**

99. Our engagement with a range of stakeholders has identified other factors that may be affecting the take-up of wholesale offers, mainly:

- 99.1. a lack of transparency in wholesale offerings for suppliers;
- 99.2. the different level of vigour with which RGRs compete for wholesale customers; and
- 99.3. concerns over how information about wholesale demand might be used by RGRs.

100. These issues are discussed further in **Attachment B**.

## Chapter 4: Delivering change

101. This chapter explains our preliminary view that we have enough evidence to meet the threshold required to impose further regulation. It explains, however, that we will give industry more time to meet our expectations before we consider options for further regulation. The chapter concludes by outlining some of the regulatory interventions we expect to consider if our expectations are not met in due course.

### The statutory framework provides stronger tools to help shape the wholesale access regime

102. The Act provides a pathway for stronger intervention to help shape the wholesale access regime.<sup>68</sup>

### We consider the threshold tests for imposing additional regulation have likely been met

103. The Act sets out tests before such interventions can be made (discussed in **Attachment A**). Based on evidence as set out in **Attachment B**, we consider that the wholesale offerings of groceries provided by RGRs (in relation to any one or more of price, range, quantity, frequency, or any terms and conditions) are not consistent with wholesale offerings provided in a competitive wholesale market.<sup>69</sup> We further consider that the wholesale agreements the RGRs have made do not materially contribute towards achieving the purpose of Part 3 of the Act and we are currently not satisfied that some or all of the RGRs have taken all reasonable steps to achieve this.<sup>70</sup> If we maintained these views, progressing stronger regulatory options would be open to us if we determined that it is necessary or desirable to do so to promote the purpose of Part 3 of the Act.<sup>71</sup> The progress we see from industry over the next 12 months will inform our decision to impose or recommend additional regulation and what form that regulation should take.

### There is a wide range of stronger interventions available to us

104. The stronger interventions include:

- 104.1. a wholesale framework;
- 104.2. a wholesale code;
- 104.3. non-discriminatory terms;

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<sup>68</sup> This factsheet provides an overview of the stronger regulation options available under a wholesale inquiry: Commerce Commission “Fact sheet: Wholesale Supply Inquiry and strong regulation options” (2 October 2024), [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0031/362668/Wholesale-Supply-Inquiry-Stronger-regulation-options-factsheet-2-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0031/362668/Wholesale-Supply-Inquiry-Stronger-regulation-options-factsheet-2-October-2024.pdf).

<sup>69</sup> Sections 65(1)(b)(ii) and 82(1)(b) of the Act.

<sup>70</sup> Sections 65(2)(d) and 65(3)(a) of the Act.

<sup>71</sup> Sections 65(1)(a) and 82(1)(a) of the Act.

- 104.4. specified access terms; and
- 104.5. a determination prescribing the manner in which a person must comply with a duty under Part 3 of the Act.

105. Further detail on each of these additional regulatory interventions is discussed in **Attachment C**.

## **Delivering on our expectations without the cost of stronger regulation**

106. We consider that the outcomes we have identified in the previous chapter could be achieved by industry without stronger regulation and it will be more efficient for all stakeholders if this occurs.
  - 106.1. Suppliers and RGRs both have incentives to see the successful implementation of a wholesale regime. It diversifies the customer base for suppliers and it reduces the risk of further regulation for the RGRs.
  - 106.2. Some submitters on our PIP expressed the view that it is too early for more regulation.<sup>72, 73</sup>
  - 106.3. Regulation is likely to reduce RGRs' and suppliers' flexibility to design:
    - 106.3.1. options and alternatives for how the pass through of promotional funding to wholesale customers can be facilitated; and
    - 106.3.2. mechanisms to provide suppliers with assurance the payments they make will be reflected in lower retail prices, and higher sales, for their products.
107. We are aware of the complexity of the commercial arrangements and distribution systems in the grocery sector. Supermarkets, with suppliers, are best placed to know what will work and innovate to implement change efficiently. Regulation tends to be blunt. For example, it would be difficult for us to develop a system that effects the pass through of promotional discounts to consumers without being banked by retailers. Regulation could lead to less scope for promotional discounts, and less flexibility for sector participants, whereas the RGRs and suppliers could innovate around this.

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<sup>72</sup> New Zealand Food and Grocery Council “Wholesale Supply Inquiry Preliminary Issues Paper Submission” (8 November 2024) at para 2.1, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0025/363328/New-Zealand-Food-and-Grocery-Council-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0025/363328/New-Zealand-Food-and-Grocery-Council-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>73</sup> Foodstuffs North Island and Foodstuffs South Island “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (8 November 2024) at para 5.1, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf).

108. However, we also recognise that RGRs, and perhaps some suppliers, may have incentives for the wholesale regime not to succeed, in which case a blunter response may be required. If industry does not start to make meaningful progress towards a competitive wholesale market promptly, we will consider the case for stronger regulatory intervention. We will closely monitor industry progress in addressing the issues that we have identified. We anticipate reaching a final decision on whether further regulation is necessary or desirable in 2026 and will resume the process in around 12 months—but we remain open to bringing this forward if it becomes clear that industry is not making sufficient progress.
109. In this consultation, we are inviting industry participants to commit to delivering on the expectations we have set out in the previous chapter. Participants can do so via their public submissions on this paper.

### **We will continue to seek opportunities to develop the wholesale grocery market**

110. In addition to monitoring industry's progress against our expectations in relation to wholesale, we will continue to use the other tools at our disposal to promote improvements in competition and consumer outcomes, including:
  - 110.1. enforcing existing laws and requirements wherever we find examples of conduct that hinders the wholesale market and hampers the development of stronger competition; and
  - 110.2. exploring other ways of enabling current participants to more actively and confidently participate in the wholesale market.

### **Delivering on our expectations through stronger regulation**

111. This section outlines some of the regulatory options we would expect to further explore if necessary.
  - 111.1. **A wholesale framework** - We can make a determination requiring a RGR to establish and implement a wholesale framework. The framework would be a manual or rule book that sets out how certain decisions would be made by the RGR about price, range, quantity, frequency and terms and conditions for the wholesale supply of groceries. Each framework would be prepared by, and tailored to, each RGR.
  - 111.2. **A wholesale code** - We can make a determination setting out a grocery wholesale industry participation code (**wholesale code**). It could apply to one or more RGR, suppliers and wholesale customers. The wholesale code could include provisions that:
    - 111.2.1. provide rules about wholesale supply;
    - 111.2.2. improve or clarify wholesale regime operations and expectations; and/or
    - 111.2.3. address some of the issues observed.

111.3. **Non-discriminatory terms** - The Minister responsible for the Act, following an inquiry and 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. This would require RGRs to supply like wholesale customers on a like basis. It would mean a RGR could not treat them differently from how they treat themselves, except in limited circumstances.

111.4. **Specified access terms** - The Minister, following an Inquiry and a recommendation from the Commission, could also seek an Order in Council from the Governor-General to require RGRs to supply wholesale customers on specific terms. Once the Order in Council is made we would issue a determination that specifies how the terms apply. This determination must regulate the terms and conditions on which RGRs supply wholesale groceries, related to price, range, quantity, frequency or any other matter and would avoid the need for wholesale supply agreements.

111.5. **A determination under s 49 of the Act** - We can issue a determination prescribing the manner in which a person must comply with a duty under Part 3. We can do so if we are satisfied it is necessary or desirable in order to promote the purpose of Part 3 of the Act. Section 49 can address a number of duties, including pricing and how RGRs must comply with their duty under s 46 not to engage in certain conduct relating to supplier discounts, payments, or rebates. We see this provision as potentially useful in addressing issues addressing the pass through of funding for promotions.

## How the options for stronger regulation could address the issues we see in the current wholesale market.

112. In Table 1 we show examples of how the various options for stronger regulation could address the issues we observe in the current wholesale market.
113. Note that the form of regulation could be targeted rather than of universal application. So, for example, it could apply to one or more of the RGRs, or to some classes of groceries but not others, or to some classes of wholesale customer.<sup>74</sup>

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Sections 82(3), 88(3)(b), 94(1)(b).

**Table 1: How the regulatory tools could address the issues**

| Observed issue                              | Tool that could be used   | How would it help   | Threshold and Process requirements  |
|---|---|---|---|
| <b>Price</b>                                |   |   |   |
| No/weak pass through of promotional funding | Section 49 determination  | <p>A determination could further regulate an RGR from engaging in conduct that has the purpose, effect, or likely effect of preventing or restricting a wholesale customer from receiving (directly or indirectly) the benefits of a scale related benefit such as promotional funding (section 46, discussed further in <b>Attachment C</b>).</p>  | We must be satisfied it is necessary and desirable to promote the purpose of Part 3 of the Act. We need to consult on a draft.  |
| Wholesale price is uncompetitive            | Introduce a wholesale code including provisions relating to wholesale pricing | <p>A wholesale code enables us to regulate or prohibit any conduct in connection with entering into a supply and a wholesale agreement. We could, for example, require suppliers to make available equivalent RDP (including promotional funding) through RGR supply contracts and require RGRs to reflect this in the wholesale agreements they provide wholesale customers. We could also impose obligations on the wholesale customer, eg, to pass on the benefit of any such RDP via its retail prices.</p> | We must be satisfied it is necessary and desirable to promote purpose of Part 3 of the Act and – in imposing obligations on suppliers – ensure wholesale customers have reasonable access to RDP and reliable and cost-effective access to wholesale groceries (section 75). We need to consult on a draft. |

|              |   |   |   |   |
|--------------|---|---|---|---|
|              | Non-discriminatory terms                                  | RGRs would be required to supply wholesale customers on non-discriminatory terms. The supplier must not treat access seekers differently, and must not treat itself differently from other access seekers, except to the extent of any objectively justifiable differences. | Following consultation and other legal requirements, we would recommend that the Minister seek an Order in Council. We could then issue a determination in terms of subpart 6 including section 88.   |   |
|              | Specified access terms                                    | A specified access terms determination could ensure that a RGR supplies groceries at wholesale on regulated terms and conditions. The conditions could include maximum prices or margins, and/or principles for determining pricing and range.                              | Following consultation and other legal requirements, we would recommend that the Minister seek an Order in Council. We could then issue a determination in terms of subpart 6 including sections 93-95.   |   |
| <b>Range</b> | Supplier opting products out of the RGRs' wholesale offer | Introduce a wholesale code including provisions relating to wholesale range   | A wholesale code enables us to regulate or prohibit any conduct in connection with entering into a supply and a wholesale agreement. Among other things, we could require suppliers to allow RGRs to offer for wholesale sale the same range of products offered for sale in the RGR's retail formats | Consultation.<br>We must be satisfied it is necessary and desirable to promote the purpose of Part 3 and to ensure wholesale customers have reliable and cost-effective access to wholesale groceries (section 75). |

|   |   |   |           |
|---|---|---|-----------|
| RGRs limit the wholesale range to be narrower than the range offered in their retail stores (eg, withhold private label products or exclude products not going through their DC). | As above a wholesale code could be used to ensure the range for wholesale was the same as for retail. | As above, a wholesale code could, for example, require RGRs to include in their wholesale offers the same range of products offered for sale in the RGRs' retail formats. | As above. |
|   | Specified access and non-discriminatory access terms could similarly address this.                    | As above for these types of determination. One option could be to enable the same charge back mechanism for external wholesale customers as exists for RGR franchisees.   |           |

| <b>Ease of access</b>                            |                           |   |   |
|--|---------------------------|---|---|
| Minimum order quantities and delivery timeframes | Specified access terms    | A specified access terms determination could specify quality terms eg, delivery timeframes and/or quantity terms, for example minimum order quantities.   | Following consultation and other legal requirements, we would recommend that the Minister seek an Order in Council. |
|  | Wholesale code            | As above  | As above  |
|  | Non-discriminatory access | A non-discriminatory access terms determination could specify quality terms eg, delivery timeframes and quantity terms eg, minimum order quantities that were transparent and equivalent to the terms on which the RGR supplied its own operations (and especially its smaller ones). | Following consultation and other legal requirements, we would recommend that the Minister seek an Order in Council. |

# Attachment A: Legal and analytical framework for the Inquiry

## Purpose

- A1. This Attachment sets out the key legislative provisions in the Grocery Industry Competition Act 2023 (the Act) that we have applied when carrying out the Inquiry so far. Using the legislation as a basis, we have developed what we consider to be the key features of a competitive grocery wholesale market as an analytical framework.<sup>75</sup> We then use these features to assess progress made on the wholesale regime as outlined in Attachment B. This framework may be updated as the Inquiry progresses.
- A2. This Attachment addresses submission responses to the Preliminary Issues Paper (PIP) on issues such as insufficient consideration of mandatory requirements under the Act when deciding whether to perform functions, powers and duties in relation to wholesale supply.<sup>76</sup> It also provides a basis for expectations outlined in Chapter 3.<sup>77</sup>

## Key terms relevant to the legal and analytical framework

- A3. Relevantly, for the purposes of the Inquiry and our preliminary views paper, subpart 1 of Part 3 of the Act expressly defines a number of terms that are used in Part 3:
  - A3.1. “additional regulation” means any of the following:
    - A3.1.1. a requirement under subpart 4 for one or more regulated grocery retailers (RGRs) the wholesale supply of groceries and any ancillary services;
    - A3.1.2. a wholesale code under subpart 4;
    - A3.1.3. a requirement under subparts 5 and 6 for one or more RGRs to supply groceries and any ancillary services on non-discriminatory terms;

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<sup>75</sup> The PIP set out initial views on the features it expected a competitive grocery wholesale market to exhibit. Since then, we have considered the submissions we received in relation to the PIP and furthered our understanding of the industry.

<sup>76</sup> Woolworths New Zealand “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (8 November 2024) at para 1.6 (e)(f), [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>77</sup> Foodstuffs North Island and Foodstuffs South Island “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (8 November 2024) at para 7.1, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf).

- A3.1.4. a requirement under subparts 5 and 6 for one or more RGRs to supply groceries and any ancillary services in accordance with specified access terms regulation;
- A3.2. “ancillary services” includes services in connection with the distribution, delivery, or storage of groceries;
- A3.3. “non-discrimination”, in relation to the wholesale supply of groceries and any ancillary services, means that the regulated grocery retailer must not treat any wholesale customer differently from how it treats itself or its associated persons or any other wholesale customer, except to the extent that a particular difference in treatment is objectively justifiable and does not lessen, and is unlikely to lessen, competition in any grocery market;
- A3.4. “operational separation”:
  - A3.4.1. includes the way in which business units are managed or structured, and the type of relationships, dealings, and transactions the units have;
  - A3.4.2. does not include a requirement that any business unit must be operated by different owners; and
  - A3.4.3. may include business units being operated in different companies but only if the regulated grocery retailer wishes;
- A3.5. “regulated grocery retailer” includes each of:<sup>78, 79</sup>
  - A3.5.1. Foodstuffs North Island Limited (FSNI);
  - A3.5.2. Foodstuffs South Island Limited (FSNI);
  - A3.5.3. Woolworths New Zealand Limited (WWNZ); and
  - A3.5.4. a person that is an interconnected body corporate of, successor to, franchisee of, or transacting shareholder of any of Foodstuffs North Island Limited, Foodstuffs South Island Limited, and Woolworths New Zealand Limited;
- A3.6. “supply agreement” means an agreement between a regulated grocery retailer and a supplier;
- A3.7. “wholesale agreement” means an agreement for the wholesale supply of groceries that a regulated grocery retailer enters into or arrives at in connection with a wholesale supply request;
- A3.8. “wholesale code” means a grocery wholesale industry participation code set out in a determination under subpart 4;

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<sup>78</sup> Section 26 of the Act.

<sup>79</sup> Persons may also be designated regulated grocery retailers under section 27 of the Act, but no such designation has been made to date.

A3.9. “wholesale customer” means any person that receives the wholesale supply, or wants 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; and

A3.10. “wholesale supply request” refers to a request by a wholesale customer to a regulated grocery retailer for the wholesale supply of groceries and any ancillary services.<sup>80</sup>

## **Key legislative provisions to be considered**

A4. As part of our Inquiry under section 55 of the Act (the Inquiry), we must consider whether any of the tests in s65(2) are satisfied. We must also consider whether the tests in s65(1)(b)(ii) and s82(1)(b)(ii) are satisfied. We therefore consider that the key legislative provisions are:

A4.1. the purpose of the Act and of Part 3 of the Act;

A4.2. mandatory considerations for imposing or recommending additional regulation;

A4.3. main principles and relevant principles of Part 3 of the Act; and

A4.4. tests for additional regulation.

## **Overall purpose of the Grocery Industry Competition Act**

A5. The Act contains two purpose statements that we are required to apply when carrying out the Inquiry and making our decision. The first is the overall purpose of the Act which is to promote competition and efficiency in the grocery industry for the long-term benefit of consumers in New Zealand.<sup>81</sup> Competition is defined as workable or effective competition rather than a theoretical concept of perfect competition.<sup>82</sup>

### **Interpretation of workable competition**

A6. While the High Court acknowledges that there is no consensus on the precise conditions that define workable competition, it provided the following practical formulation in the text box below:<sup>83</sup>

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<sup>80</sup> Section 34(1) of the Act.

<sup>81</sup> Section 3 of the Act.

<sup>82</sup> Section 5(1) of the Act.

<sup>83</sup> *Wellington International Airport Ltd & Ors v Commerce Commission* [2013] NZHC 3289 at [14]-[23].

### Workably Competitive Market

[14] A workably competitive market is one that provides outcomes that are reasonably close to those found in strongly competitive markets. Such outcomes are summarised in economic terminology by the term “economic efficiency” with its familiar components: technical efficiency, allocative efficiency and dynamic efficiency. Closely associated with the idea of efficiency is the condition that prices reflect efficient costs (including the cost of capital, and thus a reasonable level of profit).

[15] [T]he practical context is the existence of sufficient rivalry between firms (sellers) to push prices close to efficient costs. The degree of rivalry is critical. In a workably competitive market no firm has significant market power and consequently prices are not too much or for too long significantly above costs.

[16] These terms are admittedly not precise. No two markets are the same and no single market stays the same. Whether workably competitive conditions exist is a judgement to be made in the light of all the information available, rather than something that can be ascertained by testing whether certain precise conditions are satisfied.

[...]

[18] In our view, what matters is that workably competitive markets have a tendency towards generating certain outcomes. These outcomes include the earning by firms of normal rates of return, and the existence of prices that reflect such normal rates of return, after covering the firms' efficient costs.

[...]

[22] In short, the tendencies in workably competitive markets will be towards the outcomes produced in strongly competitive markets. The process of rivalry is what creates incentives for efficient investment, for innovation, and for improved efficiency. The process of rivalry prevents the keeping of all the gains of improved efficiency from consumers, and similarly limits the ability to extract excessive profits.

[23] Indeed, the term “workably competitive markets” means markets in which these tendencies are seen. The more those tendencies are seen in a market, the more the market can be regarded as workably competitive. And of course, the more competitive the market, the more those tendencies will be seen.

## Interpretation of efficiency in relation to overall purpose of the Act

A7. We have interpreted ‘efficiency’ as referring to ‘economic efficiency’ – which is, as set out in the judgement above, considered to be an outcome of workable competition. Economic efficiency encompasses three components:

- A7.1. **Productive efficiency** is present when producers use inputs in such a manner as to minimise costs, subject to technological constraints;
- A7.2. **Allocative efficiency** occurs when resources are allocated within the economy to the uses in which they have the highest value; and
- A7.3. **Dynamic efficiency** refers to decisions made over time and includes decisions relating to investment and/or innovation that can improve productivity as well as the range and quality of services.

- A8. We consider that "to promote" in the context of the purpose statement refers to advancing or furthering the objectives of workable competition and economic efficiency as described above.
- A9. While the process of competition is assumed to promote efficient outcomes (such as cost minimisation, efficient allocation of scarce resources, and greater innovation) there may be circumstances where workable competition alone may not deliver efficient outcomes which benefit consumers in the long-term. In these circumstances we may choose to directly promote efficiency which may in turn impact competition.
- A10. The long-term benefit to consumers may therefore be achieved through a decision which promotes efficiency to a greater extent and competition to a lesser extent (or vice versa). When making our decision we are guided by our judgement as to what would better promote the long-term benefit of consumers.

### **Interpretation of long-term benefit of consumers**

- A11. We consider that over the long-term, greater competition and efficiency would lead to consumers able to enjoy a wider range of grocery offers which they can choose between. This may include more competitive retail prices (prices moving closer towards the cost of supply), a range of products and shopping experiences which reflect consumer demands, and more innovation in the industry.

### **Purpose of Part 3 of the Act – s21**

- A12. The second purpose that we are required to consider is specific to Part 3 of the Act and covers the wholesale supply of groceries. The purpose of Part 3 is to promote the overall purpose of the Act by enabling wholesale customers to:<sup>84</sup>
  - A12.1. have 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
  - A12.2. have reasonable access to the benefits of the scale, and the efficiency, of operations of RGRs and their associated persons.
- A13. For the purposes of Part 3, an RGR supplies groceries if it:
  - A13.1. supplies (or resupplies) the groceries by way of exchange; or
  - A13.2. arranges an agreement for the supply (or resupply) of the groceries by way of sale or exchange to one or more other persons.

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<sup>84</sup>

Section 21 of the Act.

## Interpretation of purpose of Part 3 in relation to promoting overall purpose of the Act

- A14. The wholesale regime provides for RGRs to supply (or resupply) groceries directly to other retailers or indirectly by arranging agreements between other retailers and direct suppliers for the supply (or resupply) of groceries (eg, charge through – see **Attachment B**).<sup>85</sup>
- A15. A thriving wholesale regime supports the entry and expansion of other retailers to compete with RGRs in the downstream retail market on for example, price, range of products demanded by consumers and quality of service. It does this by incentivising RGRs and suppliers to compete for other retailers. Given RGRs have a dominant combined share of national grocery market (exceeding 80% in 2023), suppliers will be incentivised to diversify their customer channels and support other retailers either through the wholesale regime or via direct supply.<sup>86</sup>

## Interpretation of s21(a)

- A16. In relation to ‘reliable and cost-effective’ supply of groceries, we consider that other retailers need to be able to consistently acquire competitively priced groceries. This can be from either a wholesale supplier (such as an independent wholesaler or a wholesaler that is part of a vertically integrated grocery retailer) or directly from suppliers (such as manufacturers, importers, and growers). The ability for the wholesale customer being able to choose and if necessary, switch their channel of supply ensures that they are then able to access reliable and cost-effective supply of groceries to then sell on to the consumer.
- A17. If the supply of groceries is not cost-effective, wholesale customers will not be able to compete with the RGRs. To ensure meaningful and enduring competition to the RGRs, the wholesale customer will need to be able access a reliable supply – otherwise end consumers will seek to fulfil their demand elsewhere, with a risk of them not returning.

## Interpretation of s21(b) - scale and efficiency

- A18. In regard to scale and efficiency, the Market Study, noted that:

“...Scale is a factor which provides the major grocery retailers with cost advantages over other retailers and entrants... New entrants and retailers would therefore need to find a way to overcome the inherent cost disadvantages they face in order to compete effectively on price with the major grocery retailers”.<sup>87</sup>

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<sup>85</sup> Section 25(2)(a)(b) of the Act.

<sup>86</sup> Commerce Commission “First Annual Grocery Report” (4 September 2024) at p. 42, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362305/Annual-Grocery-Report-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362305/Annual-Grocery-Report-2024.pdf).

<sup>87</sup> Commerce Commission “Market Study into the retail grocery sector – final report” (8 March 2022) at p. 225, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf).

A19. It also noted that, for example that:

“Woolworths NZ told us that its national business model leads to ease of doing business with its suppliers (with product decisions based on data from across all its stores) and enables them to achieve efficiencies in their transport network and centralised marketing activities.”<sup>88</sup>

A20. We consider scale to be the reduction in the average cost per unit as volume increases. This would include securing better purchase terms or discounts that come from purchasing in larger volumes.

A21. The higher volumes that RGR retailers can purchase allows them to have greater bargaining power and secure larger discounts and rebates from suppliers. In turn, the higher volumes allow RGRs to achieve efficiencies by driving down the unit costs for their business operations such as warehousing and storage, logistics and overheads.

A22. The inclusion of scale and efficiency in the Act, provides direction for RGRs to leverage scale from their own retail operations, eg, by purchasing in bulk, negotiating lower prices paid to suppliers and using centralised warehousing and distribution, for the benefit of other retailers. The scale and efficiency terms go towards addressing the inherent cost disadvantages that other retailers face so that they can obtain groceries from RGRs at efficient and competitive wholesale prices and therefore, able to compete with the RGRs’ retail operations.

#### **Relevance of scale and efficiency to different potential wholesale customers**

A23. We expect that in general, larger sized other retailers with multiple sites may be able to by-pass the wholesale regime for some, or all, product categories by having sufficient scale and efficiency to use bargaining power to negotiate directly with suppliers. These large sized, multiple site retailers may still however, wish to use the wholesale regime to address supply shortages, or as a stepping stone for additional products. There may also be indirect benefits to this cohort when negotiating with suppliers directly by being able to switch to the RGRs as an alternative source of supply.

A24. Medium to small sized other retailers are likely to have less scale and efficiency than larger sized other retailers to be able to negotiate directly with suppliers. They are likely to benefit from the ability of the RGR to aggregate demand across multiple other retailers as well as the RGR being able to utilise its scale. The benefit may be direct, in terms of sourcing supply but also indirect as the wholesale regime provides leverage for medium to smaller sized other retailers to negotiate more effectively with suppliers directly.

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<sup>88</sup> Commerce Commission “Market Study into the retail grocery sector – final report” (8 March 2022) at para 4.144, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf).

A25. We therefore consider that at s21(b), the Act seeks to address the difference in scale and efficiency that the RGRs obtain by giving wholesale customers access to those benefits.

### **Interpretation of s21(b) - 'reasonable'**

A26. We consider that inclusion of "reasonable" shows that the access to scale and efficiency is not complete or total – rather it is constrained in some respects.

A27. In a workably competitive market, wholesale customers who have lower costs to serve will, all other things equal, face prices that are lower than wholesale customers who have higher costs to serve. For example, it would be unreasonable for all wholesale customers to have full, unfettered access to the scale and efficiency benefits of a large RGR store close to a RGR's distribution centre, as its costs to serve are likely to be lower than a smaller RGR store, further away from a distribution centre. A one-size fits all approach, which does not reflect costs to serve, is unlikely to promote efficiency in the grocery industry nor is it how a typical wholesaler would operate in a workably competitive wholesale market. We therefore anticipate some wholesale customer segmentation to occur.

