

Commerce (Supermarket Adjudicator and Code of Conduct) Amendment Bill

Member's Bill

Explanatory note

General policy statement

This Bill amends the Commerce Act 1986 to require that a supermarket adjudicator is established, to resolve disputes between supermarkets and suppliers. The adjudicator will be funded by a levy of supermarkets and suppliers and will have power to involve the Commerce Commission when required. The first task of the adjudicator will be to develop a code of conduct for supermarket grocery suppliers to prevent or mitigate restrictive trade practices and unfair dealings in the supply of groceries to supermarkets and to ensure that all parties are treated fairly. This Bill will require that designated supermarket chains comply with the code of conduct to regulate grocery supply practices and promote fair trade practices. The code will provide a guiding negotiation framework to keep supplier-retailer negotiations free from the misuse of power. The draft code will be prepared by the adjudicator in consultation with representatives of interested parties such as designated supermarket chains, the New Zealand Food and Grocery Council, Horticulture New Zealand, and Consumer New Zealand, and must be approved by the Minister of Commerce.

New Zealand has just 2 supermarket chains, which control about 90% of our grocery retail market; this is one of the highest concentrations in the world. The market has become so consolidated, and the buying power of supermarkets so extensive, that supermarkets are able to dictate terms and conditions and prices to suppliers. This poses a risk to long-term consumer interests as well as to suppliers, in particular to small-scale suppliers and growers. If small suppliers are forced out of business by anti-competitive practices, this will have a detrimental effect on consumer choice and on competition in the sector. This Bill follows the lead of the United Kingdom, which already has in place a Groceries Supply code of conduct and adjudicator, and Australia, where progress has been made on developing a fairer grocery market by having the Australian Competition and Consumer Commission (ACCC) carry out a comprehensive in-

quiry into the grocery market. The inquiry led the ACCC to state that it finds merit in the idea of the introduction of a legally enforceable supermarket and grocery industry code of conduct with clear, real obligations that set out acceptable practices.

Clause by clause analysis

Clause 1 contains the Bill's title.

Clause 2 states the commencement date.

Clause 3 provides that the Commerce Act 1986 is the Act being amended.

Clause 4 replaces the current purpose in section 1A with a purpose that mentions the long-term benefit of consumers and suppliers.

Clause 5 inserts a *new Part 2A*, which deals with the development and implementation of a code of conduct for supermarket grocery suppliers.

Mojo Mathers

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Commerce (Supermarket Adjudicator and Code of Conduct) Amendment Act **2015**.

2 Commencement

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This Act comes into force on the day after the date on which it receives the Royal assent.

3 Principal Act

This Act amends the Commerce Act 1986 (the **principal Act**).

4 Section 1A replaced (Purpose)

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Replace section 1A with:

1A Purpose

The purpose of this Act is to promote competition in New Zealand markets by introducing measures to prevent or mitigate restrictive trade practices for the long-term benefit of consumers and suppliers.

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5 New Part 2A inserted

After section 46, insert:

Part 2A
Code of conduct for supermarket grocery suppliers

46A Purpose of Part

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The purpose of this Part is to—

- (a) establish the role of adjudicator; and
- (b) provide for the adjudicator to develop a code; and
- (c) enable the adjudicator to receive and deal with complaints about breaches of the code.

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46B Interpretation

In this Part, unless the context requires another meaning,—

adjudicator means the adjudicator appointed under **section 46C**

code means a code of conduct for supermarket grocery suppliers that—

- (a) states that its objective is the prevention and mitigation of restrictive trade practices in the supply of groceries to supermarkets; and
- (b) has the purpose of creating—

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- (i) a transparent and fair agreement on how negotiations between parties will be conducted; and
- (ii) a clear process for disputes resolution; and
- (c) provides a guiding framework within which negotiations between parties are carried out free from the misuse of power

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designated supermarket chain means a company that—

- (a) is in the business of operating a regional or national supermarket chain for retailing groceries; and
- (b) has been designated as a supermarket chain by the Minister by notice in the *Gazette*

