MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

COVERSHEET

Minister	Hon Dr David Clark	**Portfolio**	Commerce and Consumer Affairs
Title of Cabinet paper	Response to the Commerce Commissions Retail Grocery Sector Market Study	**Date to be published**	8 June 2022

List of documents that have been proactively released		
Date	**Title**	**Author**
May 2022	Response to the Commerce Commission's Retail Grocery Sector Market Study	Office of the Minister of Commerce and Consumer Affairs
23 May 2022	Response to the Commerce Commission's Retail Grocery Sector Market Study CAB-22-MIN-0186 Minute	Cabinet Office
May 2022	Regulatory Impact Statement: Government response to the Commerce Commission Grocery Sector Market Study – Policy decisions	MBIE (Published 5 July 2022)

Information redacted **YES / ~~NO~~** *[select one]*

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Some information has been withheld under the grounds of confidential advice to government and constitutional conventions.

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Regulatory Impact Statement: Government response to the Commerce Commission Grocery Sector Market Study – Policy decisions

Coversheet

Purpose of Document	
Decision sought	Agree to a set of regulatory changes to implement the Government's response to the Commerce Commission's market study into New Zealand's retail grocery sector report. Note that the detail of several proposals will be subsequently consulted on during the legislative process.
Advising agencies	Ministry of Business, Innovation and Employment (MBIE)
Proposing Ministers	Minister of Commerce and Consumer Affairs, Hon Dr David Clark
Date finalised	6 May 2022
Problem Definition	
Competition is not currently working well for consumers in New Zealand's retail grocery sector. The retail grocery sector is characterised by a duopoly of two major grocery retailers making profits that exceed a normal rate of return for the market, with a range of smaller retailers that have a limited impact on competition. This problem is likely to persist without government intervention.	
Executive Summary	

Background

Groceries are a vital part of consumer spending in New Zealand, with consumers spending around $22 billion each year on groceries. New Zealand's retail grocery market is dominated by three major grocery retailers – Woolworths New Zealand, Foodstuffs South Island and Foodstuffs North Island (with the two Foodstuffs co-operatives operating in separate geographic markets) – with a range of smaller retailers such as international food stores, meal box companies and online-only supermarkets.

The Commerce Commission undertook a market study looking at the features of competition in New Zealand's retail grocery sector. On March 8 2022 the Commission released its final report, which identified the following market outcomes:

- Major grocery retailers enjoy high levels of profitability over and above what would be expected under workable competition[1]
- Grocery prices in New Zealand appear high by international standards
- Innovation in New Zealand's retail grocery sector is low compared to overseas
- There has been no major new entrant into the sector recently.

In the Commission's view, there is unlikely to be an increase in competition without any intervention. Major grocery retailers would continue to hold high levels of market share, with only limited price and non-price competition between retailers.

Problems identified by the Commission

The Commission's key finding is that competition in the retail grocery sector is not working well for consumers. Consistently high profits by retailers, high food prices, and relatively low innovation indicate there is a lack of workable competition in this sector. Competition in this important sector is muted and this impacts in a limited retail grocery offering to consumers and impacts the price, quality, range, and service of grocery offerings to consumers.

There are three main problems underpinning competition in this sector:

- Issue one: Entry and expansion conditions are not conducive to competition
- Issue two: There is an imbalance in bargaining power between major retailers and suppliers
- Issue three: It is difficult for consumers to make informed purchasing decisions.

Options considered in this RIS

In this RIS we consider actions to address these issues based on feasible options identified by the Commission as part of its market study. We consider how these options contribute to the overarching objective in this paper of promoting competition in grocery markets for the long-term benefit of consumers.

1 The term 'workable competition' is drawn from the Commerce Act 1986. It is used to distinguish from the non-optimal 'perfect competition' where there are many suppliers and buyers, but also weak incentives to innovate and invest. Workable competition is based on rivalry amongst firms, where each firm takes efforts to equal or exceed the attractiveness of their competitor's offerings, and consumers can make informed choices between vendors. A workably competitive market is one where no firm has significant and enduring market power, and prices are not too much or for too long significantly above cost.

Based on the analysis in this paper, we recommend a suite of regulatory and non-regulatory options that address the three issues above. The preferred package of options include:

Issue one: Entry and expansion conditions are not conducive to competition:

- Implementing a new regulatory oversight regime for wholesale supply of groceries by the major grocery retailers. This will include an obligation on the major grocery retailers to respond to requests for wholesale supply in good faith and in a transparent manner.
- Monitoring strategic conduct by major grocery retailers in relation to best price and exclusivity clauses to ensure that such clauses do not unreasonably impede the ability of independent grocery retailers to directly access groceries from suppliers at competitive prices.

Separate from this impact assessment, decisions have also been made, or will be made, relating to the Commission's recommendations relating to access to suitable sites for retail grocery development.

Issue two: There is an imbalance in bargaining power between major retailers and suppliers

- Enabling in statute the making of delegated legislation for the creation of a code of conduct to govern relationships between major grocery retailers and suppliers based on good faith principles and reasonable terms. A subsequent regulatory impact assessment will be prepared for the code before it is adopted.
- Establishing an exception from Part 2 of the Commerce Act 1986 to allow for collective bargaining between suppliers and major grocery retailers (which may be otherwise prohibited by the cartel prohibition in that Act).
- Strengthening the unfair contract terms regime currently in the Fair Trading Act 1986 to make these protections more available to suppliers of groceries. The amendments include raising the monetary threshold for grocery transactions subject to the regime and providing for private enforcement.

Issue three: It is difficult for consumers to make informed purchasing decisions

- Monitoring non-regulatory commitments by the major grocery retailers to enhance information for consumers to improve pricing and promotional practices, loyalty programmes, data collection and co-operation with price comparison services.
- Mandating the consistent use of unit pricing for retail groceries. This may be given effect in delegated legislation, as a consumer information standard under the Fair Trading Act 1986. A subsequent regulatory impact assessment will be prepared for the unit pricing consumer information standard before it is adopted.

Many of the recommendations above will require legislative change to implement them. These will be advanced through a standalone Grocery Industry Competition Bill, which will be introduced to Parliament in 2022, as well as making relevant changes to the Fair Trading Act 1986 and Commerce Act 1986.

In addition, consultation will also be undertaken on the details to be included in a code of conduct to govern retailer and supplier relationships and a mandatory unit pricing consumer information standard. These documents are being developed outside of this

RIS, but high-level Cabinet agreement is being sought to these measures as part of the Government's response to the Commission's final report.

Implementation and monitoring

In terms of implementation, a new grocery regulator function will be developed and implemented in one or more agencies. This agency will provide oversight of competition in the retail grocery sector and monitor closely how competition develops. The actual agency to hold these functions will be confirmed as part of upcoming work.

The Commission recommended that a review of the regulatory regime is carried out after it has been in effect for three years. We intend to provide that MBIE or the grocery regulator is resourced to conduct annual reviews as required (including annual monitoring and reporting). These reviews will enable the Government and public to identify if there are any serious unintended consequences arising from the regulatory regime, or if the benefits of competition are not emerging in reasonable time.

Limitations and Constraints on Analysis

Range of options considered

The range of options considered in this paper is based on the Commerce Commission's (the Commission's) analysis in its final market study report titled *Market study into the retail grocery sector – final report* (the Final Report) released on 8 March 2022.

The Commission was charged with identifying any factors that may affect competition for the supply or acquisition of groceries by retailers in New Zealand. This scope excluded non-competition factors that may be resulting in high grocery prices, such as goods or services tax on food or food and biosecurity regulation.

The timeframe for the market study also meant that the Commission took a broad look for common issues across grocery markets, rather than analysing the supply chain for any particular grocery products.

In this RIS, we have focused on the Commission's findings and the suite of recommendations outlined in its final report, but if appropriate, we have also considered other options to respond to the findings. Some of these additional options could be considered in future if monitoring and evaluation of the preferred regime reveals that further regulation is desirable.

In addition, given the tight timeframes for developing the options and the focus of the Commission study, we have not considered whether some of the issues and options may have wider application to other sectors in the economy. As relevant, this could be considered in the future.

Quality of data used for impact analysis

This RIS relies on much of the analysis in the Commission's final report, the submissions from interested parties to the Commission, and information gathered by MBIE as part of targeted stakeholder engagement on the Commission's final recommendations.

MBIE has confidence in the Commission's analysis.

We note that much of the data used by the Commission in its report predates the state of national emergency in response to COVID which was imposed in March 2020. This was to avoid basing its assessment on the unusual market conditions that applied in the short term under the lockdowns. However, the Commission has made a qualitative assessment

of whether any issues or practices that emerged during the pandemic are likely to affect competition in the longer term. The sources of information we used did not include much quantitative assessments of the costs and/or benefits of options. We have therefore set out qualitative and quantitative analysis in this RIS, to the extent possible. **Consultation and testing** The RIS has been prepared under significant time constraints, and as such, MBIE has not tested its analysis with interested parties outside of targeted consultation on the Commission's final recommendations. We intend to further refine the proposals and our analysis as we carry out further work on the details and consult as part of informing further decisions by Cabinet.
Responsible Manager(s) (completed by relevant manager)
Glen Hildreth Acting Manager Competition and Consumer Law Ministry of Business, Innovation and Employment 12 April 2022

Quality Assurance (completed by QA panel)	
Reviewing Agency:	Ministry of Business, Innovation and Employment
Panel Assessment & Comment:	The Ministry of Business, Innovation and Employment's Regulatory Impact Analysis Review Panel has reviewed the attached Regulatory Impact Statement *Government Response to the Commerce Commission Grocery Sector Market Study – Policy decisions*, prepared by MBIE. The Panel notes that an advance decision taken by Cabinet on one recommendation from the Grocery Sector Market Study was made without a Regulatory Impact Statement [recommendation 2], and will be subject to a Supplementary Analysis Report. This decision is therefore not analysed in this Impact Statement and does not impact upon the analysis summarised in this Impact Statement. The Panel considers that the information and analysis summarised in the Impact Statement **meets** the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

Section 1: Diagnosing the policy problem

1.1 What is the context behind the policy problem and how is the status quo expected to develop?

Characteristics of New Zealand's retail grocery market

Groceries are a vital part of consumer spending

1. Groceries are an essential purchase for all New Zealanders and make up a significant proportion of household spending. In the year to September 2021, more than $22 billion was spent at supermarkets and grocery stores.[2]

2. In the year to June 2019, food was the second largest expenditure category for New Zealand households, with an average spend of $234 a week, or 17.3% of weekly expenditure.[3] Households with lower incomes – such as superannuitants and Māori (on average) – often allocate an even higher proportion of their expenditure to food than average.[4]

3. New Zealanders are a diverse group of shoppers with different wants, needs, and demographics. New Zealand consumers regularly undertake different types of shopping trips (which the Commission referred to as 'shopping missions' in its report) to grocery retailers, that can be broadly categorised as a main shop, a secondary shop, and a top-up shop.

4. For most consumers, convenience and price are the key considerations that inform their choice of grocery store.[5] Convenience includes things like being able to purchase a wide range of groceries in a single location – in a 'one-stop' shop – and other convenience factors such as time/distance of travel, the range of products available, the length of opening hours, and parking accessibility.

5. Māori contributors to the market study indicated the ability to access competitive prices and a wide range of goods are important for many Māori, hapū and iwi in both urban and rural areas. However, location, accessibility and connectivity are also factors which may affect where and how some Māori, particularly those in rural areas, are able to shop for groceries.

Consumers purchase groceries from major grocery retailers and smaller 'fringe' retailers

6. There are three 'major grocery retailers' operating in New Zealand. These are

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[2] Statistics NZ "Retail trade survey: September 2021 quarter" (23 November 2021) at Table 1, excludes GST, available at: https://www.stats.govt.nz/assets/Uploads/Retail-trade-survey/Retail-trade-survey-September-2021-quarter/Download-data/retail-trade-survey-september-2021-quarter.xlsx.

[3] Statistics NZ "Household Expenditure Statistics: Year ended June 2019". Includes GST. Note this includes spend on restaurant and ready-to-eat food but excludes alcoholic beverages and tobacco. See: https://www.stats.govt.nz/information-releases/household-expenditure-statistics-year-ended-june-2019 .

[4] In 2021 the average spend by the lowest income and expenditure quintile is 21.2% and 21.8% of weekly expenses, compared to an average of 20.5%. Refer to Statistics NZ "Household Living Costs Price Indexes September 2021 Quarter Expenditure Weights". Includes GST. Note this includes spend on restaurant and ready-to-eat food, and excludes alcoholic beverages and tobacco. https://www.stats.govt.nz/information-releases/household-living-costs-price-indexes-september-2021-quarter. This data is not directly comparable with the 2019 household economic survey, so cannot be used to infer a change in grocery prices from 2019 to 2021.

[5] Commerce Commission, "Market study into the retail grocery sector: Final report", (8 March 2022), at chapter 4. (Henceforth called **Final report**).

Woolworths New Zealand Limited (**Woolworths NZ**), Foodstuffs North Island Limited (**Foodstuffs NI**), and Foodstuffs South Island Limited (**Foodstuffs SI**).

7. However, there are only two major grocery retailers operating stores under national brands on each island – Woolworths NZ and Foodstuffs NI or Foodstuffs SI. This is because the Foodstuffs co-operatives do not operate in the same geographic market.[6]

Figure 1: New Zealand's major grocery retailers

Woolworths New Zealand

- Woolworths NZ is owned by Woolworths Group Limited (Woolworths Australia).
- Woolworths NZ operates three retail banners: Countdown, Fresh Choice and SuperValue.
- There are more than 180 Countdown stores owned and operated by Woolworths NZ, as well as four e-stores for online grocery supply.
- Woolworths NZ is franchisor for 71 locally owned and operated Fresh Choice and SuperValue stores.
- In 2019, it was estimated that about three million customers were served at Countdown stores every week.

Foodstuffs

- Foodstuffs NI and SI are member-owned cooperatives, supplying their member-owned and operated retail stores.
- Foodstuffs NI supplies 101 New World, 43 PAK'nSAVE, and 167 Four Square Stores (as at 31 December 2020) across the North Island.
- Foodstuffs SI supplies 42 New World, 12 PAK'nSAVE and 62 Four Square stores, as well as Five Raeward Fresh and 99 On the Spot retail stores across the South Island.
- Foodstuffs NI stores serve an average of 2.7 million customers every week (in store or online), while Foodstuffs SI stores serve over 600,000 customers each week.

8. The major grocery retailers offer the convenience and product range for consumers to complete their shopping in one place. They are each other's closest competitors. Their most well-known retail banners differentiate their offerings to attract different consumer types:

- PAK'nSAVE stores provide an offering targeting consumers who value low prices
- New World stores aim to attract consumers who place relative value on friendly staff who provide a quality service
- Four Square stores are situated and operated either for convenience or specific shopping missions, often in smaller regional centres
- Countdown stores aim to provide its customers with a mix of choice, value, and convenience
- FreshChoice and SuperValue stores provide a quick and friendly service and a broad range.[7]

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[6] Commerce Commission, Final report, at 2.11.

[8] Commerce Commission, Final report, at 2.76-2.77. Data from NZ Post indicates that online sales of specialty food, groceries and liquor increased by 47% to $1.3 billion between 2019 and 2020, and that customers

9. In addition to major grocery retailers, New Zealand's retail grocery market also includes other retailers, which typically provide a more focused offering. These include:

Figure 2: Other grocery retailer types

International food stores (e.g. Tai Ping, Japan Mart)	**Fresh format or cash'n carry** (e.g. Farro Fresh, Moore Wilson's)	**Single category or specialist grocery stores** (e.g. greengrocers, butchers, bakeries)
General merchandisers (e.g. The Warehouse)	**Convenience stores** (e.g. diaries, petrol stations, Night 'n Day)	**Meal kit providers** (e.g. Hello Fresh, My Food Bag)
Food box operators (e.g. Foodbox and Ooooby)	**Online-only supermarkets** (e.g. The Honest Grocer, Supie)	**Specialist online retailers** (e.g. Hypermeat).

10. The New Zealand grocery sector lacks a significant presence of some grocery business formats that are common overseas, such as limited assortment stores offering low-priced groceries (e.g. Aldi), supercentre stores (e.g. Walmart supercentre) and wholesale clubs (e.g. Costco). However, Costco has confirmed that it intends to open a store in Auckland in 2022 and is also thought to be looking for store sites in Christchurch and Wellington.

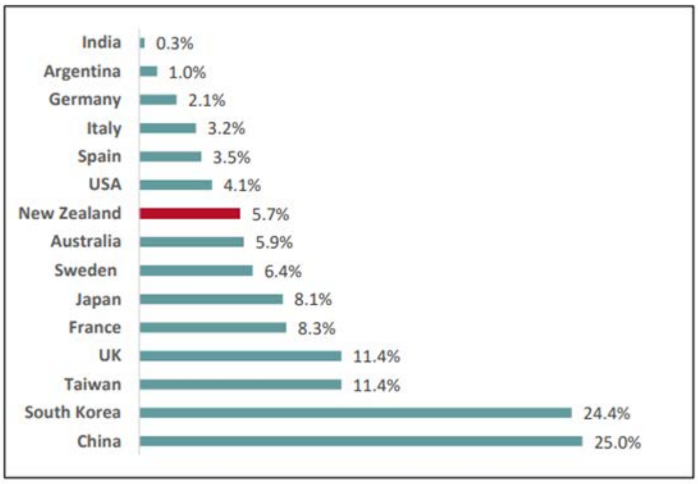
11. Most consumers visit a retail store (either a major grocery retailer or fringe store) to purchase groceries. A small proportion shop online. However, the online grocery market has been growing rapidly, and online sales growth has been accelerated by the COVID-19 pandemic lockdowns.[8] It is estimated to have accelerated demand for online by about 6 years.[9]

carried out 41% more online transactions in 2020 with a growth in basket size of 5%. NZ Post "The Full Download: 2021 New Zealand eCommerce Review" (2021) at 59, available at: https://thefulldownload.co.nz/sites/default/files/2021-05/NZPost_TheFullDownload_2021.pdf.

[8] Commerce Commission, Final report, at 2.76-2.77. Data from NZ Post indicates that online sales of specialty food, groceries and liquor increased by 47% to $1.3 billion between 2019 and 2020, and that customers carried out 41% more online transactions in 2020 with a growth in basket size of 5%. NZ Post "The Full Download: 2021 New Zealand eCommerce Review" (2021) at 59, available at: https://thefulldownload.co.nz/sites/default/files/2021-05/NZPost_TheFullDownload_2021.pdf.

[9] Commerce Commission, Final report, at 3.191.

Figure 3: Online grocery sales as a percentage of total grocery sales (2020)



Source: Kantar Worldpanel; NZ Post; Statistics NZ; IRI Australia.[214]

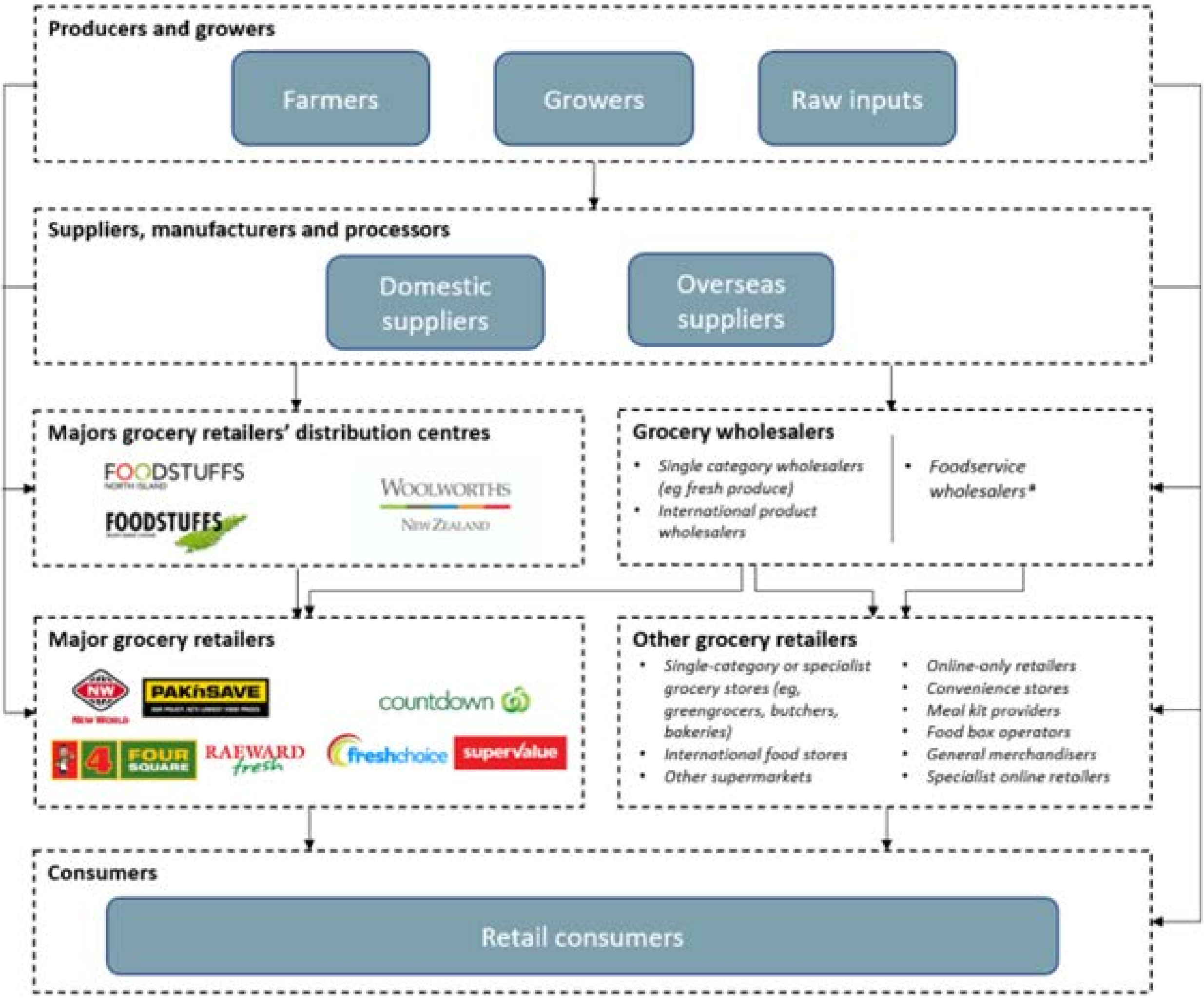
12. All major grocery retailers have online offerings to varying degrees. These online offerings are growing. For example, Woolworths NZ's online sales grew from 3% in 2014 to over 13%.[10]

New Zealand's major grocery retailers are vertically integrated

13. The major grocery retailers (and others such as Supie) are vertically integrated with integrated acquisition, distribution and retail operations. This means that they 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. Vertical integration generates significant economies of scale for major retailers, enabling them to reduce costs across their networks.

