

# **Grocery Industry Competition Bill**

Government Bill

As reported from the Economic Development, Science and Innovation  
Committee

## **Commentary**

### **Recommendation**

The Economic Development, Science and Innovation Committee has examined the Grocery Industry Competition Bill and recommends that it be passed. We recommend all amendments unanimously.

### **Introduction**

The Grocery Industry Competition Bill is an omnibus bill that seeks to improve competition and efficiency in the grocery sector for the long-term benefit of consumers. It responds to some of the recommendations of the Commerce Commission’s market study into New Zealand’s retail grocery sector.

The bill aims to improve access to the wholesale grocery supply market so that it is easier for businesses to enter the retail market. The bill also aims to improve conduct in the grocery industry, particularly between retailers and their suppliers.

It would do so by:

- creating a regulatory regime for the wholesale supply of groceries
- establishing a Grocery Commissioner, within the Commerce Commission, to oversee the grocery industry to monitor and report on the industry’s performance, and to enforce compliance with the regulatory regime
- creating a grocery supply code of conduct that would apply to regulated grocery retailers (RGRs)<sup>1</sup>

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<sup>1</sup> Under clauses 8 and 22 of the bill, the term “regulated grocery retailer” (RGR) refers to Foodstuffs North Island Limited, Foodstuffs South Island Limited, Woolworths New Zealand

- extending some protections of the Fair Trading Act 1986 to contract terms between grocery suppliers and retailers
- providing an exemption for collective bargaining by suppliers
- providing for an alternative dispute resolution scheme to resolve disputes between grocery suppliers and retailers.

### **Legislative scrutiny**

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. We have no issues regarding the legislation's design to bring to the attention of the House.

### **Proposed amendments**

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

### **Purpose of the bill**

The bill as introduced includes a two-part purpose clause, comprising clauses 3(a) and 3(b). Clause 3(a) states that the purpose is to improve competition and efficiency in the grocery industry. Clause 3(b) states that the purpose of the bill is to promote outcomes that are consistent with outcomes produced in competitive markets, to the extent that there is limited competition in the grocery industry.

We consider that this purpose clause could be simplified. All parts of the bill would operate in concert to achieve the purpose in clause 3(a). We consider that clause 3(b) of the bill would not be necessary to support the most significant regulation that may be imposed under Part 3 of the bill. The regulation in Part 3 is still intended to promote competition for the long term benefit of consumers. Therefore, as clause 3(b) would be redundant, we recommend removing it from the bill. This would make clear that the purpose of the bill is solely to promote competition and efficiency in the grocery sector for the long-term benefit of consumers.

We recommend consequential changes to other parts of the bill, such as the grocery supply code provisions and the wholesale supply regime, which also have purpose statements. We recommend amending clause 13 accordingly to reflect the simplified purpose of promoting competition and efficiency.

### **Functions of the Commerce Commission under the bill**

Clause 4 of the bill would give the Commerce Commission a range of functions to enable it to monitor and investigate the grocery industry and enforce the regulatory

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Limited, or another person designated under clauses 9 and 23 as an RGR. In the case of Woolworths, RGR means the whole operation; for Foodstuffs North and South, it includes interconnected body corporate, successor, franchisee, and transacting shareholders.

provisions in the bill. We consider that these functions could be specified more clearly. We discuss some recommended amendments below.

### **Compliance and enforcement**

Clause 4(c)(iii) specifies a compliance and enforcement function for the Commerce Commission. It told us that clause 4(c)(iii) as introduced could be restrictive, and could limit its ability to fully enforce the provisions of the bill.

We do not want the Commission to be limited in its ability to enforce and monitor the effects of the bill. Therefore, we recommend amending clause 4(c)(iii) to avoid restricting the Commission's activity in relation to compliance and enforcement.

### **Monitoring and reporting**

The bill as introduced would give the Commerce Commission the power to monitor and report on the grocery industry. We think that the bill could be more specific about what the Commission should monitor and report on. We recommend inserting clause 4(2) to make the breadth of the Commission's monitoring and reporting powers clearer. Clause 4(2) specifies the objectives for the Commission's monitoring and reporting on the industry, including:

- understanding and reporting on current and future trends
- improving transparency in the industry
- informing participants in the market of their obligations
- supporting consumers to make informed purchasing decisions.

### **The Commerce Commission's requirements to report should be consistent throughout the bill**

In the bill as introduced, the Commerce Commission would be required to report to the Minister on a variety of things, including the grocery supply code, any inquiries the Commission conducts, and wholesale frameworks. The Commission would also be required to report annually on the state of the grocery industry.

We consider that these reporting requirements should be consistent throughout the bill. Therefore, we recommend a number of amendments throughout the bill to make the reporting consistent. Generally, we think that the Commission should be required to present reports to the Minister as soon as is practicable. It should also be able to include material in its annual report, if that is the most practical way of publication.

### **The Commerce Commission is not responsible for policy advice**

Clause 4(f) as introduced would give the Commerce Commission the function of reviewing policy, law, and practices that are relevant to its functions.

The Commission suggested that this was unclear, and that it should not have any responsibility for reviewing policy. We agree with the Commission. We recommend amending clause 4(1)(f) to make clear that the Commission is not responsible for policy advice related to the bill.

### **The boundaries between different functions could be clearer**

The bill as introduced would give the Commerce Commission a substantial range of tools to regulate the wholesale grocery market. They include requiring RGRs to establish and operate a grocery wholesale framework, or creating a grocery wholesale supply code for the whole industry. The Commission submitted that the boundaries of these regulatory tools could be clearer.

We agree with the Commerce Commission that there should be clearer guidance in the bill on the boundaries between the tools. Therefore, we recommend inserting clause 64(3). This clause would provide that a wholesale framework may substitute for the default obligations in subpart 2 of Part 3.

### **Disputes in the dispute resolution scheme must be resolved within 25 days**

Schedule 2, clause 13 of the bill as introduced would require any dispute referred to the dispute resolution scheme to be concluded within the period specified in regulations, or in 25 working days if not specified. We consider that 25 working days is an appropriate amount of time for a commercial dispute to be resolved. We consider that timeliness is essential for dispute resolution, especially in the grocery industry.