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groceries—

- (a) means any or all of the following:
 - (i) cleaning products; and
 - (ii) food and drink sold by a supermarket for consumption outside the supermarket by humans or pets; and
 - (iii) household goods; and
 - (iv) toiletries; and
- (b) excludes—
 - (i) cosmetics; and
 - (ii) gardening equipment; and
 - (iii) greeting cards; and
 - (iv) kitchen hardware; and
 - (v) newspapers; and
 - (vi) petrol; and
 - (vii) pharmaceuticals; and
 - (viii) tobacco; and
 - (ix) tobacco products

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party means a designated supermarket chain, supermarket, or supplier

supermarket means a business that sells groceries—

- (a) at retail; and
- (b) in association with a designated supermarket chain; and
- (c) to 20% or more of the market for groceries in New Zealand

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supplier means—

- (a) a person carrying on, or actively seeking to carry on, a business of supplying groceries directly to a supermarket; and

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- (b) includes all persons with whom the person has arrangements to supply the groceries or to facilitate the supply of the groceries.

Adjudicator

46C Appointment of adjudicator

- (1) The Minister must appoint an adjudicator. 5
- (2) The adjudicator is an independent Crown entity under section 7(1)(a) of the Crown Entities Act 2004.

46D Functions of adjudicator

The adjudicator's functions are—

- (a) to prepare a code; and 10
- (b) to receive and deal with complaints that the code has been breached.

46E Funding of adjudicator

- (1) A levy may be imposed on parties to fund the adjudicator.
- (2) Section 53ZE applies, with all necessary modifications, to the levy.

Code

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46F Preparation of code

- (1) The adjudicator must work with representatives of the following to prepare a draft code:
- (a) parties; and
- (b) the New Zealand Food and Grocery Council; and 20
- (c) Horticulture New Zealand; and
- (d) Consumer New Zealand; and
- (e) the New Zealand Standards Authority; and
- (f) any other person whom the adjudicator considers appropriate.
- (2) When the adjudicator and the representatives have prepared a draft code, the adjudicator must send the draft code to the Minister with a recommendation to approve it. 25
- (3) The Minister must—
- (a) approve the code recommended; or
- (b) approve an amended code after consultation with the adjudicator and the representatives. 30
- (4) The Minister must publish in the *Gazette* a notice about the code that—
- (a) states that it is approved; and
- (b) states when it comes into force; and

(c)	states where copies of it may be read; and	
(d)	states where copies of it may be obtained without charge.	
(5)	Subsections (1) to (4) must be complied with by 31 December 2015.	
(6)	Subsections (1) to (4) apply, with all necessary modifications, to amendments to the code.	5
46G	Effect of code	
	Once a code exists and while it is in force, parties may make supply contracts or arrangements for groceries only if the contracts or arrangements—	
(a)	incorporate the code; and	
(b)	contain terms and conditions consistent with the code.	10
	<i>Complaints</i>	
46H	Receiving and dealing with complaints	
(1)	A party may complain to the adjudicator that another party has breached the code.	
(2)	The adjudicator must investigate the complaint.	15
(3)	Sections 53ZD and 98 apply, with all necessary modifications, to the adjudicator’s investigation.	
(4)	After completing the investigation, the adjudicator must attempt to resolve the complaint.	
(5)	If the adjudicator is unable to resolve a complaint, the adjudicator may request the Minister to exercise the Minister’s power in section 52H(1)(a) to require the Commission to hold an inquiry.	20
(6)	A party found by the adjudicator or the Commission to have breached the code is liable to pay the costs of the adjudicator’s investigation.	
(7)	The adjudicator and the Commission each has an absolute discretion to release or withhold the name of the complainant.	25
	<i>Administrative provisions</i>	
46I	Review of code	
(1)	The adjudicator must review the code every 5 years.	
(2)	Section 46F applies to the review, with all necessary modifications.	30
46J	Application of Legislation Act 2012	
(1)	A notice given for the purposes of the definition of designated supermarket chain in section 46B is neither a legislative instrument nor a disallowable instrument for the purposes of the Legislation Act 2012 and does not have to be presented to the House of Representatives under section 41 of that Act.	35

- (2) The code approved under **section 46F(3)** is not a legislative instrument but is a disallowable instrument for the purposes of the Legislation Act 2012 and must be presented to the House of Representatives under section 41 of that Act.