10 Commerce Commission, Final report, at 2.78.

Figure 4: High-level summary of the supply chain for the retail grocery sector



14. While major grocery retailers are vertically integrated, there is currently no wholesale supplier stocking the full range of groceries for smaller grocery retailers to purchase from. There are some limited wholesale supply options in single product categories like fresh produce or meat, for international products, and for the import of globally branded products.[11] Major grocery retailers also operate wholesale brands, but these are typically targeted at the food service industry.

15. Māori have a strong role in grocery supply as growers and primary producers. In New Zealand, Māori own 50% of the fishing quota; 30% of lamb, sheep, and beef production; and 10% of dairy production and kiwifruit.[12] However, the Commission's consultation with Māori indicated that Māori do not currently have a prominent role in the retailing of groceries.[13]

Pricing information, promotional practices, and loyalty schemes influence buying behaviours

16. Promotions and discounts are used by grocery retailers to encourage consumers to shop at their store, or to purchase certain products in store. New Zealand consumers

11 Commerce Commission, Final report, at 2.57-2.59.

12 Commerce Commission, Final report, at 2.61.

13 Commerce Commission, Final report, at 2.31

appear to be highly sensitive to promotions: nearly 60% of consumer spending in grocery retail in 2017 was on products on promotion.[14]

17. Countdown and New World offer loyalty programmes, and most consumers are members of at least one of these programmes.[15] Members of loyalty programmes exchange their consumer data for access to member-only discounts, accumulated rewards (such as on fuel or travel) and may include personalised offers. These loyalty programmes enable retailers to gather data on consumers' preferences and purchasing behaviour.[16]

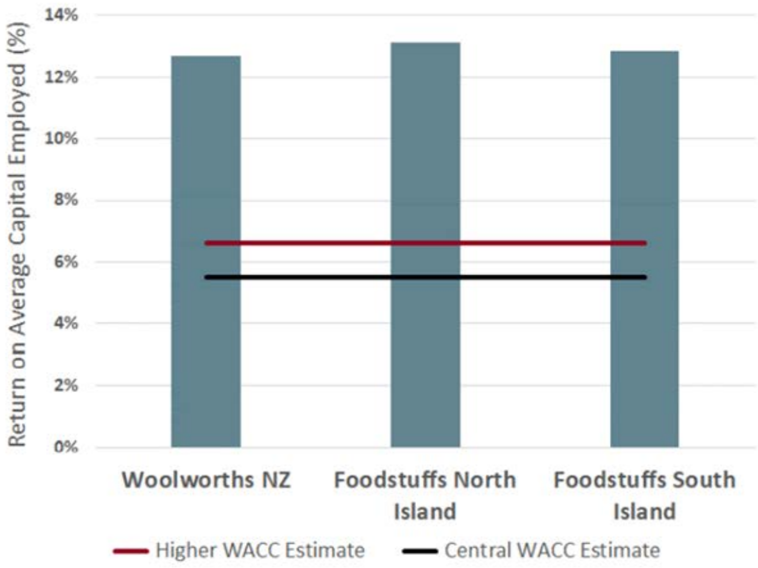
Market outcomes

Profitability of major grocery retailers appears higher than expected under workable competition

18. In a competitive market, profits would not significantly exceed a normal rate of return over time. The Commerce Commission (**the Commission**) has found that the major grocery retailers achieved higher profits than would be expected in a workably competitive market for at least the five years prior to the COVID-19 pandemic.[17]

19. The Commission calculated an estimated return on average capital employed (**ROACE**) for each of the major grocery retailers for 2015 to 2019. These estimates were 12.8% for Foodstuffs SI, 12.7% for Woolworths NZ, and 13.1% for Foodstuffs NI. This is above the normal rate of return (the working average cost of capital, **WACC**) of about 5.5 percent the Commission would expect under workable competition.[18]

Figure 5: Average ROACE for major grocery retailers compared to WACC (2015-19)



Source: Commerce Commission profitability analysis.[100]

20. The high profitability of the major retailers was relatively stable over 2015-2019, and did not demonstrate any clear upward or downward trajectory, yet continued to exceed

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[14] Commerce Commission, Final report, at 2.44 – 2.45. Figure 2.5 is from page 35.

[15] Commerce Commission, Final report, at 2.49-2.50.

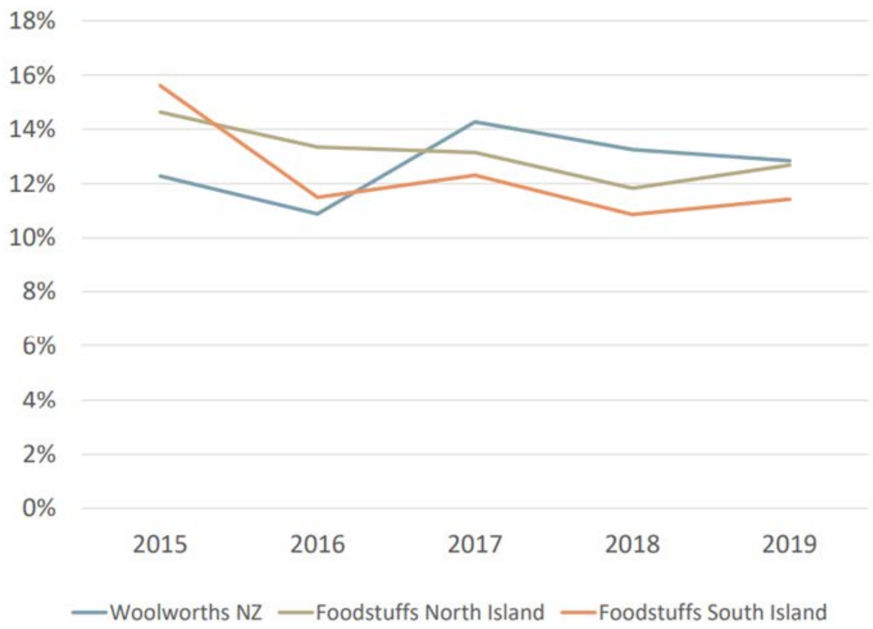
[16] Commerce Commission, Final report, at 2.51.

[17] Commerce Commission, Final report, Executive Summary, at p.5

[18] Commerce Commission, Final report, at 3.7, and 3.53.

a normal rate of return over time.[19]

Figure 6: Annual ROACE for each major grocery retailer (2015-19)



Source: Commerce Commission profitability analysis.[102]

21. If the major grocery retailers' profitability was closer to a normal rate of return then it is expected their profits would be lower by between $365m and $430m per year.[20]

Grocery prices in New Zealand appear high by international standards

22. In a workably competitive market, firms have incentives to compete on price. These incentives are lessened when competition is not working well. However, even in competitive markets, prices can be impacted by a range of non-competition factors such as input costs, regulatory costs, and economies of scale.

23. Grocery prices in New Zealand appear high by international standards. Out of OECD countries, New Zealand ranked fifth highest in terms of grocery prices, and fourth highest in terms of grocery expenditures.[21]

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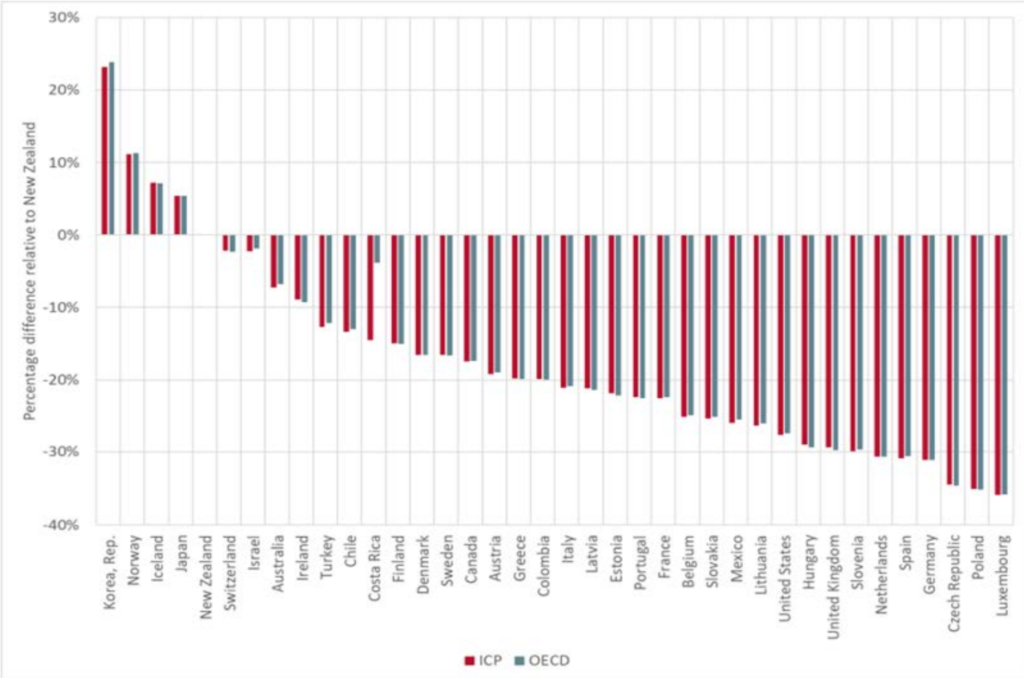
[19] Commerce Commission, Final report, Figure 3.3, at page 56.

[20] Commerce Commission, Final report, at 3.54.

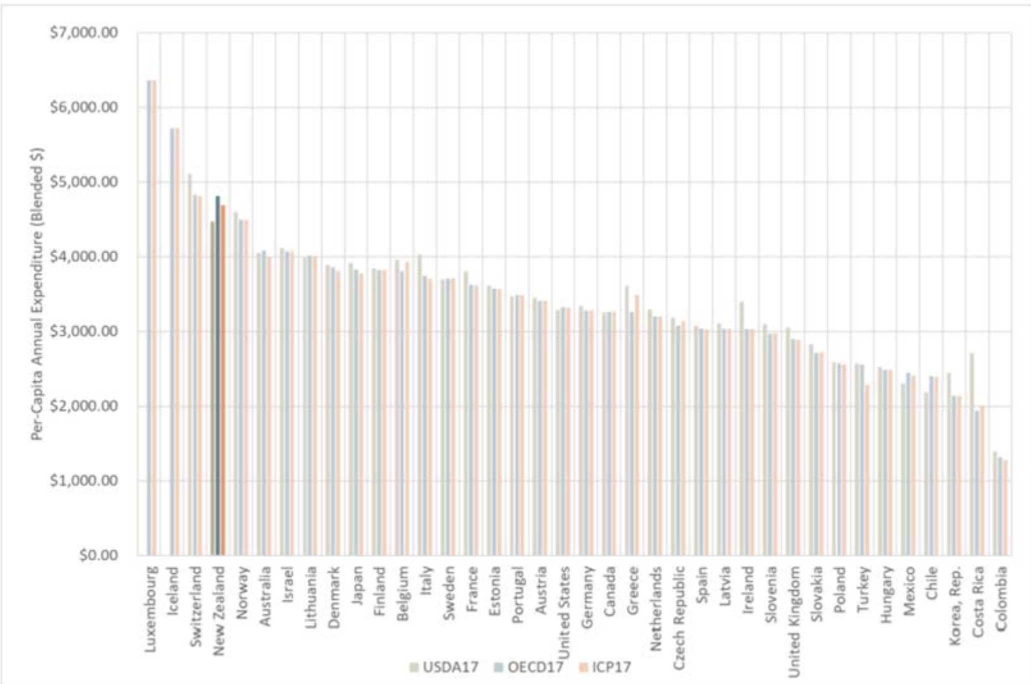
[21] Commerce Commission, Final report, at 3.91. The Commission considers this conclusion to be the most reliable evaluation of international prices due to the use of official data sources and a blended approach using market exchange rates and purchasing power parity (each where appropriate) to compare international prices.

Figure 7: Percentage difference in food, beverages, and tobacco prices compared to New Zealand (NZ =0 0, blended approach, 2017)



Source: Commission analysis of ICP and OECD datasets.[133]

Figure 8: Per capita expenditures on food, beverages (alcoholic and non-alcoholic) and tobacco (blended approach, $, 2017)



Source: Commission analysis of ICP, OECD and USDA datasets.[134]

24. When compared to countries with similar demand and supply factors, namely Australia,

Finland, Iceland, Ireland, and Israel,[22] New Zealand still had a higher price than average, and was more expensive than Australia, Finland, and Ireland regardless of whether alcohol and/or tobacco was excluded.[23]

Innovation and investment in New Zealand's grocery retail market is low compared to overseas

25. In a workably competitive market, firms will invest and innovate to meet consumer demands and earn profits in the future. Where there are opportunities for innovation and investment to deliver high margins or profits, firms would be expected to compete for the potential profits these innovations bring.

26. The Commission's report noted that the scale and pace of innovation in New Zealand has been less than might be expected in a workably competitive market:[24]

    - The major grocery retailers appear to be largely adopters of other retailers' or suppliers' innovations rather than generating their own innovations
    - Their buying power can also weaken suppliers' incentives to invest in new products
    - The benefits of supply chain efficiencies may not be shared with consumers to the same extent as would be likely if competition was stronger
    - Some of the major grocery retailers have been slow to introduce online sales channels
    - Global innovations in food retailing have been rapidly advancing – such as developments of robotic fulfilment centres and drone delivery[25] – but these are yet to be adopted in New Zealand.

27. The Commission suggests that the slow innovation pace of major grocery retailers is likely due to lower than expected competition not driving innovation pressure, not New Zealand's size or location. Evidence supporting this view are that major retailers have been matching innovative offerings by other retailers such as meal kit providers and online-only retailers.[26]

There has been no major new entrant into New Zealand's retail grocery sector recently

28. No large-scale retail grocer with an offering comparable to PAK'nSAVE, Countdown or New World has entered the sector in the last decade.[27] In 2006, the Warehouse launched Warehouse Extra, a chain of hypermarkets which included grocery offerings. Plans to continue with the format were abandoned in 2008 and stores were converted to the standard stores.

29. Recently, Costco has confirmed that it intends to open a store in Auckland in 2022, and it appears to be actively looking for store sites in Christchurch and Wellington, although this may depend on the success of its Auckland store.[28] Costco's entry is likely to place

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[22] Commerce Commission, Final report, at 3.133.

[23] Commerce Commission, Final report, at 3.133-3.135.

[24] Commerce Commission, Final report, at 3.218.

[25] For example: Mike Troy, Abby Kleckler and Lynn Petrak "2020 Grocery Innovation Outlook" (1 February 2020) Progressive Grocer https://progressivegrocer.com/2020-grocery-innovationoutlook.

[26] Commerce Commission, Final report, at 3.221.

[27] Commerce Commission, Final report, at 2.27.

[28] Commerce Commission, Final report, at 2.29.

some limited constraint on the major grocery retailers in the areas it is present. However, its prospects to establish a national store network appear very limited and its offerings are differentiated from the major grocery retailers.

Competition in the retail grocery sector without any intervention

30. Consistent with the outcomes above, the Commission has found that competition in the retail grocery sector in New Zealand is not currently working well for consumers.

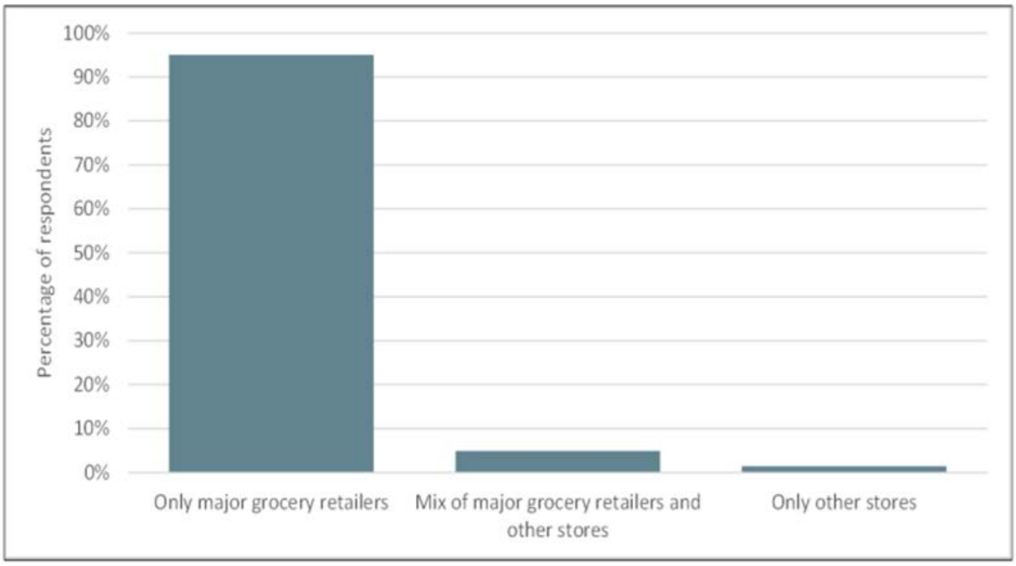
31. The retail grocery sector is characterised by a duopoly of two major grocery retailers (Foodstuffs and Woolworths), who are each other's' closest competitors. The strategies of the major grocery retailers – and their brand differentiation – are nationally co-ordinated, resulting in little competition on price dimensions except for promotional price competition, which is often driven (and funded) by suppliers.

32. While there are many smaller fringe retailers, these have a limited impact on competition. The competition that does occur between major grocery retailers and other grocery retailers is asymmetric. Major grocery retailers constrain the other grocery retailers, but the constraint imposed by the other grocery retailers is generally limited.[29]

Major grocery retailers capture the majority of consumer shopping missions

33. More than 95% of respondents to the Commission's consumer survey indicated they use a major grocery retailer for their main shop.[30]

Figure 9: Main store choice by respondents to our consumer survey (%)



Source: Commerce Commission analysis of responses to our consumer survey.[288]

34. More broadly, most consumers use a major retailer for most of their shopping missions.[31] Approximately 60% of respondents to the survey reported only shopping at the major grocery retailers in a typical week, 40% reported shopping at a mix of major grocery retailers and other stores, and only 0.5% reported shopping exclusively at non-

[29] Commerce Commission, Final report, at 5.30 – 5.45.