We note that RGRs may be able to absorb the time-cost of dispute resolution better than smaller suppliers or wholesale customers. This could reduce the effectiveness of the dispute resolution scheme. We recommend amending Schedule 2, clause 13 to remove the reference to a period of time prescribed by regulations. This would mean that all disputes referred to the scheme would need to be resolved within 25 working days unless extended by the parties, the adjudicator, or the dispute resolution scheme provider.

One of the issues that the committee was concerned about was the need to ensure diversity of suppliers, and consequently we reflected that in sections 13 and 20 of the bill.

We have made amendments to the bill to reduce the risk of relitigation by ensuring that matters that are finally resolved by the court cannot be relitigated in dispute resolution, and that matters that have been the subject of binding resolution in dispute resolution cannot be relitigated in court, except where appeal rights are provided.

### **Pecuniary penalties related to turnover should be consistent with other legislation**

The bill would set maximum pecuniary penalties for non-compliance with certain provisions. A pecuniary penalty is a monetary amount paid in relation to a contravention of a civil liability provision. Clauses 122(4)(b) and 123(4)(b) would factor in the turnover of a business to calculate the maximum penalty that could be applied to it, while clauses 122(4)(a) and 123(4)(a) factor in the commercial gain from the contravention.

Some submitters suggested that the turnover penalties in the bill should be consistent with other regimes, such as the Commerce Act 1986. We agree that consistency with other legislation is desirable. Therefore, we recommend inserting the definition of “turnover” from the Commerce Act into clause 5.

### **The High Court should be able to factor in outcomes of dispute resolution process in determining penalties**

Under clause 126 as introduced, the High Court would be able to determine an amount for a pecuniary penalty, based on a number of relevant matters. Submitters suggested that the status or outcome of a proceeding of the dispute resolution scheme should be a factor that the court may consider when determining penalties.

We agree. We recommend amending clause 126 to explicitly allow the court to consider a proceeding of the dispute system as one of the factors when determining pecuniary penalties.

### **Disputes may be referred to the dispute resolution scheme**

The bill as introduced would allow disputes between RGRs and suppliers or wholesale customers to be referred to the dispute resolution scheme. However, submitters noted that the bill does not make clear when the disputes may be referred.

We consider that the resolution must be clearly defined in the bill to be effective. Therefore, we recommend amending clause 149 to insert 149(c). This would make clear that disputes may go to the dispute resolution scheme while a matter that is still being considered has not been resolved by a court or other tribunal.

### **Concurrent proceedings related to disputes**

The bill’s dispute resolution scheme would provide an option for disputes between wholesale customers, suppliers, and RGRs to be resolved. These parties may also litigate their disputes through courts or other adjudicators.

We consider that the bill as introduced is not clear which dispute resolution process takes priority. We think clarity is needed so that the dispute resolution process is effective.

Therefore, we recommend amending clause 151(2) to make clear that any concurrent proceeding to the bill’s dispute resolution scheme is to be stayed. Concurrent proceedings would be stayed regardless of when the proceeding commenced in relation to the matters of the dispute.

### **The Commerce Commission may apply to the courts to stay dispute proceedings**

Clause 151(3) would give a court the discretion to allow a proceeding before it to continue, or to stay the same proceeding if it is before the dispute resolution scheme. A court may also stay proceedings before the dispute resolution scheme on the application of the Commerce Commission.

However, the bill does not give any direction on when the Commission should seek a stay in proceedings. This could lead to delays and undermine the efficacy of the dispute resolution scheme.

We consider that disputes should be resolved as efficiently and quickly as possible, for the benefit of all parties. Therefore, we recommend amending clause 151 to make clear the grounds on which the Commission may apply for a stay on concurrent proceedings.

### **Exercising the powers of the Commerce Commission**

The bill as introduced would give the Commerce Commission a range of functions, as well as create a Grocery Commissioner. The Commission suggested that the bill could be improved by making clear who in its organisation could exercise the functions given to the Commission under the bill.

We consider that these functions would be vital to the effective administration of this legislation. Therefore, we recommend amending clause 163 to make clear when the Grocery Commissioner could act with two or more other members of the Commerce Commission with the permission of the Commission's chairperson.

We also recommend inserting clause 164(3). This amendment would stipulate that when acting with other members of the Commission, the Grocery Commissioner is not automatically the chairperson of the proceeding, but the Grocery Commissioner still has the deciding vote where votes are tied.

For similar reasons of clarifying the role of the Grocery Commissioner, we recommend amending clause 166. This amendment would make clear that the Commissioner could also delegate functions that require two or more members of the Commerce Commission with the permission of the chairperson.

### **The Minister may recommend that a person be designated as a regulated grocery retailer**

Clause 10 of the bill as introduced would give the relevant Minister the ability to recommend to the Governor-General that a person be designated as a regulated grocery retailer (RGR) under Part 2. Clause 24 would give the Minister the ability to make a similar recommendation, but for designation for the purposes of Part 3. Being designated as an RGR would make a person subject to additional regulations and obligations. Some submitters suggested that the Minister's recommendation for designation should only be based on a recommendation from the Commerce Commission.

We consider that it should be clearer in the bill how the Minister may respond to a recommendation. We think that restricting a Minister's recommendation to only what the Commerce Commission supports would be overly restrictive. Rather, we think that the Minister should be able to make a recommendation if the Minister thinks it is in the public interest to do so. We recommend amending clause 10 accordingly. We recommend a similar amendment to clause 24(2) for the same reasons.

### **The Commission should consult before recommending a designation**

In the bill as introduced, the Commerce Commission would be required to consult the affected person before recommending to the Minister that they be designated as an RGR. Some submitters suggested that broader consultation requirements might be beneficial when the Commission considers recommending substantial regulation. In particular, consulting more people than just the person who may be designated would prevent the Commission from getting a one-sided view.

We agree that the Commission should consult more broadly before recommending designation as an RGR. We recommend amending clause 11(2) to require the Commerce Commission to consult people who may be substantially affected by a recommendation to designate before making a recommendation. We also recommend inserting clause 25(2)(aa) for the same reasons.

### **Designation as a regulated grocery retailer could be triggered by an investigation**

The bill would require certain criteria to be met before the Commerce Commission could recommend that a person be designated as an RGR. These criteria include an annual revenue threshold of \$750 million, or that the Commission is satisfied that a designation would promote competition in the grocery industry.