A28. Any segmentation should reflect objective factors such as differences in the cost to serve different customers. Differences in how the RGRs serve their own associated parties (eg, banners) may provide a benchmark for differences in how external wholesale customers are treated. For example, we understand that discretionary promotional funding (trade spend) is often provided on a banner basis to reflect suppliers' relative competitive positionings under different banners.<sup>89</sup>

## **Current obligations on the RGRs**

A29. Under s 26 of the Act, FSNI, FSSI and WWNZ have wholesale supply obligations. These require that the RGRs:

A29.1. must consider wholesale supply requests in good faith;<sup>90</sup>

A29.2. establish and implement rules, criteria and procedures for considering wholesale supply requests;<sup>91</sup>

A29.3. comply with ongoing duties relating to rules, criteria and procedures;<sup>92</sup>

A29.4. establish and implement standard terms and conditions and principles for wholesale supply;<sup>93</sup>

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<sup>89</sup> Foodstuffs North Island and Foodstuffs South Island "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at para 24, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf).

<sup>90</sup> Section 35 of the Act.

<sup>91</sup> Section 36 of the Act.

<sup>92</sup> Section 37 of the Act.

<sup>93</sup> Section 38 of the Act.

- A29.5. comply with ongoing duties relating to standard terms and conditions and principles;<sup>94</sup>
- A29.6. notify the Commission of wholesale supply request;<sup>95</sup>
- A29.7. notify the Commission of variation or cancellation;<sup>96</sup>
- A29.8. ensure transparency of wholesale agreement;<sup>97</sup>
- A29.9. ensure transparent pricing under wholesale agreement;<sup>98</sup>
- A29.10. must put in place systems and process for wholesale supply;<sup>99</sup> and
- A29.11. ensure that its agreements and conduct do not hinder or obstruct trading relationships.<sup>100</sup>

A30. The Commission may make a determination prescribing the manner in which a person must comply with a duty under s 34(2) or any sections s35 to s46 (above).<sup>101</sup>

## **Commission's power to impose or recommend additional regulation**

- A31. Subpart 3 of Part 3 empowers the Commission to hold an inquiry on its own initiative into whether the wholesale supply of groceries and any ancillary services should be subject to additional regulation, and, if so, what type or types of additional regulation should apply.<sup>102</sup> The Commission is also empowered to consider whether any other regulation or action may be necessary or desirable to promote the purpose of the Act.<sup>103</sup>
- A32. If satisfied of certain specified matters the Commission may impose additional regulation or recommend to the Minister that additional regulation be provided for by an Order in Council.<sup>104</sup> We discuss the tests that must be satisfied and other mandatory considerations when considering additional regulation below.<sup>105</sup>
- A33. The Commission may impose either or both of the following type of regulation under subpart 4 of Part 3:
  - A33.1. a requirement for one or more RGRs to establish, implement, and maintain a wholesale framework for the wholesale supply of groceries - to provide

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<sup>94</sup> Section 39 of the Act.

<sup>95</sup> Section 40 of the Act.

<sup>96</sup> Section 41 of the Act.

<sup>97</sup> Section 42 of the Act.

<sup>98</sup> Section 43 of the Act.

<sup>99</sup> Section 44 of the Act.

<sup>100</sup> Section 45 of the Act.

<sup>101</sup> Section 49 of the Act.

<sup>102</sup> Sections 22(2)(a), 55(1)(b), and 56(1)(a) of the Act.

<sup>103</sup> Section 56(1)(c) of the Act.

<sup>104</sup> Sections 22(2)(b), 56(2)(a), 64, 65, and 83 of the Act.

<sup>105</sup> We do not discuss the additional regulation in detail as this is not relevant at this stage considering these preliminary findings.

transparency about how a regulated grocery retailer will make decisions about price, range, quantity, frequency, and terms and conditions in connection with the wholesale supply of groceries (wholesale frameworks);<sup>106</sup> and

A33.2. a grocery wholesale industry participation code - to provide rules in connection with the wholesale supply of groceries provided by RGRs (wholesale code).<sup>107</sup>

A34. The Commission may recommend to the Minister that either or both of the following types of regulation should be imposed:

A34.1. a requirement for one or more RGRs to supply groceries at wholesale on non-discriminatory terms - to ensure that a regulated grocery retailer does not treat wholesale customers differently from how it treats itself or its associated persons or any other wholesale customer, except in limited circumstances (non-discrimination regulation);<sup>108</sup> and

A34.2. a requirement for one or more RGRs to supply groceries at wholesale in accordance with specified access terms regulation - to ensure that a regulated grocery retailer supplies groceries at wholesale on regulated terms and conditions (whether relating to price, range, quantity, frequency, or any other matter) (specified access terms regulation).<sup>109</sup>

## **Mandatory considerations for imposing or recommending additional regulation**

A35. We are required to take account of several factors in deciding whether, and on what terms, to impose or recommend additional regulation. These considerations are:

A35.1. whether doing so would promote or achieve the relevant purposes of the Act;

A35.2. the main principle and other principles to the extent that we consider them relevant to the main principle; and

A35.3. the tests and other considerations for additional regulation referred to in s 57(1).

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<sup>106</sup> Sections 22(2)(b)(i) and 64(1)(a) of the Act.

<sup>107</sup> Sections 22(2)(b)(ii) and 64(1)(b) of the Act.

<sup>108</sup> Sections 22(2)(c), 81(1)(a) and 83(1) of the Act.

<sup>109</sup> Sections 22(2)(c), 81(1)(b) and 83(1) of the Act.

## Principles of the Act

### Main principle of Part 3

A36. When performing or exercising our functions, powers or duties under Part 3 (or when deciding whether to perform or exercise them) we are also required to take into account the importance of wholesale offerings to wholesale customers (including by RGRs) being consistent with wholesale offerings provided in a workably competitive wholesale market (main principle).<sup>110</sup>

### Interpretation of main principle, Part 3

A37. In a workably competitive wholesale market, a RGR's wholesale operations would seek to satisfy demand from wholesale customers in the knowledge that those wholesale customers may also be seeking to satisfy their demands from the rival RGR wholesale operation and directly through suppliers. This rivalry drives both RGR wholesale operations and direct suppliers to continuously improve their offers and generates incentives for investment, innovation and efficiency across the industry.

A38. We consider 'access' to competitive offers to be important as we acknowledge that some competitive offers to wholesale customers may depend on a number of aspects, including minimum order quantities and logistics processes. For example, some stock keeping units (SKUs) may be better suited to be delivered direct to store rather than via a distribution centre eg, perishable products such as bread and milk.<sup>111, 112, 113</sup>

A39. Access to some SKUs may require investment on the part of the wholesale customer eg, chilled and frozen may require specific infrastructure and/or capacity.<sup>114</sup> Other SKUs which may have a longer shelf life and so could potentially be offered directly through the wholesale regime via distribution centres, are supplied directly and have no, or relatively low, minimum order quantities.<sup>115</sup>

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<sup>110</sup> Section 23 of the Act.

<sup>111</sup> Foodstuffs North Island and Foodstuffs South Island "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at para 20, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf).

<sup>112</sup> Fonterra Brands (New Zealand) Limited "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at para 9, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/363322/Fonterra-Brands-New-Zealand-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/363322/Fonterra-Brands-New-Zealand-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>113</sup> Commerce Commission engagement with suppliers.

<sup>114</sup> Commerce Commission engagement with wholesale customers.

<sup>115</sup> Commerce Commission engagement with suppliers.

A40. Suppliers who have existing distribution networks that supply non-RGR customers directly (including wholesale customers), consider these networks as investment.<sup>116</sup> These suppliers are likely to have incentives to maintain these networks, rather than opt-into the wholesale regime.<sup>117, 118</sup> Suppliers' incentive to opt out of the wholesale regime may in part be explained by the current focus of the regime on supply (or resupply) of groceries by way of exchange rather than RGRs arranging agreements for the supply of groceries, which then could utilise suppliers' existing distribution networks.<sup>119</sup>

A41. There are also benefits to suppliers from a workably competitive wholesale market. This would include a more diverse customer base and the ability to supply alternative products to those being stocked in the RGRs. For example, for some smaller suppliers, the wholesale regime may be an appropriate channel to grow.<sup>120</sup> In other cases, due to the smaller volumes required, a larger supplier could test new products through the wholesale regime, thereby giving consumers more choices. However, this may require an alternative to approach to how some suppliers have conventionally considered RGRs as an entry point for new products and then used success with RGRs to then expand into other customer channels.<sup>121</sup>

A42. Rivalry created by the RGRs' wholesale operations and suppliers desire to diversify their customer channels should ensure that:

- A42.1. if supplying directly (due to own distribution network and/or desire to maintain separate customer channels) that those offers are competitive; or
- A42.2. suppliers are incentivised to opt in to the wholesale regime full or in some capacity eg, limited range.

## Other principles

A43. To the extent we consider them relevant to the main principle, we must also take into account the following principles when performing or exercising our functions, powers or duties under Part 3 (or when deciding whether to perform or exercise them).<sup>122</sup>

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<sup>116</sup> Fonterra Brands (New Zealand) Limited “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (8 November 2024) at para 9.1,  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/363322/Fonterra-Brands-New-Zealand-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/363322/Fonterra-Brands-New-Zealand-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>117</sup> Fonterra Brands (New Zealand) Limited “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (8 November 2024) at paras 9 and 10,  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/363322/Fonterra-Brands-New-Zealand-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/363322/Fonterra-Brands-New-Zealand-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>118</sup> Commerce Commission engagement with suppliers.

<sup>119</sup> Section 25((2)(a)(b)) of the Act.

<sup>120</sup> Commerce Commission engagement with RGRs.

<sup>121</sup> Commerce Commission “Foodstuffs merger clearance determination” (30 September 2024) at para 190, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0025/362761/5B20245D-NZCC-24-Foodstuffs-merger-clearance-determination-30-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0025/362761/5B20245D-NZCC-24-Foodstuffs-merger-clearance-determination-30-September-2024.pdf).

<sup>122</sup> Section 24(1) of the Act.

A44. We have set out the principles we applied in reaching our findings and then our interpretation of each in turn. We consider that if there are trade-offs within principles, then they must be applied in a way which best reflects the main principle under s 23. Further detail can be found in **Attachment B**.

### **Pricing principle**

A45. In relation to pricing, the Act states, the desirability that each regulated grocery retailer's wholesale prices reflect efficient costs, taking into account the following:

A45.1. the costs of the regulated grocery retailer and its associated persons when buying groceries from suppliers, using the scale of operations of the regulated grocery retailer and its associated persons:

A45.2. the efficiency of operations of the regulated grocery retailer and its associated persons:

A45.3. the regulated grocery retailer's reasonable expectation of recovering its efficient costs, including a reasonable return on investments made in connection with a wholesale offering.<sup>123</sup>

### **Interpretation of pricing principle**

A46. In order to promote the purpose of the Act (which is in turn to promote competition and efficiency in the grocery industry for the long-term benefit of consumers), the wholesale offers need to be competitive with RGRs' prices to enable efficient wholesale customers to compete in the downstream retail market. This means that the effective wholesale price (eg, price less discounts) would enable an efficient wholesale customer to compete with the RGR's retail operation.

A47. In its submission on the PIP, WNZ said that the Commission's approach of assessing the margin between wholesale and retail prices, and whether the margin is sufficient to cover a wholesale customer's retail costs, is not provided for by the Act.<sup>124</sup> In this regard, we note the following:

A47.1. the wholesale regime was introduced as a regulatory remedy to reduce barriers to retail entry and expansion by facilitating wholesale access to groceries;

A47.2. this is likely to be frustrated if wholesale prices do not enable efficient wholesale customers to compete at the retail level.

A47.3. to test whether this is the case, we compared a markup (margin) applied on the wholesale price against RGR retail prices as an indicator of other retailers' ability to recover their wholesale costs. This is further discussed in **Attachment B**.

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<sup>123</sup> Section 24(1)(a) of the Act.

<sup>124</sup> Woolworths New Zealand "Submission on Wholesale Supply Inquiry Preliminary Issues Paper"

(8 November 2024) at para 9.2,

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

A48. As reflected in the submissions received to the PIP, we acknowledge that different wholesale customers will have different requirements in terms of the margin between wholesale and retail prices to recover retail-related costs.<sup>125</sup> Furthermore, in a workably competitive wholesale market there may be variance in margins across different products at different times. We also acknowledge that the efficiency of a wholesale customer in terms of its internal processes is outside of the RGRs' control.<sup>126</sup> However, the pricing of the RGRs' wholesale offer is a key input into the wholesale customer's downstream offering. As such, we consider that an efficient wholesale customer should be able to apply a margin at least as equal to that of an RGR retailer (eg, 20-25% markup) which would then allow them to compete effectively with RGRs' retail operations. We acknowledge that a cost build-up approach remains open to us, or other approaches such as the prices paid by the RGR banners.

A49. In terms of pricing models utilised by the RGRs for their wholesale offering, wholesale prices of groceries should tend towards the efficient costs of providing wholesale groceries. This consists of the costs paid to suppliers (taking into account RDPs) and any other costs incurred by the RGR such as costs associated with the RGR's distribution centres and wholesale functions such as ordering and delivery.<sup>127</sup>

A50. In a workably competitive wholesale market, we would observe wholesalers striving to minimise their costs of operation, by seeking larger volumes and in doing so able to spread their costs over the largest possible volume of transactions to achieve efficient costs. However, if volumes are low or sub-scale, which is likely in the early years of wholesaling operations, wholesalers will not be operating efficiently. Increases in volumes will drive greater efficiency, and ultimately profitability, all other things equal. Increases in volumes will also allow for reasonable returns on investments made in connection with a wholesale offering. As RGR wholesale volumes are currently low relative to overall grocery volumes, RGRs are unlikely to be operating efficiently at this time.

### **Principles related to discounts, payments and rebates**

A51. In relation to discounts, payments and rebates, the Act states the desirability that wholesale customers have reasonable access to any discounts, payments, or rebates made available to a RGR or indirectly by, or on behalf of, a supplier in connection with either or both of the following:

A51.1. the scale of operations of the RGR and its associated persons:

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<sup>125</sup> Night 'n Day Foodstores Ltd Zealand "Submission on Wholesale Supply Inquiry Preliminary Issues" (8 November 2024) at para 4, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0026/363329/Night-27n-Day-Foodstores-Ltd-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0026/363329/Night-27n-Day-Foodstores-Ltd-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf).

<sup>126</sup> Woolworths New Zealand "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at paras 9.2, 9.3 and 9.7, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>127</sup> Sections 24(1)(a)(i) and 24(1)(a)(ii) of the Act.

A51.2. the efficiency of operations of the RGR and its associated persons.<sup>128</sup>

A52. In addition, the RGR must not engage in conduct that has the purpose, effect, or likely effect of preventing or restricting a wholesale customer from receiving (directly or indirectly) the benefits of a range-, quantity-, or frequency-based discount, payment, or rebate.

A53. In this section, range-, quantity-, or frequency-based discount, payment, or rebate means a discount, payment, or rebate made available to a regulated grocery retailer directly or indirectly by, or on behalf of, a supplier

A53.1. in connection with either or both of the following:

- A53.1.1. the scale of operations of the regulated grocery retailer and its associated persons;
- A53.1.2. the efficiency of operations of the regulated grocery retailer and its associated persons; and

A53.2. that meets the requirements specified in a determination made under this subpart (if any).<sup>129</sup>

#### **Interpretation of discounts, payments and rebates principles**

A54. Rebates, discounts and payments (**RDPs**) effectively reduce the price of groceries supplied to RGR retailers by suppliers. The ability to access RDPs enables wholesale customers to have cost-effective wholesale supply groceries by the RGRs. Foodstuffs submitted that RDPs related to scale and efficiency were already being passed forward to wholesale customers.<sup>130, 131</sup> However, as noted in Attachment B, wholesale customers' access to those RDPs is limited. The access does not consistently cover the breadth of RDPs that are available to RGRs' own retail operations. Wholesale customers note the difference in RDPs received by RGRs relative to what is available through the wholesale regime.<sup>132</sup> Without reasonable access to discretionary funding, wholesale customers cannot effectively compete with the RGRs.

A55. WWNZ raised the issue of some RDPs being a choice that the supplier would make – not necessarily something that the RGR has control over.<sup>133</sup> A question about who

<sup>128</sup> Section 24(1)(b) of the Act.

<sup>129</sup> Section 46 of the Act.

<sup>130</sup> Foodstuffs North Island and Foodstuffs South Island "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at para 5.2, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf).

<sup>131</sup> Commerce Commission engagement with RGRs.

<sup>132</sup> Kennerley Gourmet Grocery Ltd "Submission on Wholesale Supply Inquiry Preliminary Issues" (23 October 2024) at paras 12 and 13, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/363327/Kennerley-Gourmet-Grocery-Ltd-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-23-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/363327/Kennerley-Gourmet-Grocery-Ltd-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-23-October-2024.pdf).

<sup>133</sup> Woolworths New Zealand "Cross Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (11 December 2024) at para 9.3.1, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/364025/Woolworths-New-Zealand-Cross-submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-11-December-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/364025/Woolworths-New-Zealand-Cross-submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-11-December-2024.pdf).

typically initiates rebate, discounts and payment agreements with RGRs was included in the grocery supplier survey that the Commission undertook with TRA. Only a small proportion of survey respondents (7%) responded that they initiate the agreements.<sup>134</sup> This was also echoed by some suppliers in our engagement – see **Attachment B** for further details.<sup>135</sup>

A56. We understand from our engagement that some types of RDPs are discretionary in that suppliers pay customers for certain marketing and promotional activities.<sup>136</sup> Also known as trade spend, these payments can be considered as an investment to the supplier as they then lead to an increase in sales.<sup>137, 138</sup> To ensure that the promotion activity has taken place and leads to an increase in sales, such payments are often monitored by the supplier.<sup>139</sup> We recognise that access to some RDPs through the wholesale regime may require the establishment of processes and/or infrastructure.<sup>140</sup>

A57. In a workably competitive wholesale market, a wholesaler would seek out innovative solutions to act on behalf of the wholesale customers to secure RDPs with suppliers. For example, to ensure compliance with a time-limited promotional RDP, the RGR could provide anonymised wholesale customer purchase data.<sup>141</sup> Alternatively, instead of establishing processes to monitor activity at the point of sale, the end-consumer could be used to assess whether additional sales have occurred due to a promotion (an example of this was a recent Fruju marketing campaign aimed at fuel stops and dairies, where consumers were given a scratch card to access a game, giving them a chance to win a prize.)<sup>142</sup> In direct supply situations, the RGR could arrange grocery supply to wholesale customers by aggregating demand across multiple other retailers and negotiating with suppliers charge through rebates.<sup>143</sup> We do not consider that the grocery supply code precludes RGRs from acting on behalf of wholesale customers and negotiating with suppliers for RDPs to be passed forward to wholesale customers.

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<sup>134</sup> Commerce Commission "TRA x Commerce Commission Grocery Supplier Survey" (January 2025) at p. 28.

<sup>135</sup> Commerce Commission engagement with suppliers.

<sup>136</sup> Woolworths New Zealand "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at para 1.6(i), [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>137</sup> Fonterra Brands (New Zealand) Limited "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at para 12, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/363322/Fonterra-Brands-New-Zealand-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/363322/Fonterra-Brands-New-Zealand-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>138</sup> Commerce Commission engagement with suppliers.

<sup>139</sup> For example, Retail Scan Funding as outlined in Woolworths New Zealand "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (11 December 2024) at para 1.6(h), [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>140</sup> Commerce Commission engagement with industry participant.

<sup>141</sup> Commerce Commission engagement with industry participant.

<sup>142</sup> Farrimond "Fruju Fruit Frenzy" (accessed 20 May 2025), <https://www.farrimond.co.nz/blank-2>

<sup>143</sup> Commerce Commission engagement with industry participant.

A58. Consistent with our interpretation of ‘reasonable’ as outlined above, we recognise that differentiated business models exist in the retail grocery market (and consumers have a range of shopping missions) – from large full-service supermarkets to small limited range stores. As such we consider that other retailers should have access to RDPs that an equivalent RGR retail operation would receive.

#### **Principles related to range, quantity and frequency**

A59. In relation to range, quantity and frequency, the Act states the desirability that each regulated grocery retailer’s wholesale offering provides reliable and cost-effective access to the range of wholesale groceries, at the quantity and frequency, that are or are likely to be demanded by wholesale customers.<sup>144</sup>

A60. In addition, when taking into account the principle above, the Commission (or Minister) must have regard to other reasonably available channels of supply of groceries to wholesale customers (for example, wholesale customers directly arranging supply from suppliers).<sup>145</sup>

#### **Interpretation of range, quantity and frequency**

A61. RGRs and suppliers seek to satisfy demand from wholesale customers to enable them to in turn meet the demand of consumers in the downstream retail grocery market. Since demand in the retail market spans across a number of shopping missions (main shop, secondary shop and top-up shops), the range available through the wholesale regime should be comprehensive and reliable to ensure that wholesale customers are able to satisfy the range and quantity of goods that end consumers demand. There would be few if any material gaps in the product range available to wholesale customers, and any material gaps would be quickly closed. If those gaps were to persist, wholesale customers would be able to easily switch and secure groceries directly from suppliers.

A62. Consumers seek choice in terms of range of product and at different price point of product within a range. This is then mirrored by wholesale customers seeking to satisfy this demand at a cost-effective price and reliable supply in line with s 21(a) of the Act.

A63. From our engagement we note for example, strong demand for notable branded products that are likely to fall within the top 500 selling grocery SKUs and low-cost options, which can include private labels or generic brands.<sup>146</sup> We received submissions on the risks of mandating private label into the wholesale regime including:

A63.1. entrenching the market power of RGRs further by crowding out supplier-branded products and thereby reducing consumer choice; and

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<sup>144</sup> Section 24(1)(c) of the Act.

<sup>145</sup> Section 24(2) of the Act.

<sup>146</sup> Commerce Commission engagement with other retailers.

A63.2. disincentivising future investment into private label.<sup>147, 148, 149</sup>

A64. Both Foodstuffs and WWNZ noted the desirability of suppliers retaining reasonable control over customer channels in line with s24(h) of the Act.<sup>150, 151</sup> We note that the policy intention of the Act was to allow for suppliers (including private label) to opt out of wholesale regime but that the Commission should be able to impose any terms and conditions necessary to promote the purpose of the Act.<sup>152</sup>

A65. In a workably competitive wholesale market, if wholesale customers demand a private label SKU which the RGR fails to supply, that would constitute a gap in the market. In line with the RGR acting on behalf of the wholesale customer, that gap would be addressed by the RGR supplying a substitute product eg, low-cost version. The incentive for the RGR to fill this gap is driven by the ability of the other RGR or suppliers directly providing wholesale customers with a private label substitute (see main principle above).

A66. In a workably competitive wholesale market, for those products that are usually delivered direct to store (rather than via a distribution centre) the RGR would be able to aggregate individual wholesale customers' demands and negotiate with suppliers for delivery direct to the wholesale customer. The costs of this service may fall on the wholesale customer eg, negotiation fee.<sup>153</sup> However the cost of the service could also fall on the supplier as commission for additional/alternative sales to the RGR banners.

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<sup>147</sup> New Zealand Food and Grocery Council “Wholesale Supply Inquiry Preliminary Issues Paper Submission” (8 November 2024) at para 4.9,  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0025/363328/New-Zealand-Food-and-Grocery-Council-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0025/363328/New-Zealand-Food-and-Grocery-Council-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>148</sup> Fonterra Brands (New Zealand) Limited “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (8 November 2024) at para 16,  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/363322/Fonterra-Brands-New-Zealand-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/363322/Fonterra-Brands-New-Zealand-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>149</sup> Woolworths New Zealand “Cross Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (11 December 2024) at para 10.2,  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/364025/Woolworths-New-Zealand-Cross-submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-11-December-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/364025/Woolworths-New-Zealand-Cross-submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-11-December-2024.pdf).

<sup>150</sup> Woolworths New Zealand “Cross Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (11 December 2024) at para 10.3,  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/364025/Woolworths-New-Zealand-Cross-submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-11-December-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/364025/Woolworths-New-Zealand-Cross-submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-11-December-2024.pdf).

<sup>151</sup> Foodstuffs North Island and Foodstuffs South Island “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (8 November 2024) at para 40,  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf).

<sup>152</sup> Economic Development, Science and Innovation Committee “Final Report (Grocery Industry Competition Bill” (February 2023) at p. 10, [https://www.parliament.nz/resource/en-NZ/53SCED\\_ADV\\_129934\\_ED11982/4b7b0091994de94c6064db9df0ae615c35b2b8ac](https://www.parliament.nz/resource/en-NZ/53SCED_ADV_129934_ED11982/4b7b0091994de94c6064db9df0ae615c35b2b8ac).

<sup>153</sup> Commerce Commission engagement with industry participant.

A67. In a workably competitive wholesale market, RGRs and suppliers, through rivalry, would seek to satisfy demand from wholesale customers to enable them to in turn meet the demand of consumers in the downstream retail grocery market. The range available at wholesale should reflect the demand at retail, including for branded as well as private label or generic brands.

#### **Non-price terms (quality of wholesale service)**

A68. In terms of non-price terms (quality of wholesale service), the Act states the desirability that the quality of groceries supplied under each regulated grocery retailer's wholesale offering, and the quality of any ancillary service, is reasonable, having regard to the price of the groceries or the charge for the service.<sup>154</sup>

#### **Interpretation of non-price terms (quality of wholesale service)**

A69. In line with our approach that wholesale customers may be differentiated, in a workably competitive wholesale market, we would expect that wholesale customers can obtain goods on similar non-price terms (such as the quantity, frequency, and the quality of groceries and ancillary services) to an equivalent RGR retailer.

A70. Where wholesale customers require a differentiated level of non-price terms such as changes to minimum order quantities or delivery frequency, wholesalers will look to satisfy that demand while recovering the efficient costs of doing so. In a workably competitive wholesale market, we would observe RGRs responding to demand eg, by reducing minimum order requirements for a fee.<sup>155</sup> This responsiveness would be across all RGRs.