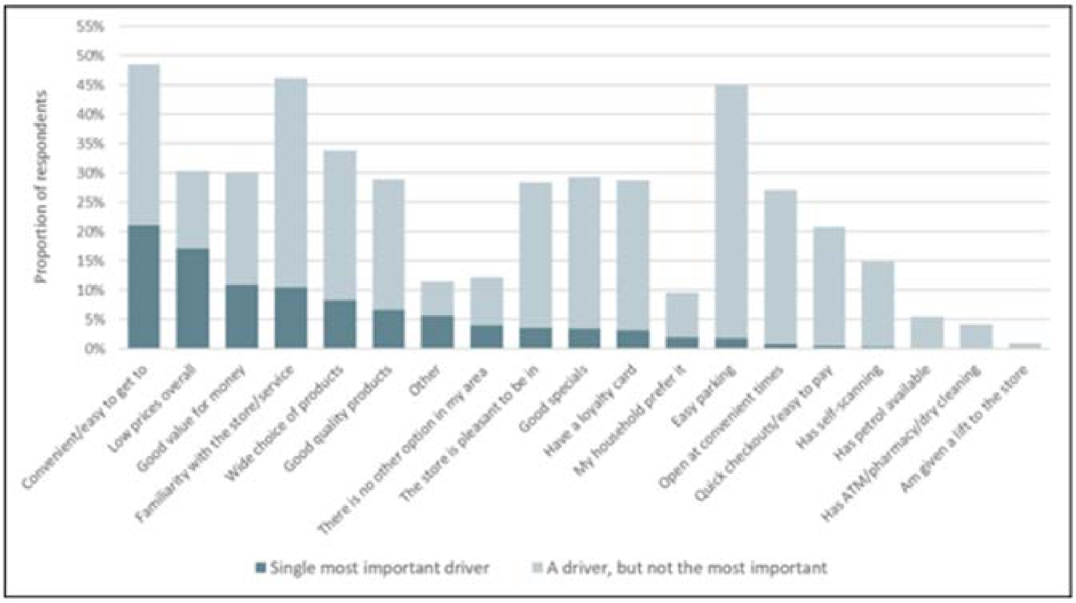
[30] Commerce Commission, Final report, Figure 4.2 page 110.[31] Commerce Commission, Final report, at 4.39.

[31] Commerce Commission, Final report, at 4.39.

major grocery retailers.[32]

35. Consumers prefer major grocery stores because they are uniquely well placed to provide the convenience of ‘one-stop’ shopping with comparatively low prices. These are key drivers of consumer shopping habits, and the ability of major grocery retailers to respond directly to these preferences means they are likely to continue to dominate shopping choices for many New Zealanders.

Figure 10: Drivers of store choice in New Zealand



Source: Commerce Commission analysis of responses to our consumer survey.[301]

Major grocery retailers are well placed to compete on convenience and price for consumer spend

36. Major grocery retailers are uniquely placed to cater to consumer preferences for convenience. They have large stores which stock a wide range of grocery products, enabling consumers to do one-stop shopping. Additionally, major grocery retailers have a clear brand identity, which influences consumers’ perceptions of store familiarity.[33]

37. Major grocery retailers are also able to cater to consumer preferences on price, with their significant buying power enabling them to offer lower prices. Other grocery retailers have difficulty matching the major grocery retailers on price across the full range of products.[34]

38. Other grocery retailers tend to focus on the non-price dimensions, such as product range and quality. Examples include offering a different range of fresh produce and meat products, take-away food options, convenience/impulse products, and international foods.[35]

39. Overall, other grocery retailers do not compete strongly with major grocery retailers because they cannot target their offering to the key drivers of consumer preference –

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32 Commerce Commission, Final report, at 4.48.

33 Commerce Commission, Final report, at 4.91-4.97.

34 Commerce Commission, Final report, at 4.98-4.99.

35 Commerce Commission, Final report, at 4.86, and 5.34-5.45. The Commission notes that major grocery retailers are not consistently monitoring the prices and products carried by other grocery retailers.

convenience and price. This means there is a low likelihood that a significant number of consumers will shift their grocery spend away from a major grocery retailer to one of the other grocery retailers.[36]

Major grocery retailers hold high market share

40. The Commission has determined that the major grocery retailers have a high proportion of market share, with "most annual estimates of combined shares ranged from 80% to 90% and the lowest estimates of their combined market share were from 70% to 80%."[37]

41. This market share is persistently high and relatively stable over time and exceeds the 60% threshold that the Commission suggests is an informal metric of a duopoly, as the major grocery retailers' market share is consistently over 70%.[38] However, the Commission is clear that a high market share between Woolworths NZ and Foodstuffs is not conclusive evidence of a lack of competition in the retail grocery market.[39]

42. What matters is that the relative stability of these market shares and the high concentration are together an indicator of market power and weak competition. This is particularly compelling because the concentration of market share has remained high despite the entry and expansion of other grocery retailers such as meal kit providers and some online-only retailers. This is further evidence that the major grocery retailers are each other's closest competitors and that other grocery retailers do not compete strongly with other grocery retailers.[40]

43. It is not clear what the market share of the online grocery market is between the major grocery retailers and the other grocery retailers. However, the Commission does not consider that consumer preferences will change at such a pace to remove the benefits of a physical 'bricks-and-mortar' store in the near future.[41]

Competition between major grocery retailers across price, quality, range and service

44. Major grocery retailers are each other's closest competitors and compete, to varying degrees, across dimensions of price, quality, range and service (PQRS). However, the Commission considers the intensity of competition to be "muted", and not reflective of workable competition.[42]

45. One reason the intensity of competition is muted is due to the major grocery retailers differentiating their product offering, often on non-price grounds. This allows major grocery retailers to partially segment the grocery market according to consumer preferences in a way that reduces their need to compete with rival major grocery retailers on price.[43]

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[36] Commerce Commission, Final report, at 4.89 and 5.26-5.28.

[37] Commerce Commission, Final report, at 5.79. The Commission noted several complexities and approximations involved in calculating market share such as the judgements on the definition of the market and the firms in the market.

[38] Commerce Commission, Final report, at 5.72 and refer to footnote 443.

[39] Commerce Commission, Final report, at 5.63.

[40] Commerce Commission, Final report, at 5.82 – 5.85.

[41] Commerce Commission, Final report, at 5.97.

[42] Commerce Commission, Final report, at 4.80-4.81, 4.84, and 5.3.

[43] Commerce Commission, Final report, at 5.118-5.125. The Commission says that "the impact of retail grocery offer differentiation on the magnitude of benefits to consumers will depend on the extent of competition between grocery stores who compete across the PQRS spectrum. This is because competitors who target a

Non-price competition between major retailers

46. Major retailers compete to ensure they meet consumers' expectations around product range, quality, and service. Some common examples include major grocery retailers adjusting product range to address the specific demographics in local markets, ensuring stock availability to provide the full range of groceries all the time, and providing online services (including delivery) with ongoing improvements in the quality of the online purchasing option.[44]

47. An example of the impact of non-price differentiation is that there appears to be very little cross-shopping between only New World and PAK'nSAVE consumers. This could be because Foodstuffs has avoided these two retail banners directly competing for the consumers with the same preferences, to better enable them to compete with Woolworths NZ.[45]

48. While brand differentiation is done at a national level, many decisions on non-price competition, such as product range, are made at the individual store rather than on a national level.[46]

Price competition between major retailers

49. Major grocery retailers' decisions on pricing and promotions tend to be made at a national level, meaning that competition at the national level is a key driver of prices.[47] This means that major grocery retailers are largely not competing on price with other grocery retailers in local markets.

50. Promotional price competition tends to be limited and temporary in nature, with the promotions by the different major grocery retailers often being staggered.[48] This sort of competition benefits consumers who prefer the discounted products and (by coincidence or deliberate effort) make purchases at the time of the promotion. It does not benefit all consumers and there may be a reliance on some consumer data collected by the major grocery retailers to inform and drive promotional practices.

51. The Commission concludes that some retail promotional activity is driven by competition between suppliers rather than between retailers as a method to generate sales. Promotions are often funded by suppliers.[49]

52. Aside from promotional pricing, evidence suggests that price competition is limited to a relatively small subset of "key value items" (KVI). A KVI is a grocery item that drives the value and price perception of a grocery retailer by consumers. The Commission's report noted that price monitoring and price competition between the major grocery

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particular segment of the PQRS spectrum have weaker incentives to compete strongly, particularly on price, with competitors who target a different segment" (5.121).

[44] Commerce Commission, Final report, at 4.83 and at 5.115.

[45] Commerce Commission, Final report, at 5.119.

[46] Commerce Commission, Final report, at 4.143-4.151 and 5.126. This means there may be more competition locally on non-price factors.

[47] Commerce Commission, Final report, at 4.137-4.142 and 5.126

[48] Commerce Commission, Final report, at 5.132-5.133. The Report discusses this matter further in Chapter 7 as the promotional practices of the major grocery retailers are examined.

[49] Commerce Commission, Final report, at 5.130-5.131. The Commission notes that retailers negotiate a range of matters relating to promotions with suppliers, including: the size of the discount from the usual shelf price, the wholesale price that suppliers will offer (namely the discount from the usual wholesale price), and the suppliers' trade and marketing spend. While retailers may contribute funds to promotions, the suppliers generally fund the majority if not all.

retailers seems to focus on these KVIs.

53. The Commission does not consider that declining real grocery prices or evidence that all price increases are not completely passed-through to consumers are indications of workable competition.[50] This is because:

- The largest driver of nominal food prices is the conditions in the relevant food production market, not the competition in the retail market
- It is expected that not all cost increases are passed on to consumers, except in limited circumstances, and this is therefore not indicative of the intensity of competition.[51]

Conclusions on price and non-price competition between major grocery retailers

54. The Commission considers that major grocery retailers are engaged in some level of competition on both price and non-price grounds. However, the Commission found that competition is muted and does not reflect workable competition.[52] This is because:

- The major grocery retailers are each other's closest competitors and have similar competitive strategies which are well known
- The price gains that might be made from more intense price competition such as promotions are limited and short term, carrying the risk of a 'price war'
- The likelihood of needing to adjust the competitive strategy to accommodate a disruption (like entry or expansion by a new competitor) is limited.[53]

Likelihood of the status quo changing without intervention

55. Without intervention, the Commission expects the situation described above (the status quo) to continue. This is because the market conditions and the outlook for major grocery retailers are relatively stable due to:

- Demand for groceries, which are a consumer staple, is relatively stable and predictable compared with other industries
- The conditions for entry and expansion (notably, lack of access to suitable sites and to wholesale supply) appear to be entrenched. Section 1.2 discusses these barriers, which are central to the problem definition
- Absent a significant entry event, major retailers will continue to enjoy cost advantages in the acquisition and distribution of groceries, which limits the ability of smaller retailers to compete directly on price
- The major retailers themselves expect profits to continue to be well above normal return (as evidenced in Figure 6 above).

56. Entry (or expansion) by a retailer able to operate on a similar scale to the incumbents is the most likely way to materially increase competition in the market. The Commission assesses the likelihood of this happening as low under current market conditions is not

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50 Commerce Commission, Final report, at 5.19-5.24. These were two assertions raised by the major grocery retailers.

51 Commerce Commission, Final report, at 5.19-5.24.

52 Commerce Commission, Final report, at 5.148.

53 Commerce Commission, Final report, at 5.148.

aware of any factors which are likely to change the current lack of competitively priced wholesale for a full range of groceries.[54] The barriers to competition improving under the current market settings is evidenced by recent closures of two online-only retailers, This Local Piggy and The Honest Grocer, in May 2022.[55]

57. Certain practices affecting consumers may lessen without further intervention. For example, the major grocery retailers have indicated a willingness to discontinue use or enforcement of covenants affecting site availability and said they intend to decrease promotional pricing and increase long-term low price strategies (which are easier for consumers to assess and compare). However, while these are positive competition-enhancing steps, it is unlikely that competition in this sector will materially improve without more significant interventions and actions.

What regulatory systems are already in place?

New Zealand's competition regulatory system

58. The Commerce Act 1986 (**the Act**) is part of the Competition Regulatory System. The purpose of the Commerce Act is to promote competition in markets for the long-term benefit of consumers within New Zealand. The Act protects the process of competition, or if competition is limited, provides for regulation for outcomes that are consistent with competition. The main prohibitions in the Act applicable to the grocery sector relate to:

- Anticompetitive arrangements between parties – arrangements that substantially lessen competition (section 27), land covenants that substantially lessen competition (section 28), and agreements between competitors containing cartel provisions (sections 30-33)
- Anticompetitive conduct by single firm – taking advantage of substantial market power (section 36) and resale price maintenance (sections 37-42)
- Anticompetitive mergers or acquisitions that substantially lessening competition (section 47).

59. The Commerce Amendment Act 2022 reforms the prohibition in section 36 and strengthens the Act's operation. For example, it will:

- Strengthen the cartel prohibition / offence to include land covenants where the parties are competitors (sections 30-33). The application of the Act to 'land' is also clarified
- Reform section 36 to redefine the prohibited conduct by a firm with substantial market power to being that which has the purpose, effect or likely effect of substantially lessening competition
- Raise the penalties for anticompetitive mergers or acquisitions.

Consumer and commercial regulatory system

60. The Fair Trading Act 1986 and Consumer Guarantees Act 1993 are part of the Consumer and Commercial Regulatory System, which aims to enable consumers and businesses to transact with confidence. This system helps consumers to:

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[54] Commerce Commission, Final report, at 5.92-5.100, and 6.24.

[55] Accessed from Newsroom.co.nz on 5 May 2022: ['Heartbreaking': Grocery Start-Ups Close and Retrench In Shadow of Dominant Supermarkets | Newsroom]

- Access and understand information to inform their purchasing decisions
- Be protected from high levels of detriment from actions outside of their control
- Access appropriate avenues for redress if their expectations are not met.

61. The Fair Trading Act 1986 applies to the retail sale of groceries and any advertising, promotional prices, or loyalty schemes associated with the sale of groceries. Some of the key provisions of the Fair Trading Act 1986, in relation to the grocery sector, include:

    - Restrictions on unfair contract terms in standard form consumer contracts
    - Prohibitions against misleading and deceptive conduct
    - Prohibitions against false or misleading representations, including with respect to price
    - Specific prohibitions against advertising goods for supply at a price that the person does not intend to offer or offering gifts, prizes, or free items in connection with the supply of any goods without the intention of provide these as offered.

62. The Fair Trading Amendment Act, which passed in August 2021, introduces new protections for vulnerable businesses against unconscionable conduct and unfair contract terms in business-to-business contracts, although the latter only applies to contracts below a $250,000 value threshold on an annual basis.

Fitness-for-purpose of the regulatory systems

63. MBIE has primary responsibility for maintaining, monitoring, evaluating and improving the regulatory systems above. MBIE is accountable to the Minister of Commerce and Consumer Affairs for the competition and consumer and commercial regulatory system.

64. Regulatory charters and systems assessments are publicly available on MBIE's website. The last regulatory system assessments were completed in June 2017, and these are expected to take place every five years. The 2017 system assessments found the regimes to be generally fit for purpose.

Related government regulations

Consumer data right

65. The Government has agreed to establish a consumer data right, similar to that implemented in Australia. A consumer data right is a mechanism that requires data holders to share consumer data with third parties with consumers' consent. This could improve consumer welfare by giving consumers access to a wider range of products and services that better meet their needs, as well as providing benefits for the wider economy by improving productivity, incentivising innovation and facilitating competition.

66. The consumer data right will be applied to individual sectors using a designation model. In the future, subject to the designation of sectors, the consumer data right may have some implications for the retail grocery sector in relation to consumer loyalty schemes, and the management and use of data in the grocery sector.

Reform of the Resource Management Act 1991 (RMA)

67. The Government has stated that the RMA has not delivered on its desired environmental or development outcomes, nor have RMA decisions consistently given effect to the principles of the Treaty of Waitangi. Government plans to repeal the RMA

and replace it with three new pieces of legislation. The three proposed acts are:

Figure 11: Components of planning law reforms

The Natural and Built Environments Act (NBA)	The Strategic Planning Act (SPA),	The Climate Adaptation Act (CAA)
The main replacement for the RMA, to protect and restore the environment while better enabling development	Requires the development of long-term regional spatial strategies to coordinate and integrate decisions made under legislation	This addresses complex issues associated with managed retreat.

68. This reform to planning law is relevant to the performance of the retail grocery sector in so far as it influences opportunities for entry and expansion of grocery retailers by enabling access to land for supermarket sites.

1.2 What is the policy problem or opportunity?

Competition in the retail grocery sector is not working well for consumers

69. The Commission has carried out extensive analysis into the state of competition in the grocery sector, and it considers that competition is not working well for consumers. We agree. As described in the section 1.1, consistently high profits by the major grocery retailers, high grocery prices by international standards, and relatively low market innovation indicate there is a lack of workable competition in New Zealand's retail grocery market.

70. The Commission characterises the retail grocery market as a duopoly of two major grocery retailers (Woolworths NZ and Foodstuffs) with a fringe of other competitors that do not have a direct influence over competition.[56] Competition is muted. This lack of workable competition results in a limited retail grocery offering to consumers and impacts the price, quality, range, and service of grocery offerings to consumers.

71. There are three main problems causing this lack of workable competition in the sector, each of which are explored in more detail below.

Figure 12: Three problems underpinning the lack of competition in the retail grocery sector

Issue one: Entry and expansion conditions are not conducive to competition	**Issue two**: There is an imbalance in bargaining power between major retailers and suppliers	**Issue three**: It is difficult for consumers to make informed purchasing decisions

72. Officials consider that issue one is the primary issue relating to competition given it directly limits the ability of additional retailers needed to improve inter-retailer competition. Issues two and three contribute to a lack of competition also but have a comparatively smaller impact on competition.

Issue one: Entry and expansion conditions are not conducive to competition

73. The Commission's thesis is that the best way to improve competition is through measures likely to improve entry and expansion:

- Entry means a new grocery retailer entering the market to compete with the major grocery retailers
- Expansion can take the form of expansion of product range, or geographic location, or expansion from another sector such as general merchandising, or expanding into different parts of the supply chain
- While there has been entry and expansion by a range of grocery retailers (e.g. online retailers), the Commission considers that entry and expansion is likely to be particularly beneficial if it relates to grocery retailers able to offer a convenient one-stop shopping option in competition with the major grocery retailers. It considers that the New Zealand market could sustainably accommodate at least

[56] Woolworths NZ and Foodstuffs NI in the North Island and Woolworths NZ and Foodstuffs SI in the South Island

one more large-scale rival and that reducing current constraints on entry and expansion would help to facilitate this additional competition.

74. The Commission identified several conditions preventing or slowing entry and expansion in the grocery sector (retail and wholesale).

A lack of supermarket site availability (solutions not considered in this RIS)

75. Because many supermarket sites are built on large footprint sites in urban or peri-urban areas, there are a limited number of sites that are viable for supermarket development. A requirement for successful entry and expansion on a regional or national basis is access to suitable sites in areas where existing grocery retailers are present.

76. The Commission identified two conditions of entry and expansion that may impact site availability or development – planning regulations and restrictive covenants and exclusivity covenants in leases.[57]

77. Planning regulations, created under the Resource Management Act 1991 (**RMA**) (which has been reviewed and reforms are underway), can set limitations on land-use through District Plans and Regional Plans, which can have the effect of stopping, or delaying the development of a site for a supermarket. The consenting process is also costly, time consuming and uncertain. Additionally, the RMA provides for submissions on consents and appeals, which can slow the process of development. However, there are restrictions to stop these from being used for anti-competitive purposes.[58]

78. In the past, the RMA has resulted in some lengthy delays to development, and generally the RMA process can be time consuming and costly. The Commission noted that aspects of the current planning regime can impede or slow entry and expansion by grocery retailers, in the following ways:[59]

- Council zoning policies and relevant District Plans can limit the number of sites available for grocery retail
- Developments requiring resource consents or plan changes are slow and can be subject to legal challenges that take further time, costs, and may result in conditions that reduce the viability of the proposed development.
- The lack of a consistent approach to applying planning laws across territorial authorities can impede large-scale entry across the country.

79. For completeness, we note that in May 2022 Cabinet approved policies and a Bill that is intended to address the constraint placed on site availability by certain restrictive covenants on land titles, and exclusivity covenants on leases. This Bill amends the Commerce Act 1986 to directly prohibit restrictive land covenants and exclusivity covenants in leases in which any designated grocery retailer has an interest if they impede use of a site by a competing grocery retailer. The Commission identified 90 such restrictive land covenants and over 100 such exclusivity covenants, the majority of which affect sites in major urban areas – Auckland, Wellington and Christchurch.[60]

80. Although these amendments will immediately alleviate some constraints on availability of sites for entry or expansion by grocery retailers, Free and frank opinions

[57] Commerce Commission, Final report, at 6.57.

[58] Commerce Commission, Final report, at 6.62, 6.65.

[59] Commerce Commission, Final report, at 6.65.

[60] Commerce Commission, Final report, at 6.77-6.80.

Free and frank opinions

These will take longer to address and are beyond the scope of this document.

