

Unclassified

English - Or. English

15 November 2024

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

Competition in the Food Supply Chain – Contribution from New Zealand

- Session IV -

2-3 December 2024

This contribution is submitted by New Zealand under Session IV of the Global Forum on Competition to be held on 2-3 December 2024.

More documentation related to this discussion can be found at: oe.cd/gfc24.

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JT03555593

Competition in the Food Supply Chain

- Contribution from New Zealand –

Competition in the wholesale supply of groceries in New Zealand

1. Introduction

1. This paper is a contribution to the Global Forum on Competition's Roundtable on Competition in the Food Supply Chain to be held on 3 December 2024.
2. It is not uncommon in grocery markets for large incumbent firms to be vertically integrated in terms of performing both retail and wholesale functions. Wholesaling can be beneficial for smaller retailers as it provides the ability to purchase in bulk and negotiate lower prices by aggregating purchases, and it can generate cost efficiencies through centralised storage and distribution to retail stores. However, if the wholesale market is not workably competitive, smaller retailers can face difficulties in competing by encountering a lack of access to a sufficiently wide range of wholesale groceries at competitive prices.
3. In this paper we discuss legislative reform and work of the New Zealand Commerce Commission (NZCC) relating to competition in New Zealand's wholesale grocery sector. We firstly provide background on the wholesale grocery sector in New Zealand, and the NZCC's market study into the retail grocery sector. We then outline new grocery sector legislation in New Zealand, including a new wholesale supply regime, and discuss the findings of the NZCC's first Annual Grocery Report, which has led them to initiating a wholesale supply inquiry. Finally, we briefly describe some other work the NZCC is undertaking in the grocery sector.

2. Background

2.1. Overview of wholesale grocery supply in New Zealand

4. There are three major grocery retailers operating under various retail banners in New Zealand. These are Woolworths New Zealand Limited, Foodstuffs North Island Limited, and Foodstuffs South Island Limited. The two Foodstuffs co-operatives do not currently compete in the same geographic retail market, as they operate as separate co-operatives focusing on serving the island in which they are located. So effectively there are only two major grocers operating on each of the islands in New Zealand – Woolworths and one of the Foodstuffs co-operatives.
5. The three major grocers' operations are vertically integrated, meaning that they have integrated wholesale and retail functions. However, their wholesale functions largely only service their own retail businesses and franchisees. They own and operate central distribution centres which supply their retail stores throughout the country. Therefore, they typically purchase direct from the suppliers (primary producers, manufacturers), not a

separate wholesaler, and operate their own distribution centres and supply-chain infrastructure such as warehousing.

6. Aside from the three major grocers, there are no other wholesale suppliers stocking the full range of groceries for smaller grocery retailers to purchase from. There are only a limited number of alternative wholesale supply options which are typically in single product categories like fresh produce, meat, and international products.

2.2. Market study and enactment of Grocery Industry Competition Act 2023

7. In November 2020, the Government requested the NZCC to begin a market study into New Zealand's retail grocery industry. The NZCC published its final report in March 2022.¹ The market study found that competition in the retail grocery industry is not working well for consumers and identified a range of issues. In terms of competition for the wholesale supply of groceries, the study found that there is a lack of wholesale access to a full range of groceries for resale at competitive prices, which is a barrier to entry and expansion for smaller retailers, and is a contributor to the dominance of the three major grocers.

8. The vertical integration of the three major grocers, while likely providing efficient outcomes for them, contributes to a lack of availability of competitively priced wholesale options for smaller retailers seeking access to a full range of grocery products and brands. The three major grocers' access to cost efficiencies through vertical integration also means that they are likely to have cost advantages over new entrants that are not vertically integrated.

9. This is a concern because without good access to wholesale supply, smaller independent retailers (and any potential new entrants at the retail level) are unlikely to be able to buy a sufficient range of products cheaply enough to compete with the three major grocers for a wide range of shopping missions. This may have a compounding "chicken and egg" effect also impacting larger new entrants that may be looking to vertically integrate into the wholesale and retail markets in New Zealand. This is because constraints on the number and scale of independent retailers may limit the viability of entry of independent wholesalers, while the lack of independent wholesale supply may limit the number and scale of independent retailers. The NZCC viewed good access to wholesale supply as an enduring benefit to smaller retailers and a temporary benefit for larger new entrants looking to vertically integrate into these markets.