#### **Clear market signals**

A71. The principles related to clear market signals are:

A71.1. The desirability that RGRs, suppliers, and wholesale customers operate in an efficient wholesale market in which reliable, clear, and comparable information about wholesale supply and demand is available.<sup>156</sup>

A71.2. The desirability of RGRs, suppliers, and wholesale customers being able to invest and innovate for the long-term benefit of consumers.<sup>157</sup>

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<sup>154</sup> Section 24(1)(d) of the Act.

<sup>155</sup> Commerce Commission engagement with wholesale customer.

<sup>156</sup> Section 24(1)(e) of the Act.

<sup>157</sup> Section 24(1)(f) of the Act.

### **Interpretation of clear market signals**

A72. Under s38 of the Act, the RGR must establish and implement standard terms and conditions and principles for wholesale supply.<sup>158</sup> RGRs are required to give a copy of the standard terms and conditions and principles to the Commission and are also required to publish them.<sup>159</sup> These obligations facilitate information exchange that would be observable to participants in a workably competitive wholesale market eg, the ability of wholesale customers to compare wholesale offers between the RGRs and direct supply.

A73. Our ongoing existing compliance activity associated with current obligations on RGRs' wholesale supply (see above), including under s38 will continue to ensure that this information is reliable, clear and comparable. As part of the expectations outlined in Chapter 3, we will continue to monitor and report on the industry.

A74. Monitoring and reporting of information will ensure that there are clear market signals available to current participants – as well as to potential participants to inform investment decisions.

### **Principles related to commercial relationships**

A75. The principles related to commercial relationships are:

A75.1. The desirability of RGRs and suppliers acting in a way that does not unduly hinder or obstruct wholesale customers and suppliers from developing and maintaining their own trading relationships for any commercial purpose, including:

A75.1.1. for the purpose of negotiating agreements for promotion and marketing; and

A75.1.2. for the purpose of negotiating direct supply agreements.<sup>160</sup>

A76. The desirability of suppliers retaining reasonable control over the channels for the retail sale of their own products and brands.<sup>161</sup>

### **Interpretation of commercial relationships**

A77. In relation to agreements relating to promotion, marketing and direct supply, there are likely to be some codifications of trading relationships between the RGRs and suppliers to foster certainty for the mutual benefit of both parties. Examples may include best price clauses and exclusive supply agreements.

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<sup>158</sup> Sections 38(1)(a) and 38(1)(b) of the Act.

<sup>159</sup> Sections 38(1)(c) and 38(1)(c)(d) of the Act.

<sup>160</sup> Section 24(1)(g) of the Act.

<sup>161</sup> Section 24(1)(h) of the Act.

A78. If these agreements are not time-limited (or cannot be re-negotiated) and are pervasive across the industry, they have the potential to hinder wholesale customers and suppliers from developing their own relationships. For example, such agreements may weaken suppliers' ability to support and foster the expansion of new and existing wholesale customers and other retailers.<sup>162</sup>

A79. Therefore, in a workably competitive wholesale market, while agreements between RGRs and suppliers may exist, we would not observe them to be widespread eg, in terms of breadth of SKUs covered and enduring eg, not time-limited or not subject to periodic re-negotiation. We would expect such suppliers to have products or be able to develop products for other retailers that are not subject to such agreements.

A80. We acknowledge that RGRs' wholesale offers and suppliers' direct offers are in competition with each other.<sup>163</sup> This could hinder the ability of the RGR to act on behalf of the wholesale customer. However, in a workably competitive wholesale market, a RGR will have incentives to establish information safeguards with its retail operation so that it is able to act on behalf of wholesale customers and negotiate pricing with suppliers. Furthermore, the existence of information safeguards between RGR retail and RGR wholesale operations, would foster the ability of wholesale customers and suppliers developing their own commercial relationships. The importance of establishing such information safeguards is more acute if wholesale customers are in competition with RGR retail operations.

A81. In regards s24(1)(h), in a workably competitive wholesale market, suppliers may choose to exert reasonable control over the channels for the retail sale of their own products and brands. This may include: control over RDPs (see above), decision of suppliers whether to opt in (including RGR private label) or supplier's choice of customer to ensure consistency with the supplier's brand positioning.

A82. However, in line with the main principle under Part 3, we would expect suppliers to diversify and expand their existing customer base - which may in many cases by the RGRs' retail operations – to include other retailers. If other retailers can meet supplier terms such as meeting minimum order requirements and consistency with brand positioning, but are still not able to secure direct supply, this is likely to be inconsistent with a workably competitive wholesale market.

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<sup>162</sup> Fonterra Brands (New Zealand) Limited “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (8 November 2024) at para 8,  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/363322/Fonterra-Brands-New-Zealand-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/363322/Fonterra-Brands-New-Zealand-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>163</sup> Foodstuffs North Island and Foodstuffs South Island “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (8 November 2024) at para 24.4,  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf).

### **Principle related to diversity**

A83. In terms of diversity, the Act states the desirability of the grocery industry including a diverse range of suppliers and wholesale customers.<sup>164</sup>

### **Interpretation of diversity principle**

A84. A workably competitive wholesale market should encourage and not preclude the diversity of suppliers and wholesale customers. Other retailers – either serviced by the wholesale regime or through direct supply - provide suppliers with an alternative customer channel to RGRs. Some suppliers may be more responsive to other retailers and their demands eg, smaller suppliers with smaller volumes. Supplier diversity reinforces the ability of other retailers to tailor their offering and in doing so provide choices to the consumer.

A85. The systems and processes of the wholesale regime should be responsive to wholesale consumers' demands – whether that be the price, quality and range of SKUs as well as the services (non-price terms) being supplied. This in turn ensures that other retailers are able to compete with RGRs retail operations. Diversity of suppliers and wholesale customers fosters innovation and efficiency in the grocery industry, for the long-term benefit of consumers.

### **Taking the principles into account**

A86. We are required to take account of the main principle when carrying out the Inquiry and making our draft decision.<sup>165</sup> This stands alongside our obligation to give effect to the Part 3 purpose statement in a way which promotes the overall purpose of the Act.

A87. The main principle implicitly recognises that the Part 3 purpose and the overall purpose of the Act will be promoted where wholesale offerings to wholesale customers (including by RGRs) are more consistent with the wholesale offerings that would be provided in a workably competitive wholesale market. Accordingly, provided our decision is consistent with the main principle, the Part 3 purpose and overall purpose are likely to be promoted.

A88. When carrying out the Inquiry and making the draft decision we must also have regard to the other principles where we consider them relevant to the main principle.<sup>166</sup> These principles all relate to outcomes that would be found to a greater or lesser degree in a workably competitive wholesale market and are therefore integral to promoting the outcomes found in workably competitive wholesale markets.

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<sup>164</sup> Section 24(1)(i) of the Act.

<sup>165</sup> Section s23 of the Act.

<sup>166</sup> Section 24 of the Act.

- A89. None of the other principles are paramount and we must apply and balance them in a way that we consider is consistent with wholesale offerings that would be provided in a workably competitive wholesale market in the context of the specific decisions being made.
- A90. We will therefore consider the relevancy of the other principles to the main principle and accord each the weight that is appropriate in the circumstances.
- A91. In addition to the mandatory considerations, we may also have regard to other factors that are relevant to the main principle and the purposes in Part 3 and s 3 of the Act. For example, when considering wholesale customers' access to any RDPs, we are not limited to considering the scale of operations and efficiency of the RGR and their associated persons but can also consider other matters that we consider relevant to RDPs.<sup>167</sup>

### **Tests and other considerations for additional regulation**

- A92. In carrying out the Inquiry we must consider whether any of the tests in s 65(1) or s 82(1) are satisfied.<sup>168</sup>
- A93. If the test or tests are satisfied, we must consider whether the wholesale supply of groceries and any ancillary services should be subject to additional regulation.<sup>169</sup>
- A94. If we consider that additional regulation should apply, we must consider which type or types of regulation should apply, and which RGR should be subject to the additional regulation.<sup>170</sup>
- A95. We may also consider how a type or types of additional regulation should apply and whether any other regulation or action may be necessary or desirable to promote the purpose of this Act.<sup>171</sup> Other regulation or action may include:
  - A95.1. changes to legislation or other instruments;
  - A95.2. changes to the policies or practices of central or local government;
  - A95.3. changes to the amount or type of information made available by a person in relation to the grocery industry;
  - A95.4. a person researching or monitoring a specified matter; and
  - A95.5. persons within the grocery industry changing their behaviour.<sup>172</sup>

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<sup>167</sup> We further note that s 57(4) provides that we may have regard to any other matters we consider necessary or desirable for the purpose of the inquiry.

<sup>168</sup> Section 57(1)(a) of the Act.

<sup>169</sup> Section 57(1)(b) of the Act.

<sup>170</sup> Section 57(1)(c) of the Act.

<sup>171</sup> Section 57(2) of the Act.

<sup>172</sup> Sections 57(2)(b) and 58(2) of the Act.

A96. When considering the matters in paragraphs A93 and A94 we must assess the benefits of applying different types of additional regulation and consider what would be the most cost-effective type or types of additional regulation in the circumstances.<sup>173</sup> We received a number of submissions on the relative costs of additional regulation, including unintended consequences.<sup>174, 175, 176, 177</sup> As we have not recommended additional regulation in this paper, we will consider these matters at a later stage.

A97. We may also have regard to any other matters we consider necessary or desirable for the purpose of the Inquiry.<sup>178</sup>

## Tests for additional regulation

### Wholesale Framework and Wholesale Code

A98. We may only make a determination imposing a wholesale framework or wholesale code if we are satisfied that:

A98.1. doing so is necessary or desirable to promote the purpose of Part 3;<sup>179</sup> and

A98.2. any of the following applies:

A98.2.1. an RGR has failed to comply with either or both section 36(1) (which relates to establishing and implementing effective rules, criteria, and procedures) and section 38(1) (which relates to establishing and implementing standard terms and conditions and principles for the wholesale supply of groceries) within three months after subpart 2 of Part 3 came into force;<sup>180</sup>

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<sup>173</sup> Section 57(3) of the Act.

<sup>174</sup> Woolworths New Zealand “Cross Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (11 December 2024) at para 12.5, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/364025/Woolworths-New-Zealand-Cross-submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-11-December-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/364025/Woolworths-New-Zealand-Cross-submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-11-December-2024.pdf).

<sup>175</sup> Foodstuffs North Island and Foodstuffs South Island “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (8 November 2024) at para 7.2, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf).

<sup>176</sup> New Zealand Food and Grocery Council “Wholesale Supply Inquiry Preliminary Issues Paper Submission” (8 November 2024) at para 2.2 onwards, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0025/363328/New-Zealand-Food-and-Grocery-Council-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0025/363328/New-Zealand-Food-and-Grocery-Council-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>177</sup> Retail NZ “Wholesale Supply Inquiry Preliminary Issues Paper Submission” (18 November 2024) at para 7, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0018/363330/Retail-NZ-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-18-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0018/363330/Retail-NZ-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-18-November-2024.pdf).

<sup>178</sup> Section 57(4) of the Act.

<sup>179</sup> Section 65(1)(a) of the Act.

<sup>180</sup> Sections 65(1)(b)(i) and 65(2)(a) of the Act (subpart 2 of Part 3 came into force on 10 July 2023).

- A98.2.2. an RGR failed to comply with section 44(1) (putting in place systems and processes for the wholesale supply of groceries) within six months after subpart 2 of Part 3 comes into force;<sup>181</sup>
- A98.2.3. on the first anniversary of subpart 2 of Part 3 coming into force, a RGR had not entered into or arrived at any wholesale agreements at all, in circumstances where one or more wholesale customers had made wholesale supply requests to the regulated grocery retailer, and one or more of those wholesale customers had taken all reasonable steps to enter into or arrive at a wholesale agreement with the regulated grocery retailer but have been unable to do so within a reasonable period of time;<sup>182</sup>
- A98.2.4. on the first anniversary of subpart 2 of Part 3 coming into force, a RGR has entered into one or more wholesale agreements, but those wholesale agreements do not materially contribute towards achieving the purpose of Part 3;<sup>183</sup> or
- A98.2.5. the wholesale offerings of groceries provided by one or more RGRs (in relation to any one or more of price, range, quantity, frequency, or any terms and conditions) are not consistent with wholesale offerings provided in a workably competitive wholesale market (noting that s 65(4) provides that this element of the test will be satisfied where the Commission is satisfied that a regulated grocery retailer has seriously or persistently contravened one or more of the duties in ss 35, 37, 39, and 43 to 47 of the Act).<sup>184</sup>

A99. The matters in paragraphs A98.2.3 and A98.2.4 do not apply to a RGR if we are satisfied that the RGR has taken all reasonable steps to enter into or arrive at one or more wholesale agreements that materially contribute towards achieving the purpose of Part 3, but the regulated grocery retailer has failed to do so:

- A99.1. because one or more wholesale customers have entered into or arrived at agreements for the wholesale supply of groceries with one or more other persons; or
- A99.2. because of some other cause beyond the regulated grocery retailer's control.<sup>185</sup>

A100. We may make a determination that the wholesale framework and/or wholesale code will apply to any regulated grocery retailer that has failed to comply with subpart 2 and any or all other RGRs, irrespective of whether the other RGRs have failed to comply with any duties in subpart 2.<sup>186</sup>

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<sup>181</sup> Section 65(1)(b)(i) and 65(2)(b) of the Act.

<sup>182</sup> Sections 65(1)(b)(i) and 65(2)(c) of the Act.

<sup>183</sup> Sections 65(1)(b)(i) and 65(2)(d) of the Act.

<sup>184</sup> Sections 65(1)(b)(ii) and 65(4) of the Act.

<sup>185</sup> Section 65(3) of the Act.

<sup>186</sup> Section 66 of the Act.

A101. Before making a determination to impose a wholesale framework or wholesale code, we must also consider whether any matter would be more appropriately dealt with by way of additional regulation requiring one or more RGR to supply groceries and any ancillary services on non-discriminatory terms, or to supply groceries and any ancillary services in accordance with specified access terms regulation.<sup>187</sup>

## **Non-discrimination regulation and specified access terms regulation**

A102. We may only make a recommendation to the Minister relating to non-discrimination regulation or specified access terms regulation if we are satisfied that:

- A102.1. such regulation is necessary or desirable in order to promote the purpose of Part 3;<sup>188</sup> and
- A102.2. the wholesale offerings of groceries provided by one or more RGRs (in relation to any one or more of price, range, quantity, frequency, or any terms or conditions) are not consistent with wholesale offerings provided in a workably competitive wholesale market (noting that s 82(2) provides that this element of the test will be satisfied where a regulated grocery retailer has seriously or persistently contravened one or more of the duties in ss 35, 37, 39, and 43 to 47 of the Act).<sup>189 190</sup>

A103. The recommendation may apply to one, some or all RGRs irrespective of whether any of those RGRs have failed to comply with any duties in subpart 2 of Part 3 of the Act.<sup>191</sup>

## **Preparation and consultation on draft report**

A104. We must prepare a report recording our findings from the Inquiry and setting out:

- A104.1. whether we intend to impose a wholesale framework or wholesale code;
- A104.2. any recommendations to the Minister that non-discriminatory terms regulation and/or specified access terms regulation be provided for; and
- A104.3. any recommendations to the Minister in relation to regulations under subpart 8 of Part 3.<sup>192</sup>

A105. Before finalising the report, we must publish a draft report and allow a reasonable time for comments on the draft.<sup>193</sup>

A106. In preparing the final report we must have regard to any comments received on the draft report within the time allowed.<sup>194</sup>

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<sup>187</sup> Section 65(5) of the Act.

<sup>188</sup> Section 82(1)(a) of the Act.

<sup>189</sup> Sections 82(1)(b) and (2) of the Act.

<sup>190</sup> Sections 82(1) and (2) of the Act.

<sup>191</sup> Section 82(3) of the Act.

<sup>192</sup> Section 58(1) of the Act.

<sup>193</sup> Section 59(1) of the Act.

<sup>194</sup> Section 59(2) of the Act.

## Attachment B: Supporting analysis

- B1. This Attachment sets out supplementary information supporting our preliminary assessment of the grocery wholesale market, and the regulated grocery retailers' (RGRs) wholesale offers, against the requirements in Part 3 of the Act which we have set out in Attachment A.
- B2. This Attachment presents our findings in relation to three tests for additional regulation:
  - B2.1. whether RGRs' wholesale offers are consistent with a competitive wholesale market (see paragraphs B11-B276);
  - B2.2. whether RGRs' wholesale offers are material in achieving the purpose of Part 3 (see paragraphs B277-B294); and
  - B2.3. our regard for the tests of serious or persistent contravention (see paragraphs B295-B299).
- B3. Our analysis to date that the RGRs' wholesale offers are not consistent with offerings in a competitive wholesale market and that RGRs' wholesale offerings have not materially contributed to the purpose of Part 3 show that these tests for additional regulation are likely met.

## We gathered information from a range of sources

- B4. During the Inquiry, we engaged interested parties through submissions and cross-submissions on our PIP, requests for information to industry participants and targeted engagements.
- B5. We received 19 submissions on our Preliminary Issues Paper (PIP) and five cross-submissions.
- B6. We undertook targeted engagement including interviews with more than 60 market participants including suppliers, wholesale customers, other retailers, wholesalers and industry bodies. We also included targeted questions within the Grocery Supplier Survey the Commission undertook with TRA.<sup>195</sup>
- B7. We received responses to requests for information from RGRs, a selection of suppliers and other retailers and in some instances obtained information by notices issued under the Act.
- B8. This information has been considered in conjunction with information relating to RGRs' wholesale supply obligations that has been reported by RGRs under the Act and publicly available information.
- B9. In relation to RGRs, this information and our subsequent analysis has been focused on the new wholesale offerings developed in response to the Act.

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<sup>195</sup>

Commerce Commission "TRA x Commerce Commission Grocery Supplier Survey" (January 2025).

B10. Other information provided by RGRs or industry participants prior to the commencement of the Inquiry is considered to the extent this is relevant to specific analysis.

## **Test: consistency with a competitive wholesale market**

B11. This analysis relates to the tests set out in section 65(1)(b)(ii) and section 82(1)(b) – whether the wholesale offerings of one or more RGRs are not consistent with wholesale offerings provided in a competitive wholesale market (in relation to any one or more of price, range, quantity, frequency, or any terms and conditions).

B12. These tests relate to consideration of the addition of a wholesale code or wholesale framework, or non-discriminatory terms or specified access terms regulation.

B13. Our analysis of whether RGR wholesale offers are consistent with a competitive is split into the following sections:

- B13.1. Price (see paragraphs B15-B77);
- B13.2. Range (see paragraphs B78-B223);
- B13.3. Ease of access (see paragraphs B224-B252); and
- B13.4. Other issues (see paragraphs B253-B276).

B14. At each stage of this analysis, we note the relevance of the main principle of Part 3 (s23(2)) and the relevant principles in s 24, then present our analysis which considers these principles against the information provided by market participants and publicly available information. Where we have not discussed a principle we considered it insufficiently relevant to our analysis of a particular aspect at this stage.

## **Price**

### **Introduction**

B15. The key principles relevant to our analysis of pricing are the main principle (s23(2)) and the pricing principle regarding:

- B15.1. the desirability that wholesale customers have reasonable access to any discounts, payments, or rebates made available to a regulated grocery retailer (s24(1)(b)).

B16. We have set out our view on the legal and analytical framework for this Inquiry in **Attachment A**, including the characteristics of a workably competitive wholesale market in regard to pricing and limitations of our analysis.

B17. Based on our interpretation of s24(1)(a), outlined in **Attachment A** (see paragraphs A45-A50) we have not considered the desirability that each regulated grocery retailer's wholesale prices reflect efficient costs in our analysis of pricing that follows.

B18. In considering whether the pricing of supply through RGR wholesale offers and direct supply is consistent with a competitive wholesale market we have analysed:

- B18.1. wholesale customer perceptions on the competitiveness of RGR wholesale pricing (see paragraph B20);
- B18.2. the ability of wholesale customers to compete with average RGR banner pricing based on RGR wholesale prices (see paragraphs B21-B43);
- B18.3. RDPs in the New Zealand grocery sector (see paragraphs B44-B55);
- B18.4. the RDPs wholesale customers can access through RGR wholesale offerings (see paragraphs B56-B65); and
- B18.5. the pricing and RDPs other retailers can access through direct supply (see paragraphs B66-B77).

B19. The following sections discuss each of these points in turn.

**Wholesale customers indicate the pricing of RGR offers is not enabling them to compete at retail**

B20. Some RGR wholesale customers have indicated they are either not able to compete on price, not able to achieve a sufficient markup when buying from RGRs' wholesale offerings, or have found wholesale prices to be higher than retail at their local Pak'nSave.<sup>196</sup>

**We have compared RGRs' wholesale pricing to the retail pricing of their banners**

B21. To assess whether the RGR wholesale offerings provide other retailers with cost-effective supply of groceries which allow them to compete in the retail market, we have examined if RGR wholesale offers could viably be used by other retailers, considering downstream costs of retailing grocery products.

B22. To test this, we consider whether RGR wholesale offers provide a sufficient markup compared to the RGRs' retail prices, from which retail-related costs can be recovered.

**Participants had a range of views about the appropriate margin between retail and wholesale prices**

B23. In AGR1 and our PIP, we used a margin of 15% between retail and wholesale prices to illustrate the effect of allowing for the recovery of retail costs. In our PIP, we invited views on the use of this margin, and a number of submissions commented on this. For example, WWNZ submitted that the Act directs that wholesale prices should reflect efficient costs of wholesale supply, and that if any measure of retail costs is to be used, it should be based on the RGRs' own costs of retail to prevent inefficient entry.<sup>197</sup>

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<sup>196</sup> Commerce Commission engagement with wholesale customers.

<sup>197</sup> Woolworths New Zealand "Submission on Wholesale Supply Inquiry Preliminary Issues Paper"

(8 November 2024) at para 9,

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

B24. WWNZ commented on the approach used to assess wholesale pricing. WWNZ submitted that the Commission’s approach of assessing the margin between wholesale and retail prices, and whether the margin is sufficient to cover wholesale customer retail costs, is not provided for by the Act.<sup>198</sup> They submitted that “it is theoretically possible that retail prices that are lower than wholesale prices could be an indicator that wholesale prices do not reflect efficient costs, but that would at most be a potential indicator and would never be determinative.”<sup>199</sup>

B25. Other submitters commented that a greater difference between retail and wholesale prices may be required to recover the cost of retail activities.<sup>200, 201, 202</sup>

B26. For example, retailer Night ‘n Day submitted that:

A 20% difference between the GST-exclusive retail price and the GST-exclusive purchase price is considered a sufficient margin to remain competitive. This ensures coverage of downstream costs while allowing for a modest net margin for the operator.<sup>203</sup>

B27. In engagement and submissions, other retailers commented that greater differences between wholesale and retail prices of up to 30% would be required to cover the costs of their retail operations.<sup>204, 205</sup>

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<sup>198</sup> Woolworths New Zealand “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (8 November 2024) at para 9.3,

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>199</sup> Woolworths New Zealand “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (8 November 2024) at para 9.6,

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>200</sup> Anonymous A “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (24 October 2024) at para 11,

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0021/363315/Anonymous-A-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-24-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0021/363315/Anonymous-A-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-24-October-2024.pdf).

<sup>201</sup> Anonymous D “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (20 November 2024) at para 11,

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/363318/Anonymous-D-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-3-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/363318/Anonymous-D-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-3-November-2024.pdf)

<sup>202</sup> Night ‘n Day Foodstores Ltd “Submission on Wholesale Supply Inquiry Preliminary Issues” (8 November 2024) at para 4, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0026/363329/Night-27n-Day-Foodstores-Ltd-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0026/363329/Night-27n-Day-Foodstores-Ltd-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf).

<sup>203</sup> Night ‘n Day Foodstores Ltd “Submission on Wholesale Supply Inquiry Preliminary Issues” (8 November 2024) at para 4, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0026/363329/Night-27n-Day-Foodstores-Ltd-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0026/363329/Night-27n-Day-Foodstores-Ltd-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf).

<sup>204</sup> Commerce Commission engagement with other retailers; Anonymous A “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (24 October 2024) at p. 2,

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0021/363315/Anonymous-A-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-24-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0021/363315/Anonymous-A-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-24-October-2024.pdf).

<sup>205</sup> Anonymous D “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (20 November 2024) at para 11,

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/363318/Anonymous-D-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-3-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/363318/Anonymous-D-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-3-November-2024.pdf).

B28. The intention of Part 3 is unlikely to be realised if wholesale prices do not enable efficient wholesale customers to compete at retail. While retail competition occurs across a number of dimensions, price is an important feature for competition in the supply of groceries to consumers.

B29. Having considered the views set out in submissions, our view is that a comparison of retail and wholesale prices continues to be a relevant indicator in assessing whether RGRs' wholesale offers provide other retailers with cost-effective supply of groceries which allow them to compete in the retail market.

#### Rationale for 20-25% markup

B30. When considering an appropriate markup for wholesale customers to recover retail-related costs, as a starting point, we have considered Woolworths New Zealand Group Limited's published financial information on store expenses and the markup required for Woolworths New Zealand Group Limited to recover those expenses.<sup>206</sup>

B31. From 2018 to 2022, Woolworths New Zealand Group Limited reported store expenses as a separate expense line in their financial statements, as summarised in Table B1.

**Table B1: Woolworths Group New Zealand Limited revenues and store expenses (\$m)<sup>207</sup>**

|   | 2018         | 2019         | 2020         | 2021         | 2022         |
|---|--------------|--------------|--------------|--------------|--------------|
| Revenue                                 | 6,440        | 6,727        | 7,203        | 7,146        | 7,585        |
| Store expenses                          | 988          | 1,009        | 1,058        | 1,084        | 1,201        |
| Revenue less store expenses             | <b>5,452</b> | <b>5,718</b> | <b>6,145</b> | <b>6,062</b> | <b>6,384</b> |
| Required markup to cover store expenses | 18%          | 18%          | 17%          | 18%          | 19%          |

B32. Over this period, the implied markup required to cover store expenses represented between 17% and 19%, with an average of 18%.

B33. There are likely to be other retail-related costs as well. These costs include (but may not be limited to) an allowance for head office functions (such as HR, IT, *finance*, and board costs), as well as an allowance for capital-related costs (including a return on and return of capital) associated with retail stores.

B34. In light of the *above*, and the views expressed in submissions on the PIP, we have used a range of 20% to 25% to assess whether there is a sufficient gap between wholesale and retail prices to recover retail-related costs.