Major grocery retailers enjoy cost advantages accessing grocery supply

81. Major grocery retailers have significant cost advantages over other competitors due to the efficiencies of vertical integration (combined with their purchasing power to negotiate lower product prices) and economies of scale by spreading fixed costs across many retail stores.[61]

82. A new entrant or retailer looking to expand will need to overcome cost disadvantages to compete with major grocery retailers on price across a broad range of products while operating at smaller scale. These challenges make it hard to compete with the major grocery retailers to try and meet consumers' preferences for convenience and price.[62]

83. Further evidence supporting the impact of cost disadvantages is the view presented by Coriolis that there is no organic entry of a new "traditional supermarket"[63] in a developed grocery market. These cost disadvantages mean that new entrants tend to adopt a differentiated product offering – such as an online-only eCommerce (Supie), a 'limited assortment store' offering a range of products but fewer offerings within that range (Aldi), or as a 'wholesale club' with membership costs and (Costco).[64] However, this is a way to overcome cost disadvantages rather than indicating that economies of scale is not required for effective competition.

84. The Commission also noted that constraints on direct supply of product from suppliers, and lack of access to wholesale supply, also impedes entry and expansion.

Constraints on direct supply of groceries from suppliers

85. The Commission heard concerns about:

   - Grocery retailers pressuring suppliers to limit access to other grocery retailers
   - Instances of suppliers indicating they will only be willing to supply if the retailer does not undercut retail prices set by another grocery retailer
   - The possibility that some suppliers may decline to supply potential entrants, even without direct pressure, due to concerns about a possible response from the major grocery retailers.[65]

86. Refusal to supply has the potential to impact entry and expansion by reducing the ability of new entrants and grocery retailers to source products directly from suppliers.

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61 Commerce Commission, Final report, at 6.115.

62 Commerce Commission, Final report, at 6.122-124.

63 Defined as "Stores offering a full line of groceries, meat, and produce with at least $2 million in annual sales and up to 15% of their sales in GM/HBC. These stores typically carry anywhere from 15,000 to 60,000 SKUs (depending on the size of the store), and may offer a service deli, a service bakery, and/or a pharmacy." Other types of retailers, according to Coriolis' classification are Fresh Format (eg Farro Fresh), Limited-Assortment Stores, Super Warehouses (eg PAK'nSAVE), Other small grocery (eg Night ' Day,), Wholesale Club (eg Costco), Supercentre, Non-store/non-chain eCommerce (eg Supie). Refer to Coriolis "Post conference submission on Market study into grocery sector" (18 November 2021), page 5 at [56].

64 Commerce Commission, Final report, at 6.20.

65 Commerce Commission, Final report, at 6.185, 6.187, and 6.188.

The Commission intends to open an investigation into conduct of this nature.[66]

87. However, behaviour by retailers to limit favourable supply terms to other grocery retailers using best price clauses or exclusive supply agreements was relatively uncommon and is not having a significant impact on the entry or expansion of retailers.

Constraints on wholesale supply

88. There is currently a limited wholesale market in New Zealand for fresh produce, meat, and some international groceries but little wholesale offerings for other products. There does not appear to be any likelihood of a new entrant into the wholesale market in the near future.[67]

89. The limited wholesale market is unlikely to be as significant an issue for large new entrants, which are more likely to bring their own supply chains or invest in vertical integration. However, improved access to wholesale may assist with the early stages of entry by a large retailer or expansion by a smaller existing retailer. The Commission's view is that a large new entrant is more likely to provide meaningful competition to the current major retailers.[68]

90. A range of other retailers are offering viable businesses now without access to wholesale. However, smaller retailers face challenges providing an offering that meets customers' desire for convenience and price as they face higher costs-to-serve (due to scale/efficiencies), and the lack of access to the full range of wholesale goods at competitive prices may be hindering these firms from stocking certain products or brands that consumers expect to purchase in a 'one stop' shop (eg dry goods). This is a contributing factor for why other retailers are only providing a limited competitive constraint on the major grocery retailers.[69]

91. The Commission is of the view that the lack of wholesale supply has a material but limited impact on the conditions for entry and expansion, particularly in relation to small retailers.

Barriers posed by legislation regulating foreign investment

92. Some submitters mentioned the Overseas Investment Act 2005 is potentially making it difficult for overseas retailers to enter. Some of the possible concerns have been addressed through recent legislative reforms, including streamlining consent processes, and removing consent requirements for low-risk transactions.[70]

93. However, there is still the possibility that there are barriers to overseas investment in retail grocery, for example – submissions opposing consent by a competitor.

Challenges posed by alcohol licencing laws

94. Retailers such as the Dairy and Business Owners Group, Night 'n Day, and The Warehouse Group raised the potential for alcohol licensing laws to be a factor impacting on their ability to enter and expand in the retail grocery sector.[71]

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66 Commerce Commission, Final report, at 6.189-6.191.

67 Commerce Commission, Final report, at 6.147.

68 Commerce Commission, Final report, at 6.148-6.153.

69 Commerce Commission, Final report, at 6.154-6.157.

70 Commerce Commission, Final report, at 6. 210-6.215.

71 Commerce Commission, Final report, at 6.216.

95. The Sale and Supply of Alcohol Act 2012 limits the issuance of ‘off-licences’ to sell alcohol in a retail setting to either specialised liquor stores, supermarkets with a floor area of at least 1000 square metres or grocery stores (as defined in associated regulations). This legislation may make it difficult for some retailers to offer the full range of products that consumers want to buy in a ‘one stop’ shop given their preference for convenience.[72]

Issue two: Imbalances in bargaining power between major retailers and suppliers

96. Major grocery retailers have a significant market share across the country and are a key route to market for many suppliers.

97. The major grocery retailers each have many suppliers. Woolworths NZ has over 1,400 suppliers while Foodstuffs NI has approximately 1,850 suppliers and Foodstuffs SI has a little over 1,800 suppliers. The majority of these are small suppliers. As a result, the major retailers can often choose to change supplier and with little impact on their business. Retailers even develop products themselves through private labels, which makes it easier for the retailer to switch supplier of their private label without any impact on their grocery offering to consumers.[73]

98. For many suppliers there are few alternative buyers for their products at the same volume outside of major grocery retailers.[74] There is also little recourse for suppliers that encounter difficulties while trading with major grocery retailers.

99. The Commission’s view is that for most suppliers, and particularly smaller suppliers, there appears to be an imbalance in bargaining power in favour of major grocery retailers.[75] This appears to hold also for Māori suppliers which are a significant proportion of production in the primary sector.[76]

100. There are a few suppliers with relatively more bargaining power than others due to the nature of their product or strength of their brand. However, it is not clear that any suppliers have comparatively more bargaining power than retailers as even some strong brands are dependent on supermarkets for their supply channels.[77]

101. In its analysis the Commission points to three ways that major retailers are using their stronger negotiating position to:

- Transfer costs and risks to suppliers, despite retailers being better placed to manage them in certain cases
- Reduce transparency and certainty over terms of supply
- Limit suppliers’ ability or incentive to provide favourable supply terms to other grocery retailers (although the use of best price clauses and exclusive supply arrangements are relatively uncommon).[78]

102. The imbalance of bargaining power has a flow-on impact of reducing incentives for

[72] Commerce Commission, Final report, at 6.219.
[73] Commerce Commission, Final report, at 8.63-8.68.
[74] Commerce Commission, Final report, at 8.50-8.56.
[75] Commerce Commission, Final report, at 8.60.
[76] Commerce Commission, Final report, at 8.62.
[77] Commerce Commission, Final report, at 8.58-8.61.
[78] Commerce Commission, Final report, at 6.193-6.199 and 8.150.

suppliers to invest and innovate – including developing new products to bring to market – which should have associated benefits to food production productivity and growth. Improved food production productivity and growth should ultimately improve the prices, quality, and range of products available to consumers. However, the pressure exerted by retailers on supplier margins also has the potential to benefit consumers if those cost reductions are passed onto consumers.

Transferring costs and risks to suppliers

103. The Commission observed that costs and management of risks are often allocated to the supplier, despite the retailer being in a better position to manage these. This impacts on the business of the supplier, potentially reducing their ability to invest and innovate. Some of the costs and risks placed on suppliers include:

- Retailers seeking payments from suppliers for damaged, unsaleable, or lost stock that occurred while the retailer was in possession of the product
- Standard invoice settlement terms which include extended payment terms for retailers
- Bearing a disproportionate share of the costs and risks of promotional discounts
- Often being expected to pay for merchandising.[79]

Reducing transparency and certainty over terms of supply

104. Reduced transparency over price and non-price terms of supply can undermine the confidence of suppliers and their ability to make efficient investment decisions.

105. Some examples of this include not providing clear justification for delisting products (which was consistently raised with the Commission), slow responses to requests for price increases[80], setting off amounts against supplier's invoices without prior consent, and not committing to provide suppliers with promotional displays (even if suppliers are paying for access to in-store displays).[81] It is not clear that these examples are limited to smaller suppliers, although it is possible that some larger suppliers with strong brand recognition and alternative channels to market may be less likely to be affected.

Limiting favourable supply terms to other grocery retailers.

106. The Commission heard some examples of retailers seeking to limit the ability of suppliers to deal with other retailers, including pressuring suppliers not to supply competing stores with lower retail pricing, best price guarantee clauses, and (in rare instances) exclusive supply agreements.[82] The ability of retailers to require such terms reflect the favourable bargaining position of retailers.

Private labels

107. There is the possibility of supplier-branded products being crowded out by private label brands or squeezed by retailers in favour of their own products. The Commission is not

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[79] Commerce Commission, Final report, at 8.102-8.131.

[80] Suppliers often request price increases from retailers, for example where the supplier faces increasing input costs.

[81] Commerce Commission, Final report, at 8.132-8.149.

[82] The Commission determined it was unlikely that limiting favourable supply terms to other grocery retailers was having a significant impact on the entry or expansion of retailers.

clear whether any of the longer-term risks associated with private label products outweigh the benefits to consumers.[83]

Issue three: It is difficult for consumers to make informed purchasing decisions

108. Consumers have a set of preferences in relation to grocery shopping and need to be able to make comparisons between different retail grocery offerings to determine what will best meet their demands. Difficulty comparing retail grocery offerings means consumers are less able to make informed decisions which may reduce price competition, and mean retailers receive less accurate information about consumer preferences – making it harder for retail offerings to cater to consumer demands.[84]

109. The Commission identified that the following factors affect consumers ability to make informed purchasing decisions:

- Pricing and promotional mechanisms
- Inconsistent use of unit pricing
- Loyalty programmes.

Pricing and promotional mechanisms

110. The major grocery retailers use a range of pricing and promotional mechanisms online and in store. These include everyday low pricing (EDLP), specials and multi-buys, and member-only discounts such as club deals.

111. The Commission found that "the use of complex and/or multiple promotional mechanisms by the major grocery retailers may make it harder for consumers to compare prices of products in store". This may hinder consumers from making purchases that best reflect their preferences, with the flow-on impact of providing inaccurate information to retailers and making price competition less effective in the longer-term.[85]

Inconsistent use of unit pricing

112. Unit pricing helps consumers to make informed purchasing decisions by enabling rapid comparisons between the value of different sized products, and the identification of "shrinkflation" where products are shrunk in size, quantity, or quality, while prices remain the same or increase.[86] It is possible that unit pricing could also help drive competition between retailers by putting pressure on grocery retailers to compete on metrics such as value and pricing transparency.

113. Major grocery retailers often use unit pricing on their products, but this is often inconsistently applied with some differences in units used and some promotions not showing unit prices. These inconsistencies reduce the benefits consumers may derive from unit pricing, and the contribution unit pricing can make to competition.[87]

114. The Commission is of the view that "where unit pricing information is not consistently available or cannot easily be assessed and acted upon by consumers, they may be

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[83] Commerce Commission, Final report, at 8.202.

[84] Commerce Commission, Final report, at 7.3

[85] Commerce Commission, Final report, at 7.69.

[86] Commerce Commission, Final report, at 7.105.

[87] Commerce Commission, Final report, at 7.114-7.118.

less able to make informed decisions and less likely to shop around. This may reduce the major grocery retailers' incentives to engage in price-based competition."[88]

Loyalty programmes

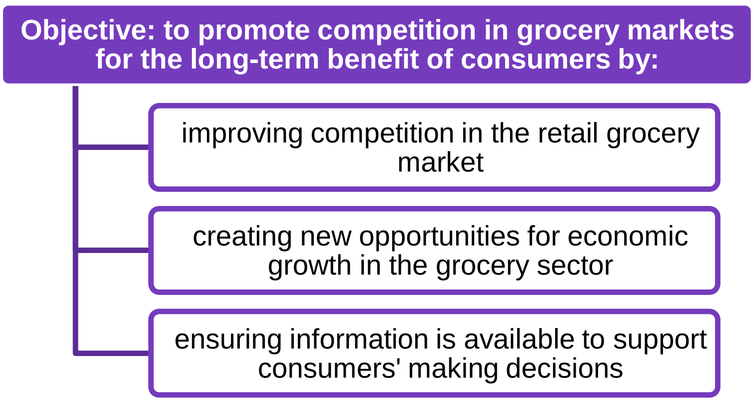
115. Loyalty programmes can provide benefits to consumers such as member-only discounts and other rewards. However, complex reward structures, and unclear data collection and use policies confuse consumers. If consumers have a limited understanding of complex rewards structures, this can shift consumers' focus away from making price and quality comparisons, instead focusing on rewards-based offers.

116. Consumers with certain data and privacy preferences may not make purchases that reflect their preferences if they do not know how their data is collected and used.[89]The Commission notes that these are "issues for consumers that also have the potential to affect consumer decision making and competition if consumers with privacy and data preferences are not able to make informed decisions about their participation in these programmes. Competition for these consumers will be inhibited."[90]

1.3 What objectives are sought in relation to the policy problem?

117. The overall objective sought in relation to this policy problem is to ***promote competition in grocery markets (both the retail market, and the supply of goods to the retail market) for the long-term benefit of consumers within New Zealand.*** Achieving this objective would result in competition benefits to consumers. Underneath this objective are three sub-objectives:

Figure 13: Objectives relating to this policy problem



88 Commerce Commission, Final report, at 7.119

89 Commerce Commission, Final report, at 7.128.

90 Commerce Commission, Final report, at 7.157.

Section 2: Deciding upon the options to address the policy problem

2.1 What criteria will be used to compare options to the status quo?

118. Based on The Treasury's 'Best Practice Regulation: Principles and Assessments (February 2015), the following six criteria will be used to compare the different options:

Figure 14: Criteria used in this Regulatory Impact Statement

1. Enabling competitive markets	• Enabling a competitive retail grocery markets, at both local and national levels. • Enabling a competitive grocery sector, including the market for the acquisition of grocery produce from primary producers, manufacturers, and suppliers
2. Ability to support economic growth / efficiency	• Encouraging innovation within the grocery sector. • Encouraging investment and initiatives that will enhance productivity and enable economic growth across New Zealand. • Ensuring that the sector operates efficiently.
3. Proportionality	• Regulation is proportionate given costs and benefits and provide a proportionate impact on consumers, retailers and suppliers in relation to levels of benefit or cost.
4. Durablilty	• Regulation is up-to-date with current industry and regulatory practice, and are cognisant of expected future context. • Changes are flexible over time and improve in response to feedback received.
5. Certainty	• Intervention is predictable and understandable for government and market players to minimise uncertainty and manage risks. • Consistency with other regulatory regimes. • Any decision-making criteria are clear and provide certainty of process.
6. Timeliness	• Changes or regulations can be implemented in a timely manner.

119. No criterion will be given greater weighting than another criterion in the options analysis (refer to Section 2.2, below).

120. However, there is some inherent overlap between the criteria and some potential trade-offs between different criteria.

121. An example of overlap is that two of the six criteria - enabling competitive markets and ability to support economic growth – overlap and link directly to the desired objective (refer to Section 1.3 above). We consider that having a full 1/3 of the criteria focused on economic objectives is appropriate.

122. In terms of how these two criteria overlap, we argue that improved competition generates opportunities for economic growth by signalling opportunities for profits where firms should focus investment and innovation.

123. There are also some trade-offs between criteria. For example:

- An option that provides high levels of certainty over time because it is consistent and less likely to change may be less durable for those very same reasons because it may not have the flexibility to change to potential changes over time.

- An option that is timely and can be implemented rapidly may also be less certain and efficient because it the details may not be well understood by the relevant stakeholders (such as the major retailers) if they have not had time to prepare for the change.

2.2 Summary of options

What scope are options being considered within?

124. The options considered to address the problems in section 1.3 are split out by the competition problem they seek to address and are based on the feasible options identified by the Commission in its market study.

125. Note that some of the Commission's final recommendations are not considered as part of this options analysis because they are being, or have been, progressed under different legislation, or through a different policy process. These include:

- Improving access to sites through planning law – this is being progressed under the RMA reforms being led by Ministry for the Environment (MfE) to ensure changes made to support competition are consistent with the new purpose and structure of reformed planning laws
- Prohibiting restrictive and exclusive covenants that inhibit retail grocery store development – Cabinet approved policies and a Bill to this effect (amending the Commerce Act 1986) in May 2022
- Reviewing whether the Overseas Investment Act and Sale and Supply of Alcohol Act unduly impede entry of expansion – the impacts on grocery competition will be considered in the next review of the Sale and Supply of Alcohol Act (no review of the Overseas Investment Act is currently planned)
- The design of a mandatory unit pricing regime – a separate public consultation document is being progressed.

126. Recommendations to establish a regulator and dispute resolution scheme, and undertake a review in three years, are considered under the implementation, monitoring and evaluation sections below.

Options considered by MBIE in this document

127. To address the three competition problems noted above, MBIE is considering the following options presented by the Commission in its final report as they relate to the three problem areas identified in section 1.3. Collectively the options explored below contribute to addressing these three issues and enhancing competition in the retail grocery sector for the benefit of consumers (our overall objective in this paper).

Figure 15: Categories of options and how they relate to the issues identified

Issue one: Entry and expansion conditions are not conducive to competition	**Issue two:** There is an imbalance in bargaining power between major retailers and suppliers	**Issue three:** It is difficult for consumers to make informed purchasing decisions
- Improving conditions for entry and expansion - access to groceries	- Address imbalances in bargaining power between major grocery retailers and suppliers	- Improving the ability of consumers to make informed decisions

Improve conditions for entry and expansion – access to groceries

- **Option 1.1** – Counterfactual

- **Option 1.2** – Regulatory oversight of wholesale supply **(preferred)**
- **Option 1.3** – Regulated wholesale access
- **Option 1.4** – Non-regulatory option to monitor strategic conduct by major grocery retailers with suppliers **(preferred)**
- **Option 1.5** – Prohibit supplier terms that limit competition.

Address imbalances in bargaining power between major grocery retailers and suppliers

- **Option 2.1** – Status quo
- **Option 2.2** – Introduce a voluntary, non-enforceable, grocery code of conduct
- **Option 2.3** – Introduce a mandatory grocery code of conduct **(preferred)**
- **Option 2.4** – Develop an exception from Part 2 of the Commerce Act 1986 to allow for collective bargaining **(preferred)**
- **Option 2.5** – Amend value cap and allow private action in relation to the Fair Trading Act for the grocery sector (Recommendations 8A & 8C) **(preferred)**
- **Option 2.6** – Amend the mechanism for imposing penalties and other remedies in relation to the unfair contract terms regime for the grocery sector in the Fair Trading Act (Recommendation 8B).

Improve ability of consumers to make informed decisions

- **Option 3.1** – Non-regulatory option to monitor existing steps by major grocery retailers to enhance information for consumers **(preferred)**
- **Option 3.2** – Mandate simplified pricing and promotional practices
- **Option 3.3** – Mandate the consistent use of unit pricing **(preferred).**

128. Each of these options sets are explored in further detail below, noting where there are interdependencies between different options above. Section 2.3 considers each of the options above against the criteria presented in section 2.1 above.

Options to improve conditions for entry and expansion – access to groceries

129. The Commission identified a problem for independent grocery retailers, particularly smaller retailers, in accessing a full range of groceries at competitive prices. To address this, MBIE has considered the following options at two levels of the supply chain:

- **Option 1.1**: Counterfactual

Options for wholesale supply of groceries by major grocery retailers

- **Option 1.2**: Regulatory oversight of wholesale supply **(preferred)**
- **Option 1.3**: Regulated wholesale access

Options for the direct supply of groceries from suppliers

- **Option 1.4**: Non-regulatory option to monitor strategic conduct by major grocery retailers with suppliers **(preferred)**

- **Option 1.5**: Prohibit supplier terms that limit competition.

Interaction between the options

130. The options for intervention for wholesale supply by major grocery retailers and direct supply of groceries from suppliers are not mutually exclusive.

131. There are significant efficiencies from vertical integration. This includes the retailer being able to collaborate with suppliers:

    - On merchandising strategies and promotions
    - By providing demand forecasting to support alignment with the suppliers' capacity and production
    - To curate product range based on the suppliers' brand (e.g. 'green'), customer demand and to support new product offerings
    - To support resilience of the supply chain, including during disruptions.

132. If commercially feasible, most grocery retailers seek to develop direct relationships with suppliers. As such, the options for wholesale supply may provide a stepping-stone for a new entrant grocery retailer until it develops scale and develops those direct supply relationships. However, for smaller grocery retailers, wholesale supply options may provide a longer-term solution to enable them to provide more competitive offerings on price.