10. Further, the market study found that independent retailers are unable to compete on price with the three major grocers across the full range of grocery products. One reason for this is that independent retailers receive less competitive rebates, discounts or payments from suppliers compared to the three major grocers due to independent retailers acquiring lower volumes. Other identified reasons were that independent retailers do not enjoy economies of scale and scope in wholesaling, warehousing and distribution; and are unable to spread their fixed costs across significant retail volumes as the three major grocers do.

11. The presence of volume requirements (for example, minimum order quantities) was even found to prevent some retailers from being able to purchase from some suppliers entirely.

¹ https://comcom.govt.nz/_data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf

12. The NZCC, in the final market study report, made a range of recommendations to the Government to enhance competition in the grocery industry, including some limited regulatory measures regarding wholesale supply.

13. In response to the market study findings, the Government enacted the Grocery Industry Competition Act 2023 (GICA) as well as changes to existing legislation to improve competition in the grocery sector for the long-term benefit of New Zealand consumers. The regulatory measures relating to wholesale supply are contained in the GICA, which came into force in July 2023.

14. The GICA designated each of the three major grocers as a ‘regulated grocery retailer’ (RGR) that has wholesale supply obligations. Additional grocery retailers can be designated as RGRs for this purpose through secondary legislation. The GICA also made the NZCC the regulator of the grocery industry under the new regime, and established a new Grocery Commissioner within the NZCC.

3. Wholesale supply regime under the Grocery Industry Competition Act 2023

15. To address the wholesale supply concerns identified in the market study, the GICA established a new ‘quasi-regulatory’ wholesale supply regime that places obligations on RGRs to set up systems to facilitate wholesale supply to other grocery retailers. The purpose of this regime is to enable wholesale customers to have a reliable and cost-effective wholesale supply of groceries, and have reasonable access to the benefits of scale and efficiency of operations that the RGRs enjoy.²

3.1. Expected features of a competitive wholesale grocery market

16. The Government’s expectation in designing the regime was that it would enable negotiated wholesale supply arrangements to be consistent with what would be expected in a workably competitive wholesale market.³

17. The NZCC has outlined what it considers to be features expected in a competitive wholesale grocery market. These are:

- RGRs vigorously compete for wholesale customers;
- Wholesale customers have choices when buying products for resale;
- Wholesale pricing is based on RGRs’ actual costs to provide products to wholesale customers;
- Wholesale pricing reflects a sufficient margin between wholesale and retail prices to enable wholesale customers to compete with RGRs on price;
- Over time, downward pressure on retail pricing; and
- Wholesale customers can obtain goods on similar non-price terms to RGRs’ retail stores.⁴

² Grocery Industry Competition Act 2023, s21.

³ <https://www.treasury.govt.nz/sites/default/files/2022-11/ria-mbie-gsrbr-jul22.pdf>

⁴ https://comcom.govt.nz/data/assets/pdf_file/0019/362305/Annual-Grocery-Report-2024.pdf

3.2. Outline of wholesale supply regime under the GICA

18. Currently the wholesale supply regime requires RGRs to:
- Consider and negotiate all requests for wholesale supply in good faith. This includes considering the request in a reasonable manner; responding to communications from the wholesale customer in a timely manner; and ensuring that communications about a request are not false or misleading.
 - Establish, implement, publish, regularly review, and comply with both:
 - Rules, criteria, and procedures for considering wholesale supply requests; and
 - Standard terms and conditions and principles for wholesale supply.
 - Within one month, notify the NZCC of each supply request received and the outcome, including the reasons for rejecting a request or a copy of the wholesale supply agreement if a request is accepted.
 - Ensure each wholesale agreement is in writing and expressed in plain language in a clear, concise, and intelligible manner.
 - Ensure each wholesale agreement specifies a transparent pricing or charging method, and that the method of calculation is used for prices.
 - Put in place systems and processes for wholesale supply (for example, systems for ordering, billing and managing confidentiality arrangements).⁵
19. The wholesale supply regime also prohibits RGRs from:
- Unduly hindering or obstructing a wholesale customer or supplier from developing or maintaining its own trading relationship with any other supplier or wholesale customer.
 - Unduly hindering or obstructing a supplier from participating in a wholesale offering.
 - Inducing a supplier to refuse or fail to sell any groceries in connection with a wholesale offering.
 - Restricting a wholesale customer from receiving (directly or indirectly) the benefits of a range-based, quantity-based, or frequency-based discount, payment, or rebate.⁶
20. Should a RGR fail to comply with the obligations and prohibitions under regime (including the obligation to consider wholesale supply requests in good faith), wholesale customers can seek compensation orders and other civil remedies.⁷ There is a formal dispute resolution mechanism for wholesale supply disputes,⁸ and a Grocery Industry Dispute Resolution Scheme has been approved by the Minister and is now in operation.⁹