<sup>206</sup> The analysis in this report refers to a mark-up as opposed to a margin, this differs from the language used on AGR1 and our PIP.

<sup>207</sup> Woolworths Group New Zealand Limited "Annual Reports 2018-2022" (Accessed 27 May 2024) <https://app.companiesoffice.govt.nz/companies/app/ui/pages/companies/1686297/documents>

The percentage of wholesale available SKUs that enable different markups

B35. As part of the Inquiry process, we have requested SKU level pricing data from all RGRs. For each RGR wholesale offer, our analysis shows the average percentage of SKUs where that RGR's retail price exceeds the RGR's wholesale price by a given markup in October 2024.

**Table B2: Average percentage of SKUs where retail price exceeds wholesale price by a given markup (0%, 20%, 25%) at October 2024**

| Wholesale offering                 | Retail Comparison | 0% or above | 20% or above | 25% or above |
|------------------------------------|-------------------|-------------|--------------|--------------|
| WWNZ <sup>208</sup>                | Woolworths        | 86%         | 51%          | 42%          |
| FSNI                               | New World         | 92%         | 70%          | 61%          |
|                                    | Pak'nSave         | 83%         | 46%          | 34%          |
| FSSI (Christchurch)                | New World         | 63%         | 30%          | 23%          |
|                                    | Pak'nSave         | 51%         | 19%          | 15%          |
| FSSI (South Island) <sup>210</sup> | New World         | 59%         | 25%          | 19%          |
|                                    | Pak'nSave         | 45%         | 16%          | 12%          |

*Note: For any given markup between wholesale and retail prices, a high percentage of SKUs is preferable, as this means more SKUs are available at wholesale prices that deliver at least that markup. Percentages vary across categories and WNZ's regional price lists.*

B36. FSNI has introduced a temporary discretionary discount aimed at improving their offering to wholesale customers in the short-term.<sup>211</sup> Table B2 reflects this current discounted pricing. However, should the discount be discontinued, we would expect the wholesale pricing to be higher.

<sup>208</sup> Based on average retail price for all stores for that banner, for each RGR (ie, Foodstuffs South Island price lists are compared with Foodstuffs South Island's average New World and Pak'nSave prices for the period.)

<sup>209</sup> WNZ has seven regional price lists. Due to the limited variation between the SKUs, for the purposes of Table B2, we have combined the price lists together as one percentage.

<sup>210</sup> FSSI has two regional price lists – one for Christchurch metropolitan delivery and the other for South Island wide delivery. Due to the variation of SKUs between the price lists, for the purposes of Table B2, we have represented the price lists into two separate rows.

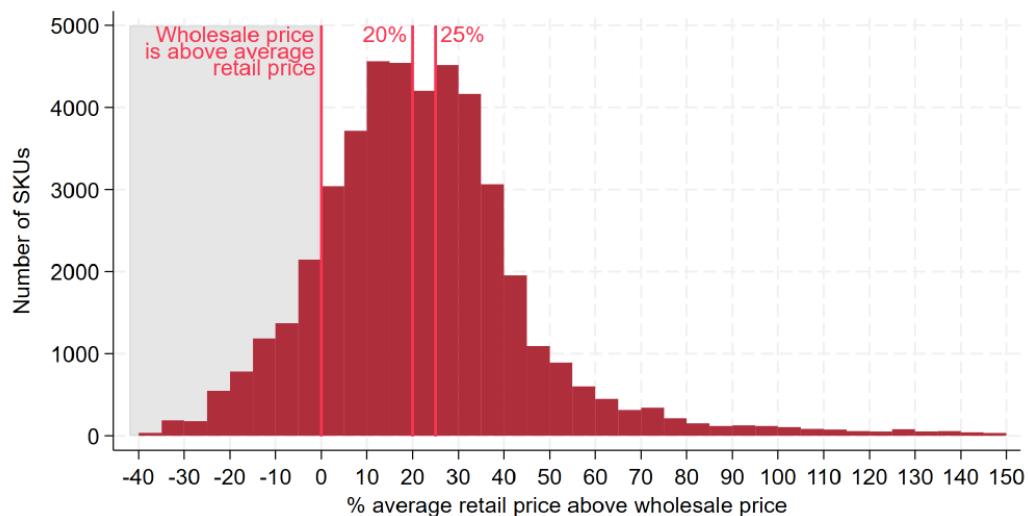
<sup>211</sup> Commerce Commission engagement with FSNI.

B37. FSSI data tends to show a lower percentage of SKUs that allow the recovery of retail costs. This may reflect that their wholesale offer is designed for smaller customers.<sup>212</sup>

B38. Figures B1 to B4 below show the distribution of SKUs for which the retail prices of the RGR banner lie above the RGR's wholesale price by a given percentage. The more the distribution of SKUs sits to the right of our markup assumptions (the red lines in each Figure), the more SKUs allow wholesale customers to compete with the RGRs retail banners at that markup. Regarding these figures we note:

- B38.1. the further to the right the bell-curve sits on the X-axis, the more SKUs will allow for a specific markup for a efficient wholesale customer to compete,
- B38.2. there is a “long tail” of SKUs that are priced at retail much higher than they are priced at wholesale, indicating an apparent high retail markup, and
- B38.3. there may be SKUs priced at retail as ‘loss-leaders’ (SKUs that are priced below cost) represented within our comparison.

**Figure B1: Distribution of SKUs by percentage difference between wholesale and retail price (against average Woolworths price – October 2024)**



Note: Excluding liquor and tobacco.

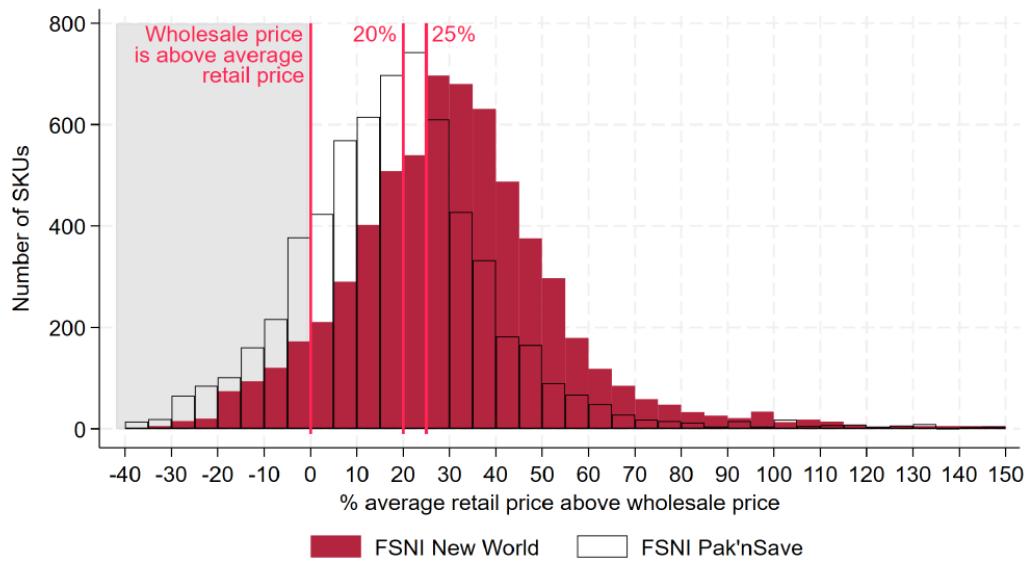
Note: *WWNZ has seven regional price lists. In this chart we represent all price lists together. This means the number of total SKUs appears higher than for other RGRs. While the pricing of products across WWNZ's price lists vary, the range of SKUs is similar across WWNZ price lists.*<sup>213</sup>

<sup>212</sup> Commerce Commission analysis of industry information.

<sup>213</sup> Commerce Commission analysis of industry information.

B39. As noted in Table B2, 51% of the SKUs in WZNZ's wholesale offering would allow a wholesale customer to operate with at least a 20% markup and compete with the average Woolworths retail price of that SKU. This number decreases to 42% of SKUs if a wholesale customer requires a 25% markup.

**Figure B2: Distribution of SKUs by percentage difference between wholesale and retail price (against average FSNI New World or Pak'nSave price – October 2024)**

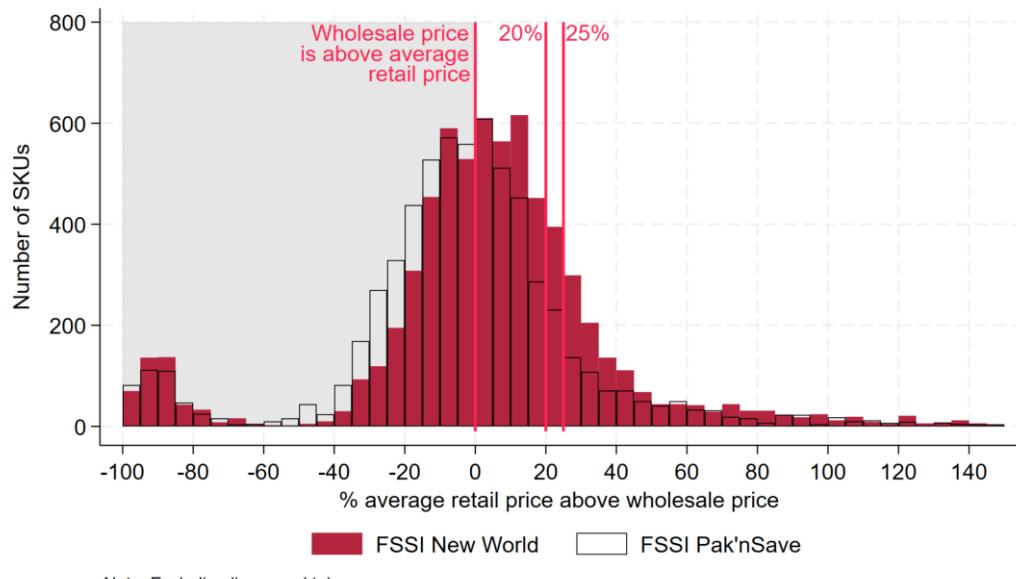


*Note: FSNI has one wholesale price list for all wholesale customers.*

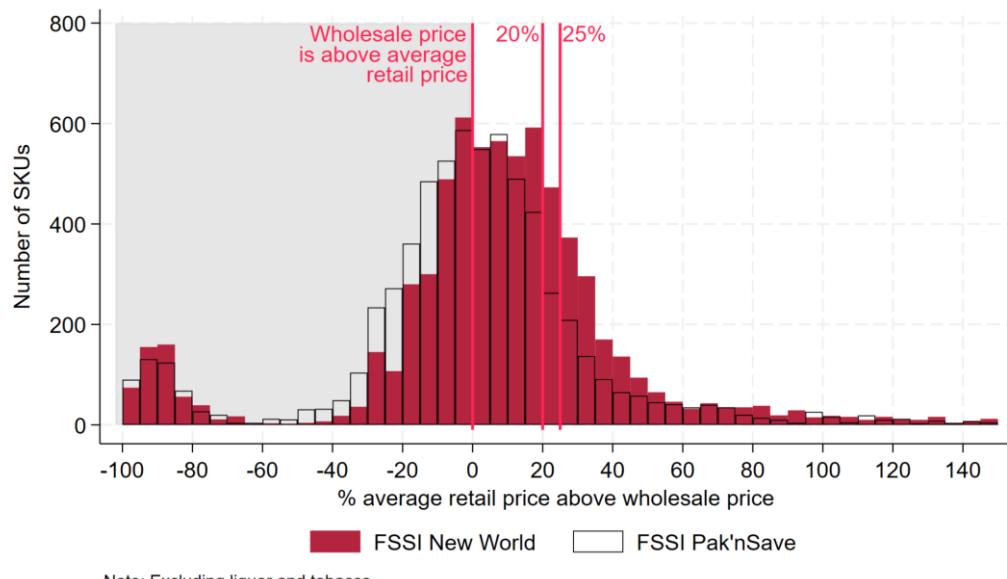
B40. As noted in Table B2, 70% of the SKUs in FSNI's wholesale offering would allow a wholesale customer to operate with at least a 20% markup and compete with FSNI's average New World retail price of that SKU. This number decreases to 61% of SKUs if a wholesale customer requires a 25% markup. It decreases further to 46% if competing with Pak'nSave retail prices at 20% markup.

B41. The removal of FSNI's temporary discretionary discount will worsen the competitiveness of their wholesale pricing.

**Figure B3: Distribution of SKUs by percentage difference between wholesale and retail price (against average FSSI (South Island) New World or Pak'nSave price – October 2024)**



**Figure B4: Distribution of SKUs by percentage difference between wholesale and retail price (against average FSSI (Christchurch metropolitan) New World or Pak'nSave price – October 2024)**



*Note: For our analysis of pricing we have not aggregated FSSI's price lists as the SKUs available significantly differ.*

- B42. FSSI generally has a low percentage of SKUs that enable a 20% markup between their retail and wholesale prices. As shown in Table B2, for a significant proportion of SKUs, the FSSI wholesale price is above the retail prices of New World and Pak'nSave.
- B43. There are a number of SKUs for which the wholesale prices are significantly above the average retail price.<sup>214</sup> These appear as outliers sitting close to the Y-axis on the above charts. We note that they are priced much higher at wholesale than retail, likely making them inaccessible to wholesale customers at cost-effective prices. FSSI has suggested these may be a result of data issues, we have given them the opportunity to resolve these issues and will continue to work with them to ensure data quality, especially where this may impact wholesale customers.

### **Rebates, discounts and payments**

- B44. In our Terms of Reference, we indicated we would assess the relative availability of rebates, discounts and promotional payments to RGRs and non-RGRs in direct supply, and issues with the availability of RDP in RGR wholesale offers.<sup>215</sup>
- B45. The key principle of the Act regarding RDPs is s24(1)(b), the desirability that wholesale customers have reasonable access to any discounts, payments or rebates made available to a regulated grocery retailer directly or indirectly by, or on behalf of, a supplier in connection with either or both of the following:
  - B45.1. The scale of operations of the regulated grocery retailer and its associated persons;
  - B45.2. The efficiency of operations of the regulated grocery retailer and its associated persons;
- B46. As noted in Attachment A, we consider reasonable access to RDPs to reflect access to RDPs that an equivalent RGR retail operation receives.<sup>216</sup>
- B47. We have also considered s46, which in this context, relates to a discount, payment or rebate made in connection with the scale or efficiency of the RGR.<sup>217</sup>

### **Rebates, discounts and payments in the grocery industry**

- B48. As we noted in our PIP, there are many types of RDPs in use between RGRs and suppliers.<sup>218</sup> Information provided by RGRs and engagement with suppliers indicates that RDPs vary in form, structure, and timing.<sup>219</sup>

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<sup>214</sup> Commerce Commission analysis of industry information.

<sup>215</sup> Commerce Commission “Wholesale Supply Inquiry Terms of Reference” (4 September 2024) at p. 3, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0021/362307/Terms-of-Reference-Wholesale-Supply-Inquiry.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0021/362307/Terms-of-Reference-Wholesale-Supply-Inquiry.pdf).

<sup>216</sup> Attachment A (see paragraph A58).

<sup>217</sup> Section 46 of the Act.

<sup>218</sup> Commerce Commission “Wholesale Supply Inquiry Preliminary Issues Paper” (24 September 2024) at para 50, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0026/362519/Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-24-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0026/362519/Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-24-September-2024.pdf).

<sup>219</sup> Commerce Commission analysis of industry information.

B49. In response to our PIP, Fonterra submitted that RDPs can be separated into a ‘fixed’, relating to volume or supply chain efficiencies, and ‘discretionary’, relating to marketing or promotional activities carried out by the retailer.<sup>220</sup> Some suppliers we interviewed acknowledged rebates could be useful if they provided a return. We also heard that in some instances, suppliers felt pressured by the market power of the RGRs to make payments and found it hard to track the benefit from them.<sup>221</sup>

B50. RDPs appear to be embedded in the New Zealand grocery sector in a way that may complicate RGR wholesale, with WWNZ’s describing that suppliers charge “higher upfront invoice prices to retailers, with discretionary funding discounts then provided on a periodic basis to achieve an overall lower “net price” to RGRs”.<sup>222</sup>

B51. Suppliers shared mixed views on the role of RDPs in the grocery industry. Some indicated they found some or all RDPs confusing or would prefer that they did not exist.<sup>223</sup> Other suppliers indicated that RDPs were a standard part of doing business and that they saw value in negotiating them.<sup>224</sup>

B52. Suppliers are likely incentivised to adopt the pricing approach WWNZ describes above due to RDPs generally being expected or required by RGRs. Suppliers who responded to our supplier survey indicated that the initiation and terms of RDPs are frequently driven by the RGRs. 63% of respondents included “to meet retailer requirements” as a reason for providing RDPs and to “maintain or secure a product listing with the retailer” was additionally listed by 62% of respondents.<sup>225</sup>

B53. Specifically in relation to promotional funding, 27% of respondents who reported an issue with the RGRs reported having faced issues relating to agreements for promotions.<sup>226</sup> Of these, 55% reported facing issues with pressure to pay for promotions and 40% said they were required to pay for a promotion that seems unreasonable.<sup>227</sup> Our report on the Review of the Grocery Supply Code discusses these concerns and the role of the Code, which was introduced in 2023, further.

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<sup>220</sup> Fonterra Brands (New Zealand) Limited “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (8 November 2024) at p. 3, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/363322/Fonterra-Brands-New-Zealand-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/363322/Fonterra-Brands-New-Zealand-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>221</sup> Commerce Commission engagement with suppliers.

<sup>222</sup> Woolworths New Zealand “Cross Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (11 December 2024) at para 13.6, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/364025/Woolworths-New-Zealand-Cross-submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-11-December-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/364025/Woolworths-New-Zealand-Cross-submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-11-December-2024.pdf).

<sup>223</sup> Commerce Commission engagement with suppliers.

<sup>224</sup> Commerce Commission engagement with suppliers.

<sup>225</sup> Commerce Commission “TRA x Commerce Commission Grocery Supplier Survey” (January 2025) at p.28.

<sup>226</sup> Commerce Commission “TRA x Commerce Commission Grocery Supplier Survey” (January 2025) at p. 33.

<sup>227</sup> Commerce Commission “TRA x Commerce Commission Grocery Supplier Survey” (January 2025) at p. 35.

- B54. We have engaged with retailers in adjacent markets, who indicated that RDPs are a feature of their industries, but that they do not appear to be at the same scale and complexity as in the grocery sector.<sup>228</sup>
- B55. These payments reduce the final prices paid by RGRs to suppliers, which subsequently impacts other retailers' ability to compete on price if they do not receive the same level of RDPs from suppliers.<sup>229</sup> Suppliers have indicated that the RDP paid reflects the scale of the customer.<sup>230</sup>

#### **The RDPs wholesale customers can access through RGR wholesale offerings**

- B56. Based on the information RGRs provided for a year period November 2023 - October 2024, the value of RDPs available to wholesale customers ranged from 0-14% as a percentage of wholesale sales revenue for the period across each of RGR.<sup>231</sup> In comparison, the value of RDPs in their retail offerings, made up around 13-27% of the value of RGRs' sales revenue for the period.<sup>232, 233</sup>
- B57. The RGRs have different approaches to passing on RDPs to wholesale customers:
  - B57.1. Information provided by FSSI indicated that fixed scale/volume and efficiency discounts are included in the wholesale price list. Variable RDPs (trade spend) are only passed on to wholesale customers where a supplier agrees to this.<sup>234, 235</sup>
  - B57.2. Where agreed to by suppliers, WWNZ passes on its business volume rebate, settlement terms and wastage/ullage to wholesale customers.<sup>236</sup> WWNZ does not pass on scan back rebates. It has indicated that these are tied to retail sales and therefore unable to be passed on to wholesale customers. WWNZ has also indicated it negotiates some 'deferred deals' that amount to a long-term investment in price reduction for its wholesale customers.<sup>237</sup>

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<sup>228</sup> Commerce Commission analysis of industry information.

<sup>229</sup> Commerce Commission "Wholesale Supply Inquiry Preliminary Issues Paper" (24 September 2024) at para 51, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0026/362519/Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-24-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0026/362519/Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-24-September-2024.pdf).

<sup>230</sup> Commerce Commission engagement with suppliers.

<sup>231</sup> Commerce Commission analysis of industry information.

<sup>232</sup> Commerce Commission analysis of industry information.

<sup>233</sup> We are aware there are limitations to some of the RDP data provided to us by the RGRs. In some cases, we have not been able to ascertain the value of certain RDPs passed through to wholesale customers. These limitations highlight the complexity of how RDPs are paid and recorded.

<sup>234</sup> Commerce Commission analysis of industry information.

<sup>235</sup> Foodstuffs South Island "Non-Member Wholesale Customer Information Pack" (accessed 27 May 2025) at para 4.1, [https://www.foodstuffs-si.co.nz/-/media/Project/Sitecore/Corporate/Corporate-South-Island/wholesale/Non-Member-Wholesale-Customer-Information-Pack\\_0124.pdf](https://www.foodstuffs-si.co.nz/-/media/Project/Sitecore/Corporate/Corporate-South-Island/wholesale/Non-Member-Wholesale-Customer-Information-Pack_0124.pdf).

<sup>236</sup> Commerce Commission analysis of industry information.

<sup>237</sup> Commerce Commission analysis of industry information.

B57.3. FSNI passes on some supplier discretionary funding.<sup>238</sup> As discussed at paragraph B36, FSNI's temporary discretionary discount is applied in instances where suppliers have not agreed to pass on equivalent funding.<sup>239</sup>

#### Promotional funding is a significant type of RDP paid by suppliers to RGRs

B58. Promotional funding is the major type of RDP that is paid by suppliers to the RGRs. We have defined promotional funding as any discretionary RDP for which a purpose related to improving sales or encouraging retailers to support products including weekly or longer-term promotions, advertising, merchandising and data insights. Using data provided by the RGRs we estimate that promotional funding can make up almost two-thirds of the total RDP suppliers provide. Information received from a sample of suppliers indicates that on average trade promotion accounted for approximately a third of RDP received by RGRs.<sup>240</sup> The difference between RGR and supplier information could be due to a number of factors including that we only requested information from a sample of suppliers and differences in how promotional funding is interpreted.

B59. Suppliers' promotional funding was identified in the Market Study as a key issue for determining competitively priced wholesale access. For example, we stated that:<sup>241</sup>

The price that grocery retailers pay suppliers for groceries, including any discounts for volume and economies of scale, only partially reflects the final net cost of those goods to the major grocery retailers. Suppliers also provide promotional funding (or trade and marketing spend) which can significantly reduce the retail price of goods. **Any wholesale arrangement that does not address this issue is unlikely to result in wholesale prices to other grocery retailers lower than the retail prices charged by a large grocery retailer such as Pak'nSave, and is therefore unlikely to promote retail competition.**

#### Pass through of promotional funding to wholesale customers.

B60. RGRs submitted that the policy intent behind the Act has been that the pass through of promotional funding to wholesale customers should remain the choice of suppliers.<sup>242</sup> During the drafting of the Act, the expectation was that suppliers would want to "negotiate retail-focused promotional and marketing discounts directly with the wholesale customer."<sup>243</sup>

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<sup>238</sup> Commerce Commission analysis of industry information.

<sup>239</sup> Commerce Commission analysis of industry information.

<sup>240</sup> Commerce Commission analysis of industry information.

<sup>241</sup> Commerce Commission "Market Study into the retail grocery sector – final report" (8 March 2022) at para 9.91, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf).<sup>242</sup>

<sup>242</sup> Foodstuffs North Island and Foodstuffs South Island "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at para 40, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf).<sup>243</sup>

<sup>243</sup> Ministry of Business, Innovation and Employment "Grocery sector reform: regulation of access to grocery wholesale and collective bargaining exemption" (August 2022) at para 36, <https://www.mbie.govt.nz/dmsdocument/23721-grocery-sector-reform-regulation-of-access-to-grocery-wholesale-and-collective-bargaining-exemption-proactive-release-pdf>.

B61. The Commission is aware of this occurring in some instances through RGR wholesale offers, and via other wholesalers.<sup>244</sup> These arrangements may work for some suppliers, however, as noted in Attachment A, we expect the wholesaler to be innovating to secure this funding for its customers.<sup>245</sup>

B62. In our PIP, we noted we would look into the incentives for suppliers to provide promotional funding to wholesale customers.<sup>246</sup> Key concerns expressed by some suppliers in relation to promotional funding centres on the confidence that the funding will be passed on to consumers in the form of retail price promotions and retailer behaviour. Suppliers have told us that they need to be sure they will receive benefits from passing on promotional spend to wholesalers, in the form of lower retail prices and an uplift in retail sales.<sup>247</sup>

B63. We recognise these concerns and the desirability of suppliers retaining reasonable control over the channels for the retail sale of their own products and brands (s24(1)(h)) should apply. RGRs should provide some visibility to suppliers of their products in wholesale offerings, especially where this relates to the pass through of RDPs. Suppliers' current visibility of their products in each RGRs' wholesale offers is covered further in our other issues section at paragraphs B256-B262.

B64. As discussed earlier, we disagree with RGR submissions that promotional funding provided by suppliers is not related to the RGRs' scale and efficiency. We have seen indications that RGRs receive significant volumes of promotional funding from suppliers on account of their scale. For example:

- B64.1. As noted above, a significant proportion of the value of RDPs paid by suppliers to the RGRs is promotional funding;
- B64.2. Smaller independent retailers have told us they have not been able to access promotional funding from suppliers;<sup>248, 249</sup> and
- B64.3. We understand suppliers often pay more RDPs to RGRs than to other retailers.<sup>250</sup> For example, about 60% of suppliers who responded to our supplier survey said that the RDPs paid to the RGRs differ “a lot” from those paid to other retailers.<sup>251</sup>

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<sup>244</sup> Commerce Commission engagement with industry participants.

<sup>245</sup> Attachment A (see paragraph A57).

<sup>246</sup> Commerce Commission “Wholesale Supply Inquiry Preliminary Issues Paper” (24 September 2024) at para 82.2.2, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0026/362519/Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-24-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0026/362519/Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-24-September-2024.pdf).

<sup>247</sup> Commerce Commission engagement with suppliers.

<sup>248</sup> Edgcumbe Supermarket Ltd “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (11 November 2024) at para 13,

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0017/364022/Edgcumbe-Supermarket-Ltd-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-11-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0017/364022/Edgcumbe-Supermarket-Ltd-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-11-November-2024.pdf).