Interaction with options dealing with other problems

133. These options also interrelate with options dealing with other problems, including those relating to:

    - Site accessibility (not covered by this RIS)
    - Contractual arrangements with suppliers, such as supply terms relating to:
        i. Promotional discounts
        ii. Payments for merchandising – stocking on shelves and product displays
        iii. Payments for damaged, unsaleable, or lost stock.

134. This interrelationship will be considered in the next section of the RIS when developing the preferred package of options.

Option 1.1 – Counterfactual

135. This option considers the current ease of access to groceries and the potential for improvements from direct supply, existing wholesalers, and potential wholesalers.

136. Some independent grocery retailers negotiate directly with a large number of suppliers and arrange distribution, which may include the operation of their own warehouses and distribution centres. In favour of this:

    - There is some concentration in grocery supply markets which could mitigate the transaction costs for a grocery retailer of contracting directly for a basic product range. For example, for Foodstuff NI, 90% of sales relate to 228 suppliers and for Foodstuffs SI, 90% of sales relate to 198 suppliers, but for both over 1,600 suppliers make up the remaining 10% of sales.

- There are some large suppliers who can support ‘direct store’ delivery, such as Tip Top Bakeries, Coca-Cola, Frucor, Fonterra, Goodman Fielder and Unilever.

- Large multinational grocery retailers may enter the New Zealand market with their own international supply chain and relationships with overseas suppliers.

137. Against this:

- Suppliers may not wish to deal with many retailers, particularly for small volumes. Minimum order quantities may apply. There may also be some reluctance or contractual constraints on suppliers’ ability to deal with other grocery retailers.

- A full product range retail grocery offering is likely to require access to domestic brands and products preferred by New Zealand consumers, meaning that an overseas supply chain is not a close substitute.

138. Current wholesale options for a full range of groceries at competitive prices and associated services in New Zealand are limited.

139. There are independent wholesale options for some product categories:

- fresh produce (T&G Fresh, Fresh Direct and MG Marketing)

- Meat (JR Wholesaler Meat, Wholesale Meat Distributors)

- International – Indian, Chinese, Korean foods

- Some globally branded products (e.g confectioneries, tobacco).

140. The major grocery retailers also own and operate firms which perform wholesale functions:

- Woolworths NZ owns Wholesale Distributors Limited, which is the franchisor to 71 locally owned and operated SuperValue and FreshChoice stores. It also provides wholesale to some Pacific Island and has a supply arrangement with Night ’n Day.

- Foodstuffs SI and Foodstuffs NI own Trents Wholesale and Gilmours (respectively). These wholesalers primarily supply the hospitality and foodservice channel, and this is reflected in their limited product range. They also supply some convenience retailers (e.g. dairies and petrol stations), however, at comparatively higher prices (on average over 40% more expensive than the lowest retail price).

141. However, the Commission considers that the major grocery retailers are unlikely to provide a significant wholesale supply offering to independent retailers under the status quo. This is because:

- The major grocery retailers would have limited incentives to supply potential retail to competitors. For example, Foodstuffs does not permit grocery resellers to shop at Pak’nSAVE.

- The independent retailers would be reluctant to rely on the major grocery retailers due to:

    i. the supply is unlikely to be at prices that would enable them to be competitive

    ii. security of supply may be an issue, with the supplier having the ability to withdraw or limit supply at any time

iii. the supplier could use information on quantity, range and price of goods ordered to inform its own retail strategy.

142. Potentially some foodservice wholesalers could pivot to wholesale supply (given their investments in distribution centres, logistics and transport):

   i. Bidfood has distribution centres and processing facilities at over 17 regional locations from Whangarei to Invercargill, with over 450 trucks on the road everyday delivering a range of over 20,000 products.

   ii. Service Foods has 11 branches across New Zealand, with over 125 trucks delivering a range of over 4,000 imported and 8,000 locally produced products.

143. But many of their products are sold in formats that are not suitable for grocery and they are unlikely to obtain competitive prices due to low purchase volumes. Costco is an emerging entrant that supplies to business customers, but it is also likely to only sell a limited range of products.

144. Coriolis says that there are no 'independent grocery wholesalers' in the world. They are either 'cooperatives' or 'captives' (i.e. dependent on specific retailers). This reflects the significant efficiencies from vertical integration.

145. The Commission concludes, and we agree, that they are not aware of any factors which are likely to significantly change the current lack of competitively priced wholesale for a full range of grocery products and brands in the New Zealand grocery sector.[91]

Wholesale supply of groceries by major grocery retailers

Option 1.2 – Regulatory oversight of wholesale supply (preferred)

Commerce Commission's recommendation 3

146. This option would involve establishing a regulatory framework for oversight of wholesale supply by the two major grocery retailers. The three main elements of this regulatory framework are to:

- Require the major grocery retailers to consider all requests for commercial wholesale supply in good faith. There would be no obligation to supply, but all requests would be notified to the grocery regulator, along with the outcome of any requests and, if declined, a summary of the retailers' reasons for declining to provide supply.

- Require the major grocery retailers to put in place and disclose principles and terms and conditions of wholesale supply. That is, the major grocery retailers would be required to:

   i. put in place formalised rules, criteria, and procedures for considering requests for wholesale supply

   ii. put in place standardised terms and conditions of wholesale supply, or, to the extent that particular terms and conditions (such as price) are not standardised, put in place principles for determining how such terms and

[91] Commerce Commission final report, para 6.147.

conditions will be decided, and

iii. provide these to the regulator, and to any person who requests them for the purpose of considering or making a request for commercial wholesale supply.

- Establish a formal dispute resolution mechanism for wholesale supply disputes. The dispute resolution mechanism:

i. should be fast, low cost, and impartial

ii. consider matters such as: whether the wholesale supplier considered requests for wholesale supply in good faith (particularly when it declines to provide supply), as well as other matters such as disputes over order fulfilment or delivery

iii. if it was found that the supplier did not consider a request in good faith, it could be required to reconsider a request (and be subject to financial penalties or other remedies if it did not) but could not be ordered to provide wholesale supply

iv. to avoid costly and complex supply disputes, disputes would not extend to the price or quantity of any actual or proposed supply agreement

v. should be empowered to share aggregated information on disputes with any grocery regulator and how well commercial arrangements are operating. The regulator could then report to the Government on the success or otherwise of commercial wholesale agreements, including making recommendations for further regulatory intervention, if it considered that appropriate commercial arrangements were not being reached.

147. The major grocery retailers have indicated a willingness to provide wholesale supply under this arrangement. Following publication of the Commission's draft report:

- Woolworths NZ stated that it has an open mind toward voluntarily negotiating commercial wholesale supply contracts with other grocery retailers. For example, Woolworths Australia has recently entered the wholesale market entering into a long-term wholesale supply agreement with Caltex (now Ampol) and is in the process of scaling up its business-to-business operations.

- Foodstuffs NI and SI said they are exploring how they could put together commercially attractive offers to supply products to other grocery retailers.

148. Critical for the major grocery retailers is that the obligations do not impact on the efficiencies of their own vertically integrated business operations. Confidentiality [redacted]

149. Some other stakeholders question whether this regime will lead to wholesale supply at competitive prices.

Does this option address the problem?

150. This option would increase transparency and predictability regarding the development of commercial wholesale arrangements and provide independent grocery retailers a cost-effective means to have disputes heard. The measures proposed would be low cost, and unlikely to discourage major grocery retailers from offering wholesale supply

of groceries for resale.

151. This option may provide a stepping-stone for a new entrant grocery retailer until it develops scale and develops those direct supply relationships. For smaller grocery retailers, it may provide a longer-term solution to enable them to provide more competitive offerings on price.

152. However, there will be some complexities to be worked through by the major grocery retailers and independent retailers in developing commercial wholesale arrangements. For example:

- Negotiating commercial pricing arrangements, including the treatment of promotional pricing conditions in existing contracts between suppliers and the major grocery retailers. Promotional prices are price reductions borne by suppliers to promote their products in competition with other suppliers in their product category. Promotional pricing arrangements are a significant reason why the major grocery retailers can retail at lower comparative prices. Suppliers would need to be involved in decisions about whether promotional pricing could be passed on to other retailers. The Commission notes that under this option, suppliers may choose to directly enter promotional funding relationships with independent grocery retailers, or in some cases may permit pass-through by the wholesaler.

- Putting in place information barriers between the wholesale unit and the retail strategy arm of the major grocery retailers' businesses to protect the independent grocery retailers' commercially sensitive information.

153. The benefit of this option is that if these commercial wholesale arrangements do not develop in reasonable timeframes, the transparency mechanisms outlined should alert the Government to this outcome and allow it to consider further regulation. For example, further intervention may be considered if wholesale offerings by the major grocery retailers are uncompetitive and/or there is a high incidence of refusals to supply or disputes.

What impacts does this option have and does it address the objective?

154. This option could promote competition through two means:

- Provide a new channel for independent grocery retailers, particularly small or niche alternative format retailers, to access a full range of groceries at one place. Free and frank opinions [redacted]

- Potentially strengthen competition between the two major grocery retailers as wholesale supply may provide a means to achieve additional scale economies and spread fixed costs over larger volumes. If wholesale supply is able to be provided efficiently at low cost, this diversification of business could be a service where the major grocery retailers compete with each other.

Option 1.3 – Regulated wholesale access

This option was considered by the Commission, but not recommended

155. Access regulation is a form of economic regulation designed to provide access to an essential input provided by a vertically integrated firm to facilitate competition in downstream or related markets. The Commission outlines that access regulation may come in many forms, including:

- Detailed regulation that seeks to base access terms on the access provider's costs and an allowable return on its investments; or

- Lighter-touch regulation that avoids price or earnings control and instead aims to increase the viability of actual and potential competitors.

156. The Commission concludes that the lack of any 'essential facility' or 'natural monopoly' characteristic means that grocery wholesaling is not the type of industry ordinarily regarded as potentially amenable to access regulation. For example, the Commission found that warehousing and distribution logistics were duplicable or available for supply from third parties. In addition, often these factors were bypassed, with suppliers delivering their groceries directly to stores. The boundaries between 'wholesale' and 'retail' were often difficult to define.

157. Rather, the comparative advantage of 'economies of scale' that is enjoyed by the major grocery retailers largely arises through their relationships with suppliers and consumers preference for one-stop shopping. Applying access regulation to 'wholesale supply of groceries' would raise the risk of overriding suppliers' freedom to contract and their own promotional and marketing arrangements.

158. Also as indicated above, there are significant efficiencies from vertical integration. Buying arrangements and logistics are optimised to focus on retail product-offerings. The sector is dynamic, involving a large and diverse range of product offerings. Significant intervention could disrupt existing efficient vertical integration efficiencies, operational efficiencies, efficiencies of scale and scope, dynamic efficiency, and introduce significant additional costs which could be passed on to consumers in higher grocery prices.

159. A further complicating factor is the diversity of grocery retail business formats and that access to groceries is unlikely to be 'one-size fits all'. Retailers are likely to seek to differentiate their retail offerings and will want to customise the price, range and quality of grocery products purchased. Most large retailers would seek to develop their own supply chains, meaning any demand for wholesale access would be short term, if used at all.

160. Given these and other factors, the Commission recommended against imposing substantive access regulation *at this time*. It considered other more proportionate low-cost options should be tried and tested first. As such this option is not well developed in its final report.

161. Drawing on the Commission's draft report, submissions to the Commission and applying on our own assessment, we have fleshed out some high-level elements of what a regulated wholesale access regime may cover for the purposes of this impact assessment.

162. Confidential advice to Government

Confidential advice to Government

163.

164.

165.

166. We have not consulted on this option, and if this was to proceed, further work and consultation would be desirable. However, we can gauge high-level stakeholder views on this regime from the submissions to the Commission's proceedings.

167. The major grocery retailers raised several concerns that the Commission considered appeared to be well-grounded. Given the lack of any essential facility or natural monopoly characteristic, and the diverse range of grocery products, such a regulatory regime would be novel and unprecedented. This would increase the design and implementation cost – and uncertainty – arising from the regulation. It would also increase the risk of unintended consequences.

168. Independent grocery retailers generally considered a regulated wholesale access regime to be 'second best' to a structural solution to competition problems in the grocery sector. This is because:

- It would require them to deal with, and be reliant upon, one of their major competitors to gain access to groceries.
- The major grocery retailers would benefit from the additional volume of wholesale supply going through their supply chains, further increasing their economies of scale and cost advantage in the sector.

169. We are not aware of major suppliers' views on this option. The New Zealand Food and Grocery Council noted that access to supply on competitive terms was likely to be a barrier to entry, but did not comment on the potential impacts of access regulation on the ability of suppliers to control their supply arrangements with different grocery retailers and different distribution channels.

Does this option address the problem?

170. In theory, this option would allow independent grocery retailers to benefit from the low retail prices that the major grocery retailers can currently offer consumers. It would enhance their ability to compete on the elements of "price, quality, range and service" spectrum for groceries.

171. Free and frank opinions [redacted]

For example, Aldi typically enters at both the retail and wholesale levels by building several stores (about 10 stores being the benchmark) as well as distribution stores to service them. It brings its overseas supply chain, supplemented by direct supply arrangements with suppliers.

172. Free and frank opinions [redacted]

What impacts will this option have and does it address the objective?

173. This option could promote competition by alternative business format retailers, particularly those competing at the fringe, such as the 3,000 or so dairies operating on the route trade (with sales of about $1.2 billion per annum)[92]. The Commission considered that small independent retailers did not impose a significant competitive constraint on the major grocery retailers, and it is unclear if regulated access to groceries would increase this constraint.

174. A regulated wholesale access regime could also disrupt the major grocery retailers' existing efficient vertical integration efficiencies, operational efficiencies, efficiencies of scale and scope, dynamic efficiency, and introduce significant additional costs. It may also reduce retail competition on price. It would require significant monitoring and regulatory oversight.

175. If the regime is to be in long-term benefits to consumers, the benefits must exceed the costs. Further work would be required to assess this. Such an option could be explored further after progressing other less-costly options or as a regulatory backstop to a voluntary access option (such as Option 1.2).

Other options for wholesale access to groceries not considered

176. The Commission considered other options to improve access to wholesale supply of groceries that is independent of the major grocery retailers (to differing extents). These options could supplement options two or three above related to wholesale access or be standalone. The options include:

- Operational separation of the major grocery retailers' wholesale and retail businesses
- Structural separation of the major grocery retailers' wholesale and retail businesses, with or without divestiture
- Facilitation of wholesale entry by the Government, such as by providing funding following a contestable procurement process or entering a joint venture.

177. The Commission defined these terms as follows[93]:

- Operational separation is where a wholesale only business unit would be

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92 Dairy and Business Owners Group submission to the Commerce Commission draft report, dated 25 August 2021.

93 Refer transcript of Commission conference, day 6.

established within each of the major grocery retailers. It would have its own leadership team, run its own budgets and accounts.

- Structural separation would take the operationally separated wholesale business unit and turn it into a company with its own board of directors. However, it could still be owned by the same shareholders as the major grocery retailer.

- Divestment is where the structurally separated wholesale business unit, potentially with or without associated retail banners and/or stores, would be sold to different owners.

178. Internationally, operational or structural separation may be introduced in regulated industries where a firm is operating simultaneously in a non-competitive (monopoly) activity and a potentially competitive complementary activity. Divestment may be used as a remedy to horizontal competition concerns where one firm has substantial market power in a particular activity, and it is technically feasible for more than one firm to carry out that activity.

179. The Commission did not recommend these options, and we agree, for the following reasons:

- There is likely insufficient demand by independent grocery retailers to support an independent wholesaler to give it sufficient scale to compete with the major grocery retailers. Some stakeholders estimated that approximate 15% market share would be necessary to achieve minimum scale, which exceeds the market share of existing independent grocery retailers (less than 10% by most estimates). Any large potential competitors to the major grocery retailers would likely seek to establish their own supply chains and not use independent wholesale on a longer-term basis.

- The major grocery retailers could be required to divest some retail stores or brands to create this demand for wholesale supply, but this would come at the expense of the substantial efficiencies from end-to-end vertical integration, from the buying relationship with suppliers through to supply to retail stores and the customer relationship. Coriolis highlighted in its submission that Metcash is the only independent grocery wholesaler in peer group countries, and it is changing its business model. The concept of an independent wholesaler (e.g. J B Rattray Ltd) has failed and would not work in New Zealand. Retail divestment could be explored further as a way of directly improving more retail competition but is not justified solely on the basis of facilitating more independent wholesale supply.

- Operational or structural separation would raise a range of practical challenges and transaction costs. The same concerns as outlined above would apply for any proactive facilitation of wholesale entry. Any procurement or joint venture process would likely be complex, potentially expensive, and could present a high risk of failure.

180. As such, we do not consider these options further as a possible solution to address the problem of wholesale access to groceries. But retail divestment could be considered in future to introduce actual competition in the sector if the current approach of removing barriers to entry and expansion to 'potential competition' is not effective.

Direct supply of groceries from suppliers

Option 1.4 – Non-regulatory option to monitor strategic conduct by major grocery retailers with suppliers (preferred)

Commerce Commission's recommendation 5

181. The Commission identified a range of conduct by major grocery retailers in their relationships with suppliers that could potentially affect the ability of independent grocery retailers to enter or expand. This includes:

- Best price clauses, or most favoured nation (MFN) clauses, which 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 other buyers

- Exclusive supply clauses, specifying that a supplier to supply products or certain brands of products exclusively to a particular grocery retailer.

182. These terms could harm an independent grocery retailers' ability to compete if they cannot access these grocery products or purchase them at comparable prices, and:

- Alternative substitute grocery products are not available in reasonable time; and

- Consumers would expect to see those products or brands in a competitive grocery retail offering.

183. However, the Commission did not find widespread use of these clauses in supply arrangements.[94]

184. Under this option, the Commerce Commission or new grocery regulator would have a role in monitoring the use and effect of these clauses in supply arrangements, but no regulation would be imposed. The nature of this monitoring function would be specified further when setting up the new grocery regulator function. The Commerce Commission may also have an enforcement role if these provisions have a material impact on competition. This option was recommended by the Commerce Commission.

Does this option address the problem?

185. Provisions in contracts, arrangements or understandings that substantially lessen competition are prohibited under section 27 of the Commerce Act 1986. Monitoring the nature and extent of use of these clauses would support effective enforcement under the Commerce Act and inform the case for further regulation if required.

What impact does this option have and does it meet the objective?

186. This option would increase transparency regarding the use of conditions in supplier contracts that may limit competition and the direct supply of groceries to independent grocery retailers. Where commercially feasible, vertical integration from supplier through to consumer relationships has considerable efficiency benefits. This could be a low-cost way to limit a potential barrier to entry and expansion.

Option 1.5 - Prohibit supplier terms that limit competition

187. Under this option, regulations could limit the use of best price or exclusive supply clauses in supplier contracts. These measures could be included in the supplier code of conduct or primary legislation.

188. The Commission did not recommend this option, and we agree. The reasons being:

- Provisions in contracts, arrangements or understandings that have the purpose, effect, or likely effect of substantially lessening competition in a market are

[94] Commerce Commission final report, paras 6.197 to 6.198, page 254.

already prohibited under the Commerce Act 1986

- There are efficiency rationales for including these clauses in contracts that would justify their use in some cases. For example:

    i. Best price clauses may reduce transaction costs between parties by reducing the need for renegotiations whenever prices fluctuate over time (e.g. due to seasonal changes in availably or quality)

    ii. Exclusivity clauses may be used if a retailer has made relationship-specific investments into a product or supplier and wants to avoid other buyers free-riding on them.

189. However, this option could be explored if monitoring indicates that the use of these clauses is harming competition.

Does this option address the problem?

190. This option could ensure that grocery retailers (being one of the majors or an independent) are not prevented from accessing certain groceries or negotiating competitive prices. But the Commission did not find widespread use of these clauses, so their prohibition may make little difference in practice.

What impact does this option and does it achieve the objective?

191. There are efficiency rationales for the use of these clauses in supply contracts. A blanket prohibition could undermine some procompetitive arrangements for investment.

Other options not considered

192. The Commission considered whether the major grocery retailers have engaged in any strategic acquisitions of suppliers or brands that would have the effect of foreclosing these groceries to other retailers.

193. However, the Commission did not find any recent or systematic acquisitions (or attempts) that would support further intervention. Acquisitions that substantially lessen competition are already prohibited under section 47 of the Commerce Act 1986. We agree with this conclusion. Therefore, options to strengthen the prohibition or the Commission's voluntary clearance regime, such as by requiring the major grocery retailers to notify the Commission of any planned acquisitions relating to the grocery sector, have not been considered.

Address imbalances in bargaining power between major grocery retailers and suppliers

194. The Commission's view is that for most suppliers, and particularly smaller suppliers, there appears to be an imbalance in bargaining power in favour of major grocery retailers.[95] This appears to hold also for Māori suppliers who account for a significant proportion of production in the primary sector.[96] This section considers options to address these imbalances in power.

