

## Grocery wholesale regime

### *Scheme of the wholesale regime*

1. Section 18 of the Grocery Industry Competition Act (**GICA**) provides an overview of the wholesale regime. Essentially, a **voluntary framework** is imposed, with options to impose **additional regulation**.
2. The **purpose of the wholesale regime** is to promote competition and efficiency in the grocery industry for the long-term benefit of consumers in New Zealand by enabling wholesale customers to:
  - a. Have reliable and cost-effective wholesale supplies of groceries (either through wholesale supply provided by regulated grocery retailers (**RGR**), directly arranging supply from suppliers, or other channels, or any combination of those channels).
  - b. Have reasonable access to the benefits of the scale, and the efficiency, of operations of RGRs and their associated persons.

### *Voluntary framework*

3. The GICA provides a framework to facilitate voluntary commercial negotiations between the regulated retailers and wholesale access seekers (**Voluntary Framework**).
4. The Voluntary Framework requires RGRs to:
  - a. Consider and negotiate wholesale supply requests in good faith.
  - b. Establish, implement, publish, regularly review, and comply with rules, criteria, and procedures for considering wholesale supply requests.
  - c. Establish, implement, publish, regularly review, and comply with standard terms and conditions and principles for wholesale supply.
  - d. Notify the Commission of wholesale supply requests, the outcome of the request, variations, and cancellations, within 1 month.
  - e. Ensure each wholesale agreement is in writing and expressed in plain language in a clear, concise, and intelligible manner.
  - f. Ensure each wholesale agreement specifies a pricing or charging method.
  - g. Put in place systems and processes for wholesale supply.
5. RGRs are prohibited from engaging in conduct that has the purpose, effect, or likely effect of:
  - a. Unduly hindering or obstructing a wholesale customer/supplier from developing or maintaining its own trading relationship any supplier/wholesale customer.
  - b. Unduly hindering or obstructing a supplier from participating in a wholesale offering.

- c. Inducing a supplier to refuse or fail to sell any groceries in connection with a wholesale offering.
- d. Preventing or restricting a wholesale customer from receiving (directly or indirectly) the benefits of a range-, quantity-, or frequency-based discount, payment, or rebate (made available in connection with the regulated retailer's scale and efficiency of operation).

### ***Additional regulation***

6. The GICA also provides processes to impose four types of **Additional Regulation** in case the Voluntary Framework is not effective:
  - a. A **wholesale framework**, which would provide transparency about how a regulated grocery retailer will make decisions about price, range, quantity, frequency, and terms and conditions in connection with the wholesale supply of groceries.
  - b. A **wholesale code**, which would provide rules in connection with the wholesale supply of groceries provided by regulated grocery retailers.
  - c. **Non-discriminatory terms** regulation, which would ensure that a regulated grocery retailer does not treat wholesale customers differently from how it treats itself or its associated persons or any other wholesale customer, except in limited circumstances.
  - d. **Specified access terms** regulation, which would ensure that a regulated grocery retailer supplies groceries at wholesale on regulated terms and conditions (whether relating to price, range, quantity, frequency, or any other matter).
7. The Commerce Commission (**Commission**) may hold an inquiry into whether the wholesale supply of groceries should be subject to additional regulation, and, if so, what type or types of additional regulation should apply.
8. A **wholesale framework** and **wholesale code** can be imposed by the Commission. It must first be satisfied that doing so is necessary or desirable to promote the purpose of the wholesale regime and either:
  - a. The RGR fails to set up certain aspects of the Voluntary Framework within certain time periods, or fails to meet certain benchmarks; or
  - b. The wholesale offerings of groceries by a regulated grocery is not consistent with wholesale offerings provided in a competitive wholesale market.
9. Note that a wholesale code can impose obligations on suppliers and in relation to supply agreements. If the supplier breaches those obligations, it will be liable to civil liability remedies. The wholesale code can only impose obligations on suppliers if the Commission is satisfied:
  - a. The provisions are necessary or desirable to promote the principle that wholesale customers have reasonable access to any discounts, payments, or rebates; or
  - b. The conduct of suppliers has been, or is likely to have been, lessening competition in a wholesale or retailer grocery market, and the provisions are necessary or desirable to promote the principle that wholesale customers have reliable and cost-effective access to wholesale groceries.
10. **Non-discriminatory terms** and **specified access terms** can be imposed by the Minister (by recommending the Governor-General make an Order in Council). These can only be imposed if:

- a. The Commission has carried out an inquiry and the Minister has had regard to the recommendations made; and
  - b. If the Minister's final decision is different from the Commission's recommendation, the Minister has requested and received written advice from the Commission on what relevant supporting determinations would look like; and
  - c. The Minister is satisfied that imposing the Additional Regulation is necessary or desirable to promote the purpose of the wholesale regime; and
  - d. The Minister is satisfied the wholesale offerings of groceries by a regulated grocery is not consistent with wholesale offerings provided in a competitive wholesale market (including if a regulated retailer has seriously or persistently contravened certain duties under the Voluntary Framework).
11. The Order in Council may allow suppliers to opt out of participating in the wholesale supply of groceries under non-discriminatory terms and/or specified access terms regulation. Regulated retailers cannot induce a supplier to opt out.

**Matthews Law**  
**17 November 2023**