⁵ Grocery Industry Competition Act 2023, ss34-44.

⁶ Grocery Industry Competition Act 2023, ss45-46.

⁷ Grocery Industry Competition Act 2023, ss134-135.

⁸ Grocery Industry Competition Act 2023, ss151-166.

⁹ <https://www.nzdrcc.co.nz/expertise/grocery-industry-dispute-resolution-scheme>

21. The NZCC is also able seek significant penalties against a RGR for failing to comply with the regime.¹⁰

3.3. Regulatory backstop to wholesale supply regime

22. The current wholesale supply regime is relatively light-handed. As a result, if the wholesale regime is found not to be achieving its purpose, the GICA provides for additional secondary regulation, subject to specific legal requirements being met.¹¹ The reason for this ‘regulatory backstop’ is to incentivise RGRs to provide competitive wholesale offerings under the quasi-regulatory regime.¹² The potential additional regulation includes:

- The NZCC requiring RGRs to implement a wholesale framework, which would set out how the RGRs must make decisions about pricing, range, quantity, frequency, and terms and conditions in connection with the wholesale supply of groceries.
- The NZCC requiring RGRs to implement a wholesale code, which would provide rules in connection with the wholesale supply of groceries provided by RGRs.
- Upon the order of the Minister, the NZCC setting non-discriminatory terms, which would require the RGRs to supply groceries on related terms and conditions that are transparent and equivalent to terms and conditions they each supply themselves and other wholesale customers.
- Upon the order of the Minister, the NZCC setting specified access terms, which would regulate the terms and conditions that RGRs supply groceries at wholesale, including prices, charges, margins and quality standards.

3.4. Ability for NZCC to hold inquiry

23. The GICA provides the NZCC with the ability to hold an inquiry into whether the wholesale supply of groceries should be subject to the additional regulation above and, if so, what type or types of additional regulation should apply.

24. The inquiry is not a prerequisite for the making of a wholesale framework or wholesale code, but it is required to inform recommendations on non-discriminatory terms and specified access terms. If additional regulation is in place, an inquiry can determine whether the regulations should be amended, revoked, or replaced. A draft inquiry report is required to be published and consulted upon.¹³ As outlined below, the NZCC has recently initiated an inquiry.

3.5. NZCC’s monitoring role under wholesale supply regime

25. One of the NZCC’s functions under the GICA is to monitor competition and efficiency in the grocery industry.¹⁴ This includes:

¹⁰ Grocery Industry Competition Act 2023, ss125-133.

¹¹ The NZCC has published a Fact Sheet on the additional regulatory options available under the GICA, available here: https://comcom.govt.nz/_data/assets/pdf_file/0031/362668/Wholesale-Supply-Inquiry-Stronger-regulation-options-factsheet-2-October-2024.pdf

¹² Grocery Industry Competition Act 2023, ss64-105.

¹³ Grocery Industry Competition Act 2023, ss55-63.

¹⁴ Grocery Industry Competition Act 2023, s4.