Some submitters suggested that an investigation by the Commission could also be the basis of a recommendation for designation. We think that this suggestion would improve the bill. We consider that the Commission should have flexibility in monitoring and recommending improvements for the grocery industry. We recommend amending clause 11 to enable the Commission to make a recommendation for designation based on an investigation of a person.

### **The Minister must consult before recommending a grocery supply code**

The bill as introduced would allow the Minister to recommend that a grocery supply code be created by Order in Council. A grocery supply code would regulate the conduct between RGRs and their suppliers, with the aim of improving conduct and transparency and contributing to a positive trading environment.

Submitters expressed concern that there was no requirement in the bill as introduced for the Minister to consult on a draft code before recommending the creation of a grocery supply code. They noted that such a code would be a substantial piece of regulation, which would deeply affect RGRs and their suppliers.

We agree that the Minister should consult on a draft grocery supply code. We recommend amending clause 12 to require the Minister to consult on a draft code before making a recommendation that a grocery supply code be created.

### **The grocery supply code should be more clearly linked to the purpose of the bill**

Clauses 13 and 14 outline the purpose and contents of the grocery supply code. Some submitters suggested that the purpose of the grocery supply code was not linked clearly enough to the purpose of the bill.

Although the bill as introduced includes a purpose clause for the grocery supply code, we consider that its purpose could be clearer. We recommend replacing clause 13 with new clause 13, which would give more detail about the purpose and intention of the grocery supply code. It would also be more clearly linked to the purpose of the bill.

### **The grocery supply code should apply to people related to regulated grocery retailers**

We were concerned about potential loopholes in a grocery supply code. In particular, we were worried that a potential grocery supply code may not fully capture the related parties of an RGR in their dealings.

We consider that a grocery supply code, to be fully effective, should capture all of the related parties of an RGR. We think that related parties should include anyone whom an RGR has a material influence or significant holding in. Therefore, we recommend inserting new clauses 14A and 15(1A) to make clear that related parties would be captured by a grocery supply code.

### **Grocery supply code should be regularly reviewed and reported on**

The bill as introduced would require the Commerce Commission to review any grocery supply code two years after the code came into force. After the first review, the Commission would review the grocery supply on its own initiative or if the Minister requested a review.

We gave thought to whether future reviews of a grocery supply code should be required more regularly, say at least every five years after the first review. We think regular reviews of a code would be beneficial to ensure that it is relevant and effective for encouraging competition in the grocery industry. Therefore, we recommend inserting new clause 16(2A) to require the Commerce Commission to review any grocery supply code at least every five years after the initial review.

We also recommend inserting new clause 16(4) to require the Commission to report on its review, either as a part of its annual report on the grocery industry, or separately.

### **Grocery supply code should be made by a determination of the Commission**

Clause 12 of the bill as introduced would give the Minister the ability to recommend the creation of a grocery supply code. The Minister would be able to do so after con-



sulting the Commerce Commission, and anyone that the Minister thinks will be substantially affected by the code.

We consider that the Commission would be a more appropriate entity to administer the grocery supply code in the long-term. However, we also consider that the Minister should make the first version of the code. This would allow the code to be introduced expeditiously.

The Commission, as the regulator of the grocery industry, will have detailed knowledge of the grocery industry and the necessary resourcing to perform its regulatory functions. It would be better suited to both reviewing a grocery supply code and making any changes to a grocery supply code by determination.

Therefore, we recommend amending Part 2, clause 12, and clause 4 in Schedule 1. This amendment would give the Commission the ability to make a determination creating a grocery supply code, and allow for the Minister to make the first grocery supply code by Order in Council.

### **Regulated grocery retailers' wholesale offerings should give a reasonable return on investment**

The bill as introduced would create a number of regulatory tools, including the wholesale framework and non-discriminatory terms, to make RGRs sell wholesale groceries to wholesale customers. Non-discriminatory terms would mean that RGRs would be obligated to supply wholesale groceries to retail competitors on the same terms as they supply their retail arms.

Clause 20 specifies that RGRs should be able to make a reasonable return on investments that are required to supply wholesale groceries to competitors. Some submitters suggested that this clause should be broadened to allow RGRs to make a reasonable return on all investments used in their wholesale offerings.

We consider that RGRs offering wholesale groceries should be able to make a reasonable return on relevant investments. Therefore, we recommend amending clause 20(1)(a)(iii) to make it clear that RGRs may make a reasonable return on investments made in connection to their wholesale supply business.

### **Retailers should benefit from the economies of scale of regulated grocery retailers**

Some submitters were concerned that RGRs' wholesale offerings would not pass on related rebates, payments, or discounts associated with large-scale purchases. For example, if a supplier to RGRs offered a discount on purchases of more than 10,000 units, then RGRs could purchase 10,000 units, but not include the discount when wholesaling those units to wholesale customers who are retail competitors.

We believe retailers should get the scale benefits of RGRs when buying wholesale groceries from RGRs. Therefore, we recommend inserting new clause 20(1)(aa). This inserts a principle to make it clear that wholesale customers of RGRs should have reasonable access to the scale benefits such as rebates or discounts that RGRs get

when they buy wholesale groceries from suppliers. We also recommend consequential amendments to clause 40A, clause 70, and clause 71, for the same reason of ensuring that the benefits of bulk discounts are passed on to wholesale customers.

### **Regulated grocery retailers must assist with creating a workable wholesale grocery market**

The bill as introduced outlined principles for how wholesale supply by RGRs should operate. Included in these principles were provisions related to return on investment, efficiency, and range of products.

Some submitters suggested that other principles should be added to ensure that RGRs' wholesale grocery offerings function as a part of a workable wholesale market. Suggested principles included that wholesale customers have cost-effective and reliable access to wholesale groceries, and that the groceries provide quality relative to price. Submitters also suggested that wholesale customers should have access to information about the range of groceries and prices available on the wholesale market.

We agree with submitters that wholesale customers should expect to get access to reliable, quality, and cost-effective wholesale groceries from RGRs. Therefore, we recommend inserting new clauses 20(1)(b) and 20(1)(ba), and amending clause 20(1)(c). These changes would help to ensure that wholesale customers could access wholesale groceries from RGRs in line with the principles noted above. We also recommend inserting clause 20(2) to make clear that the Minister or the Commerce Commission must consider the other reasonable wholesale options available to wholesale customers when taking into account the principles.