195. We are not limiting this analysis to options identified in the Commission's final report to address problems relating to an imbalance of negotiating power between certain suppliers and retailers. However, we are limiting the scope of options to problems

95 Commerce Commission, Final report, at 8.60.

96 Commerce Commission, Final report, at 8.62.

specific to the grocery retail sector.[97]

196. This section considers the following options to:

- **Option 2.1**: Status quo
- **Option 2.2**: Introduce a voluntary, non-enforceable, grocery code of conduct
- **Option 2.3**: Introduce a mandatory grocery code of conduct ***(Preferred)***
- **Option 2.4**: Develop an exception from Part 2 of the Commerce Act 1986 to allow for collective bargaining **(*Preferred*)**
- **Option 2.5**: Amend value cap and allow private action in relation to the Fair Trading Act for the grocery sector ***(Preferred).***
- **Option 2.6**: Amend the mechanism for imposing penalties and other remedies in relation to the unfair contract terms regime for the grocery sector in the Fair Trading Act (Recommendation 8B).

197. Some of the options above are mutually exclusive, namely Options 2.2 and 2.3. All options address the imbalance of negotiating power in different ways. We address these interactions in the evaluation table below.

198. There is also an interaction between any options suggesting a Code of Conduct and options for the direct supply of groceries from suppliers that prohibit supplier terms that limit the use of best price or exclusive supply clauses in supplier contracts. This interaction relates to the detail of what is in a Code of Conduct and is not discussed further in this analysis.

Option 2.1 – Status quo

199. This option would allow the status quo to persist, where there is a lack of competition for the acquisition of groceries. The current imbalance of negotiating and bargaining power between the major grocery retailers and their suppliers would be expected to continue.

200. Notably, the major grocery retailers have ‘supplier charters’, relatively high-level documents setting out the principles and expectations of major grocery retailers.[98] Neither of the supplier charters have an independent dispute resolution process, something the Commission indicates is needed. These do not appear to have stopped the problems identified by the Commission from arising.

201. Under this option, unfair contract term provisions under the Fair Trading Act would provide some additional protections and recourse in certain cases (when these changes come into force on 16 August 2022). However, the benefit of these provisions would be limited under the status quo:

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[97] This excludes options from the Commission of extending a specific statutory authorisation or exception for collective bargaining, making changes to unfair contract terms across the economy, or developing a power to make industry codes of conduct beyond the grocery sector. It also excludes the option of empowering the Commission to generally grant class exemptions for specified types of business conduct that might otherwise be prohibited by Part 2 of the Commerce Act.

[98] Woolworths New Zealand Supplier Charter - https://www.countdown.co.nz/media/9959/wwnz-supplier-charter-180618.pdf and Foodstuff Supplier Charterv (covers both Foodstuffs NI and Foodstuffs SI) - https://suppliers.foodstuffs.co.nz/assets/documents/Supplier_relationship_charter.pdf

- Contracts below a $250,000 value threshold will be protected by unfair contract terms and provisions, however, a number of supply contracts with major grocery retailers are expected to be above this amount.

- No provision has been made for private action in relation to unfair contract terms. Only the Commission has the ability to take a case seeking a Court judgement that a contract term is unfair

- Unfair contract terms are subject to a two-step enforcement process and it is not an offence to include a term in a contract unless that term has previously been declared unfair by a Court.

202. Under the status quo, existing legal and procedural barriers mean that collective bargaining[99] between suppliers would remain limited. To collectively bargain with confidence they are not entering into unlawful arrangements or agreements, suppliers would need to apply to the Commission for authorisation. This can be a costly and time-consuming process (though the actual time and cost required is often case-specific).

Option 2.2 – Introduce a voluntary, non-enforceable, code of conduct

Option not recommended by Commerce Commission

203. Under this option a code of conduct would be developed between retailers and suppliers. It would be voluntary with no legislative backing. It may be possible for such a Code to include enforcement procedures, but these would only be binding to the extent that the Code was binding on those parties which were signatories.

204. A Code without legislative backing could be created by Government with assistance from industry, or it could be created by industry. It would likely need to be funded by industry and would rely on some form of industry body to maintain. Any Code could contain provisions addressing the transfer of risks and costs to suppliers and the lack of transparency and certainty, for example:

- An overarching principle of good faith

- Obligations on retailers to set out terms and conditions of supply in written agreements, including a range of matters such as any quality or quantity standards, shelf allocation criteria, range review processes, and matters relating to delisting.

- Obligations on retailers in relation to payment and pricing, such as the timing of payments, any payments for shrinkage or wastage, and promotional pricing/payment matters.

205. This option could include some form of dispute resolution mechanism, although it may not be completely independent, and may only be binding to the extent that a retailer voluntarily continues to be a signatory to the Code.

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[99] Collective bargaining in a product market involves two or more competitors jointly negotiating with a common supplier or customer about terms and conditions of supply, which may include factors influencing price or output (and therefore risk amounting to a cartel). This may involve appointing a single representative, such as an industry association, to act on their behalf in negotiations. An example the Commission provides of when collective bargaining may be useful is when a major retailer is seeking to modify non-price terms or conditions in agreements common to the suppliers.

206. This option would not have regulatory oversight such as monitoring, reporting, and enforcement. However, the industry body tasked with maintaining the Code may be able to carry out some sort of monitoring functions.

207. While Australia has a voluntary Code in so far as qualifying grocery retailers may choose whether to participate, the Code has regulatory standing under the Australian Competition and Consumer Act 2010 and is binding on grocery retailers once they have opted-in. The Australian Code has more Government oversight than a voluntary New Zealand Code with no legislative backing would have.

208. It is unclear which industry body may be able to play the lead role to develop and maintain a Code. There are some examples of industry operated codes with dispute bodies such as the Advertising Standards Authority and the Insurance Council, but we are not aware of such an entity in the grocery sector.

Does this option address the problem?

209. This option could impose some limitations on how the major grocery retailers use their advantage in negotiating power, but only to the extent that major grocery retailers agree to comply with a voluntary code and that the parties involved in determining a code agree a code is sufficient to address the conduct of concern. It does not address the underlying causes of the imbalance in negotiating power, but it would reduce the ability of the major retailers to leverage their advantage into terms that shift costs and risks onto suppliers or to take an approach that favours certain suppliers over others.

What impacts will this option have and does it address the objective?

210. This option is likely the best way to progress a Code of Conduct without legislative change. Whether this option makes a significant improvement to the conditions faced by suppliers depends largely on the industry body that designs and maintains the Code, and the relative power that retailers have to shape the design of the Code before they are willing to sign-on.

211. The impacts of this option are likely to include some benefits for suppliers, although these are likely to be dependent on the industry body and the willingness of retailers to sign on. The nature of the possible benefits include some distribution benefits as suppliers are more evenly able to negotiate with retailers, and also some dynamic efficiency benefits as suppliers have a greater profit incentive to invest and innovate.

212. This approach would impose a lower regulatory burden than a mandatory Code, and it would require less input from Government because the code would be privately designed and maintained. Additionally, this Code could more easily be extended to any new entrants in the near future if required, and would be more able to respond to any changes.

213. However, the benefits to suppliers – and the extent to which this approach addresses the imbalance of negotiating power – are less likely to occur than under a mandatory Code because this option provides the retailers with some control over the content of a Code and relies on their voluntary sign-on.

214. One way that this option may be more likely to deliver benefits is if there is social and societal awareness of this Code of Conduct and pressure to persuade retailers to sign on.

215. This approach also has some risks:

- One or more of the major retailers may not sign up to the Code or may hold-off signing up to the Code until changes are made so the Code does reduce their bargaining power.

- While Government could contribute to the development of a Code, there is nothing to stop the major retailers developing their own Code and signing up to it, this could result in an industry-designed Code with minimal competition benefits above the status quo.

- If a Code was developed and implemented, there is a risk that suppliers would be suspicious of the Code and whichever dispute resolution body is created or appointed to address disagreements.

216. The Commission did not recommend that a code of conduct be set by industry self-regulation. It commented that "suppliers lack confidence in the current supplier charters, which were negotiated by industry. To the extent there is a significant imbalance in bargaining power, there is a real risk that the outcome of industry negotiations would further reflect any imbalance in bargaining power and represent a minimal improvement on the current position."[100]

217. In particular, we note that this option does not address the fundamental causes of the imbalance of negotiating power (refer to Issue two above). Instead, this option places limitations around the use of that negotiating power by retailers.

218. Overall, we consider that this option has only a limited ability to deliver an improvement in competition by addressing the imbalance of negotiating power between suppliers and retailers because it relies on the voluntary action of retailers.

Option 2.3 – Introduce a mandatory Code of Conduct *(preferred)*

Commerce Commission's Recommendation 6

219. This option is focused only on the provisions in primary legislation that would be required to enable the creation of a mandatory Grocery Code of Conduct. Any detail relating to the creation of a Grocery Code of Conduct would be developed as secondary legislation and the regulatory impact of any such Code would be considered at that time.

220. The intent of a mandatory Grocery Code of Conduct, as recommended by the Commission, would be to:

- Create an obligation of good faith on the major grocery retailers in all their interactions with suppliers

- Improve the transparency of supply agreements

- Prohibit or limit a range of conduct

- Be complemented by a formal dispute resolution mechanism.

- Be aligned with the proposed creation of a Grocery Regulator – particularly in terms of information gathering and sharing, reporting and accountability, and enforcement powers.

221. The key provisions in primary legislation to achieve this are:

- Powers to establish a Grocery Code of Conduct as secondary legislation

- Transitional arrangements clarifying how the Grocery Code of Conduct applies to

[100] Commerce Commission, Final report at 9.181.

existing contracts[101]

- Enabling provisions to levy funding for the relevant Grocery Code of Conduct related powers held by the Grocery Regulator
- Provisions to provide the Grocery Regulator with powers to enforce and monitor the Code of Conduct.

Does this option address the problem?

222. A mandatory Grocery Code of Conduct is recommended by the Commission as an intervention to address the competition issues in the acquisition of groceries and the imbalance of negotiating power between the major retailers and suppliers.

223. While this intervention does not address the structural elements of the market that give rise to the imbalance of negotiating power – ie the reliance of suppliers on the two major retailers as the primary route to market – it will limit the ability of retailers to use any bargaining power over suppliers.

224. It will do this by imposing regulatory controls on conduct by the major retailers in the industry. Likely components include an overarching behavioural obligation – such as good faith – on retailers, as well as improving transparency and certainty around the terms of supply, limiting or prohibiting the transfer of certain risks and costs to suppliers when they are better addressed by retailers, and by providing an independent dispute resolution mechanism.

225. As the Commission noted, this option may proportionally benefit Māori as suppliers of products to the major grocery retailers.[102]

What impacts will this option have and does it address the objective?

226. Based on the experience of Australia and the United Kingdom (**UK**), which both have some form of grocery sector code of conduct, we estimate that developing a mandatory Grocery Code of Conduct is likely to improve competition in the long-run by rebalancing the negotiating relationships between retailers and suppliers. Overall, this option could provide consumers with a broader range of products at good prices if it results in improved food production productivity and growth.

227. Suppliers facing increased risks and costs, would be expected to benefit from an improved relationship with retailers. In the UK, suppliers experiencing Code-related issues has decreased from 79% in 2014 to 29% in 2021[103], while in Australia, suppliers are reporting that they are always or mostly treated fairly and respectfully by retailers between 75-95% of the time.[104] One example of this would be that suppliers may benefit from more prompt payment by retailers, while suppliers and retailers may

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101 Upon implementation, the Australian Grocery Code of Conduct had transitional arrangements of up to 12 months for retailers. The arrangements were intended to allow new signatories time to change their business practices to comply with the new regulations. Refer to The Australian Treasury's Independent Review of the Food and Grocery Code of Conduct Final Report, September 2018, at p.24. Accessed at https://treasury.gov.au/sites/default/files/2019-03/Independent-review-of-the-Food-and-Grocery-Code-of-Conduct-Final-Report.pdf.

102 The Commission, Final report, at 2.61. and 9.155.

103 refer to the former Groceries Code Adjudicator's (Christine Tacon) Post conference submission at slide 8. Accessed here: https://comcom.govt.nz/__data/assets/pdf_file/0036/269847/Christine-Tacon-The-Impact-of-Groceries-Regulation-in-the-UK-New-Zealand-Briefing-GCA-2013-October-2020.pdf

104 Refer to the Food and Grocery Code Independent Reviewer, Annual Report, 2020-21, at Figure 3. Accessed here: https://treasury.gov.au/sites/default/files/2021-11/p2021-229034_0.pdf

benefit from improved communications and more efficient working.

228. Developing a dispute resolution pathway gives improved certainty that the benefits of the code will be realised. Evidence from the UK indicates since 2019 the percentage of suppliers who say they would raise an issue with the Groceries Code Adjudicator has risen to 57%.[105]

229. The benefits for suppliers, include some distribution benefits as suppliers are more able to negotiate with retailers, and also some dynamic efficiency benefits as suppliers have a greater profit incentive to invest and innovate.

230. The risks associated with this approach are a possible increase in prices for consumers due to compliance costs on retailers and if the Code reduces the ability of retailers to bargain for competitive prices from suppliers.

231. The best available estimate of the cost of this option is based on the regulatory burden and administrative costs of the UK model, which has a mandatory code and similar monitoring functions to what is proposed for New Zealand:

- Costs to government from implementing the regulatory functions associated with the Grocery Code of Conduct are estimated to be approximately $1.5-$1.6 million per year.[106]
- Compliance costs to grocery retailers and suppliers are estimated to be approximately $750,000 - $800,000 per annum. This is based on the original UK estimates of approximately £290,000 a year in 2008, including costs associated with disputes, complaints and queries from the regulator.[107]

232. Similar to option 2.2, we note that this option does not address the fundamental causes of the imbalance of negotiating power (refer to Issue two above). Instead, this option places limitations around the use of that negotiating power by retailers.

233. However, different to option 2.2, we consider that this option may deliver an improvement in competition by establishing a mandatory Code that should provide clear limitations on the acceptable conduct of retailers and therefore address the imbalance of negotiating power between suppliers and retailers.

Option 2.4 – Develop an exception from Part 2 of the Commerce Act 1986 to allow for collective bargaining *(preferred)*

Commerce Commission's recommendation 7

234. This option would be to develop an exception that prevents sections 27 (prohibiting anticompetitive agreements) and 30 (prohibiting cartels) from applying to arrangements between certain grocery suppliers to collectively negotiate terms of supply with grocery retailers. This would facilitate communication and arrangements between suppliers for the purpose of collectively negotiating terms of supply with grocery retailers according

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105 Groceries Code Adjudicator Annual report and Accounts, 2020-2021, at p.11, Accessed at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/995915/Groceries_Code_Adjudicator_Annual_Report_and_Accounts_2020-2021.pdf

106 This is based on the current costs of the UK, at approximately £0.8 million per year, covering a staff of approximately 5FTE106 excluding any arbitration or investigation costs (that are typically recovered from the relevant retailer, but an investigation is estimated to cost around £1 million106.).

107 Refer to "The supply of groceries in the UK market investigation" by the UK Competition Commission, on 30 April 2008. at 11.409.

to their common interests.

235. The scope of the exception would need to be carefully designed. At this stage we envisage that it might be limited in three ways:

- It would apply only to a specified class of persons – namely, grocery suppliers (eg of a specified by size) – who have made certain disclosures to the regulator (at the very least, of their intention to collectively bargain).

- It might apply only to arrangements and interactions between suppliers that are necessary for specified purposes. These purposes could reflect the intended benefits of collectively negotiating reasonable terms with grocery retailers.

- There could be a protections against arrangements or interactions likely to facilitate unintended outcomes, such as collective boycotts.

236. Any activities between suppliers that fall outside the scope of this exception would remain vulnerable to the possibility of contravening prohibitions in Part 2 of the Commerce Act 1986.

237. This exception would not oblige any suppliers to collectively bargain, nor would any retailer be obliged to negotiate with suppliers making use of the exception. It would also not prevent suppliers party to collective bargaining arrangements from negotiating bilaterally with retailers concurrently with any collective bargaining process.

Does this option address the problem?

238. To the extent it is used by suppliers, this exception would remove disadvantages they experience negotiating terms with retailers in isolation from one another, without enabling suppliers to negotiate clearly inefficient or anticompetitive outcomes. It would directly remove cost and uncertainty barriers associated with the process of obtaining authorisation from the Commission.

What is the impact of this option and does it address the objective?

239. To the extent collective bargaining does increase under this option, we expect it would contribute to our objectives in a few ways[108]:

- We would expect modest improvements to competition in terms of the overall value of supplier offerings in the long-term. Collective bargaining would enable suppliers to secure more favourable and efficient contractual outcomes from retailers. This would tend to increase supplier confidence and incentivise greater investment and productivity by suppliers, which improves the long-term quality and value of their offerings to consumers. If these more favourable contractual outcomes constitute a transfer from grocery retailers to suppliers, it is therefore likely to be a beneficial one.

- The costs of negotiating terms of supply are likely to materially decrease for some or all negotiating parties (increasing ‘efficiency’ in the sector). At the very least, we expect that some bargaining costs to suppliers will be avoided where common terms of supply are able to be negotiated collectively and resources shared.

- It is possible this would slightly improve conditions for entry or expansion by

[108] We note the first two of these expected benefits are broadly consistent with those identified by the Commerce Commission in its draft determination of an application by Tegel chicken growers to collectively bargain with Tegel Foods Limited.

competitors to the major retailers by increasing the ease with which a competitor could do business with suppliers (to the extent they seek to do this directly rather than access wholesale supply).

240. There is at least some potential for an increase in collective bargaining to also facilitate conduct that can reduce competition:

- For the acquisition of groceries (eg higher prices negotiated by suppliers may affect a new entrant into the retail market), and

- For the supply of groceries (eg increasing opportunities for cartels beyond the scope of authorisation or abuse of collective bargaining power that is made possible by the authorisation to secure returns that are higher than consistent with ordinary competition for supply of groceries, and which are likely to be passed onto consumers).

241. We assess these risks as low given they can be accounted for in the design of the exception and the fact retailers are not obliged to accept any terms sought by the collective. We also expect that collective bargaining in the grocery sector would predominantly concern non-price terms of supply (particularly where there is heterogeneity in the products offered within the collective, which we expect would be common).

242. Collective bargaining may also appear to present risks to dynamic and productive efficiency. It creates the potential to weaken performance incentives by enabling less efficient suppliers to benefit from contractual outcomes negotiated by the collective or the potential to commit more ambitious suppliers to collectively negotiated terms that prevent them from innovating or otherwise differentiating their offerings from the collective. This would depend on the nature of any collective bargaining agreement the suppliers reach. However, for exactly these reasons, it seems unlikely to us that suppliers would foreclose their freedom to negotiate bilaterally if their interests are not being adequately met by strategies being pursued and outcomes being obtained the collective.

Option 2.5 – Amend value cap and allow private action in relation to the Fair Trading Act for the grocery sector

Commerce Commission's recommendations 8A and 8C

243. This option would implement two of the three components the Commission recommended to strengthen the business-to-business unfair contract terms regime in the Fair Trading Act as they apply to grocery suppliers:[109]

- Allowing private action in respect of unfair contract terms so that a grocery supplier may take a case to the Court (District Court or High Court) to seek a declaration that a contract term is an unfair contract term.

[109] For context, the test for an unfair contract term is defined in the Fair Trading Act as a term that:

- would cause a significant imbalance in the contractual parties' rights and obligations arising under the contract;
- is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- would cause detriment (whether financial or otherwise) to a party if it were applied, enforced, or relied on.

- Lifting the transaction value cap to allow unfair contract terms provisions to apply to a larger proportion of grocery suppliers. The unfair contract terms regime is not available in circumstances where the value of the trading relationship exceeds $250,000. In the grocery sector there are likely to be many trading relationships exceeding $250,000 per annum where the supplier still faces a substantial imbalance in negotiating power with a retailer.

244. The proposed increase of the transaction value cap for the retail grocery industry would be to $1 million per year under this option. We expect this increase would capture about two-thirds of the major retailers' suppliers and would not capture the larger suppliers. This on the basis that 900 out of 1400 of Woolworths NZ's suppliers have retail sales of less than $1 million per annum.

245. This will apply to contracts for the supply to retail groceries (defined in terms of the range of products that may be found in a retail grocery store), but only for larger grocery retailers where there may be an imbalance of negotiating power (defined by either annual turnover or store size).

246. For consistency, in addition to allowing private action by grocery businesses in relation to unfair contract terms, we propose that the grocery regulator will also be able to take proceedings.

Does this option address the problem?

247. This option is expected to improve the imbalance of negotiating power by extending the prohibition on unfair contract terms to a greater number of suppliers, providing stronger incentives for major grocery retailers to remove what they suspect may be unfair contract terms from grocery supply contracts and providing an avenue for grocery suppliers to take private action in relation to unfair contract terms.