- monitoring competition and efficiency;
 - carrying out inquiries, reviews, and studies (including international benchmarking);
 - improving transparency by making reports, summaries and other information about the grocery industry available; and
 - monitoring the law and practices that are relevant to our functions under the GICA (including overseas law and practices).
26. The GICA provides the NZCC with a wide and flexible range of information gathering and enforcement powers to use, as needed, to support regulation in the sector.¹⁵
27. The NZCC is required to produce an Annual Grocery Report which, amongst other things, reports on the state of competition in the industry including any changes to the level of competition and outcomes for consumers, and market concentration levels.¹⁶
28. In terms of wholesale supply monitoring, to date the NZCC has focused on monitoring the RGRs closely to ensure that they meet requirements under the new wholesale supply regime and make meaningful progress towards providing a reliable, cost-effective wholesale offering.¹⁷ It has used a range of information to do this, including:
- Information reported by RGRs to the NZCC about wholesale supply requests (as they are required to do under the wholesale supply regime) and requested by the NZCC from RGRs;
 - Engagement with a range of wholesale customers, including potential customers; and
 - Engagement with suppliers and other industry participants.
29. The NZCC undertook an assessment of the wholesale regime in mid-2024, which raised concerns with the wholesale grocery offerings of the RGRs and how the wholesale regime was progressing under the current regulatory settings. This led to its findings in the Annual Grocery Report, as outlined below.

4. NZCC's First Annual Grocery Report

30. On 4 September 2024, the NZCC published its first Annual Grocery Report (Report) on the state of competition in the grocery sector.¹⁸ In terms of wholesale supply, it assessed:
- Whether wholesale customers have reliable and cost-effective access to wholesale supplies of groceries, and reasonable access to the benefits of the scale and efficiency of the RGRs;

¹⁵ Grocery Industry Competition Act 2023, ss180-183.

¹⁶ Grocery Industry Competition Act 2023, s175.

¹⁷ Upon the GICA coming into force, the NZCC's Grocery Commissioner issued an open letter to the grocery sector outlining the NZCC's initial priorities as regulator. See https://comcom.govt.nz/_data/assets/pdf_file/0018/322047/Open-letter-to-the-grocery-sector-Commencement-of-the-Grocery-Industry-Competition-Act-2023.pdf

¹⁸ https://comcom.govt.nz/_data/assets/pdf_file/0019/362305/Annual-Grocery-Report-2024.pdf

- Whether the RGRs' wholesale offerings are consistent with a competitive wholesale market; and
- Whether the wholesale supply regime is helping to materially improve competition and efficiency, and benefiting New Zealand consumers.

31. Overall, its assessment of data from the period 2019 to 2023 found that there has been no meaningful improvement in the state of competition in the grocery industry since the market study and the introduction of the wholesale supply regime under the GICA. It observed that the RGRs continue to maintain high market shares and high levels of profitability. Concerningly, the RGRs' retail margins have even increased over this time. These margins are measured by the difference between the retail prices that consumers pay for groceries and the prices paid by supermarkets to their suppliers for those goods.

32. In terms of wholesale supply, it found that the wholesale supply regime is having limited impact, as reflected by the very low volume of trade. For example, between July 2023 and June 2024, 510 potential wholesale customers had made enquiries to at least one of the three RGRs about entering into a wholesale agreement, but only 88 wholesale customers signed agreements and, of these, 49 were actively making orders. Also during this period, the total sales through the RGRs' wholesale offerings was approximately NZ\$7.4 million, which represents only about 0.03% of total supermarket and grocery retail sales in New Zealand.¹⁹

33. The NZCC found that the range and price of goods included in the RGRs' wholesale offerings are inconsistent with a competitive wholesale market. Therefore, it considered that additional regulations (as outlined above) may be necessary to achieve the intended benefits of the wholesale regime, and it has since launched an inquiry to consider whether additional regulations are required.

34. We outline below two features of wholesale supply identified in the Report that raise concerns, these being (1) the RGRs' pricing models and (2) limited product range.

4.1. RGRs wholesale pricing models is restricting competition

35. As outlined in the Report, the NZCC observed the following features that it considers shows that the RGRs' wholesale pricing models may be restricting competition:

- RGRs' wholesale grocery prices are higher than RGRs' retail prices for many products;
- Rebates, discounts or payments (RDPs) from suppliers enable RGRs to price cheaper in retail than competitors.