<sup>249</sup> Commerce Commission engagement with other retailers.

<sup>250</sup> Commerce Commission engagement with industry participants.

<sup>251</sup> Commerce Commission analysis of additional supplier survey information.

### **Pricing and RDP accessibility for other retailers in direct supply**

B65. As noted in **Attachment A**, direct supply is an important component of supply in a competitive wholesale market that contributes to the purpose of the Act.

B66. Some Wholesale customers and other retailers highlighted that the pricing of direct supply is frequently not cost-effective and does not enable competition with RGRs.<sup>252</sup> One submission noted wholesale price of Dilmah tea exceeds supermarket retail prices.<sup>253</sup>

B67. We consider that RDPs are a significant factor in the difference between direct supply pricing for other retailers and the pricing RGRs negotiate with supplier.

B68. When considering direct supply pricing we have assessed:

- B68.1. The customer channels that obtain the cheapest net prices through direct supply; and
- B68.2. The value of RDPs that different customer channels obtain.

B69. Instances when direct supply from suppliers is most critical include:

- B69.1. When supply is not available through RGR wholesale offers (eg, if the supplier has opted out); or
- B69.2. When supply is available through RGR wholesale offers but is not priced competitively.

B70. We obtained data on a select number of top-selling SKUs from a sample of suppliers as well as data on RDPs across all SKUs for those suppliers. This sample included suppliers who do not offer their products through RGR wholesale offers.

- B70.1. The level of direct supply for these top-selling SKUs to different customer channels is discussed in our analysis of range available through direct supply at paragraph B195.

### **RGRs usually receive lower net prices than other customer channels**

B71. In the data we assessed, for approximately 70% of the top-selling SKUs a RGR received the lowest net price. Notably, only approximately 8% of SKUs were sold to clearance stores at the lowest net price. “Wholesalers/distributors” and “other retailers” each seldom obtained the lowest net price in direct supply, indicating the importance of the competitive pricing in the wholesale offers for these customers.<sup>254</sup>

- B71.1. Net prices were net of rebates, discounts, and payments. The net prices are the prices that are in effect paid by the purchaser, and net of any payment received from the supplier.

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<sup>252</sup> Commerce Commission engagement with wholesale customers and other retailers.

<sup>253</sup> Anonymous C “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (5 November 2024) at para 11, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0023/363317/Anonymous-C-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-5-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0023/363317/Anonymous-C-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-5-November-2024.pdf).

<sup>254</sup> Commerce Commission analysis of industry information.

### The value of RDPS that different customer channels obtain

B72. The data also suggested RGRs obtain 82% of all RDPS. This was greater than the 76% of units sold to RGRs for the select top-selling SKUs.<sup>255, 256</sup> General merchandisers, wholesalers/distributors, and other retailers combined received 18% of the total RDPS through direct supply.<sup>257</sup>

B73. In this dataset promotional funding made up 32% of all RDP across all customer channels.<sup>258, 259</sup> Of that promotional funding, 86% was provided to RGRs and 14% was provided to general merchandisers, wholesalers/distributors, and other retailers through direct supply.<sup>260</sup>

### RGRs generally obtain greater RDP than other customer channels through direct supply

B74. In the data we assessed, rebates impact the net price of goods obtained through direct supply. RGRs appear to obtain the most promotional funding, the most RDPS, the highest frequency of the cheapest net pricing, and the most supply through direct supply.

B75. The wholesale regime is designed to enable wholesale customers to obtain reasonable benefits of the RGRs scale and efficiency. The data we discussed above indicates that ensuring the products are both available and cost-effective in RGR wholesale offers is critical to the success of the regime.

B76. Analysis of the range of products available through direct supply and other limitations on obtaining groceries by direct supply are considered in our analysis of wholesale range at paragraphs B187-B191.

### Range

B77. This section discusses the range of groceries which are offered to wholesale customers in the wholesale market. This includes the range offered in RGR wholesale offers, as well as the range available through alternative channels including by direct supply.

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<sup>255</sup> Commerce Commission analysis of industry information.

<sup>256</sup> This statement compares the RGRs and other customer channels in terms of percentage of supply and percentage of RDPS obtained from the suppliers. Unlike information gathered for RDPS, data on supply is limited to the select top selling SKUs.

<sup>257</sup> Commerce Commission analysis of industry information

<sup>258</sup> Commerce Commission analysis of industry information.

<sup>259</sup> We interpret promotional funding as rebates, discounts and payments for advertising/marketing, merchandising (including shelf space), data, and promotional activities. This interpretation may not align with suppliers' interpretation of these rebates, discounts or payments.

<sup>260</sup> Commerce Commission analysis of industry information.

B78. Product range cannot be assessed in isolation from price, as there is an important inter-relationship between price and range. The Market Study found that even if products were available through other channels (eg, direct supply) that did not necessarily encourage effective competition since the customer might not have been able to buy them on terms and conditions which enabled them to compete effectively with the RGRs.<sup>261</sup> This issue was a key consideration in the introduction of the wholesale regime in Part 3 of the Act.

B79. Reflecting this, the purpose of Part 3 is expressed in terms of “enabling wholesale customers to have a reliable and cost-effective supply of groceries [and to] have reasonable access to the benefits of the scale, and the efficiency, of operations of regulated grocery retailers”.<sup>262</sup>

B80. The key principles relevant to the assessment of the comprehensiveness of the product range are the main principle (s23(2)) and the principles regarding:

- B80.1. The desirability that wholesale customers have reasonable access to any discounts, payments, or rebates made available to a regulated grocery retailer (s24(1)(b));
- B80.2. Range, quantity, and frequency, (s24(1)(c));
- B80.3. Clear market signals (s24(1)(e-f));
- B80.4. Commercial relationships (s24(1)(g-h));
- B80.5. Diversity (s24(1)(i)).

B81. We explain our interpretation of these principles in **Attachment A**.

B82. In considering if the range available to other retailers through both wholesale offers and direct supply is consistent with a competitive wholesale market we have analysed:

- B82.1. Wholesale customers’ access to the products they are most likely to demand (see paragraphs B83-B135);<sup>263</sup>
- B82.2. Other retailers’ current access to a low-cost offering, for example private labels (see paragraphs B136-B169);
- B82.3. The wholesale price list provided by the RGRs (see paragraphs B175-B191); and
- B82.4. The availability of products directly from suppliers to other retailers, including any restrictions (material or behavioural) on direct supply (see paragraphs B192-B226).

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<sup>261</sup> Commerce Commission “Market Study into the retail grocery sector – final report” (8 March 2022) at para 6.124, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf).

<sup>262</sup> Section 21 of the Act.

<sup>263</sup> The availability of top 500 selling grocery SKUs at RGRs’ retail banners to wholesale customers as a proxy for the demand of consumers in the downstream retail market. Grocery SKUs include all products defined as groceries under the s5(1) of the Act and excludes non-grocery products such as alcohol and tobacco.

### **Access to most demanded products - Availability of top 500 selling grocery SKUs**

B83. Wholesale customers seek a range of grocery products in order to sell them to their retail customers. Which specific products each wholesale customer buys in the wholesale market will vary, by the type and demands of retail customers they serve. We assume products bought in RGR banners give a wide selection of the products which might, on average, also be widely bought in a wholesale customers' stores. We compare this list of the RGRs' top-selling products at retail with the products included in each RGR's wholesale offer.

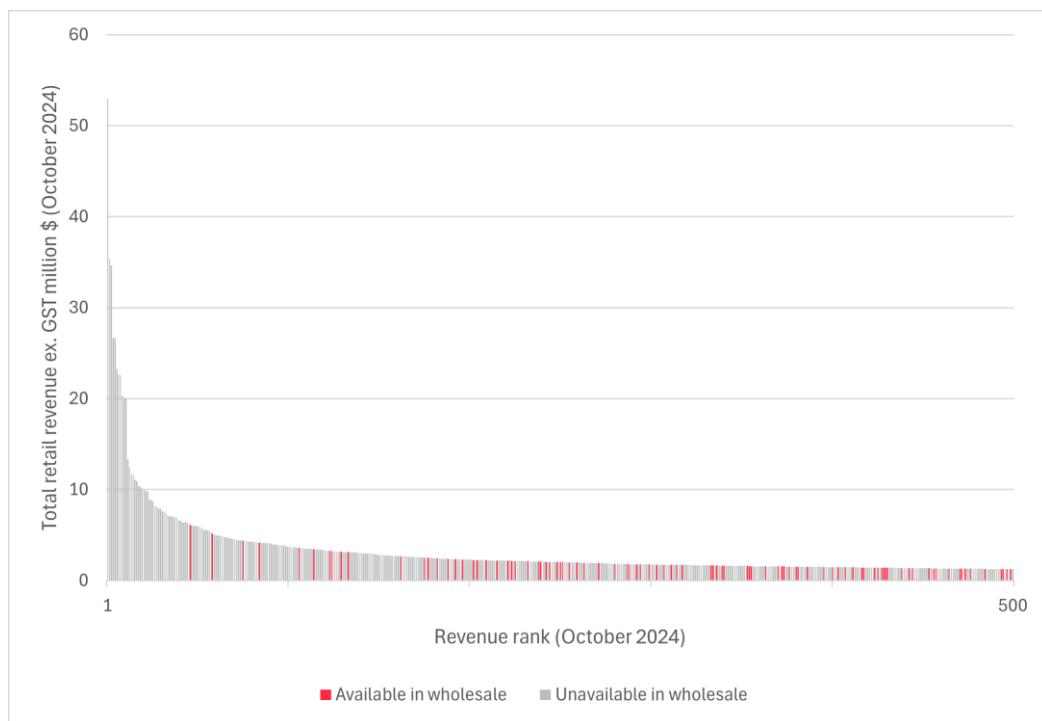
B84. We have undertaken analysis of the top-selling products at RGRs' banners which shows that:

- B84.1. The overall availability of the top 500 SKUs on wholesale pricelists in October 2024 is limited, with some changes since February 2024.
- B84.2. Across all RGRs (see Figures B5-B7), the wholesale availability of SKUs among top-selling retail products decreases as the retail sales revenue of the SKU increases. This means the more lucrative a SKU in revenue terms, the less likely it is that SKU is available in the RGRs' wholesale offering.

B85. Our analysis of the top 500 retail grocery SKUs assumes these SKUs are representative of the SKUs consumers, and therefore wholesale customers, are likely to demand. Ultimately, we are prepared to moderate this assumption where necessary with an analysis of the express demands of wholesale customers.

B86. While we accept that there are limitations to the use of the top 500 retail SKUs for each RGR as a proxy for the most demanded products by wholesale customers, we consider that this remains a useful indicator. Limitations include that the SKUs which customers demand may fall outside of those ranged by RGRs (eg, when a wholesale customer seeks a point of difference to compete with RGRs at retail) or the wholesale customer might target top-up or impulse buying missions and prefer a narrower range of products.

**Figure B5: Distribution of FSNI wholesale products among top-selling FSNI Pak'nSave retail products (October 2024)<sup>264</sup>**



B87. As shown in Figure B5, in October 2024, 18% of the top 500 selling products at FSNI Pak'nSave were available in FSNI's wholesale offer. This is a decrease from 26% in February 2024.<sup>265</sup> This Figure also shows that SKUs become less available at wholesale as the retail revenue of the SKU increases with only 4% of top 100 selling available at wholesale.<sup>266</sup>

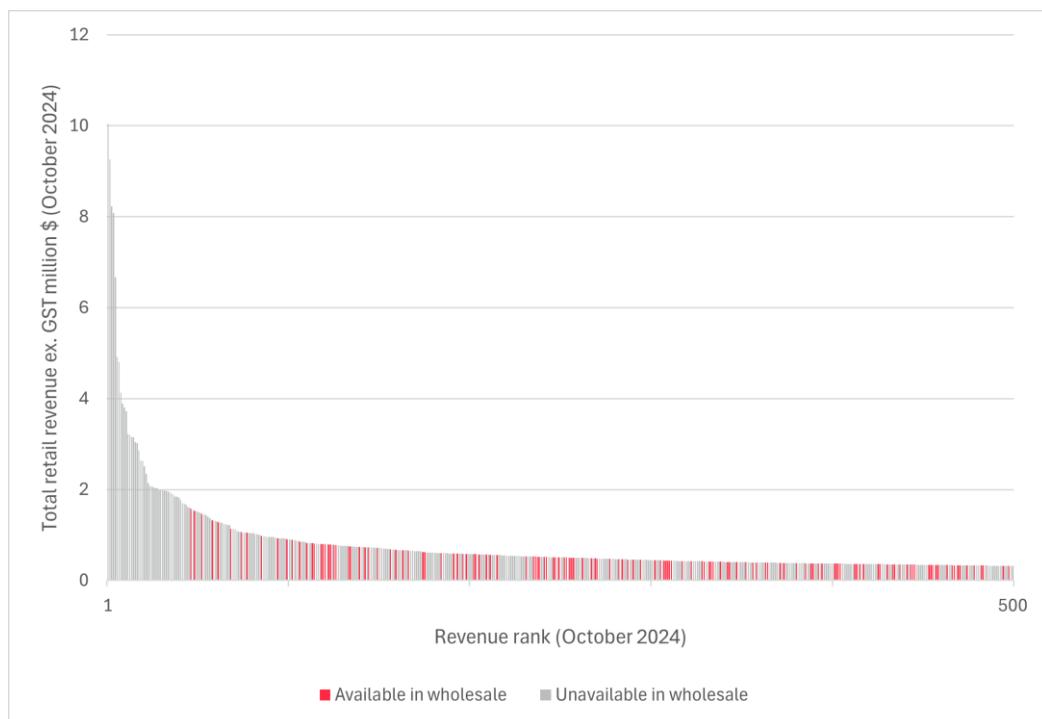
<sup>264</sup> Commerce Commission analysis of industry information.

<sup>265</sup> Commerce Commission “First Annual Grocery Report” (4 September 2024) at p. 98,

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362305/Annual-Grocery-Report-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362305/Annual-Grocery-Report-2024.pdf).

<sup>266</sup> Commerce Commission analysis of industry information.

**Figure B6: Distribution of FSSI wholesale products among top-selling FSSI Pak'nSave retail products (October 2024)**

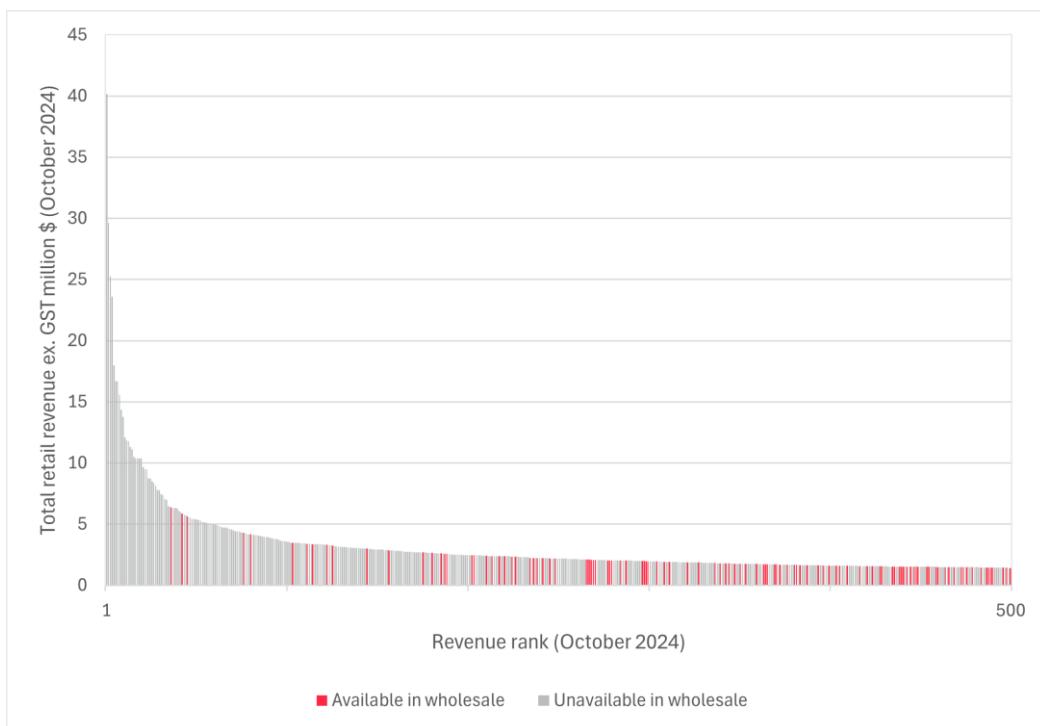


B88. As shown in Figure B6, in October 2024, 27% of the top 500 selling products at FSSI Pak'nSave were available in FSSI's wholesale offer. A slight decrease from 28% in February 2024.<sup>267</sup> This Figure also shows that SKUs become less available at wholesale as the retail revenue of the SKU increases, with only 11% of the top 100 selling available at wholesale.<sup>268</sup>

<sup>267</sup> Commerce Commission “First Annual Grocery Report” (4 September 2024) at p. 99, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362305/Annual-Grocery-Report-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362305/Annual-Grocery-Report-2024.pdf).

<sup>268</sup> Commerce Commission analysis of industry information.

**Figure B7: Distribution of WNZ wholesale products among top-selling Woolworths retail products (October 2024)**



B89. As shown in Figure B7, in October 2024, 22% of the top 500 selling products at Woolworths banners were available in WNZ's wholesale offer. This is an increase from 15% in February 2024.<sup>269</sup> This Figure also shows that SKUs become less available at wholesale as the retail revenue of the SKU increases with only 5% of the top 100 selling products for WNZ at Woolworths available at wholesale.<sup>270</sup>

#### Summary of our 'most demanded products' analysis

B90. Our analysis shows that between our samples taken in February and October 2024 the number of SKUs available in wholesale offers increased for WNZ, remained roughly stable for FSSI and decreased for FSNI.<sup>271</sup>

B91. WNZ may have focused on improving access to top products due to real or assumed demand from wholesale customers. Between February 2024 and October 2024 there was an almost 50% increase in the number of top 500 WNZ grocery SKUs available.<sup>272</sup> This compares to a 14% increase in SKUs across all WNZ price lists.<sup>273</sup>

B92. This aligns with some wholesale customers' views that WNZ appears to be working to improve their wholesale offering in general, and range in particular.<sup>274</sup>

<sup>269</sup> Commerce Commission analysis of industry information, the percentage of wholesale available products in February 2024 is updated since AGR1 using on amended data provided by WNZ.

<sup>270</sup> Commerce Commission analysis of industry information.

<sup>271</sup> Commerce Commission analysis of industry information.

<sup>272</sup> Commerce Commission analysis of industry information.

<sup>273</sup> Commerce Commission analysis of industry information.

<sup>274</sup> Commerce Commission engagement with wholesale customers.

B93. We are aware of at least one example of WNZ responding to requests for certain products by wholesale customers and seeking to bring suppliers into their wholesale offering when their products are sought.<sup>275</sup> We recognise WNZ has not always been able to provide these products due to supplier decisions.

B94. On the other hand, for FSNI there has been a greater decrease in wholesale availability among top 500 SKUs than the decrease across their full wholesale price list. Between February 2024 and October 2024, wholesale availability among FSNI's top 500 selling Pak'nSave grocery SKUs decreased by 29% compared to a 15% decrease in SKUs on their full price list.<sup>276</sup> This indicates that the most popular products are becoming less available in FSNI's wholesale offer over time.

#### Factors for limited availability of top 500 SKUs

B95. Factors impacting the availability of top 500 retail SKUs to wholesale customers include suppliers opting out, RGRs opting out their private label products, the full or partial exclusion of produce by RGRs, and products being delivered directly to store from a supplier rather than through a distribution centre.

B96. SKUs are frequently unavailable due to multiple factors at once.<sup>277</sup> This means addressing any one factor is likely to have a limited impact.

**Table B3: Availability of most demanded products through RGRs' wholesale offers or alternative channels of supply.**<sup>278</sup>

|                          | Availability in RGRs' wholesale offers   | Availability through alternative channels of supply   |
|--------------------------|--|---|
| <b>Supplier opt outs</b> | <p>Explicit supplier opt outs, excluding private labels, significantly limit wholesale availability of top 500 SKUs accounting for:</p> <ul style="list-style-type: none"> <li>• 13% of WNZ SKUs</li> <li>• 45% of FSNI Pak'nSave SKUs</li> <li>• 17% of FSSI Pak'nSave SKUs</li> </ul> <p>The approach of each RGR may influence participation of suppliers in wholesale offers.</p> <p>FSNI's opt out process may have initially reduced clarity and reliability of range for wholesale customers.</p> | <p>Suppliers of opted out products offer their products through direct supply but higher pricing and unattainable minimum order requirements can make price and range competition with RGRs difficult for products sourced through direct supply.</p> |

<sup>275</sup> Commerce Commission analysis of industry information.

<sup>276</sup> Commerce Commission analysis of industry information.

<sup>277</sup> Commerce Commission analysis of industry information.

<sup>278</sup> Commerce Commission analysis of industry information.

|   |  |  |
|---|--|--|
| <b>Direct to store delivery</b>             | <p>Products delivered directly to RGR banners significantly limit availability of top 500 SKUs accounting for between 27% to 43% of RGR SKUs.</p> <p>Different logistics processes for similar products create variation in product range available in each RGRs' wholesale offer.</p>   | <p>Many products delivered direct to store are available through direct supply. But higher pricing and unattainable order requirements often make price and range competition with RGRs difficult on products sourced through direct supply.</p>   |
| <b>Low-cost options (eg, private label)</b> | <p>Retailers do not have access to low-cost options which would allow them to compete with the RGRs' private labels and smaller retailers have expressed demand for RGR private labels.<sup>279</sup></p> <p>A very small number of non-WWNZ branded private label products are available on their wholesale price lists.</p> <p>Excluding fresh produce, private labels account for between 12% to 30% of RGR top 500 SKUs.</p> | <p>The Warehouse and Costco have sourced private labels to offer low-cost options.</p> <p>Scale is a factor in the development of a private label and creates a barrier to sourcing low-cost products directly.</p> <p>RGR brands are available to wholesale customers "off the retail shelf" but at prices that do not allow price competition.</p> |
| <b>Fresh produce</b>                        | <p>Neither FSNI nor WWNZ include fresh produce in their price lists.</p> <p>FSSI includes fresh produce on their wholesale price lists.</p> <p>Fresh produce is prevalent among Top 500 SKUs, representing between 17% and 21% of RGR SKUs.</p>  | <p>There appears to be a competitive existing market for wholesale supply of fresh produce that provides retailers with both a range of choices and cost-effective supply.</p>   |
| <b>Wholesale available products</b>         | Wholesale available products in each RGRs' top 500 retail SKUs are between 18% to 27% of RGR SKUs.   | N/A  |

<sup>279</sup>

Commerce Commission engagement with wholesale customers and other retailers.

## **Supplier opt outs**

B97. Supplier opt outs are prevalent among the top 500 retail products for all RGRs.<sup>280</sup>

B98. We understand the primary reasons for suppliers to opt out are the desire of suppliers to preserve their existing distribution (route trade) networks and a hesitancy to further concentrate supply in the RGRs and their wholesale offerings.<sup>281</sup> As a result, the customer may have no effective choice in channels of supply for some products. As a customer likely lacking bargaining power, the price of the direct supply option may be uncompetitive.<sup>282</sup> In short, the customer is not benefitting from the scale and efficiency of the RGR, a result which is inconsistent with the purpose of Part 3 (s21(b)).

B99. Suppliers and the RGRs have noted that operating specialised direct supply chains can maintain product safety and quality for perishable goods and provide more efficient supply for bulky, fast-moving and high-volume lines.<sup>283</sup>

B100. Suppliers we engaged with who have established significant route trade networks for the distribution of their products to other retailers have often opted out.<sup>284</sup> However, other retailers have told us the prices offered in these channels are not cost-effective, rendering their retail offerings as uncompetitive with RGR stores.<sup>285</sup>

B101. Fonterra described a system of route trade through their Anchor franchisees in their submission on the PIP. They note that forcing their products into RGR wholesale “will undermine Fonterra Oceania’s ability to efficiently operate its chilled supply chain and route to market (via the Anchor Franchise Network) over the longer-term”.<sup>286</sup>

B102. We challenge this assertion as wholesale customers are only likely to switch away from Fonterra’s existing route trade where RGRs’ wholesale prices are lower than those Fonterra offers directly, and service levels are sufficient. If Fonterra’s concern is founded, then it is probable that the benefits of Fonterra’s route trade are unequally distributed across their customer base. This would potentially enable RGRs to access better pricing, recover costs, and on sell to wholesale customers. All while beating the price Fonterra currently sells to their customers directly.

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<sup>280</sup> Commerce Commission analysis of industry information.

<sup>281</sup> Commerce Commission engagement with suppliers.

<sup>282</sup> Commerce Commission engagement with wholesale customers and other retailers.

<sup>283</sup> Commerce Commission engagement with industry participants.

<sup>284</sup> Commerce Commission engagement with suppliers.

<sup>285</sup> Commerce Commission engagement with wholesale customers.

<sup>286</sup> Fonterra Brands (New Zealand) Limited “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (8 November 2024) at p. 3,

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/363322/Fonterra-Brands-New-Zealand-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/363322/Fonterra-Brands-New-Zealand-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

- B103. Suppliers may be incentivised to opt out of RGR wholesale offerings, if wholesale customers can instead get a better price for their products through RGR wholesale.<sup>287</sup> This may be a larger issue for suppliers who do not see significant potential to increase sales volumes through wholesale and who already operate extensive direct supply networks. Suppliers may be concerned about the RGRs' ability to negotiate better prices than a wholesale customer could directly, potentially resulting in lower margins overall.
- B104. Supplier opt outs when RGR wholesale pricing is more competitive may impact the ability of other retailers to leverage RGR wholesale offerings in their negotiations directly with suppliers.
- B105. One submission sceptical of the viability of RGR wholesale noted that “price competitiveness [of wholesale supply] comes down to suppliers truly supporting other channels.”<sup>288</sup>
- B106. We encourage suppliers who operate route trade models to consider how to best facilitate the distribution of benefits they gain across their customer base to ensure wholesale customers are getting a fair deal when buying directly.