### **Suppliers should have reasonable control over where their products are sold**

The bill as introduced would protect the right of independent suppliers (that is, not the in-house brands of RGRs, known as private labels) to ultimately control where their products went to market.

Some submitters suggested that all suppliers in the wholesale market should be treated the same. They considered that RGRs should still be able to have reasonable control over where their in-house products are sold, even in a regulated wholesale market.

We agree and recommend amending clause 20(1)(f) to make it clear that suppliers should retain reasonable control of where their products are sold. We also recommend amending clauses 82, 84, and 92(1)(g) to ensure that suppliers may maintain reasonable control of where their products are sold in all regulatory contexts.

### **Ability to impose some regulation on supplier conduct in wholesale regime**

We were concerned that the wholesale supply regime may not be effective if suppliers use their control to avoid selling their goods through an RGR's wholesale offering.

We recommend amending clause 70, the wholesale code, to allow the Commission to regulate conduct of RGRs and suppliers, or terms or conditions in supply agreements. The Commission would only be able to implement this regulation if the conditions in clause 70(2) are met – including consideration of whether the conduct of suppliers lessens competition.

### **The definition of “non-discrimination” in the bill is too narrow**

Clause 21 includes a definition of “non-discrimination” for the purposes of Part 3 of the bill. Non-discrimination would mean that RGRs must treat all wholesale customers the same as they treat their own retail arms, to the extent that it is not likely to lessen competition in the wholesale market. The Commerce Commission submitted that this definition was too narrow, and should be broadened to include any grocery market.

We agree with the Commerce Commission. We think that the definition of “non-discrimination” should include all grocery markets. We recommend amending clause 21 accordingly.

### **The Commerce Commission should be required to review the effect of non-discriminatory terms and specified access terms**

In the bill as introduced, the Commerce Commission would be required to regularly review and report on some aspects of the bill. However, it would not be required to review the regulations regarding non-discriminatory terms and specified access terms.

We think this is inconsistent, and not appropriate for the substantial regulatory intervention that non-discriminatory terms entails. Therefore, we recommend inserting new clauses 87A and 99A to require the Commerce Commission to review the non-discriminatory terms and specified access terms regulations within three years of these regulations coming into force.

### **The Commerce Commission should be required to review the wholesale access regime**

Clause 104 of the bill would require the Commerce Commission to review the level of concentration in the wholesale grocery market. We think that the purpose of the review could be clearer and more specific. We recommend inserting clause 104(2) to make clear that the review must address the efficacy of the wholesale access regime as a whole.

### **The five-year regulatory holiday**

Clause 24(1)(c) of the bill as introduced would provide for a five-year regulatory holiday for new entrants into the New Zealand grocery market. The holiday would mean that a new entrant would be unable to be designated as an RGR within five years of entering the market. This means that new entrants would not be required to supply wholesale groceries to competitors under the wholesale supply regime.

We consider that the regulatory holiday is imprecisely defined and does not strike the right balance between giving the five-year holiday to a new entrant without being susceptible to exploitation by an RGR. For example, a new entrant that buys a small grocery retailer (not part of an RGR) should still enjoy the five-year holiday. But RGRs should not be able to rearrange their businesses in order to gain the five-year regulatory holiday.

We recommend inserting clause 24(3). This would only make a person ineligible for the regulatory holiday if they acquired a substantial part or whole of an RGR's business, or if they entered into a relationship with a significant number of the franchisees or transacting shareholders of an RGR. We believe this would ensure that genuine new entrants to the market would still benefit from the regulatory holiday, and prevent exploitation from RGRs.

### **Regulated grocery retailers should be able to stop supplying groceries to wholesale customers in certain circumstances**

Clause 110 would allow an RGR to stop supplying groceries to a wholesale customer in certain circumstances. To do so, the RGR would need approval from the Commerce Commission.

The Commerce Commission noted that it would be more efficient and effective for the circumstances to be specified in a prior determination under the bill. That is, the Commission would make a determination that set out the circumstances in which an RGR could stop supplying groceries, rather than just giving approvals on a case-by-case basis.

We agree with this suggestion, and think it would improve the efficiency of the regulation in the bill. Therefore, we recommend amending clause 110 to effect this change, with related amendments to clauses 57, 84, and 92.

### **Reasonable defence for compliance with the bill**

The bill provides a defence to head offices or cooperatives of RGRs if single stores or franchisees of the RGR do not comply with provisions in the bill. However, the bill as introduced does not provide a corresponding protection to the franchisees if they take reasonable steps to comply, and reasonably rely on the cooperative or head office to comply with the other duties.

We think that franchisees and single store owners should be protected from legal liability if they are reliant on a head office to comply with provisions in the bill.

Therefore, we recommend inserting new clause 27A, which would provide single stores or franchisees of an RGR with a defence in these cases.

### **The bill as introduced does not include a definition of “good faith”**

Clause 30 would require RGRs to consider wholesale supply requests in good faith. The Commerce Commission noted that there was no definition of good faith in the bill, and suggested careful consideration of what is intended by the concept in the bill.

We agree that concepts in primary legislation should be clearly understood. Therefore, we recommend amending clause 30 to provide more clarity about what “good faith” means or involves in the context of the bill.

### **More time to prepare for the wholesale supply regime**

Clause 31 would require RGRs to establish a system for considering wholesale supply requests. Clause 31 would also require RGRs to have such a system in place as soon as the wholesale supply regime came into effect. Submitters suggested that more time to set up such a system would be beneficial both for the regulator and the RGRs.

We agree that allowing more time for RGRs to establish a system for wholesaling groceries to competitors would improve the bill. Therefore, we recommend replacing clause 31(2)(a) with new clause 31(2)(a) to allow RGRs two months to establish a system for considering wholesale supply requests.

Relatedly, we note that a person may become an RGR, for example by virtue of becoming a franchisee to an RGR. We agree that in this instance it is reasonable to provide a time period for compliance. Therefore, we recommend inserting clause 31(2)(aa) to provide that a person who entered the market as an RGR (other than by determination) would have 6 months after becoming an RGR to establish a system for considering wholesale supply requests.