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

36. In a competitive wholesale market, it would be expected that there is a sufficient margin between wholesale and retail prices to allow wholesale customers to compete at the retail level. You would also expect the benefits of the RGRs' scale and efficiency of operations to be passed through to wholesale customers.²⁰

¹⁹ NZCC, Annual Grocery Report (2024), p95.

²⁰ This is a principle contained in the Grocery Industry Competition Act 2023, s24(1)(a).

37. It appears that, in many cases, the RGRs' wholesale pricing does not leave sufficient margin for competition at the retail level.

38. The NZCC heard from some wholesale customers and access seekers that retail prices can often be cheaper than the RGRs' wholesale prices, resulting in retailers supplying their stores 'off the retail shelf'. This claim was supported through its analysis where it found that as many as 54% of the products offered by RGRs in wholesale could be purchased cheaper at retail. This situation worsens when the additional costs to wholesale customers of retailing the products are taken into account, which can be equivalent to at least 15% of the price of the goods.

39. To illustrate this, if it is assumed that a margin of 15% between retail and wholesale prices is required to cover the downstream costs of retailing (which is likely a conservative assumption), the NZCC's analysis indicates that up to 89% of products offered by the RGRs would not allow for the recovery of retail costs (assuming the retailers priced the goods consistently with the RGR's retail prices).

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

40. As mentioned above, the market study found that major grocery retailers enjoy scale and efficiency advantages accessing grocery supply. This is due to the efficiencies of vertical integration and economies of scale, both in terms of buying volume and spreading costs across a large retail network. As the major grocery retailers purchase large volumes directly, they commonly receive volume discounts and promotional funding terms which other grocery retailers are unable to match. This is a concern because price discrimination through 'volume discounts' in upstream markets can provide the major grocery retailers with a significant competitive advantage in retail markets vis-à-vis smaller retailers.

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

42. The GICA requires that the RGRs give their wholesale customers reasonable access to the benefits of scale and efficiency that their operations offer, including RDPs.²¹ However, it was not clear to the NZCC whether these are being appropriately passed on by RGRs, or whether wholesale customers have access to RDPs via direct supply. The NZCC therefore intends to explore the impact RDPs have on the grocery supply chain further through its inquiry.

4.2. Limited range of products available to wholesale customers is restricting competition

43. In a competitive wholesale market, it would be expected that the available wholesale product range is able to reasonably meet the demands of consumers and their shopping missions.

44. The Report showed that RGRs appear to have limited the range of products they offer via wholesale to products that go through their distribution centres, and to suppliers

²¹ Grocery Industry Competition Act 2023, s21(b).

who have agreed to participate/'opt into' their wholesale offerings. In particular, the following products have limited availability which appear to be impacting the ability of wholesale customers to compete at the retail level:

- Top selling products
- Private label products
- Fresh products

45. In addition, supplier 'opt outs' appear to be limiting the availability of some top selling products.

4.2.1. Many of the top selling products are unavailable from RGRs' wholesale offerings

46. The NZCC found that the availability of the RGRs' top 500 selling products in FY2023 for wholesale customers is limited, and does not reflect our expectation of an offering in a competitive wholesale market. In particular, many of the items that are the highest revenue earners for RGRs are not currently included in their wholesale offering, such as milk, bread and bananas. As a result, wholesale customers cannot use the RGRs' wholesale offers to stock a range that would enable them to compete with RGRs on a broad range of products.

47. For example, its analysis showed that of the top 100 selling products for the RGRs, only 5% to 14% are available through their wholesale offerings. Of the top 500 selling products of the RGRs, only 14.8% to 27.8% are available.

4.2.2. Private label exclusions limit availability of top-selling retail products

48. RGRs in New Zealand sell private label (own-label) products in their retail stores, which are generally cheaper than other brands supplied by third parties. The NZCC found that RGRs have mostly excluded their own private label products from their wholesale offerings. For example, the Foodstuffs' wholesale offering does not include any of their private labels in their wholesale offerings, while Woolworths includes a limited range of private label products and notably excludes all 'Woolworths' branded products.

49. Its engagement with wholesale customers highlighted high demand for private label products by consumers due to them being generally cheaper products.