#### RGR processes for facilitating supplier participation

- B107. Each RGR has established a process which gives suppliers choice over whether to opt out of the wholesale offer. RGRs see this as consistent with s24(1)(h) of the Act which allows suppliers reasonable control over the channels of supply for their products and brands. This has resulted in a number of suppliers opting out of wholesale supply.
- B108. We note that RGRs' Grocery Supply Agreement templates include a clause giving suppliers the option of opting out of wholesale, formalising the process for suppliers who have signed these new agreements.<sup>289</sup>
- B109. FSNI's supplier opt out process allows some suppliers to be consulted about opting in and out on a customer-by-customer basis. FSNI notifies these suppliers each time their product has been requested by a wholesale customer.<sup>290</sup> This means that FSNI's wholesale price list includes SKUs which are not explicitly opted in and a wholesale customer may request a product without being sure that they will be able to get the product.<sup>291</sup> FSNI has indicated that they are not seeing significant changes in opt ins or opt outs - suppliers who originally opted out are not opting in. However, FSNI are continuing to engage with suppliers on this.<sup>292</sup>

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<sup>287</sup> Anonymous B “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (15 November 2024) at p. 1, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0022/363316/Anonymous-B-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-15-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0022/363316/Anonymous-B-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-15-November-2024.pdf).

<sup>288</sup> Anonymous A “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (24 October 2024) at p. 1, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0021/363315/Anonymous-A-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-24-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0021/363315/Anonymous-A-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-24-October-2024.pdf).

<sup>289</sup> Commerce Commission analysis of industry information

<sup>290</sup> Commerce Commission engagement with RGRs.

<sup>291</sup> Commerce Commission engagement with RGRs.

<sup>292</sup> Commerce Commission engagement with RGRs.

B110. FSNI's process differs from WWNZ and FSSI which we understand require a supplier to explicitly opt in before products are offered to wholesale customers.<sup>293</sup> This may mean the processes of WWNZ and FSSI's may give customers greater reliability of supply.<sup>294</sup>

B111. A small number of top retailing products were unavailable and fell outside of the common rationale for why they were not in wholesale. Follow up discussion with WWNZ indicated the primary reason for this was due to NZGW not agreeing to the price that the supplier was offering as NZGW did not believe it was competitive enough.<sup>295</sup>

B112. While NZGW's exclusion of these SKUs does sometimes limit product access for wholesale customers, it may be consistent with the behaviour of a wholesaler in a competitive market where the wholesaler seeks to offer a range that is priced attractively for their wholesale customers. Requiring NZGW to range products when they do not receive what they consider an attractive price may limit NZGW's ability to effectively negotiate the best possible price with suppliers.

B113. Another reason was some suppliers had agreed to supply products to WWNZ in their supply agreement with WWNZ but had not explicitly consented to NZGW on-selling their products. This meant several SKUs were unavailable among the top 500 selling retail SKUs at Woolworths.<sup>296</sup>

B114. FSSI indicated that in some cases suppliers had not explicitly responded to them about whether they would opt in or out and so these supplier's products were excluded from FSSI's offering.<sup>297</sup>

B115. FSNI products that were not explicitly opted out, private label, fresh produce, or did not pass through their distribution centre, were available to wholesale customers.<sup>298</sup>

**Different opt out processes may lead to different rates of supplier participation**

B116. The significantly higher level of opt outs among FSNI's top 500 retailing products is noteworthy and may be related to differences in FSNI's process to manage supplier opt outs compared to the other RGRs.

B117. Comparing FSNI's February 2024 and October 2024 price lists, the range of available products appears to have declined in part as a result of supplier opt outs.<sup>299</sup> While these opt outs are the result of a supplier's decision, the process established by FSNI to facilitate opt outs does not appear to provide the certainty to wholesale customers that they will receive reliable supply.

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<sup>293</sup> Commerce Commission engagement with RGRs.

<sup>294</sup> Commerce Commission analysis of industry information.

<sup>295</sup> Commerce Commission analysis of industry information.

<sup>296</sup> Commerce Commission analysis of industry information.

<sup>297</sup> Commerce Commission analysis of industry information.

<sup>298</sup> Commerce Commission analysis of industry information.

<sup>299</sup> Commerce Commission analysis of industry information.

B118. FSNI identified that an advantage of their approach is that supplier decisions are responsive to customer demands with a wholesale customer able to see potential products rather than the limited explicitly opted in range. In some cases, suppliers have asked for engagement on a customer-by-customer basis for which FSNI facilitates.<sup>300</sup>

B119. The impact of this issue is likely to be limited as we know some existing wholesale customers approach RGRs with specific product demands.

B120. We are aware of WNZ offers to onboard new suppliers to meet demand for products, even if this is not always fruitful.<sup>301</sup> Analysis of WNZ's price lists shows an increase in suppliers between February 2024 and October 2024 is.<sup>302</sup>

#### **Direct to store delivery**

B121. We have found that the number of products delivered directly to store significantly limits the availability of products to wholesale customers. RGRs have only included products that pass through their distribution centres in their wholesale offers.

B122. We understand products are delivered directly to store for a variety of reasons including cost, efficiency, bulk ordering and RGR preference. We are aware that this practice occurs for both perishable and shelf stable products.<sup>303</sup>

B123. Different systems and processes between RGRs may impact which products go through distribution centres and therefore the kinds of products available to wholesale customers from each RGR. We are aware of at least one example of a supplier who delivers products directly to stores for FSSI but into distribution centres for WNZ.<sup>304</sup>

B124. FSNI appears to rely more heavily on direct to store deliveries than WNZ or FSSI, with only 52% of FSNI's top 500 retailing products at Pak'nSave passing through a distribution centre compared to 71% of WNZ's top 500 retail SKUs at Woolworths and 73% of FSSI's top 500 retail SKUs at Pak'nSave.<sup>305</sup>

#### **Cross-docking or charge through solutions**

B125. A cross-docking or charge through system for wholesale customers could facilitate the supply of products where wholesale customers struggle to access competitive terms through direct supply. Charge through allows a customer to order and be billed centrally while receiving orders directly from suppliers.

B126. We understand all RGRs have charge through systems in place to facilitate supplying franchisees directly from suppliers for their own banners.<sup>306</sup> The FSSI cross-docking system for banners centralises orders placed by a specific store from a supplier at a FSSI distribution centre and delivers these products in the next delivery to the banner.<sup>307</sup>

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<sup>300</sup> Commerce Commission engagement with RGRs.

<sup>301</sup> Commerce Commission analysis of industry information.

<sup>302</sup> Commerce Commission analysis of industry information.

<sup>303</sup> Commerce Commission engagement with industry participants.

<sup>304</sup> Commerce Commission engagement with suppliers.

<sup>305</sup> Commerce Commission analysis of industry information.

<sup>306</sup> Commerce Commission analysis of industry information.

<sup>307</sup> Commerce Commission analysis of industry information.

- B127. We understand that Metcash operates charge through and cross-docking for its wholesale customers in Australia which serves to expand the range offered beyond the products they hold in their distribution centres.<sup>308</sup> Bypassing distribution centre capacity constraints has the potential to dramatically increase the range of products available to customers.
- B128. One supplier highlighted that cross-docking is a practice used by their other wholesaler customers.<sup>309</sup>
- B129. We also note that limiting wholesale offers to SKUs which pass through RGRs' distribution centres limits the ability of wholesale customers to differentiate their offerings and the ability to leverage the scale and efficiency of the RGRs.
- B130. We found no justification for not making available certain products to wholesale customers based on whether a product is delivered to a distribution centre or directly to RGR stores.
- B131. Accessibility elements of cross-docking, charge through and the use of third-party logistics are discussed further at paragraphs B238-B244.

#### **Low-cost and private label products**

- B132. As discussed in **Attachment A** regarding s24(1)(c), the range of wholesale groceries that is demanded by wholesale customers includes a depth of product range including price and quality considerations.

#### **Private labels in the grocery sector**

- B133. The Market Study into the grocery sector found that:
  - B133.1. private labels were increasingly competing 'head-on' with supplier-branded products;
  - B133.2. private label products traditionally fill a low-cost value proposition for retailers including the RGRs;<sup>310</sup>
  - B133.3. growth of such products may lead to a loss of consumer choice and higher prices over the longer-term;<sup>311</sup> and

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<sup>308</sup> Metcash Metconnect "Sorted ChargeThrough and Cross Dock" (accessed 21 May 2024), <https://metconnect.metcash.com/food/s/article/Sorted-ChargeThrough-Cross-Dock>.

<sup>309</sup> Commerce Commission engagement with suppliers.

<sup>310</sup> Commerce Commission "Market Study into the retail grocery sector – final report" (8 March 2022) at pp. 367-369, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf).

<sup>311</sup> Commerce Commission NZ "Market Study into the retail grocery sector – final report" (8 March 2022) at p. 324, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf).

B133.4. private label sales in New Zealand are growing but are relatively low compared to overseas markets.<sup>312</sup>

B134. AGR1 noted:

B134.1. while private label products could increase consumer choice and lower prices in the short-term, there is a risk that growth of private labels could crowd out supplier-branded products;<sup>313</sup>

B134.2. RGRs have mostly excluded their own private label products from their wholesale offerings, which is effectively a supplier opt out;<sup>314</sup> and

B134.3. private label products made up a substantial proportion of the top-selling retail products.<sup>315</sup>

B135. Our analysis of data provided for the month of October 2024 shows that private label products remain prevalent among the top 500 retail SKUs.<sup>316</sup> Our analysis also shows that private labels are a significant proportion of RGRs' retail sales and revenue.<sup>317</sup>

#### Access to low-cost offerings for other retailers

B136. We are aware of cases where other retailers appear to have been able to develop their own private label products that fill a low-cost value proposition. Examples include The Warehouse's Market Kitchen and Costco's Kirkland private labels.<sup>318, 319</sup>

B137. However, there are cases where no cost-effective access to value brands is possible. The main reason a potential competitor may not be able to source their own private label appears to be lack of scale. This could cause a 'chicken and egg problem' for competitors who lack the ability to compete on a low-cost offering through a private label and cannot grow to a scale to compete on a full range of groceries.

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<sup>312</sup> Commerce Commission NZ "Market Study into the retail grocery sector – final report" (8 March 2022) at p. 365, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf).

<sup>313</sup> Commerce Commission "First Annual Grocery Report" (4 September 2024) at p. 105, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362305/Annual-Grocery-Report-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362305/Annual-Grocery-Report-2024.pdf).

<sup>314</sup> Commerce Commission "First Annual Grocery Report" (4 September 2024) at p. 100, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362305/Annual-Grocery-Report-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362305/Annual-Grocery-Report-2024.pdf).

<sup>315</sup> Commerce Commission "First Annual Grocery Report" (4 September 2024) at p. 100, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362305/Annual-Grocery-Report-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362305/Annual-Grocery-Report-2024.pdf).

<sup>316</sup> Commerce Commission analysis of industry information.

<sup>317</sup> Commerce Commission analysis of industry information.

<sup>318</sup> The Warehouse Group "The Warehouse launches Market Kitchen butter to help Kiwis with the essentials" (23 May 2023), <https://www.thewarehousegroup.co.nz/news-updates/warehouse-launches-market-kitchen-butter-help-kiwis-essentials>.

<sup>319</sup> Costco Wholesale "Kirkland Signature" (accessed 19 May 2025), <https://www.costco.co.nz/brands/kirkland-signature>.

B138. If wholesale customers cannot access a low-cost value proposition, this limits their ability to compete. However, the Commission must balance this against the risk that introducing a regulatory response may deter entry or expansion by potential competitors with strong private label offerings. Deterring new entrants would not only be contrary to principles 24(1)(f) and 24(1)(i) but would also not promote the purpose of the Act.

#### Industry perspectives on private label inclusion in wholesale

B139. Wholesale customers struggle to compete on price with the private labels of RGRs and some want access to these products through wholesale offerings.<sup>320</sup>

B140. The stores requesting access tend to be smaller independent grocery stores or dairies/convenience stores.

B141. Concerns about a lack of access to private labels usually related to the lack of a competitive, low-cost value proposition, especially in the short-term, as opposed to a desire for RGRs brands specifically.<sup>321</sup>

B142. One other retailer highlighted a concern that, in the long-term, including RGRs' private labels in wholesale offerings would grow the market share of RGRs by expanding the volume of private label products.<sup>322</sup>

B143. The NZFGC expressed concerns that the inclusion of private label products in wholesale offerings could damage current commercial incentives to develop these products and may disincentivise future entry and expansion by overseas grocery retailers concerned about their own products being regulated in future.<sup>323</sup>

B144. WNZ noted similar risks to investment incentives if the Commission were to mandate the inclusion of private label products. These risks included “undermining grocery retailers’ incentives to invest in private label products, which risks higher prices and less choice for consumers.”<sup>324</sup>

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<sup>320</sup> Commerce Commission engagement with wholesale customers.

<sup>321</sup> Commerce Commission engagement with wholesale customers.

<sup>322</sup> Commerce Commission engagement with other retailers.

<sup>323</sup> New Zealand Food and Grocery Council “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (8 November 2024) at p. 10,  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0025/363328/New-Zealand-Food-and-Grocery-Council-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0025/363328/New-Zealand-Food-and-Grocery-Council-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>324</sup> Woolworths New Zealand “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (8 November 2024) at para 6.2(b),  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf)

B145. However, the impacts of private labels on suppliers are less certain. Some suppliers, including Fonterra, express concerns that increasing dominance of private labels will decrease suppliers' ability to innovate and advocate for their branded products.<sup>325</sup> Other suppliers see private labels as an opportunity to increase volumes.<sup>326</sup>

#### Our response to these perspectives

B146. We consider that access to low-cost products for wholesale customers will provide consumers with more choice.

B147. We also consider access to private labels may provide wholesale customers with increased bargaining power when negotiating direct supply for similar products.<sup>327</sup>

B148. We note the risk that mandating the inclusion of private label in wholesale offerings may increase its prevalence, leading to fewer name brand products on shelves. The Market Study discussed how private label products can increase choice and lower prices in the short-term but may reduce supplier-branded options and raise prices long-term. The Market Study also noted the risk to consumers is higher when retail competition is weak, as retailers might favour their own brands or misuse suppliers' intellectual property.<sup>328</sup> These risks all may reduce diversity in the wholesale and retail markets.

B149. We recognise concerns that private labels may limit branded products, however we do not consider these concerns outweigh the need for improved retail competition. Retailers should have access to a range of brand and value propositions, including low-cost products. We believe that if the wholesale market does not facilitate this downstream competition then this is inconsistent with the wholesale offerings of a competitive wholesale market.

#### Substitutes for private label products

B150. We have examined substitutes for top private label products within the top 500 SKUs for each RGR, excluding fresh produce and fresh meat.

B151. In many cases, there are potential substitute goods available in RGRs' wholesale offers, however often the substitutes available do not allow competitors to compete with RGRs' private label goods at retail prices.<sup>329</sup> There are very few products where the wholesale price of a potential substitute is less than the retail price of the private label product.<sup>330</sup> This could be because:

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<sup>325</sup> Fonterra Brands (New Zealand) Limited "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at p. 4, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/363322/Fonterra-Brands-New-Zealand-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/363322/Fonterra-Brands-New-Zealand-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>326</sup> Commerce Commission engagement with suppliers.

<sup>327</sup> Commerce Commission engagement with wholesale customers.

<sup>328</sup> Commerce Commission "Market Study into the retail grocery sector – final report" (8 March 2022) at p. 324, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf).

<sup>329</sup> Compared to Woolworths for WWNZ or Pak'nSave for FSNI and FSSI.

<sup>330</sup> Commerce Commission analysis of industry information.

- B151.1. the RGRs' private labels are one avenue for accessing low-cost value propositions;
- B151.2. alternative channels include developing new private labels or relying on generic value-branded goods produced by suppliers;
- B151.3. we are not aware of a current, widespread white label offering in New Zealand for retailers;<sup>331</sup> and/or
- B151.4. as is the case for branded goods, imports can offer a viable alternative channel to access private label and/or value brand goods in some cases.

B152. Supplier interviews suggest that scale and relatively high volumes are a key factor to support new private labels, indicating that developing distinct private labels is not a credible option for smaller retailers.<sup>332</sup>

B153. We note that where suppliers have best price or exclusive agreements with RGRs on private label products this may limit the ability for other retailers to source low-cost value propositions at competitive prices. If these clauses occur in key categories or for staple products with only a small number of suppliers, this may further limit a retailers' ability to source low-cost products competitively (see paragraphs B209-B222).

B154. There appear to be cases where there is no cost-effective access to low-cost value propositions through alternative channels of supply. For example, independent supermarkets do not appear to have access – other than through purchasing 'off the retail shelf' at RGR stores. This contrasts with Australia where Metcash offers open access to its Black and Gold white label to non-member wholesale customers.<sup>333</sup>

**RGRs show inconsistent control over the channels through which their private labels are sold**

B155. While RGRs often brand products with their own private label, such products are sometimes sold by buyers. In our view, this undercuts submissions that RGRs should not be required to include their own private label product in their wholesale offers.

B156. Our engagement indicated that wholesale customers can buy off the retail shelf, including private label.<sup>334</sup> For example, some smaller retailers buy products at Pak'nSave for resale in their store.

B157. WWNZ does not exclude the purchase of private label products with their in-store discount card for wholesale customers.

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<sup>331</sup> White labelling is a practice where one party produces a product and another rebrands it under its own name and sells it to the public.

<sup>332</sup> Commerce Commission engagement with suppliers.

<sup>333</sup> Woolworths New Zealand "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at para 3.6(e)(iii),

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363332/Woolworths-New-Zealand-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>334</sup> Commerce Commission engagement with wholesale customers and other retailers.

- B158. WWNZ includes a limited range of non-Woolworths brand private label products in their wholesale offer.<sup>335</sup>
- B159. FSNI and FSSI sell some private label products, including Pams and Gilmours house brands, through their Trents and Gilmours banners.<sup>336</sup>
- B160. However, the RGRs appear to want to maintain, if not strengthen, their current control over their private labels and point toward s24(1)(h) to do so.<sup>337, 338</sup> This principle recognises the desirability of suppliers retaining reasonable control over the channels for the retail sale of their own products and brands.

### **Fresh categories**

- B161. Where existing alternative channels of supply are consistent with a competitive wholesale market, further intervention regarding the ranging of these products by RGRs may not be necessary to meet customer demands and satisfy the need for a wholesale offering consistent with a competitive wholesale market.

### **Fresh produce**

- B162. The Market Study recognised some wholesale options for fresh produce.<sup>339</sup> This was echoed in United Fresh's submission to the PIP.<sup>340</sup>
- B163. In AGR1 we indicated fresh produce was "a crucial part of the range we would expect in a competitive wholesale offer, based on their inclusion in a main shop and the availability of fresh products via other wholesalers."<sup>341</sup>
- B164. In October 2024, fresh produce accounted for between 10 - 20% of the top 500 retail SKUs at the RGRs' stores.<sup>342</sup> This highlights the demand for fresh produce.

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<sup>335</sup> Commerce Commission "First Annual Grocery Report" (4 September 2024) at p. 100, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362305/Annual-Grocery-Report-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362305/Annual-Grocery-Report-2024.pdf).

<sup>336</sup> Commerce Commission analysis of industry information.

<sup>337</sup> Foodstuffs North Island and Foodstuffs South Island "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (8 November 2024) at para 40, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/363323/Foodstuffs-North-and-South-Island-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf).

<sup>338</sup> Woolworths New Zealand "Cross Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (11 December 2024) at para 10.3, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/364025/Woolworths-New-Zealand-Cross-submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-11-December-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/364025/Woolworths-New-Zealand-Cross-submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-11-December-2024.pdf).

<sup>339</sup> Commerce Commission "Market Study into the retail grocery sector – final report" (8 March 2022) at p 38, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf).

<sup>340</sup> United Fresh "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (23 October 2024) at para 5.7, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/363331/United-Fresh-New-Zealand-Incorporated-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-paper-23-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/363331/United-Fresh-New-Zealand-Incorporated-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-paper-23-October-2024.pdf).

<sup>341</sup> Commerce Commission "First Annual Grocery Report" (4 September 2024) at p. 100, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362305/Annual-Grocery-Report-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362305/Annual-Grocery-Report-2024.pdf).

<sup>342</sup> Commerce Commission analysis of industry information.

- B165. Considering the views of a range of market participants we currently understand other retailers have reasonable access to fresh produce at competitive prices.<sup>343</sup>
- B166. Furthermore, we consider the combination of fresh produce available from primary wholesalers (eg, T&G Fresh, MG Marketing, Fresh Direct), secondary wholesalers (eg, Bidfood, Service Foods) and directly from growers constitute a diverse market for fresh produce.
- B167. If we subsequently find sufficient evidence contrary to our current understanding, including specific situations where retailers' access to fresh produce is limited, this position may be revised.
- B168. We recognise RGRs may wish to offer fresh produce at wholesale for a variety of reasons including to centralise ordering processes for a full range of groceries for their wholesale customers.

#### Fresh meat

- B169. The Market Study also recognised that there were some wholesale options for fresh meat (eg, JR Wholesale Meats, Wholesale Meats Direct).<sup>344</sup>
- B170. We have heard from some small retailers that they have access to direct supply from local suppliers or butchers for meat products. This arrangement does not appear to be ideal and gaining direct supply from a large-scale meat supplier would be the best option, especially to access economies of scale for large retailers seeking to compete with RGRs.<sup>345</sup>
- B171. We understand that large meat suppliers currently supply the RGRs, foodservice channels, and alternative wholesalers.<sup>346</sup>
- B172. However, to date we have not been able to speak to a diverse range of suppliers or wholesalers, and retailers have not provided sufficient detail on meat sourcing.
- B173. Because we lack sufficient information, we are unable to make a judgement on whether meat is accessible, competitively available and with a sufficiently diverse range of suppliers for other retailers.
- B174. We intend to explore this further in subsequent reports as part of this Inquiry and we will seek the views of all market participants to inform this.

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<sup>343</sup> Commerce Commission analysis of industry information.

<sup>344</sup> Commerce Commission "Market Study into the retail grocery sector – final report" (8 March 2022) at p. 38, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf).

<sup>345</sup> Commerce Commission engagement with retailers and wholesale customers.

<sup>346</sup> Commerce Commission "Foodstuffs merger clearance determination" (30 September 2024) at p. 63, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0025/362761/5B20245D-NZCC-24-Foodstuffs-merger-clearance-determination-30-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0025/362761/5B20245D-NZCC-24-Foodstuffs-merger-clearance-determination-30-September-2024.pdf).

<sup>346</sup> Section 24(1) of the Act.

### **Analysis of the wholesale price lists provided by the RGRs**

B175. We analysed RGRs' wholesale price lists to assess the range (including number and type) of products available to wholesale customers.

B176. Some wholesale customers noted the products available in the RGRs' wholesale range is significant, with one retailer indicating the number of SKUs on one wholesale price list exceeded the total number of SKUs they retail.<sup>347</sup> Despite this, some wholesale customers found key products were unavailable through wholesale offerings.<sup>348</sup> Wholesale customers highlighted that some products were only available directly from suppliers at prices that were not cost-effective. (see paragraph B66).

B177. We consider that the total number of products in RGR wholesale offerings is a limited measure of range. The availability of products that customers actually (or are likely to) demand remains the key measure.

B178. Changes in the total number of SKUs offered allow the assessment of broad trends in the growth and development of each RGRs wholesale offering. This enables some conclusions to be drawn especially regarding the range and reliability of supply to wholesale customers.

B179. Our analysis considers the total number of SKUs offered, the variety of products, and changes over time. Our analysis of RGRs' wholesale price lists compares product range and availability between February 2024 and October 2024.

### **Total number of products available**

B180. As of October 2024:

B180.1. WWNZ has seven regional price lists (including one national list) offering between 6,500 and 6,800 products with a very similar range of products in each price list.<sup>349</sup> Across WWNZ's price lists, the total number of wholesale available SKUs has increased by an average of 14% between February 2024 and October 2024.<sup>350</sup>

B180.2. FSSI has two regional price lists offering between 9,000 and 10,000 products each with some variation of product due to different distribution processes.<sup>351</sup> FSSI's range has marginally decreased between February 2024 October 2024.<sup>352</sup>

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<sup>347</sup> Commerce Commission engagement with wholesale customers.

<sup>348</sup> Commerce Commission engagement with wholesale customers; a lack of private label products was also raised by other retailers, (see paragraphs B141-B142).

<sup>349</sup> Commerce Commission analysis of industry information.

<sup>350</sup> Commerce Commission analysis of industry information.

<sup>351</sup> Commerce Commission analysis of industry information.

<sup>352</sup> Commerce Commission analysis of industry information.

B180.3. FSNI has one price list offering 7,400 products.<sup>353</sup> FSNI's total number of SKUs has declined 14% between February 2024 and October 2024.<sup>354</sup> This appears to be in part a result of seasonal variation and the retail availability of products.<sup>355</sup> However, given the growth and consistency of WWNZ's and FSSI's offerings respectively, FSNI's decline in total SKUs is concerning. As noted previously at paragraphs B109-B110, FSNI's process for supplier opt outs means that their price list includes some products that are available on a provisional basis pending supplier approval.

B181. We note that Metcash offers approximately 27,000 food SKUs in Australia, significantly more than any price list offered by any RGR.<sup>356</sup>

#### Categories of products available

B182. We have classified each price list by common categories which show the types of products each RGR offers to their wholesale customers.<sup>357</sup> This analysis reflected the overall trend in price list numbers with FSNI's decline in offered SKUs represented across categories and WWNZ seeing some growth in a number of categories while FSSI's offering remained almost identical.

B183. The increase in SKUs across WWNZ's price lists overall is not consistent across categories. When considering all WWNZ's SKUs offered in February 2024 and October 2024, the number of available SKUs decreased in eight categories and increased in 14 categories. WWNZ also added one new category, liquor, to most price lists.<sup>358</sup>

B184. FSNI's range has declined across 22 categories and only two categories have grown.<sup>359</sup>

B185. Due to minimal changes in FSSI's range between February 2024 and October 2024, category change is not significant. When considering both of FSSI's regional price lists, their range decreased slightly in one price list.<sup>360</sup>

B186. Overall, the number of SKUs offered by RGRs on their wholesale price lists highlight some of the underlying trends in each RGR's offering. Ultimately the products their customers demand and the wholesales willingness to supply these products is our main focus. A higher number of SKUs increases this likelihood but does not guarantee it.

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<sup>353</sup> Commerce Commission analysis of industry information.