We also recommend a similar amendment, for the same reasons, to clause 33 and clause 39, noting that clause 39 still has the commencement time of 3 months after the bill comes into force.

### **Wholesale supply obligations may be lifted from regulated grocery retailers**

The bill as introduced would require RGRs subject to the wholesale supply regime to cooperate fully in any part of that regime. We are concerned about the risk of a possible lack of competition in the wholesale market if RGRs are the largest operators in that market. We consider that the Minister, based on the recommendations of an inquiry by the Commerce Commission, should be able to remove the regulatory requirements for wholesale supply from RGRs.

Therefore, we recommend inserting clause 107A. Clause 107A would allow the Minister to recommend that requirements for wholesale supply of groceries be disapplied. We consider that this would improve the flexibility of the bill by enabling the Minis-

ter to quickly address any unintended effects on competition in the wholesale market or in some parts of the wholesale market.

### **Standard terms and conditions for wholesale supply**

Clause 33 would require RGRs to establish, implement, and publish principles for how they would supply wholesale groceries to retail customers. Submitters noted two issues with this clause. The Commerce Commission noted that it would be desirable for an RGR to use standardised terms and conditions to the extent that is reasonably practicable. Other submitters suggested that the requirement to publish these terms should include an exception for commercially sensitive information.

We agree with both these suggestions. Terms and conditions for wholesale supply should be standardised to the extent that it is reasonably practicable, with particular terms and conditions as the alternative. We also think that RGRs should not be required to publish commercially sensitive information where it relates to wholesaling groceries. Therefore, we recommend amending clause 33 to make it clear that terms and conditions for wholesale supply should be standardised, as far as it is reasonably practicable. We also recommend inserting clause 33(2A) to exempt RGRs, on reasonable grounds, from being required to publish commercially sensitive information.

For consistency, we also recommend replacing clause 34 to make clear that standardised terms and conditions should be created, rather than just principles, as far as it is practicable for RGRs.

### **Requirements for notice of wholesale supply requests should be longer**

The bill as introduced would require RGRs to notify the Commerce Commission when they receive wholesale supply requests, or requests to vary them. Some submitters suggested that this requirement was overly onerous.

We do not agree. However, we think that the timeframe for notification should be longer. We recommend amending clauses 35(2) and 36(3)(a) to extend the time for notification from 10 working days to 1 month.

### **Regulated grocery retailers may only amend a pricing or charging method for the benefit of a customer**

The bill as introduced would only allow RGRs to vary wholesale pricing and charging methods in wholesale agreements under a determination under the wholesale access regime. The Commerce Commission noted that allowing RGRs to vary pricing or charging methods may in some circumstances not be detrimental to the wholesale customer. Therefore, allowing variations would be beneficial for the purposes of the bill, and increase its flexibility.

We agree that flexibility for pricing and charging methods should be allowed where it is not detrimental to wholesale customers. Therefore, we recommend amending clause 38(2) to allow RGRs to vary their pricing or charging methods:

- where it is beneficial to the wholesale customer, or
- where it is not detrimental to the wholesale customer and the wholesale customer agrees.

### **Wholesale agreements and conduct should not unduly hinder or obstruct trading relationships**

Clause 40 of the bill as introduced would preclude RGRs from engaging in wholesale relationships that would prevent wholesale suppliers from developing trading relationships with wholesale customers. Submitters were concerned that this could unintentionally capture positive competitive behaviours, such as offering discounts.

We agree that the bill should not prohibit competitive behaviours that are beneficial to consumers. Therefore, we recommend amending clause 40 to include the term “unduly”. We consider that this addition would prevent positive competitive behaviours from being prohibited by the bill.

### **Regulated grocery retailers may include wholesale customers**

Clause 26 defines a group to cover bodies corporate, franchisees, and transacting shareholders. However, this definition could lead to inconsistencies where parts of a group are both RGRs and wholesale customers – for example franchisees. This would make compliance with the legislation difficult for a group.

To prevent any confusion or excessive difficulty in complying, we recommend inserting clause 40(2) and 40(3). This would make clear the relationship between a wholesale customer and an RGR. Clause 40(2) would clarify that members of the same group are not wholesale customers, unless a determination provides otherwise. We think this definition would help to avoid any potential confusion or difficulty in compliance.

### **The Commerce Commission should be able to make exemptions from duties under the wholesale supply regime**

The bill as introduced would not allow the Commerce Commission to make fully effective exemptions from duties under the wholesale supply regime. It would be able to choose when and how to enforce duties under the regime, but this would still leave RGRs open to litigation by third parties.

We consider that the Commerce Commission should have the discretion to grant exemptions, where it thinks it beneficial for the purpose of the legislation to do so. We recommend inserting clause 43A to give the Commission the power to grant exemptions to the duties under the wholesale supply regime.

### **Exemptions from additional regulation should include factors beyond the control of regulated grocery retailers**

Clause 58 includes tests for additional regulation, to give the Commerce Commission rules on when to intervene in the market. As part of the tests, clause 58(3) provides for when certain tests are not triggered.

Some submitters noted that the tests did not allow for factors outside an RGR's control that might prevent it from meeting a test under the bill.

We think that RGRs should not be subject to additional regulation in situations where something beyond their control means that an outcome cannot be achieved. Therefore, we recommend amending clause 58(3)(b) to include a failure because of some cause beyond the RGR's control.

### **A regulated grocery retailer may amend its wholesale framework**

Clause 63 of the bill as introduced describes the process RGRs would be required to follow when creating a wholesale framework. The requirements include preparing a draft, consulting the Commerce Commission, and ensuring that it complies with the legislative requirements.

Submitters suggested that RGRs should be able to amend or replace their wholesale frameworks. They noted that the frameworks would be novel, and may require some trial and effort to get right.

We agree with submitters that RGRs should be able to amend or replace their wholesale frameworks, provided they go through the requirements in clause 63. The requirements in clause 63 include providing the framework to the Commission and ensuring that the framework complies with the requirements in clause 64. Therefore, we recommend inserting new clause 63(2) and (3) to allow RGRs to amend their frameworks subject the requirements of clause 63.