4.2.3. The exclusion of some fresh products reduces the availability of many top selling retail products

50. Products in fresh categories, especially fresh produce, make up a significant number of top selling products for all RGRs. However, two out of the three RGRs do not currently offer fresh produce at wholesale, while one offers some fresh products including fresh produce, meat and seafood.

51. Products in fresh categories are often available through specialty wholesalers (independent of the RGRs) and other alternative channels of supply. However, the NZCC considers that fresh products are a crucial part of the range offered by RGRs that we would expect to see in a competitive wholesale offering.

52. The NZCC's engagement with wholesale customers showed mixed demand for products in fresh categories. Some retailers inquired about fresh produce through RGRs' wholesale offerings, but found it was not available. At least one of these retailers are now sourcing fresh produce another way. Smaller and specialty retailers who stock fresh

categories generally preferred their current channels of supply. This aligns with the experience of leading Australian wholesale distributor, Metcash, where independent retailers source 50-90% of products in fresh categories from alternative suppliers in Australia.²²

4.2.4. Supplier opt outs limit the availability of some top selling products

53. The NZCC's engagement also found at least 155 suppliers that had actively opted to take their products out of at least one RGR's wholesale offering. Several suppliers of top-selling products had even opted out across all RGRs.

54. Supplier opt outs have a material impact on product availability, especially among top selling products that we would expect to be available in a consumer's main shop. When products are opted out, other retailers do not have access to the product ranges that RGRs do at prices that reflect the RGRs' scale and efficiency. Although in many cases opted out products are available through alternative channels (including direct supply), the terms offered may not allow retailers to compete on price with RGRs.

5. Wholesale Supply Inquiry

55. In response to the findings of its Annual Grocery Report, including that wholesale offerings by RGRs do not appear to be consistent with a competitive wholesale market, the NZCC decided to self-initiate an inquiry under the GICA.²³

56. The NZCC does not consider that the wholesale supply regime, in its current form, is helping to improve competition and efficiency in the New Zealand grocery industry. It appears that there are fundamental issues with the current form of the regime which mean that it is unlikely to improve competition even with the passage of time.

57. An inquiry is the best option available to the NZCC under the GICA to seek to encourage stronger competition. It can inform decisions to impose additional regulations and allows it to recommend the imposition of other forms of regulation as outlined above. It also allows the NZCC to make other recommendations that it sees fit, including recommending the following to Government:

- Changes to legislation or other instruments:
- Changes to the policies or practices of Central or Local Government:
- Changes to the amount or type of information made available by a person in relation to the grocery industry:
- A person researching or monitoring a specified matter; and
- Persons within the grocery industry changing their behaviour.²⁴

58. The inquiry will involve consultation with stakeholders about the key issues and potential solutions and will ultimately result in a report to the Minister.

²² <https://www.accc.gov.au/system/files/Metcash.pdf?ref=0&download=y>

²³ The Terms of Reference for our Wholesale Supply Inquiry are available here: https://comcom.govt.nz/_data/assets/pdf_file/0021/362307/Terms-of-Reference-Wholesale-Supply-Inquiry.pdf

²⁴ Grocery Industry Competition Act 2023, s58(2).

59. On 24 September 2024, the NZCC published a preliminary issues paper which provides more details about the areas of the wholesale regime that it has particular concerns about, and will provide an opportunity for the grocery industry and the public to provide feedback on these concerns.²⁵ A draft inquiry report for public consultation is expected to be released in early 2025, and a final report in mid-2025.

6. Other grocery-related work the NZCC is undertaking

60. As mentioned above, the market study identified a range of problems impacting competition in the grocery industry. The Government response included several regulatory tools which the NZCC is currently in the process of supporting, which are in addition to its other existing responsibilities relevant to the grocery industry.