248. Enabling private action allows for those suppliers to take action against unfair contract terms in a more efficient way than waiting for action by the Commission. Providing the ability to take private action will better address the problem if it is combined with provisions in a Code of Conduct to protect suppliers from retribution – something that may otherwise hinder suppliers from taking action.

What impacts will this option have and does it address the objective?

249. Overall, we think this option is likely to contribute positively to competition by making positive steps to address the Commission's finding of an imbalance in negotiating power between major retailers and their suppliers. It addresses the issues around the power imbalance in the acquisition of groceries, including the transfer of costs and risks to suppliers and the uncertainty or lack of transparency over terms of supply. In turn this should improve competition for consumers by enabling more supplier investment and innovation in the market.

250. Increasing the transaction cap can benefit smaller suppliers of major retailers – particularly those whose trading relationships exceed $250,000 per annum but who still face a substantial imbalance in negotiating power with a retailer. Increasing the cap to $1,000,000 per annum would extend the benefits of the unfair contract terms regime to most suppliers of major grocery retailers:

- Approximately 900 of Countdown's suppliers, out of 1,400 suppliers
- Up to 1650 of Foodstuffs NI's suppliers, out of 1850 total
- Up to 1600 of Foodstuffs SI's suppliers out of around 1800 total.

251. The benefits of extending unfair contract terms to more grocery suppliers will

complement other changes recommended by the Commission – such as implementing a mandatory code of conduct between retailers and suppliers. Collectively, these changes help to provide a more even negotiating environment between retailers and suppliers in future.

252. These benefits are likely to be both distributional and dynamic. Distributional benefits may accrue to suppliers as possibly unfair contract terms are removed from their trading relationship with retailers. Dynamic efficiency benefits as suppliers have a greater profit incentive to invest and innovate to increase output or bring new products to market at competitive prices.

253. This option manages a number of possible risks:

- Avoiding creating undue risks for retailers by discouraging them from using contract terms that are legitimate protections (for fear of liability) by retaining the two-step process for a Court to determine a term to be an unfair contract term separately from any penalties.
- Not restricting the flexibility retailers need to negotiate for better prices for consumer while protecting suppliers from the use of unfair contract terms.

254. Similar to option 2.2 and 2.3, this option does not address the causes of the imbalance of negotiating power (refer to Issue two above). Instead, this option places limitations around the use of that negotiating power by retailers.

255. However, like with option 2.3, we consider that this option may deliver an improvement in competition by protecting suppliers from the use of unfair contract terms and enabling suppliers take action themselves in relation to the use of unfair contract terms that they may otherwise be pressured to accept due to the imbalance of negotiating power between suppliers and retailers.

Option 2.6 – Amend the mechanism for imposing penalties and other remedies in relation to the unfair contract terms regime for the grocery sector in the Fair Trading Act

Commerce Commission's recommendations 8B

256. The Commission recommended changes to strengthen the business-to-business contracts regime in the Fair Trading Act. In keeping with the scope of these options, we are only evaluating an option to extend these provisions in relation to the grocery sector, not the broader economy.

257. This option is complementary to option 2.5. It would make changes to the Fair Trading Act to simplify the mechanism for imposing penalties and other remedies in relation to the use of unfair contract terms (Commission's Recommendation 8B).

258. An 'unfair contract term' only exists once a term has been declared such by the Court, and it is only after a declaration that it is an offence to include such a term in a standard form contract or enforce the term if it is in an existing standard form contract. This means a second court case is required if it the term continues to be used. However, no further court action is required if the contract parties do not add the unfair contract term (to new contracts) or cease to enforce the term (to existing contracts). There is no penalty or costs associated with the use of the unfair contract term prior to it being declared such by the Court.

259. There is significant complexity involved in this option, which proposes to allow the Courts to both declare a term to be unfair and at the same time impose penalties for the prior use of that term. While this recommendation also has the potential to address the imbalance of negotiating power between grocery retailers and suppliers, it has some significant risks:

- The change is complex from a legislative design perspective and would result in effectively having three regimes: consumer contracts, small trade contracts (as per the recent amendments), and grocery contracts.

- The legislative change may create legal uncertainty around contract terms that may hinder the ability of retailers to negotiate firmly and fairly with suppliers to provide groceries to consumers at the best possible prices.

260. We note that further work is planned to address the enforcement of unfair contract terms in business-to-business contracts – across the entire economy, not just for the grocery sector –and that this option may be better considered as part of this wider piece of work.

Does this option address the problem?

261. This option would improve the imbalance of negotiating power by adjusting in favour of suppliers. This option provides the greatest incentives for major grocery retailers to remove (what they suspect may be) unfair contract terms from grocery supply contracts and would provide an avenue for grocery suppliers to take private action in relation to unfair contract terms.

262. However, like option 2.5, this option will better address the problem if it is combined with provisions in a Code of Conduct to protect suppliers from retribution – something that may hinder suppliers from taking action.

What impacts will this option have and does it address the objective?

263. This option addresses the objective in a similar way to option 2.5. It contributes to achieving the objective of improving competition for the long-term benefit of consumers, by enabling both distributional and dynamic benefits to suppliers. It addresses the issues around the power imbalance in the acquisition of groceries (Issue two above), but does not address the imbalance itself.

264. This option would also complement option 2.3 (creating a mandatory Code of Conduct). For example, the Code of Conduct may prohibit retribution against a supplier (as is the case internationally), which could be a necessary enabler for a firm to use the Fair Trading Act's provisions to address an (perceived) unfair contract term that shifts some form of risk or cost from retailers to suppliers.

265. This option adds a level of complexity to the Fair Trading Act regime that may outweigh the benefits it provides. The benefits are that retailers are incentivised to not use any terms that may be determined to be unfair, because they could face an immediate penalty. This may benefit suppliers – either if they receive some of the penalty imposed on the retailer, or if they benefit from less use of terms that could be unfair contract terms.

266. Costs include the complexity involved in developing another legislative regime, and the possible confusion of having two definitions of 'unfair contract terms' for different business-to-business regimes within the same Fair Trading Act. This may result in extra compliance costs for businesses and may reduce the ability of retailers to bargain firmly and fairly to give the best price to consumers.

267. Additionally, this option adds to the relative risk that the legislative design will be complex and could create confusion. Overall, we think the intent of Recommendation 8B may be best considered as part of a broader review of business-to-business unfair contract terms.

Improve ability of consumers to make informed decisions

268. This section considers options for improving the ability for consumers to make informed decisions. Most of the recommendations of the Commission in this area are directed to major grocery retailers to improve pricing and promotional practices, loyalty programmes, data collection and co-operation with price comparison services.

269. In respect of the recommendations to major grocery retailers, this section considers both:

- **Option 3.1**: Non-regulatory option to monitor existing steps by major grocery retailers to enhance information for consumers **(preferred)**
- **Option 3.2**: Mandate simplified pricing and promotional practices.

270. Free and frank opinions

271. Free and frank opinions

272. The Commission has recommended that government mandate the consistent display of unit pricing. Unit pricing helps consumers to make informed purchasing decisions by enabling rapid comparisons between the value of different sized products and helps combat “shrinkflation” where products are shrunk in size, quantity, or quality, while prices remain the same or increase. Unit pricing can help drive competition between retailers by putting pressure on grocery retailers to compete on metrics such as value and pricing transparency.

273. In respect of the recommendation to government to make unit pricing consistent, this section considers:

- **Option 3.3**: Mandate the consistent use of unit pricing **(preferred).**

274. As set out above, this paper only considers the case for making unit pricing mandatory under legislation. The form and content of any unit pricing requirements are being tested separately as part of a consultation document on unit pricing options.

Option 3.1 – Non-regulatory option to monitor existing steps by major grocery retailers to enhance information for consumers

Commerce Commission’s recommendations 9, 11 and 12

275. The Commission has recommended that major grocery retailers should:

- Ensure their pricing and promotional practices are simple and easy to understand
- Ensure disclosure relating to loyalty programmes and data collection and use practices is clear and transparent
- Co-operate with price comparison services.

276. Under this option, there would be no further regulatory action (notwithstanding any action under the Fair Trading Act for misleading, deceptive or unfair conduct). It would be up to each major grocery retailer to take steps to ensure the recommendations

above are progressed and reflected in their operations.

277. Major grocery retailers have been reviewing the above practices and have provided the Minister of Commerce and Consumer Affairs with updates on this work. They are expected to complete the implementation of changes over the remainder of this year.

Does this option address the problem?

278. Under this option, major grocery retailers will examine a range of areas that the Commerce Commission has identified as affecting consumer decision-making. These include identifying any complex and confusing pricing and promotional mechanisms, considering how information about loyalty schemes and data collection is presented, and what arrangements could be put in place to support price comparison services.

279. The Commission has commented that 'some level of voluntary simplification of promotional mechanisms is likely to promote competition and improve outcomes for consumers'.

280. The extent to which these issues will be addressed is yet to be seen, as it depends on how substantial and extensive the changes made by major grocery retailers will be. There are also questions about how durable any changes will be as marketing strategies evolve over time.

What impacts does this option have and does it address the objective?

281. This option better informs consumers through voluntary changes to major grocery retailer processes and practices. The extent to which the objective of promoting competition for the long-term benefit of consumers will be addressed is yet to be seen, as it depends on how substantial and extensive the changes made by major grocery retailers will be, and how durable they will be over time.

Option 3.2 – Mandate simplified pricing and promotional practices

Option considered by the Commission but not recommended

282. Under this option, new statutory provisions would be introduced to mandate simplified pricing and promotional practices by grocery retailers.

283. There are several potential approaches to prescribing these practices:

- An (extreme) approach is that price promotions on groceries would be prohibited altogether – i.e. all goods would be sold at an 'everyday low price' without discounts or other price promotion.
- Another possibility would be to permit grocery retailers to apply temporary discounts based on a single promotional mechanism (e.g. 'special') with limits on the duration and frequency of those discounts (e.g. a single item could be discounted for less than 10% of the year)

Does this option address the problem?

284. The above versions of this option would address issues with pricing and promotional practices by major grocery retailers by constraining pricing and promotional strategies in the interests of providing more consistent and informative information to consumers.

What impacts does this option have and does it address the objective?

285. Simplifying pricing and promotional practices is likely to assist consumers to make more informed shopping decisions by reducing the complexity of the information environment in which they make decisions. Limiting promotions may also reduce the

‘usual’ price of groceries by strengthening competition on these prices. Some of the benefits of more informed choice and strengthened competition may be distributional from suppliers to consumers, but there is also a total welfare gain by enhanced price discovery and incentives for efficient allocation of resources over time.

286. However, the Commission noted that prescriptive regulation of this form may limit innovation and the extent to which retailers compete through promotions. The more restrictive options (only permitting ‘everyday prices’) could also result in consumers missing out on genuine savings during promotional periods. These options would also be likely to have upstream effects on suppliers, who enter into agreements with grocery retailers to offer promotions (funded in part by suppliers) as a mechanism for competing with other suppliers.

Option 3.3: Mandate the consistent use of unit pricing

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287. This option would involve making it mandatory for retailers to implement unit pricing on products. A legislative or regulatory mechanism would be used to set a specified and consistent format for unit pricing information – including minimum standards for display and standardised units of measurement for product categories. The specific regulatory mechanism to be used will be considered further.

288. This option is similar to how unit pricing has been implemented in other countries – including Australia and the European Union. The form and content of the specific unit pricing requirements will need to be considered further, should this option be advanced. As set out above, a public consultation document will be used to test the features of this option in more detail.

Does this option address the problem?

289. Mandated use of unit pricing by grocery retailers would address issues with inconsistent use of unit pricing by grocery retailers. Consumers will be better able to make informed choices and comparisons between products under this option.

What impact does this option have and does it address the objective?

290. The provision of consistent unit pricing information could better support competition between suppliers and between retailers by arming consumers with information to help them make more informed choices between different products and enable them to shop around.

291. It is possible that even when not directly comparing between products and retailers, clear and accurate unit pricing information could help consumers to develop perceptions of value over time which in turn help them to decide where to shop to best meet their needs. Where unit pricing information is not consistently available or cannot easily be assessed and acted upon by consumers, they may be less able to make informed decisions and less likely to shop around. This can result in a softening of competition between grocery retailers.

292. Similar to option 3.2, some of the benefits of more informed choice and strengthened competition may be distributional from suppliers to consumers, but there is also a total welfare gain by enhanced price discovery and incentives for efficient allocation of resources over time.

2.3 How do the options compare to the status quo/counterfactual?

293. The options outlined above are analysed on an issue-by-issue basis against the criteria.

- **Table One**: Improve conditions for entry and expansion – access to groceries
- **Table Two**: Address imbalances in bargaining power between major grocery retailers and suppliers
- **Table Three**: Improve ability of consumers to make informed choices.

Key for qualitative judgements in tables:

++	much better than doing nothing/the status quo/counterfactual
+	better than doing nothing/the status quo/counterfactual
0	about the same as doing nothing/the status quo/counterfactual
-	worse than doing nothing/the status quo/counterfactual
- -	much worse than doing nothing/the status quo/counterfactual

Table One: Improve conditions for entry and expansion – access to groceries

	Option 1.1 – Counterfactual	Option 1.2 - Regulatory oversight of wholesale supply	Option 1.3 - Regulated access regime	Option 1.4 – Non-regulatory option to monitor strategic conduct by major grocery retailers with suppliers	Option 1.5 – Prohibit terms of supply that limit competition
Competitive markets	**0** Competition is not working well for consumers. The market is a relatively stable duopoly with a fringe of other competitors. Competition between the major grocery retailers is muted.	+ Provide a new channel for independent grocery retailers to access a full range of groceries, but demand is uncertain. Potentially disrupt duopoly to strengthen competition between the two major grocery retailers.	+ + Provide a new channel for independent grocery retailers to access a full range of groceries. Potential for increased uptake if backed by stronger regulatory oversight. Potential steppingstone for large new entrant.	+ Monitoring improves transparency and effective enforcement to deter use of clauses that harm competition.	+ / - Provide a new channel for independent grocery retailers to access a full range of groceries. Unclear if would improve price competition.
Economic growth	**0** The level of innovation appears lower than expected under workable competition.	+ Potential to facilitate investment and growth by independent grocery retailers.	+/- Potential to cause inefficiencies for major grocery retailers and undermine their incentives to invest in supply chain capacity or innovations. But could facilitate investment by new entrants.	+ Potential to support growth if facilitates direct supply from suppliers to independent grocery retailers.	- Discourage some forms of collaboration and co-investment in innovation.
Proportional	**0** The grocery sector is subject to generic competition law (i.e. the Commerce Act). However, market power of major grocery retailers is high and enduring.	+ Major grocery retailers should have incentives to voluntarily provide commercial wholesale offering if benefits exceed costs.	- Dependent on design, but potential for costs to exceed the benefits. Unclear on extent it would be used.	+ Maintains freedom to contract on commercial basis, while providing low-cost oversight of arrangements.	- No indication of widespread use of clauses or harm to competition to justify introduction currently. Would prevent use where benefits exist.
Durable	**0** Public calls for intervention in markets to address high cost of groceries and excessive profits.	+ Commercial arrangements for wholesale supply are likely to be flexible and durable.	- Would introduce rigidity in an otherwise dynamic retail sector. Likely to lead to disputes, with risk of regulatory creep.	+ Maintains freedom to contract on commercial basis, which is likely to be flexible and durable.	- Would introduce some rigidity in supply arrangements.
Certain	**0** Public calls for intervention in markets undermines certainty.	+ Transparency promotes predictability of regime, supported by effective dispute resolution.	- - Novel and unprecedented regulation, with high risk of unforeseen consequences.	+ Transparency promotes predictability of Commerce Act enforcement.	+ Would be clear and predictable in its application.
Timely	**0**	-	- -	-	- -

	Largely effective now. Some new entry and expansion likely (e.g. Costco).	Could be introduced within 12 months.	Dependent on design but could take 2 to 3 years to implement.	Could be introduced within 12 months.	Could be introduced for new contracts within 12 months, and for existing contracts up to a year later.
Overall assessment	Competition is not working well for consumers.	**+ 4** Potential to improve competition. Transparency will enable better oversight of market performance and facilitate additional intervention if required.	**- 4** Consider other less costly options first. Further work would be required on design to ensure benefits exceed costs.	**+ 4** Potential to improve competition. Transparency will enable better oversight of market performance and facilitate additional intervention if required.	**- 4** Unlikely that benefits exceed the costs based on current evidence.

Table Two: Address imbalances in bargaining power between major grocery retailers and suppliers

	Option 2.1– Status quo	Option 2.2 - Introduce a voluntary, non-enforceable, grocery code of conduct	Option 2.3 - Introduce a mandatory grocery code of conduct (Recommendation 6)	Option 2.4 - Develop a statutory authorisation or exception for collective bargaining (recommendation 7)	Option 2.5 – Amend value cap and allow private action in the Fair Trading Act unfair contract terms regime for the grocery sector (Recommendations 8A & 8C)	Option 2.6 - Amend the mechanism for imposing penalties in the Fair Trading Act unfair contract terms regime for the grocery sector (Recommendation 8B)
Competitive markets	**0**	**+ / 0** Voluntary Code has some incentives for suppliers to invest and innovate, by addressing issues caused by retailer's negotiating power. However, improvements are dependent on voluntary sign-on by retailers.	**+ +** Mandatory Code should incentivise suppliers to invest and innovate, by addressing issues caused by retailer's negotiating power. Possible benefits for consumers from suppliers increasing output or developing new products at competitive prices.	**+** Presents both risks and benefits to competition. We believe the risks are able to be mitigated by good regulatory design. The benefits are likely to be more significant, in terms of an improvement in the quality of products available as a result of suppliers being able tonegotiate more favourable contractual outcomes (as this would incentivise investment and innovation in product offerings). This could be characterised as a beneficial transfer from grocery retailers to suppliers, in view of the resulting improvement in the quality of supplier offerings to consumers.	**+ +** Improve incentives for suppliers to invest and innovate, by protecting smaller suppliers from the use of unfair contract terms, which suppliers may otherwise be pressured to accept due to the retailer's negotiating power. This option complements option 2.3, which when combined may result in suppliers taking action against retailers to get unfair contract terms removed from grocery contracts.	**+** Improve incentives for suppliers to take action against retailers to get unfair contract terms removed from grocery contracts. This option complements option 2.3 and 2.5, and provides limited benefits if advanced separately.
Efficiency	**0**	**0** Voluntary Code minimises any inefficient costs, but is unlikely to improve efficiency.	**-** Mandatory Code as regulation is likely to add administrative compliance costs to retailers, possibly some costs to suppliers as well (depending on design of Code)	**+** Modest improvements and risks to efficiency. Transaction costs are likely to decrease for at least some negotiating parties. Some potential for inefficient outcomes from collective bargaining, but these are likely to be self-correcting.	**0 / -** Potentially neutral, but new unfair contract terms could impose small administrative costs on Government and grocery sector.	**0 / -** Potentially neutral, but could impose inefficiency due to legislative complexity caused by multiple 'unfair contract terms' definitions.
Proportional	**0**	**+** Voluntary Code has some distributional and dynamic benefits outweighing costs (particularly to suppliers) with impact flowing on to consumers.	**+ +** Mandatory Code provides distributional and dynamic benefits outweighing costs (particularly to suppliers) with impact flowing on to consumers.	**+** There are modest set up and ongoing costs to administer a collective bargaining scheme, which we expect would be justified by the benefits (provided suppliers make reasonable use of the scheme).	**+** Costs of regime should be relatively low and exceeded by potential benefits.	**+** Costs of regime should be relatively low and exceeded by potential benefits.
Durable	**0**	**-** Voluntary Code is likely to require re-working in the near	**+** Mandatory Code as regulation reflects best practice	**+** The statutory authorisation could be designed to accommodate a range of	**0** Changes to legislation add complexity but should be durable in implementation.	**-** Changes to penalties introduces legislative complexities that may

		future to better address issues caused by difference in negotiating power	internationally. Is durable and flexible over time	supplier relationships in the grocery sector and approaches to collective bargaining consistent with the policy intent. However, it's primary purpose is premised on a state of limited competition for acquisition of groceries, which we hope will change over time.		require reworking in near future (refer to para 260).
Certain	**0**	- Reliance on voluntary agreement by retailers to Code (and content of Code) means there is no certainty of outcome	+ Mandatory Code will improve imbalance of negotiating power between suppliers and retailer. Further details will be determined as the Code itself is developed.	- We have a considerable degree of uncertainty over the degree to which and manner in which a statutory exception would be used by suppliers.	**0** Not completely sure which firms would fit under a modified value cap.	**0** Not sure if any small firms would access the new penalties mechanism.
Timely	**0**	**0 / -** Could be introduced in between 6 - 12 months.	- - Could be introduced within 12 months, fully in force within 24 months	- Requires legislative change, but benefits could be realised very soon after enactment.	- Could be introduced within 12 months.	- Could be introduced within 12 months.
Overall assessment	**0** status quo remains.	**+2 / -2** Some benefits but limited by the Code being voluntary for retailers.	**+3** Dependent on the design of the mandatory Code, will limit retailers' use of negotiating power to create incentives for suppliers to innovate and invest with long-term benefits to consumers from new products at competitive prices.	**+2** Expected benefits exceed risks, provided the authorisation/exception is designed effectively. We have also assumed a reasonable degree of uptake by suppliers in reaching this assessment.	**+ 3 / +1** When combined with option 2.3, can limit retailers' use of negotiating power to incentivise suppliers to innovate and invest with long-term benefits to consumers from new products at competitive prices.	**0 / -1** Comparatively this option adds little in addition to option 2.5. It has legislative complexity and increased risk of inefficiency.