<sup>354</sup> Commerce Commission analysis of industry information.

<sup>355</sup> Commerce Commission analysis of industry information.

<sup>356</sup> Metcash "Submission to the ACCC Supermarket Inquiry 2024-25 Issues Paper" (19 April 2024) at p.14, <https://www.accc.gov.au/system/files/Metcash.pdf>.

<sup>357</sup> We have developed common categories based on RGRs' internal categories, departments and subcategories. In some cases, RGRs' own assignment of products may result in products being assigned to different common categories between RGRs or within RGRs between data sets, this means there are limits on this categorization, especially when comparing between RGRs.

<sup>358</sup> Commerce Commission analysis of industry information.

<sup>359</sup> Commerce Commission analysis of industry information.

<sup>360</sup> Commerce Commission analysis of industry information.

## **Limitations on direct supply to other retailers**

B187. As discussed above and in **Attachment A**, the alternative channels of supply such as direct supply are an important component of a competitive wholesale market that contributes to the purpose of the Act.

B188. We engaged with retailers and suppliers about the viability of direct supply as an alternative to the RGRs' wholesale offers. This showed there can be a variety of limitations for other retailers attempting to access direct supply.

B189. With respect to access to direct supply, we note that overall, the suppliers we engaged with generally appeared willing to offer supply to non-RGR retail customers.<sup>361</sup>

B190. Our supplier survey showed that many suppliers supply other retailers.<sup>362</sup> However, more than 81% of suppliers indicated the terms other retailers access differed either a little or a lot compared to each RGR. The top area of difference was price (76%) followed by payment terms (68%), delivery requirements (49%), merchandising (47%) and product range (46%).<sup>363</sup>

B191. In data obtained on select top-selling SKUs from a sample of suppliers, the portion of units sold to other retailers was small at 10%, with a further 2% of units sold to general merchandisers. RGRs on the other hand were supplied 76% of the total units sold.<sup>364</sup> While these other retailers and general merchandisers had some access to the supply of these groceries, the price at which they are offered may impact their level of demand.<sup>365</sup> The pricing of these select top-selling SKUs and the impacts of RDPs are discussed at paragraphs B65-B76.

## **Supplier minimum order requirements**

B192. Retailers have raised the suggestion that minimum order quantities set by suppliers for direct supply can be a barrier to gaining reliable supply.<sup>366</sup>

B193. One submitter also noted that supplier minimum order quantities are necessary to cover transport costs.<sup>367</sup>

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<sup>361</sup> Commerce Commission engagement with suppliers.

<sup>362</sup> Commerce Commission "TRA x Commerce Commission Grocery Supplier Survey" (January 2025).

<sup>363</sup> Commerce Commission "TRA x Commerce Commission Grocery Supplier Survey" (January 2025).

<sup>364</sup> Commerce Commission analysis of industry information.

<sup>365</sup> For this analysis other retailers included: specialist supermarkets, convenience stores, clearance stores, single category grocery retailers, and online only stores/retailers.

<sup>366</sup> Commerce Commission engagement with wholesale customers.

<sup>367</sup> Anonymous B "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (15 November 2024), [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0022/363316/Anonymous-B-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-15-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0022/363316/Anonymous-B-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-15-November-2024.pdf)

B194. Minimum order quantities can be an issue for a range of retailers, not just small ones. We heard from some retailers that large and multinational suppliers are particularly hard to open accounts with, including due to high minimum order requirements.<sup>368</sup> These retailers noted some of these products are now accessible thanks to RGR wholesale offerings.<sup>369</sup>

#### Supplier capacity constraints

B195. Some suppliers told us they were not willing to take on new customers. These were businesses who either exclusively supplied one RGR, or who told us they are not set up to supply smaller retailers.<sup>370</sup>

B196. In late 2023, supply constraints were cited as the reason for Sanitarium's brief withdrawal of Weet-Bix from The Warehouse.<sup>371</sup>

B197. We also heard from some suppliers who are selective on who they supply based on considerations such as scale, credit history, and business direction.<sup>372</sup> Suppliers described considering the cost to serve a customer against their potential volumes.<sup>373</sup> Some suppliers described the cost of freight, transport and logistics as an especially expensive aspect of servicing any customer.<sup>374, 375</sup>

B198. We have also heard that in some categories it is hard to quickly increase production volume, meaning RGRs' ability to buy large volumes quickly can leave suppliers without enough stock for other customers.<sup>376</sup>

B199. One submission described the impacts of "retail groups buying up stock, storing for future promotions and then flooding the domestic market." These impacts include insufficient supply to service independent retailers at times.<sup>377</sup>

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<sup>368</sup> Commerce Commission engagement with wholesale customers.

<sup>369</sup> Commerce Commission engagement with wholesale customers.

<sup>370</sup> Commerce Commission engagement with suppliers.

<sup>371</sup> Radio New Zealand "Sanitarium to resume supplying Weet-Bix to The Warehouse" (3 October 2023), <https://www.rnz.co.nz/news/business/499266/sanitarium-to-resume-supplying-weet-bix-to-the-warehouse>.

<sup>372</sup> Commerce Commission engagement with suppliers.

<sup>373</sup> Commerce Commission engagement with suppliers.

<sup>374</sup> Anonymous B "Submissions on Wholesale Supply Inquiry Preliminary Issues Paper" (15 November 2024), [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0022/363316/Anonymous-B-Submission-on- Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-15-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0022/363316/Anonymous-B-Submission-on- Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-15-November-2024.pdf).

<sup>375</sup> Commerce Commission engagement with suppliers.

<sup>376</sup> Commerce Commission engagement with suppliers.

<sup>377</sup> Anonymous E "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (5 November 2024) at p.1, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0025/363319/Anonymous-E-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-5-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0025/363319/Anonymous-E-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-5-November-2024.pdf).

B200. Larger suppliers with established route trade networks appear more likely to offer supply without specific terms (eg, minimum order requirements) and in some cases have dedicated teams for servicing their smaller direct customers.<sup>378</sup> One example is Fonterra, who outlined their distribution network in their submission.<sup>379</sup>

B201. As discussed at paragraphs B98-B102 these route trade networks are not always cost-effective for other retailers.

B202. We understand suppliers use a variety of delivery modes to service other retailers directly including courier or post services for small volume orders.<sup>380</sup>

B203. We have heard from retailers who have struggled to get direct supply, especially in frozen categories, due to lack of scale.<sup>381</sup> These retailers may face additional logistical constraints, such as a lack of cool storage and freight.<sup>382</sup>

#### RGR-supplier dynamics

B204. In our Terms of Reference, we noted we would assess if the RGRs' relationships with suppliers impeded suppliers' incentives to supply other retailers.<sup>383</sup> We have found evidence that RGRs' market power and domination of suppliers' sales volumes may indirectly limit the ability for other retailers to access products at competitive prices.

B205. As part of the Inquiry process, we heard some indication from wholesale customers that even in cases where they met suppliers' order requirements they have been refused supply for like products at competitive prices that are available to the RGRs.<sup>384</sup> These may be an indication that the RGRs' market power over suppliers could be hindering other retailers' access to products in direct supply.

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<sup>378</sup> Commerce Commission engagement with suppliers.

<sup>379</sup> Fonterra Brands (New Zealand) Limited “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (8 November 2024) at para 3, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/363322/Fonterra-Brands-New-Zealand-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/363322/Fonterra-Brands-New-Zealand-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-8-November-2024.pdf).

<sup>380</sup> Commerce Commission engagement with suppliers.

<sup>381</sup> Commerce Commission engagement with wholesale customers.

<sup>382</sup> Commerce Commission engagement with wholesale customers.

<sup>383</sup> Commerce Commission “Wholesale Supply Inquiry Terms of Reference” (4 September 2024) at para 11.2, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0021/362307/Terms-of-Reference-Wholesale-Supply-Inquiry.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0021/362307/Terms-of-Reference-Wholesale-Supply-Inquiry.pdf)

<sup>384</sup> Commerce Commission engagement with wholesale customers.

B206. The determination on the Foodstuffs North Island/Foodstuffs South Island merger noted suppliers' fears that supplying other retailers (especially with better prices) would result in pressure from the RGRs.<sup>385</sup> In that determination, an industry participant told us suppliers are looking for alternatives to grow, but do not want to risk their relationships with the RGRs.<sup>386</sup> This behaviour may replicate best price and exclusive supply agreements discussed further in the next section.

B207. As part of the supplier survey some suppliers commented that RGRs leverage their market power to extract margin through complex RDPs.<sup>387</sup> It is unlikely that suppliers would provide similar terms to other retailers, limiting their ability to compete. For example, one supplier response noted that despite a generally positive experience with FSNI, there is some pressure not to consider other retail relationships.<sup>388</sup>

B208. The supplier survey highlighted that 41% of suppliers were highly reliant on RGRs (between 67% and 100% of sales).<sup>389</sup> This aligns with feedback obtained during engagement with suppliers during the Inquiry, with suppliers indicating a significant portion of their business in New Zealand sits with RGRs.<sup>390</sup>

#### **Exclusive supply and best price clauses**

B209. Best price clauses and exclusive supply agreements are an example of strategic conduct used by RGRs and suppliers that may affect the ability of suppliers to sell to, or retailers to buy from, other parties.

B210. Exclusive supply agreements typically operate in one of two ways - a retailer is prohibited from buying a product from other suppliers, or a supplier's product is exclusive to one retailer.

B211. Best price clauses ensure a particular buyer obtains products from a supplier on terms that are at least as good as (or, in some cases, better than) those provided to other buyers.

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<sup>385</sup> Commerce Commission "Foodstuffs Merger Clearance Determination" (30 September 2024) at para 503.2 and 503.3, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0025/362761/5B20245D-NZCC-24-Foodstuffs-merger-clearance-determination-30-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0025/362761/5B20245D-NZCC-24-Foodstuffs-merger-clearance-determination-30-September-2024.pdf).

<sup>386</sup> Commerce Commission "Foodstuffs Merger Clearance Determination (30 September 2024) at para 503.4, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0025/362761/5B20245D-NZCC-24-Foodstuffs-merger-clearance-determination-30-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0025/362761/5B20245D-NZCC-24-Foodstuffs-merger-clearance-determination-30-September-2024.pdf).

<sup>387</sup> Commerce Commission analysis of additional supplier survey information

<sup>388</sup> Commerce Commission analysis of additional supplier survey information

<sup>389</sup> Commerce Commission "TRA x Commerce Commission Grocery Supplier Survey" (January 2025) at p.16.

<sup>390</sup> Commerce Commission engagement with suppliers.

B212. We have found exclusive supply and best price clauses are not widespread for branded products but seem to be more common for private labels.<sup>391</sup> Overall, exclusive supply agreements are more common than best price agreements when looking at branded products.<sup>392</sup> All RGRs have some form of exclusive supply agreements in place.<sup>393</sup> Best price clauses between the RGRs and suppliers are more common for private label products and extremely rare for branded products.<sup>394</sup>

B213. As outlined in our discussion of low-cost products at paragraph B150, these clauses may limit the ability for other retailers to compete, particularly when there are few suppliers of a product in the upstream market.

B214. If a retailer has an exclusive supply agreement for a specific product this could be seen as de facto private label as they are the only retailer of this product. This is sometimes referred to as a 'controlled label'.

B215. Exclusive supply agreements can be for the benefit of either the supplier and/or retailer, depending on the clause and its wording. Best price clauses appear to be mainly to the benefit of retailers. When an RGR is prohibited from buying a particular product from other suppliers, this deal is beneficial to the supplier. Generally, we only see these types of deals with very large suppliers.<sup>395</sup>

B216. When a supplier's product is exclusive to one RGR, this can be seen as either mutually beneficial between retailers and suppliers, or more beneficial for the retailer. It can be mutually beneficial as the supplier gains a degree of certainty from a retailer who will stock their product. It can also be more beneficial for the retailer, as the supplier can no longer shop around for better terms, due to being locked in with one retailer.

B217. Best price clauses are generally more beneficial for the retailers. They can entrench a buying price advantage over other retailers which could restrict other retailers' ability to compete on price.

B218. When engaging with suppliers, we found volume is the key driver in the price which suppliers offer to retailers.<sup>396</sup> This means suppliers' largest customers often get the best price, despite no formal best price agreement being in place. This effectively results in an informal best price clause for a supplier's largest customer, whether there is an agreement in place.

B219. We understand that some suppliers mitigate like-for-like price comparisons between their retail customers by offering different variations of similar SKUs.<sup>397</sup> This can take place in the form of different pack sizes or branding.<sup>398</sup> This behaviour can essentially act as an exclusive supply agreement for that variation of that product, although there may be no formal exclusivity agreement.

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<sup>391</sup> Commerce Commission analysis of industry information.

<sup>392</sup> Commerce Commission analysis of industry information.

<sup>393</sup> Commerce Commission analysis of industry information.

<sup>394</sup> Commerce Commission analysis of industry information.

<sup>395</sup> Commerce Commission analysis of industry information.

<sup>396</sup> Commerce Commission engagement with suppliers.

<sup>397</sup> Commerce Commission engagement with suppliers.

<sup>398</sup> Commerce Commission engagement with suppliers.

- B220. We have not observed widespread competition impacts from these formal clauses. For example, best price clauses appear to align with the reality that customers sourcing the largest volumes often secure the best price. If these clauses were more widespread, this could create adverse competition effects. If these clauses prevented a retailer from being able to find suppliers to create a private label line or secure a private label contract at a competitive price, this would also be concerning. Likewise, if staple branded products were exclusive to one retailer, or substantially cheaper at one store, this would be problematic as it restricts wholesale customers' ability to source a range of goods that can compete with RGRs.
- B221. The impact of these clauses, or behaviours that replicate them, is likely limited by RGRs leveraging their greater market power to access better terms. However, best price and exclusivity arrangements do not appear to benefit competition and ultimately consumers in the long-term because they limit the potential for other retailers to compete on price and product range with retailers that enjoy these relationships.
- B222. We will continue to monitor best price and exclusive supply agreements for any adverse competition effects which require intervention of the type outlined earlier in this report.

## **Ease of access**

### **Introduction**

- B223. The accessibility of wholesale supply to wholesale customers is integral to an offering consistent with a competitive wholesale market. When analysing the wholesale offerings of RGRs regarding ease of access we have considered the following principles to be relevant to the main principle:
  - B223.1. Range, quantity and frequency (s24(1)(c)) – with specific regard for quantity and frequency;
  - B223.2. Quality (s24(1)(d));
  - B223.3. Clear market signals (s24(1)(e)); and
  - B223.4. Commercial relationships (s24(1)(g)).
- B224. In AGR1, our analysis indicated that improvements to the RGRs' systems and processes established for wholesale supply would be required to operate more effectively.<sup>399</sup>
- B225. We noted that minimum order requirements and delivery requirements may be reducing the viability of the offerings for smaller retailers. Additionally we noted that systems and processes could be developed to allow wholesale customers access to more of the RDP that the RGRs currently benefit from.

<sup>399</sup>

Commerce Commission “First Annual Grocery Report” (4 September 2024) at p. 102, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362305/Annual-Grocery-Report-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362305/Annual-Grocery-Report-2024.pdf).

B226. We also noted some positive steps, including the development of the WWNZ wholesale card. This approach was also raised in submissions as a way to address the demands from smaller retailers.<sup>400</sup>

### **Wholesale access terms in a competitive wholesale market**

B227. As discussed in **Attachment A** at paragraphs A68-A70, wholesale customers should be able to obtain goods on similar non-price terms (such as the quantity, frequency, and the quality of groceries and ancillary services as the RGRs).

B228. In the context of access to wholesale supply from RGRs, systems and processes for wholesale supply should be developed to the extent that they support wholesale customers to effectively compete for retail customers. This means that wholesale customers can access the supply they need at suitable volumes, frequency and quality.

B229. Our analysis of ease of access to RGR wholesale offers considers the following components:

- B229.1. Minimum order requirements (see paragraphs B230-B237);
- B229.2. Delivery logistics (see paragraphs B238-B244);
- B229.3. Delivery schedules (see paragraphs B245-B248); and
- B229.4. Ordering systems (see paragraphs B249-B251).

### **Minimum order requirements**

B230. While we recognise that minimum order requirements can be a necessary restriction placed on wholesale customers to ensure wholesale offerings are able to run efficiently, we note that a competitive wholesale market should also encourage the diversity of wholesale customers – including a range of retail offerings.<sup>401</sup>

B231. We also note that the legislative history of the Act is clear that RGR wholesale offerings are intended to support smaller retailers.<sup>402</sup> With this in mind minimum order requirements should not be so high that these other retailers are excluded from reasonably taking advantage of the offerings.

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<sup>400</sup> Ernie Newman Consulting Limited “Submission on Wholesale Supply Inquiry Preliminary Issues Paper” (24 October 2024) at p. 4, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0018/363321/Ernie-Newman-Consulting-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-24-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0018/363321/Ernie-Newman-Consulting-Limited-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-24-October-2024.pdf).

<sup>401</sup> Attachment A (see paragraphs A83-A85).

<sup>402</sup> Ministry of Business, Innovation and Employment “Regulatory Impact Statement: grocery sector regulatory backstop to the quasi-regulated wholesale access regime” (August 2022) at p. 7, <https://www.mbie.govt.nz/dmsdocument/25463-regulatory-impact-statement-addendum-grocery-sector-regulatory-backstop-to-the-quasi-regulated-wholesale-access-regime-proactive-release-pdf>.

B232. A range of wholesale customers continue to indicate that minimum order requirements are an issue for them.<sup>403, 404, 405, 406, 407</sup>

B233. As previously discussed at paragraphs B192-B194, minimum order requirements can also be a barrier for wholesale customers seeking supply directly from suppliers, even for larger customers. Wholesalers can aggregate these volumes for their customers, allowing them to access these products. In cases where direct supply is not accessible due to supplier requirements, the wholesale offerings have a role providing supply to other retailers. Our engagement with wholesale customers and suppliers showed this is happening in some instances.<sup>408</sup>

B234. We have summarised the RGRs' minimum order requirements in Table B4.

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<sup>403</sup> Edgcumbe Supermarket Ltd “Submission on Wholesale Supply Inquiry Preliminary Issues” (11 November 2024) at p. 4, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0017/364022/Edgcumbe-Supermarket-Ltd-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-11-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0017/364022/Edgcumbe-Supermarket-Ltd-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-11-November-2024.pdf).

<sup>404</sup> Night ‘n Day Foodstores Ltd Zealand “Submission on Wholesale Supply Inquiry Preliminary Issues” (8 November 2024) at p. 3, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0026/363329/Night-27n-Day-Foodstores-Ltd-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0026/363329/Night-27n-Day-Foodstores-Ltd-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-8-November-2024.pdf).

<sup>405</sup> Anonymous A “Submission on Wholesale Supply Inquiry Preliminary Issues” (24 October 2024) at p. 2, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0021/363315/Anonymous-A-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-24-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0021/363315/Anonymous-A-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-24-October-2024.pdf).

<sup>406</sup> Anonymous D “Submission on Wholesale Supply Inquiry Preliminary Issues” (3 November 2024) at p. 4, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/363318/Anonymous-D-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-3-November-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/363318/Anonymous-D-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-3-November-2024.pdf).

<sup>407</sup> Commerce Commission engagement with wholesale customers.

<sup>408</sup> Commerce Commission engagement with wholesale customers.

## Table B4: RGRs minimum order requirements for their wholesale operations

| RGR  | Minimum Order Requirement(s)   |
|------|--|
| WWNZ | <p>For non-perishable goods, WNZ requires wholesale customers to purchase a minimum of 60 cartons of product from any one ambient distribution centre.<sup>409</sup></p> <p>For “perishable” goods (eg, chilled/frozen) WNZ require a 50 cartons of product minimum for products ordered from a WNZ perishables distribution centre.<sup>410</sup> This was recently reduced from a 60 cartons of product minimum.<sup>411</sup></p> <p>WNZ has stated that it is willing to lower the minimum for specific wholesale customers by agreement, with an additional surcharge at its discretion.<sup>412</sup></p> <p>Additionally, WNZ offers the wholesale card, which has no minimum order requirements.<sup>413</sup></p> |
| FSNI | <p>We understand that FSNI currently have a minimum order value of \$2,500 excluding GST.<sup>414</sup></p> <p>FSNI stated in their terms that “Quantities are set at a product level by FSNI and may change from time to time for genuine commercial reasons.”<sup>415</sup></p>  |
| FSSI | <p>FSSI has a minimum order requirement of \$1000.<sup>416</sup></p> <p>They state in their terms that they may charge extra if a customer orders less than the set requirement and the order places an undue burden on the picking effort and delivery route planning.<sup>417</sup></p> <p>Additionally, they also reserve the right to deliver in instalments to customers if necessary.<sup>418</sup></p>  |

<sup>409</sup> New Zealand Grocery Wholesalers "Draft Wholesale Supply Agreement" (accessed 12 May 2025) at para 6.2(a) and 6.2(b), [https://nzgrocerywholesalers.co.nz/supply\\_agreement\\_july\\_2024.pdf](https://nzgrocerywholesalers.co.nz/supply_agreement_july_2024.pdf).

<sup>410</sup> New Zealand Grocery Wholesalers "Draft Wholesale Supply Agreement" (accessed 12 May 2025) at para 6.2(a) and 6.2(b), [https://nzgrocerywholesalers.co.nz/supply\\_agreement\\_july\\_2024.pdf](https://nzgrocerywholesalers.co.nz/supply_agreement_july_2024.pdf).

<sup>411</sup> Commerce Commission analysis of industry information.

<sup>412</sup> New Zealand Grocery Wholesalers "Draft Wholesale Supply Agreement" (accessed 12 May 2025) at para 6.2(d-e) and 8.3, [https://nzgrocerywholesalers.co.nz/supply\\_agreement\\_july\\_2024.pdf](https://nzgrocerywholesalers.co.nz/supply_agreement_july_2024.pdf).

<sup>413</sup> Woolworths New Zealand “Wholesale Card Application” (accessed 27 May 2025), <https://nzgrocerywholesalers.co.nz/wholesale-card-application/>.

<sup>414</sup> Foodstuffs North Island “Wholesale Supply Request Rules, Criteria and Procedures for considering wholesale supply requests” (8 September 2023), <https://www.foodstuffs.co.nz/-/media/Project/Sitecore/Corporate/Corporate-North-Island/100th-birthday/SONIFSWholesaleLegaltermsofTrade.pdf>.

<sup>415</sup> Foodstuffs North Island “Standard Terms and Conditions for the Wholesale Supply of Groceries as at 8 September 2023” (8 September 2023), <https://www.foodstuffs.co.nz/-/media/Project/Sitecore/Corporate/Corporate-North-Island/100th-birthday/SONIFSWholesaleLegaltermsofTrade.pdf>.

<sup>416</sup> Foodstuffs South Island “Wholesale Grocery Supply” (accessed 27 May 2025), <https://www.foodstuffs-si.co.nz/partnering-with-us/wholesale-grocery-supply>.

<sup>417</sup> Foodstuffs South Island “Wholesale Supply Policy” (accessed 15 May 2025), <https://www.foodstuffs-si.co.nz/-/media/Project/Sitecore/Corporate/Corporate-South-Island/wholesale/WholesaleSupplyPolicy.pdf>

<sup>418</sup> Foodstuffs South Island “Wholesale Supply Policy” (accessed 15 May 2025), <https://www.foodstuffs-si.co.nz/-/media/Project/Sitecore/Corporate/Corporate-South-Island/wholesale/WholesaleSupplyPolicy.pdf>.

- B235. Wholesalers (for example in foodservice) operate with less restrictive minimum order requirements than those imposed by the RGRs, including in some cases, having no minimum order requirements.<sup>419</sup>
- B236. It is encouraging that FSNI and WWNZ outline the ability to lower minimum order quantities in some instances, however we do not have a sense of the scale and frequency of this practice. The WWNZ wholesale card allows a wholesale customer who does not meet minimum order requirements to access products from WWNZ retail stores. This is encouraging, although it only offers a 5% discount and does not allow for delivery. This may improve access to products for some small wholesale customers.
- B237. Innovations such as the WWNZ wholesale card, and lower requirements for new customers, can enable better access for smaller customers, and for customers looking to access difficult categories, such as chilled and frozen products.

### **Delivery logistics**

- B238. Feedback from a wholesale customer highlighted the costs of pallet providers used by the RGRs.<sup>420</sup> Currently, we understand the RGRs require the use of specific providers, although we have heard other networks may offer more cost-effective solutions.<sup>421</sup>
- B239. We also understand that logistics arrangements such as cross-docking, charge through and the use of third-party logistics providers could enable more access for wholesale customers.<sup>422</sup> For example, a third party could offer a repacking service to break down larger quantities into smaller amounts and distribute these goods to multiple delivery locations.<sup>423</sup>
- B240. The existence of similar arrangements in grocery wholesalers such as Metcash indicates that we may expect these arrangements here with a more competitive wholesale market trading higher volumes.<sup>424</sup>
- B241. The impact of cross-docking or charge through systems on the range of the RGRs wholesale offerings is contained in our discussion of range at paragraphs B125-B131.
- B242. We understand that no RGR currently accommodates cross-docking, charge through or third-party logistics for wholesale customers.
- B243. In a competitive market we expect RGRs to develop logistics services that allow them to service more customers and range more suppliers, such as cross-docking, charge through and third-party logistics arrangements.
- B244. While the quality of such logistics services should be reasonable and may come at a reasonable cost to wholesale customers, this does not mean that it should not be provided for.

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<sup>419</sup> Commerce Commission engagement with industry participants.

<sup>420</sup> Commerce Commission engagement with wholesale customer.

<sup>421</sup> Commerce Commission engagement with wholesale customers.

<sup>422</sup> Commerce Commission engagement with industry participants.

<sup>423</sup> Commerce Commission analysis of industry information.

<sup>424</sup> Metcash Metconnect “Sorted ChargeThrough and Cross Dock” (Access 21 May 2025), <https://metconnect.metcash.com/food/s/article/Sorted-ChargeThrough-Cross-Dock>.

## **Delivery schedules**

B245. We received a submission from Kennerley Gourmet who indicated that the delivery schedule of the RGRs (once a week) is restrictive.<sup>425</sup> We note we have also received positive feedback about delivery schedules from some wholesale customers.<sup>426</sup> The main purpose of Part 3 is to promote the overall purpose of the Act by enabling wholesale customers to have reliable and cost-effective supplies of groceries.<sup>427</sup>

B246. We understand that foodservice wholesalers in New Zealand tend to offer delivery more frequently than once a week.<sup>428</sup> We cannot currently conclude that this model would be cost-effective for groceries. However it does indicate delivery frequencies currently offered by the RGRs could be improved.<sup>429</sup>

B247. If delivery schedules are impeding customers' ability to have a reliable supply of groceries from RGR wholesale offerings, we would need to see improvements.