61. We briefly outline below two examples of other grocery-related work the NZCC is undertaking.

6.1. Review of Grocery Supply Code

62. The GICA provided for a Grocery Supply Code (Code) which is a 'rule book' that sets out requirements for the conduct of RGRs when dealing with grocery suppliers.²⁶ The same three major grocery retailers have been designated as RGRs subject to obligations in the Code.²⁷ As with the wholesale regime, additional grocery retailers can be designated as RGRs subject to the Code via secondary legislation.²⁸

63. The first Code was made shortly after the GICA came into force in September 2023. It was modelled on the Australian equivalent and imposes obligations designed to address the imbalance in bargaining power between RGRs and their suppliers. RGRs were provided six months to offer new agreements to existing suppliers, as necessary, with a grace period which ended on 28 March 2024.²⁹

64. Part of the rationale for the Code was that the NZCC found that deals between the RGRs and suppliers were being made ad-hoc, verbally, and at times with pressure on suppliers. This includes the transfer of risks and costs to suppliers that the retailers are better placed to manage. The Code seeks to ensure more formal and comprehensive agreements, creating more transparency and certainty for suppliers about what they are signing up to, and to protect them from unfair conduct so they can better compete and succeed. It is about "stamping out old-style handshake supply agreements" in the words of the NZCC's Grocery Commissioner.³⁰

²⁵ https://comcom.govt.nz/data/assets/pdf_file/0026/362519/Wholesale-Supply-Inquiry-Preliminary-Issues-Paper-24-September-2024.pdf

²⁶ <https://www.legislation.govt.nz/regulation/public/2023/0220/latest/whole.html>

²⁷ Grocery Industry Competition Act 2023, s8.

²⁸ Grocery Industry Competition Act 2023, s9.

²⁹ The NZCC published a Fact Sheet providing information on the Grocery Supply Code, available here: https://comcom.govt.nz/data/assets/pdf_file/0022/329710/Commerce-Commission-Grocery-supply-code-factsheet-28-September-2023.pdf

³⁰ [https://comcom.govt.nz/news-and-media/media-releases/2024/traditional-handshake-supply-agreements-not-good-enough-for-\\$25b-grocery-sector](https://comcom.govt.nz/news-and-media/media-releases/2024/traditional-handshake-supply-agreements-not-good-enough-for-$25b-grocery-sector)

65. The GICA requires the NZCC to complete its first review of the operation and effectiveness of the Code within two years of it coming into force, being 28 September 2025.³¹ However, it started the review less than a year after the Code came into effect following concerns that systemic issues are not being addressed and suppliers may not be benefiting from the full protections of the Code. The review process is providing a mechanism for all stakeholders to put forward issues and opportunities related to the operation and effectiveness of the Code. Initial submissions have now been received and the NZCC expects to consult on a draft review report in the first quarter of 2025, and publish the final review report in mid-2025.³²

6.2. Foodstuffs merger clearance application declined

66. On 1 October 2024, the NZCC announced it had declined to give clearance for Foodstuffs North Island Limited and Foodstuffs South Island Limited to merge to become a single national grocery entity.

67. The proposed merger would have reduced the number of major grocers (and RGRs) in New Zealand from three to two, thereby reducing the number of buyers for many suppliers to supply their products to and creating the largest acquirer of grocery products in New Zealand.

68. The NZCC considered the buyer power of the merged entity would harm the competitive process, and likely substantially lessen competition in many acquisition markets. It accordingly declined the merger application as it is only permitted to grant clearance to a merger when it is satisfied that the merger will not result in a substantial lessening of competition.^{33 34}

7. Conclusion

69. There has been significant legislative reform and new functions for the NZCC to improve competition in the grocery sector for the long-term benefit of New Zealand consumers. This includes a new wholesale regulatory regime and additional regulation to improve wholesale access.

70. These do not yet appear to have achieved the expected outcome of the wholesale regime, which is to enable negotiated wholesale supply arrangements to be consistent with what would be expected in a workably competitive wholesale market. However, despite this, we are confident that the wholesale supply inquiry and ongoing regulatory monitoring by the NZCC will move us closer to this outcome. This will provide the benefits of competition to wholesale customers and, ultimately, New Zealand consumers.

³¹ Grocery Industry Competition Act 2023, s20.

³² For further information on the NZCC's review of the Grocery Supply Code, see: <https://comcom.govt.nz/regulated-industries/grocery/review-of-the-grocery-supply-code>

³³ Commerce Act 1986, s66.

³⁴ A copy of the NZCC's full determination, including reasons for its decision, is available on its case register here: <https://comcom.govt.nz/case-register/case-register-entries/foodstuffs-north-island-limited-and-foodstuffs-south-island-limited>