Table Three: Improve ability of consumers to make informed choices

	Option 3.1 – Non-regulatory option to monitor existing steps by major grocery retailers to enhance information for consumers	Option 3.2 – Mandated simplified pricing and promotions	3.3 – Mandate the consistent use of unit pricing
Competitive markets	**0**	+ / - Would simply consumer decision-making but may reduce retailer competition through promotions.	+ Enables informed comparisons between product offerings and retailers, informed by consistent and comparable information.
Economic growth	**0**	- Discourages innovative promotional activities and may affect innovation by suppliers.	- May discourage or hamper retailer innovation on pricing and price labelling.
Proportional	**0**	-- May be prescriptive and costly to implement.	- Prescription of unit pricing information may be prescriptive and costly to implement
Durable	**0**	+ Likely to result in longer term change than voluntary measures.	++ Less flexible, but likely to result in longer term change and benefits to consumers than current voluntary measures.
Certain	**0**	+ Could improve certainty of Fair Trading Act provisions relating to promotions.	++ Mandating requirements provides longer-term certainty for retailers, and consumers, on how unit pricing needs to be applied and used.
Timely	**0** Major grocery retailers voluntarily reporting to Minister and MBIE on progress.	- Novel regulation that may be complex and time consuming to design.	- Timeliness will depend on the mechanism used to set the mandated unit pricing requirements (e.g. changes to primary legislation may take a long time)
Overall assessment	**0** Voluntary initiatives by major grocery retailers are expected to improve consumer information and decision-making.	**0** Consider other less costly options first. Further work would be required on design to ensure benefits exceed costs	**+ 2** Mandating the consistent use of unit pricing ensures a certain and durable way of enabling consumers to make informed purchasing decisions and comparisons.

2.4 What options are likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

Preferred options

294. Based on the analysis above, MBIE recommends progressing a suite of options to address the different issues identified and contribute towards the overall objective of promoting competition for the long-term benefit of consumers in New Zealand. The following options are recommended:

To improve the conditions for entry and expansion by enabling access to supply of groceries, MBIE recommends:

- **Option 1.2** – Regulatory oversight of wholesale supply
- **Option 1.4** – Non-regulatory option to monitor strategic conduct by major grocery retailers with suppliers

To address imbalances in negotiating power between major grocery retailers and suppliers, MBIE recommends:

- **Option 2.3** – Introduce a mandatory grocery code of conduct
- **Option 2.4** – Develop a statutory authorisation or exception to allow for collective bargaining
- **Option 2.5** – Amend value cap and allow private action in relation to the Fair Trading Act for the grocery sector.

To improve consumers' ability to make informed decisions, MBIE recommends:

- **Option 3.1** – Non-regulatory option to monitor existing steps by major grocery retailers to enhance information for consumers
- **Option 3.3** – Mandate the consistent use of unit pricing.

295. This package of measures is intended to provide a comprehensive and balanced response to improving the different issues with competition in the retail grocery sector. Many of these options are complementary and several contribute collectively to the same issue or problem (as discussed in the options analysis section).

296. The measures above represent a significant improvement on the counterfactual, where competition is not currently working well for consumers. These measures would be given effect to through several different means, as outlined below:

Stakeholder views on preferred options

297. Officials have undertaken targeted stakeholder engagement on the options above. There are mixed views as to the efficacy of these options within stakeholder groups with stakeholders supporting some proposals and recommendations, but not others.

Major retailers

298. Confidentiality

299. Confidentiality

300.

301.

302.

Other retailers (including non-profits and potential entrants)

303. Confidentiality

304.

305.

Māori as producers, grocery retailers, and grocery consumers

306. Confidentiality

307.

Consumer interest groups

308. Confidentiality

Industry (supplier) interest groups

Confidentiality

2.5 What are the marginal costs and benefits of the option?

311. The table below presents costs and benefits of the preferred option as a package, compared to taking no action at all under the counterfactual. Where appropriate, the specific costs or benefits for a particular group or option have been noted.

312. A scale of low, medium and high is used to assess the magnitude of the impact. This scale is in reference to size of the grocery sector (estimated at $22 billion per annum) and the Commission's assessment of excess returns in the order of $430 million per annum.

Figure 16: Cost and benefit summary table

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Major grocery retailers	Major grocery companies will incur additional costs in relation to enhancing price and non-price information in-store for consumers, and marginal increases in cost from negotiating with suppliers on a more even negotiating position. Providing access to grocery supply to third parties will also create costs for major grocery retailers as part of establishing separate processes and operations to enable third-party supply.	Medium	Medium
Other grocery retailers	Costs for most other grocery retailers are likely to be low as recommendations relating to improving consumer information are not targeted at them.	Low	Low
Grocery suppliers	Retailers of grocery items may need to shoulder fewer costs in relation to product supply as the rebalancing of negotiating power between retailers and suppliers would prevent retailers being able to pass costs on to suppliers that they may not be well suited to manage.	Low	Low
Consumers	Increasing the negotiating power of suppliers may result in increased cost for some goods if retailers' ability to exert pressure on supplier prices reduces.	Low	Low
Regulators	Government will need to meet the costs of implementing a regulator and dispute resolution scheme for the grocery sector and meet the ongoing costs of these functions – including the monitoring and review functions of the regulator (such as monitoring the strategic conduct of major grocery retailers with suppliers).	Confidentiality	Medium
Māori	We do not foresee any additional costs to Māori compared to the status quo, except as part of the consumer, supplier and retailer groups noted above.	Low	Low
Wider government	We do not foresee any additional costs to wider government functions compared to the status quo.	Low	Low
Total monetised costs	Only quantifiable information available is for the cost to government of establishing and running the grocery sector regulator.	Confidentiality	Unknown

Non-monetised costs	We anticipate a medium increase in non-monetised costs to major grocery retailers, other grocery retailers, suppliers, and consumers.	Medium	Low
Additional benefits of the preferred option compared to taking no action			
Major grocery retailers	The measures set out above are expected to have some marginal benefits to major grocery retailers, such as the benefits provided by access to dispute resolution for any disputes with suppliers.	Low	Low
Other grocery retailers	Other grocery retailers are expected to benefit from these measures, such as through provision of better wholesale access to groceries will help retailers looking to expand their grocery offerings.	Medium	Low
Grocery suppliers	Suppliers will have a stronger ability to negotiate with retailers and have recourse to resolution when disputes arise and be provided with a more balanced negotiating position by the code of conduct. In addition, the ability to collectively bargain and extension of unfair contract terms provisions will also benefit suppliers.	High	Low
Consumers	Consumers will benefit from the improved competition in the sector through better grocery product prices, higher quality goods, increased ranges of products, and better services. Provision of better information will also better allow consumers to compare different products and retailer offerings.	Medium	Low
Regulators	The government will have better information to monitor competition in the sector and greater ability to intervene to support competition where needed.	Low	Low
Māori	Māori as consumers will benefit from the provision of better consumer information. Māori as suppliers of grocery items, including primary produce, will benefit from a more even negotiating position with retailers.	Medium	Low
Wider government	There are wider social benefits from improving the affordability of grocery items.	Low	Low
Total monetised benefits	Without accurate quantifiable evidence, it is not possible to provide an estimate.	Unknown	Unknown
Non-monetised benefits	We anticipate a medium level of benefits from increased competition – with these benefits largely falling to other grocery retailers (outside of major grocery retailers), suppliers, consumers, and Māori.	Medium	Low

Section 3: Delivering an option

3.1 How will the new arrangements be implemented?

Process for implementation

313. The preferred regulatory package is proposed to be implemented in phases, using a range of non-regulatory and regulatory measures, as outlined and discussed below.

Figure 17: Means to give effect to the preferred proposals

Option	Non-regulatory	Legislation	New regulations
Improving the conditions for entry and expansion by enabling access to supply of groceries			
Option 1.2 – Regulatory oversight of wholesale supply		Framework for the access regime would be included in the Grocery Industry Competition Bill	Additional detail on the form and functions of the grocery regulator
Option 1.4 – Non-regulatory option to monitor strategic conduct by major grocery retailers with suppliers	New grocery regulator would monitor best price and exclusive supply clauses	This function of the grocery regulator would be determined in legislation	
Addressing imbalances of power between major grocery retailers and suppliers			
Option 2.3 – Introduce a mandatory grocery code of conduct	Content of the code of conduct to be developed with input from industry	Code of conduct to be made mandatory under the Grocery Industry Competition Bill	Development of a dispute resolution scheme enabled under regulations
Option 2.4 – Develop a statutory authorisation or exception for collective bargaining		Collective bargaining authorisation or exception would be enabled through changes to the Commerce Act 1986, as part of the Grocery Industry Competition Bill	Technical detail of the authorisation or exception for collective bargaining may be prescribed in regulations.
Option 2.5 – Amend value cap and allow private action in relation to the Fair Trading Act for the grocery sector.		Amendments specific to the grocery sector would be made to the existing unfair contract term provisions in the Fair Trading Act 1986, as part of the Grocery Industry Competition Bill	
Improving consumers' ability to make informed decisions			
Option 3.1 – Non-regulatory option to monitor existing steps by major grocery retailers to enhance information for consumers	Major grocery retailers have been instructed to implement these recommendations via a letter from the Minister of Commerce and Consumer Affairs.		
Option 3.3 – Mandate the consistent use of unit pricing	The content of mandatory unit pricing (e.g. its form) will be developed and consulted	Mandatory unit pricing will be provided for under either amendment to legislation, or through development of regulations.	

	on separately.	

Unit pricing

314. Mandating the consistent use of unit pricing can be implemented as a consumer information standard under section 27 of the Fair Trading Act 1986, through amendment of the Weights and Measures Act, or through new primary legislation. A statutory prerequisite for regulations to be made is for Minister to consult with such persons or representatives of such persons as the Minister considers will be substantially affected by any regulations and those persons have had the opportunity to comment to the Minister.

315. Cabinet approval will be sought to release a consultation document in May 2022. The intention is that regulations will be made early in 2023, with a suitable transitional period to allow affected grocery retailers to implement the new systems and for the Commerce Commission to develop guidance.

New Grocery Sector Competition Bill

316. The remainder of the preferred regulatory package is intended to be given effect in a new Grocery Industry Competition Bill. The Bill is intended to be progressed this year Confidentiality

317. Confidentiality

318. The Bill will also provide for secondary legislation to be made, such as in relation the supplier code of conduct. This reflects that the code will include technical matters that require input from industry experts and key stakeholders. We propose to develop the code in parallel with the passage of the Bill through the House. This reduces the risk of inconsistencies between the primary and secondary legislation and facilitates the early implementation of the code.

Who will be responsible for implementation?

319. The proposed regulatory package to be given effect in the new Grocery Sector Competition Bill has a range of institutional implications. MBIE will have responsibility for policy advice and regulatory stewardship. One or more agencies will be required to carry out the following functions:

- Dispute resolution in relation to the supplier code of conduct and wholesale access to groceries
- Carrying out education activities, including disseminating information and guidance to promote healthy relationships between retailers and their suppliers
- Enforcement of the supplier code of conduct
- Monitoring and oversight of the grocery sector, including monitoring the following:
    - i. Relationships between the major grocery retailers and their suppliers
    - ii. The use of best price clauses and exclusivity supply agreements by the major grocery retailers
    - iii. The operation of the major grocery retailers' arrangements for wholesale supply
    - iv. The extent of land banking by the major grocery retailers

v. Grocery retailers’ pricing and promotion practices

vi. State of competition in the retail grocery industry

vii. Conducting reviews and preparing reports on the performance of the regime.

320. The agency or agencies responsible for monitoring and enforcement will need robust information gathering powers to support these functions. This may include a mix of regular reporting obligations on the major grocery retailers and mandatory powers to require information to be provided. Information sharing powers between the agencies (and the Commission) will also be desirable to promote coherence in the system.

321. Decisions on which agency or agencies will carry out these functions will be made before the Bill is introduced. Options for the grocery regulator include:

- A dedicated business unit within MBIE with statutory functions. This model is like the United Kingdom Groceries Code Adjudicator, which is a unit located in the Department for Business, Energy & Industrial Strategy.
- The Commission for most functions, with dispute resolution functions carried out by one or more dispute resolution service providers.
- A new standalone grocery regulator with statutory powers and functions to oversee the grocery sector.

322. Funding arrangements will be determined once the responsible agency is determined.

Compliance by the grocery industry

323. The Commission carried out an open and robust consultation process in preparing its report. The major grocery retailers have generally responded positively to the report’s recommendations and given assurances of implementing some of the changes on a voluntary basis or in advance of the regulation.

324. As the preferred regulatory package is closely based on the Commission’s recommendations, we anticipate that the risk of industry stakeholders being surprised by the package of options above to be low. We expect communication with stakeholders to continue through the development of the Bill and associated regulations.

What are the implementation risks?

325. We see three major implementation risks.

326. The first of these is regulatory error which may take a few forms. The regulatory package could:

- Have unintended adverse consequences
- Have materially higher costs than expected
- Be ineffective at either addressing the problem or achieving the objective.

327. We think this risk is relatively low as the Commission’s report is well-researched and the recommendations proposed are designed to be proportionate. We propose to further manage this risk through ongoing consultation with stakeholders as the regulatory regime is developed. In addition, a robust monitoring regime will be put in place to identify any regulatory errors in a timely manner, so that it may be addressed.

328. The second risk is that the regulator is ill-suited, under resourced or unprepared at the time the regulatory scheme comes into force. The regulatory regime relies upon a grocery regulator that is responsive to the needs of the sector and can carry out its functions in a timely and low-cost manner. Management of this risk will be considered as part of the institutional design of this option, drawing on overseas and domestic comparators. MBIE will also work with the Treasury to seek necessary funding and arrangements are put in place.

329. A third risk is that addressing a key condition to entry, addressing barriers to site availability, depends on work being progressed outside of this RIS to reform New Zealand's key planning law framework under the RMA. The Commission noted that addressing these barriers will be an important enabler of improving competition. This risk will be managed by MBIE closely engaging and coordinating with MfE to ensure the planning law recommendations are progressed by MfE and ensuring that actions by MfE align with the direction of other changes undertaken by MBIE.

3.2 How will the new arrangements be monitored, evaluated, and reviewed?

330. The regulatory regime will form part of MBIE's Competition Regulatory System and have a close interface with the Consumer and Commercial Regulatory System.

331. The design of the new regulatory regime will support good regulatory stewardship, because it provides for the ability to monitor, review, and adapt the regulatory framework in response to emerging issues and trends to ensure it continues to be fit for purpose.

332. Key features of the new regulatory regime that will support monitoring, evaluation and review are:

- The regulator having explicit functions to monitor the regime, collect relevant information and to report on performance.

- Provisions to ensure collaboration and information sharing between regulatory agencies (if more than one) will also be included in the design. This will include measures to ensure the integration of this sector-specific competition regime with the wider competition system.

333. The Commission's final report sets out a clear intervention logic and a baseline against which the effectiveness of the regulatory regime may be assessed. This will be supplemented by the information gathered under the monitoring regime, with the regulator intended to be given robust powers to gather information. In addition, we expect that one of the functions of the new regulator will be to develop performance measures for specific elements of the regime, and the UK Grocery Regulator's annual reports on the effectiveness of its supplier code of conduct has been identified as best practice.

334. The Commission recommended that a review of the regulatory regime is carried out after it has been in effect for three years. We intend to provide that MBIE or the grocery regulator is resourced to conduct annual reviews as required. Annual reviews may alert the Government and public to serious unintended consequences, or if the benefits of competition are not emerging in reasonable time.

Annex One: Final recommendations in the Commerce Commission's market study report

Category	#	Commerce Commission Recommendation	#	Sub-recommendation	Implementing party
Recommendations to improve conditions for entry and expansion at the grocery wholesale and retail level	1	Improve the availability of sites for retail grocery stores under planning law.	1A	District plans should include sufficient land that is zoned to enable choice in sites for the development of retail grocery stores.	Territorial authorities
			1B	The new planning system should require Regional Spatial Strategies to provide sufficient spare capacity to enable choice in sites for the development of retail grocery stores.	Strategic Planning Reform Board
			1C	The new planning system should require every Natural and Built Environment Plan to include a minimum proportion of urban land that is zoned for retail grocery stores.	Ministry for the Environment (MfE)
			1D	The new planning system should limit the discretion available to decision-makers regarding the approval of retail grocery stores.	MfE
			1E	The positive outcomes of trade competition should be able to be considered in planning instruments under the Natural and Built Environments Act.	MfE
			1F	Retail grocery store development should not be able to be declined based on adverse retail distribution effects on existing commercial centres.	MfE
	2	Prohibit restrictive and exclusive covenants that inhibit retail grocery store development, and monitor land banking by the major grocery retailers.	2A	Prohibit restrictive covenants that relate to the development of retail grocery stores.	Ministry of Business, Innovation and Employment (MBIE)
			2B	Prohibit exclusive covenants in leases that relate to the operation of retail grocery stores.	MBIE
			2C	Monitor land banking by the major grocery retailers.	MBIE/New grocery regulator
	3	Require the major grocery retailers to consider requests for wholesale supply in good faith, and meet associated disclosure obligations.	3A	Require the major grocery retailers to consider all requests for commercial wholesale supply in good faith.	MBIE
			3B	Require the major grocery retailers to put in place and disclose principles and terms and conditions of wholesale supply.	MBIE
			3C	Establish a formal dispute resolution mechanism for wholesale supply disputes.	MBIE
	4	The next reviews of the Overseas Investment Act and Sale and Supply of Alcohol Act should consider whether they unduly impede entry or expansion by grocery retailers.	4A	The next review of the Overseas Investment Act should consider its impacts on grocery sector competition.	Treasury
			4B	The next review of the Sale and Supply of Alcohol Act should consider its impacts on grocery sector competition.	Ministry of Justice
	5	Monitor strategic conduct that affects the conditions of entry or expansion.	5A	Monitor the use of best price clauses.	MBIE/New grocery regulator
			5B	Monitor the use of exclusive supply agreements.	MBIE/New grocery regulator
Recommendations to improve competition for the acquisition of groceries (i.e. the relationship with suppliers)	6	Introduce a mandatory grocery code of conduct to govern relationships between the major grocery retailers and their suppliers.	6A	Supply relationships should be subject to an overarching principle of good faith.	MBIE
			6B	A grocery code of conduct should include provisions to improve the transparency of supply agreements.	MBIE
			6C	A grocery code of conduct should prohibit or limit a range of conduct.	MBIE
			6D	Establish a formal dispute resolution mechanism for grocery code of conduct disputes.	MBIE

	7	Consider a statutory authorisation or exception for collective bargaining by grocery suppliers.			MBIE
	8	Amend the Fair Trading Act to strengthen the business-to-business unfair contract terms regime.	8A	Allow private action in respect of unfair contract terms.	MBIE
			8B	Simplify the mechanism for imposing penalties and other remedies in relation to the use of unfair contract terms.	MBIE
			8C	Consider raising the transaction value cap for unfair contract terms.	MBIE
Recommendations to improve the ability of consumers to make informed decisions	9	The major grocery retailers should ensure their pricing and promotional practices are simple and easy to understand.			Major grocery retailers
	10	Mandate the consistent display of unit pricing.			MBIE
	11	The major grocery retailers should ensure disclosure relating to loyalty programmes and data collection and use practices is clear and transparent.	11A	The major grocery retailers should ensure disclosure of loyalty programme terms and conditions is clear and transparent.	Major grocery retailers
			11B	The major grocery retailers should ensure disclosure of consumer data collection and use practices is clear and transparent.	Major grocery retailers
	12	The major grocery retailers should cooperate with price comparison services.			Major grocery retailers
Institutional arrangements	13	Establish a grocery regulator and dispute resolution scheme.	13A	Establish a grocery sector regulator.	MBIE
			13B	Establish a dispute resolution scheme.	MBIE
Monitoring and review	14	Review the state of competition in the grocery sector three years after implementation of the recommended regime and collect information in the interim to support this review.	14A	Undertake a further review of competition three years after implementation of the recommended regime.	MBIE/New grocery regulator
			14B	Collect information to support a further review of competition.	MBIE