### **The Minister should seek the advice of the Commerce Commission before recommending additional regulation**

The bill allows the Minister to recommend additional regulation if a test in clause 77 is met, provided an inquiry has been carried out under clause 78.

Submitters suggested that where a Minister's recommendation differs from the advice of the Commerce Commission under subpart 5 of Part 3, the Minister should have to consult the Commission on the likely content and form of a determination under subpart 6.

We agree that the Minister should obtain the advice of the Commerce Commission when making a recommendation, even when the recommendation differs from what the Commission recommends. We recommend inserting clause 78(1)(c) to make sure that the Minister would get advice from the Commerce Commission on the form of the likely determination before the Order in Council is made. We also recommend an amendment to clauses 53 and 79 relating to the processes around the Minister seeking advice and the Commission providing the advice.



### **Corrective actions should be procedurally fair**

Under clause 113, the Commerce Commission would be able to give notice to take corrective actions. These notices would be issued when the Commission was satisfied that a person had contravened or would contravene a civil liability provision in the bill.

Clause 115 would allow the affected person to make a submission to the Commerce Commission explaining their perspective on the possible exercise of the power. Some submitters suggested that the time to make a submission on the matter should be longer.

We agree that the time for submissions should be longer. We recommend amending clause 115 to extend the submission time from 3 to 5 working days. We recommend an identical amendment to clause 118 for similar reasons.

### **Annual report on the grocery industry should address a wider amount of material**

Clause 168 would require the Commerce Commission to annually publish a report on competition in the grocery industry. The Commission suggested that the purpose of the annual report could be clearer. We consider that the annual report should serve a specific set of purposes, including to assess changes to the level of competition in the industry. We recommend inserting clause 168(1A) to set out the purposes of the annual report. It would also specify what material must be addressed in the report.

### **Monitoring compliance with provisions in the bill**

Clause 108 as introduced would enable the Commerce Commission to require RGRs to submit written statements about their compliance with the requirements in Part 3. In its submission, the Commerce Commission noted that these written statements did not extend to all requirements in the bill.

We think that RGRs should have to demonstrate to the Commerce Commission that they are complying with all aspects of the bill. Therefore, we recommend removing clause 108 and replacing it with clause 173A. Clause 173A is an expanded version of clause 108 that includes all aspects of the bill and also requirements under the Commerce Act.

### **Agreements for collective bargaining should be provided to the Commerce Commission for a register**

The bill would create a regulation-making power to exempt a class of persons from the Commerce Act's prohibitions on collective bargaining. This power would allow suppliers to collectively bargain in the grocery wholesale market.

Clause 181(2) would require the Commerce Commission to maintain and publish a register of all current agreements for collective negotiation. To enable this, we recommend inserting clause 181(4). Clause 181(4) would require the regulations allowing

collective bargaining to require the parties to provide their agreement details to the Commission for inclusion in the register.

### **Levies for the dispute resolution scheme may only be refunded to specific persons**

Clause 189 would provide for the creation of a regulation-making power to allow the collection of levies from RGRs. The levy would be to cover the costs of operating the dispute resolution scheme.

As introduced, clause 189(5)(i) would allow a person collecting levies for the scheme to issue waivers or refunds to classes of persons. Often class-based exemptions are subject to requirements to publish notices outlining the reason for the exemption. The bill as introduced does not contain a requirement to publish a notice outlining reasons for a levy waiver.

We consider that the waiver class exemption for this context is too broad. We recommend amending clause 189 to narrow the levy waiver to specific persons. We consider this more appropriate, and better aligned with the notification requirements.

## Appendix

### Committee process

The Grocery Industry Competition Bill was referred to the committee on 22 November 2022. We invited the Minister of Commerce and Consumer Affairs to provide an initial briefing on the bill. He did so on 30 January 2023.

We called for submissions on the bill with a closing date of 17 January 2023. We received and considered submissions from 32 interested groups and individuals. We heard oral evidence from 12 submitters in Wellington.

We received advice on the bill from the Ministry of Business, Innovation and Employment. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting.

### Committee membership

Naisi Chen (Chairperson)

Jamie Strange (Chairperson and member until 8 February 2023)

Glen Bennett

Barbara Kuriger (until 8 February 2023)

Melissa Lee

Stuart Smith (from 8 February 2023)

Hon Michael Woodhouse (from 14 February 2023)

Andrew Bayly replaced Melissa Lee for this item of business.



**Grocery Industry Competition Bill**

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**Key to symbols used in reprinted bill**

**As reported from a select committee**

text inserted unanimously

~~text deleted unanimously~~



*Hon Dr Duncan Webb*

# **Grocery Industry Competition Bill**

Government Bill

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**The Parliament of New Zealand enacts as follows:**

**1 Title**

This Act is the Grocery Industry Competition Act **2022**.

**2 Commencement**

- (1) This Act comes into force on the 14th day after Royal assent. 5
- (2) However, **section 15** comes into force—
  - (a) on a single date set by Order in Council; but
  - (b) 9 months after Royal assent, if that section has not commenced by then.
- (3) An Order in Council made under this section is secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements). 10

**Part 1**

**Preliminary provisions**

**3 Purpose**

~~The purpose of this Act is to promote, for the long-term benefit of consumers in New Zealand,—~~ 15

- (a) ~~competition and efficiency in the grocery industry; and~~
- (b) ~~to the extent that there is limited competition in the grocery industry, outcomes that are consistent with outcomes produced in competitive markets.~~

**3 Purpose** 20

The purpose of this Act is to promote competition and efficiency in the grocery industry for the long-term benefit of consumers in New Zealand.