B248. As the RGRs wholesale offerings develop, moving greater volumes more efficiently, more delivery days should be made available to wholesale customers to match their demand for supply.

## **Ordering systems**

B249. Our PIP highlighted that we have heard complaints from wholesale customers about the RGRs ordering portals and systems.<sup>430</sup> There have since been some indications of improvements from the RGRs.

B250. RGRs continue to use spreadsheet-based price lists which have been highlighted as an issue for some wholesale customers when used for ordering. Notably, FSNI has recently added a search feature to their spreadsheet and WWNZ is trialling an online portal to simplify ordering for wholesale customers.<sup>431</sup> The development of more advanced ordering systems may improve access. Given the current limited scale of RGR wholesale offerings, existing systems may be appropriate; however RGRs should support wholesale customers where issues arise.

B251. Considering how widespread the use of user-friendly portals are amongst other wholesalers, we do not think the use of manual spreadsheets for ordering can be a long-term practice in a workably competitive market. We understand that such systems can take time to develop but expect to see indications of improvements from all RGRs as their wholesale offerings grow.<sup>432</sup>

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<sup>425</sup> Kennerley Gourmet Grocery Ltd "Submission on Wholesale Supply Inquiry Preliminary Issues Paper" (23 October 2024) at p. 5, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/363327/Kennerley-Gourmet-Grocery-Ltd-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-23-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/363327/Kennerley-Gourmet-Grocery-Ltd-Submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-23-October-2024.pdf).

<sup>426</sup> Commerce Commission engagement with wholesale customers.

<sup>427</sup> Section 21 of the Act.

<sup>428</sup> Commerce Commission engagement with industry participants.

<sup>429</sup> Commerce Commission analysis of industry information.

<sup>430</sup> Commerce Commission engagement with wholesale customers.

<sup>431</sup> Commerce Commission analysis of industry information.

<sup>432</sup> Commerce Commission engagement with industry participants.

## Other issues

B252. In this section we discuss other issues affecting the RGRs' wholesale offers, and in particular:

- B252.1. The lack of transparency of wholesale sales and other information back to suppliers (see paragraphs B256-B262);
- B252.2. Our analysis of the level of vigour with which the RGRs are competing for wholesale customers (see paragraphs B263-B266); and
- B252.3. The information barriers between RGR wholesale and retail operations, and concerns about the use of non-disclosure agreements (**NDAs**) (see paragraphs B267-B275).

B253. We have concerns with the amount of information provided to suppliers.

B254. We also note that confidentiality of wholesale information may be a barrier for larger retailers looking to use RGR wholesale offers. If evidence emerged that wholesale information is not being protected from the RGRs' retail operations, this could be addressed through provisions relating to different forms of separation under the Act.

B255. We have also noted the difference in approach and attitude of the RGRs, and that this may be limiting the extent to which RGRs are competing for wholesale customers.

### There is a lack of visibility over RGR wholesale offerings for suppliers

B256. The Act requires us to consider the desirability of clear market signals, and to take into account the principle that reliable, clear and comparable information about wholesale supply and demand is available. This relates to retailers, wholesale customers and suppliers.<sup>433</sup> It also requires us to consider the desirability of participants to be able to invest and innovate for the long-term benefit of consumers.<sup>434, 435</sup>

B257. In other markets, wholesalers establish and build relationships with suppliers.<sup>436</sup> However, we have heard from multiple suppliers who had not heard of the wholesale access regime, or who had opted into a wholesale offer, but were not provided with further information about it despite the offerings being referred to in the grocery supply agreements of all three RGRs.<sup>437</sup> RGRs indicate that they provide information to suppliers when requested.<sup>438</sup>

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<sup>433</sup> Section 24(1)(e) of the Act.

<sup>434</sup> Section 24(1)(f) of the Act.

<sup>435</sup> To the extent the Commission considers them relevant to the main principle.

<sup>436</sup> Commerce Commission engagement with industry participant.

<sup>437</sup> Commerce Commission engagement with suppliers.

<sup>438</sup> Commerce Commission engagement with RGRs.

B258. Additionally, we are concerned about how little suppliers were able to tell us about their product in wholesale offers, and some suppliers have indicated that they are uncomfortable with the level of information they get from the RGRs about wholesale supply.<sup>439</sup> This may indicate an issue that impacts suppliers' reasonable control over their supply channels, as well as limiting incentives of the suppliers using the wholesale regime.<sup>440</sup>

B259. Suppliers told us they get limited data on FSNI and FSSI's wholesale offerings including volume data which may help them to forecast.<sup>441</sup>

B260. Additionally suppliers told us that WNZ offer more transparency around sales data and insight, into what is being sold through their offering (including some information about larger customers) than other RGRs.<sup>442</sup>

B261. At a minimum, we believe it is reasonable that aggregated sales data and the products supplied by RGRs to wholesale customers should be provided to suppliers at reasonably frequent intervals, without them having to ask. We understand other wholesalers provide such aggregated or segmented data to suppliers, but that wholesalers may be unwilling to release information at a customer level because of confidentiality concerns.<sup>443</sup>

B262. We are concerned suppliers could not tell us much information about which RDPs passed on to RGRs' wholesale customers.<sup>444</sup> Greater visibility for suppliers, especially regarding the wholesale customer purchase terms, is likely to ensure any RDPs are appropriately reflected in wholesale terms. The desirability outlined in s24(1)(e) of the Act that suppliers operate in an efficient market in which reliable, clear and comparable information about wholesale supply and demand is available is relevant to this.

**There are indications the RGRs are not competing for wholesale customers with equal vigour**

B263. Our engagement with market participants highlighted that the approaches taken to growing wholesale business and attracting customers has varied between the RGRs.<sup>445</sup> This includes RGRs competing for wholesale customers and taking opportunities to grow their wholesale offerings.

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<sup>439</sup> Commerce Commission engagement with suppliers.

<sup>440</sup> Section 24(1)(h) of the Act pertains to the desirability of suppliers retaining reasonable control over the channels for the retail sale of their own products and brand.

<sup>441</sup> Commerce Commission engagement with suppliers.

<sup>442</sup> Commerce Commission engagement with suppliers.

<sup>443</sup> Commerce Commission engagement with industry participants.

<sup>444</sup> Commerce Commission engagement with suppliers.

<sup>445</sup> Commerce Commission engagement with industry participants.

B264. Rivalry generates incentives for investment, innovation and efficiency. We expect RGRs to be seeking to satisfy demand from wholesale customers in the knowledge those wholesale customers may also be seeking to source supply from rival RGRs or direct supply.<sup>446</sup> Grocery wholesaling is a low margin, high-volume business. For example, Metcash earns an Earnings Before Interest and Taxes (EBIT) profit margin of 2.2%, but it generates a satisfactory return on capital by keeping its asset base small and generating a large volume of sales.<sup>447</sup> For the wholesale regime to be successful the RGRs will need to generate a high volume of sales to achieve efficient scale. It is therefore important that the RGRs are competing for new customers, and establishing relationships with suppliers to improve their range, pricing and the level of discretionary RDP suppliers provide through the wholesale offerings.

B265. WNZ have indicated they see potential in wholesale access, and we have observed them taking some proactive measures.<sup>448</sup> Stakeholders and participants have also made similar observations to us.<sup>449</sup> We also observe that WNZ has approximately 80% of wholesale sales since July 2023.<sup>450</sup>

B266. By contrast, Foodstuffs' joint cross-submission noted that when considering further regulation specific outcomes are not required in order for RGR offerings to reflect the wholesale offerings provided in a competitive wholesale market. They also state that continued growth and change in the offerings strongly suggests pro-competitive conduct.<sup>451</sup>

#### **RGR management of wholesale information is not currently a concern**

B267. We previously heard concerns from wholesale customers about using RGRs' wholesale offerings due to fears that wholesale sales information would not be well protected and could be used strategically by RGRs' retail banners to compete with the wholesale customer.<sup>452</sup>

B268. The protection of wholesale information from RGRs' retail operations is important for building and maintaining wholesale offerings to their customers, especially those seeking to compete directly with RGRs.

B269. Additionally, we have previously heard a concern about the RGRs' use of NDAs hindering customers' ability to negotiate directly with suppliers.<sup>453</sup>

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<sup>446</sup> Attachment A (see paragraph A67).

<sup>447</sup> Metcash Limited "Metcash Limited – 24 Full Year Results Presentation" (24 June 2024) at p.10, <https://www.metcash.com/wp-content/uploads/2024/06/MTS-FY24-Results-Presentation.pdf>.

<sup>448</sup> Commerce Commission analysis of industry information.

<sup>449</sup> Commerce Commission engagement with industry participants.

<sup>450</sup> Commerce Commission analysis of industry information.

<sup>451</sup> Foodstuffs North and South Island "Cross-submission on Wholesale Supply Inquiry Preliminary Issues Paper" (11 December 2024) at p.10, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0018/364023/Foodstuffs-North-and-South-Island-Cross-submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-11-December-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0018/364023/Foodstuffs-North-and-South-Island-Cross-submission-on-Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-11-December-2024.pdf).

<sup>452</sup> Commerce Commission engagement with wholesale customers.

<sup>453</sup> Commerce Commission engagement with wholesale customers.

B270. Section 24(1)(g) requires the Commission, to the extent it is relevant to the main principle, to consider the desirability of RGRs and suppliers acting in a way that does not unduly hinder or obstruct wholesale customers and suppliers from developing and maintaining their own trading relationships.

B271. Section 24(1)(i) requires the Commission, to the extent it is relevant to the main principle, to consider the desirability of the grocery industry including a diverse range of suppliers and wholesale customers.

B272. It is also possible that the use of NDAs in this way would raise concerns under s45 of the Act regarding a wholesale customer's ability to develop or maintain their own trading relationships with any supplier or vice versa.

B273. Concerns about RGRs' information barriers were not shared widely among customers.<sup>454</sup> Additionally, customers indicated they intend to use RGR wholesale offerings until they can gain supply directly from suppliers, or to fill gaps in their range left by other channels – for instance by growing in categories where they face challenges gaining direct supply.<sup>455</sup>

B274. Participants told us that having the ability to 'switch' into direct supply or other <sup>channels</sup> is important to ensure that customers do not become reliant on the RGRs.<sup>456</sup> The more customers rely on the RGRs for supply, the more confidence customers need in the information flowing between RGR wholesale and retail. Likewise, the ability for customers to access diverse channels of supply decreases the risk of strategic use of wholesale customer data by the RGRs.

B275. Previously raised concerns about the RGRs' use of NDAs to stop customers' negotiating directly with suppliers based on their knowledge of wholesale prices were not raised during the Inquiry and the use of NDAs was not a particular focus of our work. We would be concerned if NDAs are acting as a barrier for wholesale customers to negotiate directly with suppliers, especially considering the desirability of RGRs and suppliers to act in a way that does not unduly hinder or obstruct wholesale customers from developing and maintaining their own trading relationships. We understand the use of NDAs is not uncommon in the wholesale market.<sup>457</sup>

## **Test: material contribution of wholesale agreements in achieving the purpose of Part 3**

B276. This analysis relates to the test set out in s65(2)(d) – whether, at the first anniversary of the Act, the wholesale agreements which had been entered into by each RGR materially contributed toward achieving the purpose of Part 3 of the Act. This test relates to consideration of the addition of a wholesale code or wholesale framework.

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<sup>454</sup> Commerce Commission engagement with wholesale customers.

<sup>455</sup> Commerce Commission engagement with wholesale customers.

<sup>456</sup> Commerce Commission engagement with wholesale customers.

<sup>457</sup> Commerce Commission engagement with industry participants.

B277. We have noted the steps taken by each RGR in relation to their wholesale offerings and how these differ. Considering these steps, we are not currently satisfied the criteria in s65(3), to disapply obligations under s65(2)(d) are met in respect of all RGRs. This is in part because RGR wholesale offerings lack qualities consistent with wholesale offerings in a competitive wholesale market regarding price, range, ease of access and other issues that are not beyond their control to address (see paragraphs B15-B275).

## Key findings

B278. We do not consider that the wholesale offerings of the RGRs and the wholesale agreements that they have signed to date have made a material contribution to the purpose of Part 3. As noted in Attachment A, the Part 3 purpose is to promote the overall purpose of the Act by enabling wholesale customers to:

- B278.1. have 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
- B278.2. have reasonable access to the benefits of the scale and the efficiency of operations of RGRs and their associated persons.

B279. We do not consider the wholesale agreements to have made a material contribution in large part due to a low volume of sales which indicates that downstream competition between RGRs and their wholesale customers is unlikely to be material.

## Wholesale agreements are not material

B280. As of February 2025, wholesale sales remain small, especially viewed in the context of the grocery industry overall.

B281. There were 161 wholesale agreements for distribution centre supply signed as of 30 April 2025. This is made up of 75 FSNI customers, 67 WWNZ customers and 19 FSSI customers.<sup>458</sup> Despite these figures indicating some uptake, the aggregate wholesale sales to these customers does not appear to be material. 85 wholesale customers, including some of WWNZ's distribution centre supplier customers above, have been issued a WWNZ wholesale card for in-store purchases.<sup>459</sup> Some wholesale customers have agreements with multiple RGRs.<sup>460</sup>

B282. Between July 2023 and February 2025, the RGRs reported wholesale sales totalling approximately \$15.3m, with WWNZ accounting for approximately 80% of sales.<sup>461</sup>

B283. Statistics New Zealand reported \$26.9b retail sales in the year to September 2024, this compares to approximately \$9.1m in wholesale sales reported by RGRs for the same period.<sup>462</sup>

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<sup>458</sup> Commerce Commission analysis of industry information.

<sup>459</sup> Commerce Commission analysis of industry information.

<sup>460</sup> Commerce Commission analysis of industry information.

<sup>461</sup> Commerce Commission analysis of industry information.

<sup>462</sup> Statistics New Zealand "Retail trade survey: September 2024 quarter" at Table 1, <https://www.stats.govt.nz/assets/Uploads/Retail-trade-survey/Retail-trade-survey-September-2024-quarter/Download-data/retail-trade-survey-september-2024-quarter.xlsx>.

- B284. While the wholesale offers appear to assist some retailers in their acquisition of groceries, no wholesale customers with substantive scale have entered the market.
- B285. The wholesale offers are primarily being used by smaller grocery retailers or retailers extending their core range with a limited range of grocery products.
- B286. We have seen no evidence that the current wholesale offerings are likely to facilitate large-scale entry or expansion.
- B287. There are some positive signs of wholesale customers using the offers to improve their access to groceries. However, these retailers generally offer groceries using different business models from the RGRs. They make up a small part of the New Zealand grocery market and are not currently in competition with the RGRs for consumers' one-stop shop. Instead, other retailers often compete for top-up shops through offering convenience or for secondary shops by offering goods not available at the RGRs' retail stores.<sup>463</sup>
- B288. We are aware of a few independent supermarkets who are wholesale customers and seek to compete with RGRs for a one-stop shop which may foster a degree of fringe or regional competition but will not facilitate material national competition.<sup>464</sup>
- B289. Some wholesale customers explicitly state they would prefer direct supply over wholesale access through the RGRs for reasons including concerns over reliability of supply, additional costs inherent in wholesale access, and the ability to negotiate directly with suppliers.<sup>465</sup>
- B290. We believe there are a number of potential use cases for wholesale access, including gaining access to specific product ranges, helping smaller retailers expand through improved access, improving the negotiating position of wholesale customers directly with suppliers and using the offers as a stepping stone to direct supply for all or some of a retailer's range.

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<sup>463</sup> Commerce Commission “Market Study into the retail grocery sector – Final report” (8 March 2022) at para 2.24-2.26, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf).

<sup>464</sup> Commerce Commission engagement with wholesale customers.

<sup>465</sup> Commerce Commission engagement with wholesale customers.

**Table B5: Summary of our observations of current use of RGR wholesale offerings**

| Retailer size | Retailer type             | Potential use <sup>466</sup>   | Actual use   |
|---------------|---------------------------|--|--|
| <b>Large</b>  | Existing larger retailers | <b>Likely limited use</b><br>May use wholesale access as a stepping stone, (eg, to fill in gaps in range) until they achieve sufficient scale to vertically integrate. | <b>Very limited use</b><br>Can get better deals direct (including promotional funding), have data sensitivity concerns, often have distribution centres in any case, logistics concerns. |
| <b>Large</b>  | New entrant               | <b>Some or no use</b><br>May use wholesale access for a portion of their range to complement their offering until they build out a direct supply network.              | Not applicable   |

<sup>466</sup>

Ministry of Business Innovation and Employment “Regulatory Impact Statement: grocery sector regulatory backstop to the quasi-regulated wholesale access regime” (August 2022) at p. 5, <https://www.mbie.govt.nz/dmsdocument/25463-regulatory-impact-statement-addendum-grocery-sector-regulatory-backstop-to-the-quasi-regulated-wholesale-access-regime-proactive-release-pdf>.

|               |  |   |   |
|---------------|--|---|---|
| <b>Medium</b> | Medium size independents, multi store retailers and aggregator-wholesalers | <b>High use</b><br>May use wholesale access to leverage established wholesale networks in the long-term to provide a wider selection of products at prices that are more attractive to consumers. This may include building on an existing specialty offering (eg, butcher, greengrocer)<br><br>Some customers may use wholesale access for a sizable portion of their range. | <b>Some use</b><br>We are yet to see significant use. Some retailers supplement core product ranges, others address gaps in their range. Some customers are acting as wholesalers themselves, aggregating and breaking down RGR offers for customers who want RGR supply but do not reach their order requirements. |
| <b>Small</b>  | Single store retailers   | <b>Some use</b><br>May use wholesale access to leverage existing established wholesale networks in place of buying 'off the retail shelf'.  | <b>Some use</b><br>Small orders are being made for small, individual stores by several customers. These customers find order requirements and pricing to be the key issues.   |

## Other factors which impact on other retailers' ability to compete

B291. During our work on this Inquiry, stakeholders raised a range of other factors beyond access to wholesale supply which impact on other retailers' ability to compete with the RGRs but are not immediately in scope of this Preliminary Findings Paper.

B292. These factors include:

B292.1. Costs of doing business (eg, wages and capital investment);<sup>467</sup>

B292.2. Factors inherent in the New Zealand market (eg, geography, population and the split between the North and South Islands);<sup>468</sup>

B292.3. Access to sites;<sup>469</sup> and

<sup>467</sup> Commerce Commission engagement with industry participants.

<sup>468</sup> Commerce Commission engagement with industry participants.

<sup>469</sup> Commerce Commission engagement with industry participants.

B292.4. Regulatory constraints (eg, the Resource Management Act, unit pricing, import regulations and council requirements).<sup>470</sup>

B293. These factors were acknowledged in the Market Study and/or AGR1 and may remain significant factors in limiting the ability of new entry and expansion. Responses to Ministry of Business, Innovation and Employment (MBIE)'s current Request for Information may provide insights into the extent to which other retailers consider these factors significant constraints compared to access to wholesale supply.

## Other tests for additional regulation

### Serious or persistent contravention

B294. This part relates to the other tests set out in section 65(4). These tests relate to consideration of the addition of a wholesale code or wholesale framework.

B295. Given s65(1)(b)(ii) can be independently satisfied, we consider that judgements of whether any RGR has seriously or persistently contravened one or more duties in sections 35, 37, 39 and 43 to 47 is not immediately materially relevant to this Inquiry.

B296. This part relates to the other tests set out in section 82(2). These tests relate to consideration of the addition of non-discriminatory or specified access terms.

B297. Given s82(1)(b) can be independently satisfied, we consider that judgements of whether any RGR has seriously or persistently contravened one or more duties in sections 35, 37, 39 and 43 to 47 is not immediately materially relevant to this Inquiry.

B298. We are currently investigating Foodstuffs' compliance with their wholesale obligations under the Act. As the investigations are in the early stages, the details of the case have been withheld.

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<sup>470</sup>

Commerce Commission engagement with industry participants.

## Attachment C: Regulatory tools under Part 3 of the Act

- C1. 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.
- C2. More detail about how the regulatory tools under Part 3 of the Act could function is set out below.

### Wholesale Framework

- C3. The Commission can make a determination, subject to legal requirements being met (including consultation), requiring a regulated grocery retailer (RGR) to establish, implement, and maintain a Wholesale Framework for the wholesale supply of a comprehensive range of groceries at competitive prices (Wholesale Framework).<sup>471</sup>

#### How could a Wholesale Framework be used?

- C4. 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.
- C5. A Wholesale Framework would create transparency for all parties about how an 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.
- C6. Wholesale frameworks have been effective in other markets in guiding the market participant behaviour towards public interest outcomes. This lever involves the least interference with commercial arrangements and least regulatory costs.

### Wholesale Code

- C7. 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.<sup>472</sup> It could apply to RGRs, suppliers and wholesale customers.
- C8. The Wholesale Code may contain any provisions that are necessary or desirable to achieve the overall purpose of the wholesale regime under the Act.<sup>473</sup>

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<sup>471</sup> Subpart 4 of Part 3 of the Act.

<sup>472</sup> Subpart 4 of Part 3 of the Act.

<sup>473</sup> 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.

## How could a Wholesale Code be used?

C9. By including provisions that improve or clarify the requirements for the wholesale regime's operation, 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 those provided by suppliers who are currently opting out of the wholesale regime) and wholesale pricing (including the pass through of promotional spend). To address these issues the Wholesale Code could include specific provisions regarding:

- C9.1. the range of products available for wholesale supply; and
- C9.2. wholesale pricing models.

C10. 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, expectations 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).

C11. Wholesale codes have been used in other markets to guide the 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.<sup>474</sup>

C12. Subject to legal requirements being met (including consultation), imposing a Wholesale Code swiftly may avoid the need for more directive regulatory intervention.

## Non-discriminatory terms

C13. 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.<sup>475</sup> Once the Order in Council is made, the Commission would make one or more determinations specifying how that requirement applies.<sup>476</sup>

C14. Non-discrimination, in relation to the wholesale supply of groceries, means that the supplier must not treat wholesale customers differently, or, where the supplier supplies itself with groceries, must not treat itself differently from other wholesale customers. However, 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.

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<sup>474</sup> See, for example, the wholesale obligations in the Electricity Industry Participation Code 2010 (<https://www.ea.govt.nz/industry/wholesale/obligations/>). Also, the Copper Withdrawal Code (<https://comcom.govt.nz/regulated-industries/telecommunications/telecommunications-for-consumers/copper-withdrawal-code>).

<sup>475</sup> Subpart 5 of Part 3 of the Act.

<sup>476</sup> Subpart 6 of Part 3 of the Act.

C15. Non-discriminatory terms 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?**

C16. The determination may cover a wide range of matters to ensure that non-discriminatory terms are offered, including:<sup>477</sup>

- C16.1. operational separation – requiring an 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);
- C16.2. terms and conditions – requiring an RGR to supply groceries on terms that are transparent and equivalent to the terms it supplies itself; and
- C16.3. 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 audits and checks for compliance.

C17. Non-discriminatory terms would ensure that an RGR does not treat wholesale customers differently from how it treats itself or its associated persons or any other wholesale customer, except where this is objectively justifiable and does not lessen, and is unlikely to lessen competition in a grocery market.

### **Specified access terms**

C18. 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.<sup>478</sup> Once the Order in Council is made, the Commission would make one or more determinations specifying how that requirement applies.<sup>479</sup>

C19. Specified access terms would ensure that an 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?**

C20. The Commission must specify sufficient terms to ensure an RGR makes 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.

C21. The determination may deal with a range of matters, including:

- C21.1. maximum prices, wholesale margins and/or revenues that RGRs may charge, recover and/or derive;

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<sup>477</sup> Section 88(3) of the Act.

<sup>478</sup> Subpart 5 of Part 3 of the Act.

<sup>479</sup> Subpart 6 of Part 3 of the Act.

- C21.2. principles for determining prices, wholesale margins or revenues;
- C21.3. quality standards (eg, delivery timeframes);
- C21.4. terms and conditions for wholesale supply (eg, related to payment, credit, minimum order quantities and demand forecasting);
- C21.5. systems, procedures and processes related to compliance and compliance monitoring; and
- C21.6. any other duties to ensure the parties reflect wholesale offerings provided in a competitive wholesale market.<sup>480</sup>

C22. The matters in the determination could also vary depending on factors such as wholesale customer type, different product lines, and/or geographic location.

## **A determination under s 49 as to how a duty is to be carried out**

- C23. We can also make a determination under s 49 of the Act prescribing the manner in which RGRs must comply with the existing wholesale requirements.<sup>481</sup> We can do so if we are satisfied it is necessary or desirable in order to promote the purpose of Part 3.
- C24. Section 49 can address a number of duties, including prescribing:
  - C24.1. when, where, and how the duty must be complied with;
  - C24.2. what information or other evidence or documents must be provided in connection with the duty;
  - C24.3. requirements with which information, evidence, or documents that are provided in connection with the duty must comply;
  - C24.4. matters for the purposes of section 38(3);
  - C24.5. how a regulated grocery retailer may vary a pricing or charging method specified in a wholesale agreement (see section 43);
  - C24.6. for the purposes of section 45 or 46, the circumstances in which a member of the same group as a regulated grocery retailer must be treated as being a wholesale customer;
  - C24.7. requirements for the purposes of section 46(2)(b); and
  - C24.8. modifications for the purposes of clause 2 of Schedule 1.

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<sup>480</sup> Section 95 of the Act.

<sup>481</sup> Section 49 of the Act.

C25. Section 46 of the Act prohibits RGRs from engaging in conduct that has the purpose, effect, or likely effect of preventing or restricting a wholesale customer from receiving the benefits of rebates, discounts and payments made available to an RGR directly or indirectly by, or on behalf of, a supplier in connection with either or both of the following:

C25.1. the scale of operations of the regulated grocery retailer and its associated persons; and

C25.2. the efficiency of operations of the regulated grocery retailer and its associated persons.

C26. As such, a determination under s 49 of the Act could address key aspects regarding the pass- through of, or failure to pass through, promotional funding and other RDPs that relate to the scale of the each RGR.