**4 Commission's functions under this Act**

- (1) In addition to the other functions conferred on the Commission by this Act, the Commission's functions under this Act are as follows: 25
  - (a) ~~to monitor—~~
    - (i) ~~competition and efficiency in the grocery industry; and~~



- (ii) ~~to the extent that there is limited competition in the grocery industry, whether outcomes are consistent with outcomes produced in competitive markets:~~
- (a) to monitor competition and efficiency in the grocery industry:
- (b) to carry out inquiries, reviews, and studies (including international benchmarking) in connection with the grocery industry: 5
- (c) to act as a regulator of the grocery industry under this Act, including by—
- (i) issuing warnings, reports, or guidelines, or making comments, about any matter relating to the grocery industry, participants, or other persons engaged in conduct relating to the grocery industry (including in relation to 1 or more particular persons); and 10
- (ii) performing or exercising duties and powers under this Act, including making recommendations and issuing determinations under **Parts 2 and 3**; and 15
- (iii) ~~monitoring compliance with, investigating conduct that constitutes or may constitute a contravention, an attempted contravention, or an involvement in a contravention of, and enforcing this Act; and~~
- (iii) monitoring compliance with and enforcing this Act, including by investigating conduct that constitutes or may constitute a contravention, an attempted contravention, or an involvement in a contravention; and 20
- (iv) taking appropriate action in respect of persons that have contravened, are contravening, have attempted to contravene, or are likely to contravene this Act, or have been involved, are involved, or are likely to be involved in a contravention of this Act: 25
- (d) to make available, or co-operate in making available, information in connection with the grocery industry (for example, reports or summaries about the things referred to in **paragraphs (a) to (c)**): 30
- (e) to co-operate with—
- (i) any other law enforcement or regulatory agency that carries out a role in relation to the grocery industry; and
- (ii) any overseas regulator that has functions in relation to a grocery industry corresponding to those of the Commission under this Act: 35
- (f) to keep under review the law, ~~poliieies~~, and practices that are relevant to its other functions under this section (including overseas law, ~~poliieies~~, and practices).

- (2) The Commission’s objective in performing its monitoring and reporting functions under this Act is to promote the purpose of this Act, including by—
- (a) understanding the current and emerging (or likely future) trends or issues in relation to the grocery industry and its participants to the extent of their involvement in the grocery supply chain; and 5
  - (b) promoting transparency in, and about, that industry and about the way it is being regulated; and
  - (c) supporting participants to understand and comply with that industry’s regulation; and
  - (d) contributing to a trading environment in which businesses compete effectively and consumers and businesses participate confidently; and 10
  - (e) improving awareness about the matters covered by reports under **sections 16, 53, 68, 73, 87A, 99A, 105, 168, and 169.**
- 5 Interpretation**
- (1) In this Act, unless the context otherwise requires,— 15
- agreement** includes any contract, arrangement, or understanding
- associated person** or **associated** has the meaning set out in **subsection (2)**
- chief executive** means the chief executive of the Ministry
- civil liability provision** has the meaning set out in **section 120(2)**
- Commission** means— 20
- (a) the Commerce Commission established under Part 1 of the Commerce Act 1986; or
  - (b) for the purposes of determining any matter or class of matter specified in a direction under section 16(1) of the Commerce Act 1986, the Division of the Commission specified in the direction in accordance with section 16(5) of that Act 25
- competition** means workable or effective competition
- consumer** means a person who—
- (a) acquires, from a grocery retailer, groceries of a kind ordinarily acquired for personal, domestic, or household use or consumption; and 30
  - (b) does not acquire the groceries, or hold themselves out as acquiring the groceries, for the purpose of—
    - (i) resupplying groceries in trade; or
    - (ii) consuming groceries in the course of a process of production or manufacture 35
- court** means, in relation to any matter, the court before which the matter is to be determined (*see sections 142 and 143*)
- document** has the same meaning as in section 2 of the Commerce Act 1986

**franchisee** has the meaning set out in **subsection (3)**

**goods** has the same meaning as in section 2(1) of the Fair Trading Act 1986

**groceries**—

- (a) means goods in any of the following product categories:
- (i) fresh produce (for example, fruit, vegetables, and ~~eggs~~ mushrooms): 5
  - (ii) meat, seafood, or meat-substitutes:
  - (iii) dairy products (for example, milk, cheese, and butter):
  - (iv) bakery products:
  - (v) chilled or frozen food: 10
  - (vi) pantry goods or dry goods (for example, eggs):
  - (vii) manufacturer-packaged food:
  - (viii) non-alcoholic drinks:
  - (ix) personal care products (for example, toiletries, first aid, and medicine other than prescription medicine): 15
  - (x) household consumables (for example, cleaning products, laundry products, and stationery products):
  - (xi) pet care products (for example, pet food); but
- (b) does not include, for the purposes of the Act as a whole or for a specified Part of the Act, any good or product category that is excluded from this definition by the regulations for the purposes of the Act or that Part 20

**grocery retailer**—

- (a) means a person who carries on the business of supplying 1 or more categories of groceries to consumers; and
- (b) includes a regulated grocery retailer 25

**grocery supply code** means a grocery supply code ~~set out in regulations made~~ set out in a determination made under **section 12**

**interconnected** and **interconnected bodies corporate** have the meaning set out in section 2(7) of the Commerce Act 1986

**involved in a contravention** has the meaning set out in **section 144** 30

**Minister** means the Minister of the Crown who, under the authority of any warrant or with the authority of the Prime Minister, is responsible for the administration of this Act

**Ministry** means the department of State that, with the authority of the Prime Minister, is responsible for the administration of this Act 35

**participant** means a person that is—

- (a) in trade; and

- (b) involved, directly or indirectly, in the grocery supply chain
- private label product** means a product that is manufactured, processed, produced, or imported by or for a regulated grocery retailer and that is sold under a brand name owned by, or licensed to, the regulated grocery retailer
- publish**, in relation to information, means to publish on an Internet site that is— 5
- (a) administered by or on behalf of the person who must or may publish the information; and
- (b) publicly available as far as practicable and free of charge
- regulated grocery retailer**,— 10
- (a) for the purposes of **Part 2** (grocery supply code), has the meaning set out in **section 8**; and
- (b) for the purposes of **Part 3** (wholesale supply of groceries), has the meaning set out in **section 22**
- regulations** means regulations made under this Act 15
- senior manager**, in relation to a person (A), means a person who is not a director but occupies a position that allows the person to exercise significant influence over the management or administration of A (for example, a chief executive or a chief financial officer)
- supplier** includes a regulated grocery retailer to the extent that they supply their private label product to another grocery retailer 20
- supply** includes supply (or resupply) by way of sale or exchange
- transacting shareholder** has the same meaning as in section 4 of the Co-operative Companies Act 1996
- turnover** means the total gross revenues (exclusive of any tax required to be collected) received or receivable by a body corporate in an accounting period as a result of trading by that body corporate within New Zealand 25
- voting product** has the same meaning as in section 6(1) of the Financial Markets Conduct Act 2013
- wholesale customer** has the meaning set out in **section 21**. 30
- (2) In this Act, a person (A) is **associated** with, or an **associated person** of, another person (B) if—
- (a) A is a body corporate and B has the power, directly or indirectly, to exercise, or control the exercise of, the rights to vote attaching to 25% or more of the voting products of the body corporate (or vice versa): 35
- (b) A and B are interconnected bodies corporate:
- (c) A and B are partners to whom the Partnership Law Act 2019 applies:
- (d) A is a director or senior manager of B (or vice versa):

- (e) A is a franchisee of B (or vice versa):
- (f) A is a transacting shareholder of B (or vice versa):
- (g) A and B are acting jointly or in concert:
- (h) A acts, or is accustomed to act, in accordance with the wishes of B (or vice versa): 5
- (i) A is able, directly or indirectly, to exert a substantial degree of influence over the activities of B (or vice versa):
- (j) A and B are bodies corporate that consist substantially of the same members or shareholders or that are under the control of the same persons:
- (k) there is another person with which A and B are both associated. 10
- (3) In this Act, a person (C) is a **franchisee** of another person (D) if—
- (a) C has entered into or arrived at an agreement with D; and
- (b) under the agreement,—
- (i) D grants C the right to carry on the business of offering, supplying, or distributing goods under a system or marketing plan substantially determined, controlled, or suggested by D or any of D's associated persons; and 15
- (ii) the business will be substantially or materially associated with a trade mark, marketing plan, or commercial symbol owned, used, or licensed by D or any of D's associated persons. 20
- 6 Transitional, savings, and related provisions**
- The transitional, savings, and related provisions set out in **Schedule 1** have effect according to their terms.
- 7 Act binds the Crown**
- This Act binds the Crown. 25

## Part 2 Grocery supply code

### *Regulated grocery retailers*

- 8 Grocery retailers that have grocery supply code obligations**
- In this Part, **regulated grocery retailer** means each of the following: 30
- (a) Foodstuffs North Island Limited:
- (b) Foodstuffs South Island Limited:
- (c) Woolworths New Zealand Limited:
- (d) a person that is designated as a regulated grocery retailer under **section 9**: 35

- (e) a person that is any of the following in relation to a person (A) referred to in **paragraphs (a) to (d)**:
- (i) a person that is an interconnected body corporate of A:
  - (ii) a person that is a successor to A:
  - (iii) a person that is a franchisee of A: 5
  - (iv) a person that is a transacting shareholder of A.

## 9 Power to designate grocery retailer as having grocery supply code obligations

- (1) The Governor-General may, on the recommendation of the Minister, make an Order in Council designating a person as a regulated grocery retailer for the purpose of this Part. 10
- (2) An order made under this section is secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements).

## 10 Minister's recommendation for designation under this Part

- (1) The Minister may recommend that a person (A) be designated as a regulated grocery retailer under this Part only if— 15
- (a) the Commission has given the Minister a recommendation about whether A should be designated; and
  - (b) the Minister has had regard to the Commission's recommendation.
- (2) In deciding whether to make a recommendation, the Minister may do any of the following: 20
- (a) accept the Commission's recommendation that A be designated if the Minister is satisfied that the criteria set out in **section 11(3)** are met:
  - (b) reject the Commission's recommendation that A be designated:
  - (c) request that the Commission reconsider any matter (such as an error, an oversight, or competing policy interests): 25
  - (d) ~~make any other decision that the Minister considers is in the public interest.~~
  - (d) reject the Commission's recommendation that A not be designated and decide to recommend that A be designated if the Minister considers it is in the public interest: 30
  - (e) accept the Commission's recommendation that A not be designated.

## 11 Commission's recommendation about designation under this Part

- (1) This section applies when the Commission is deciding what recommendation to give to the Minister about whether a person (A) should be designated as a regulated grocery retailer under this Part. 35

- (2) ~~The Commission must consult A about whether it should be designated (including the Commission's reasons for any proposal to recommend the designation).~~
- (2) The Commission must—
- (a) publish a statement of its reasons for proposing to make a recommendation; and 5
- (b) consult the persons, or the representatives of the persons, that the Commission considers will be substantially affected by the recommendation (including A).
- (3) The Commission must be satisfied— 10
- (a) that A carries on, or is likely to carry on, a business of supplying all or a majority of categories of groceries to consumers; and
- (b) that ~~either or both~~ any or all of the following apply:
- (i) A's groceries revenue turnover for the last financial year accounting period exceeds \$750 million: 15
- (ii) the designation of A as a regulated grocery retailer would be likely to promote competitive neutrality (that is, a level playing field) or to otherwise promote competition, having regard to the extent to which A supplies, or is likely to supply, groceries in competition with 1 or more regulated grocery retailers; 20
- (iii) the Commission has carried out an investigation into A (either at its discretion or at the request of the Minister), and the Commission is satisfied that—
- (A) A's conduct has had the purpose, effect, or likely effect of unduly hindering or obstructing suppliers from participating confidently in their dealings with A; and 25
- (B) designating A as a regulated grocery retailer under this Part is likely to assist in the purpose of the grocery supply code being met.
- (3A) The Commission may use any process that it considers appropriate for an investigation under **subsection (3)(b)(iii)**. 30
- (4) The Commission must publish the recommendation as soon as practicable after making it, including a statement of its reasons for making the recommendation.

### *Grocery supply code*

- 12 Power to make grocery supply code** 35
- (1) ~~The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations setting out a grocery supply code.~~
- (2) ~~The Minister may make a recommendation only—~~

- (a) ~~after considering the purpose of the grocery supply code set out in **section 13**; and~~
- (b) ~~after consulting—~~
- (i) ~~the Commission; and~~
- (ii) ~~the persons, or representatives of the persons, that the Minister considers will be substantially affected by the code.~~ 5
- (3) ~~The Minister's consultation under **subsection (2)(b)(ii)** must include consultation about the matters referred to in **section 14(e)** (which relates to the level of pecuniary penalty for contraventions of the grocery supply code).~~
- (4) ~~The grocery supply code may apply to, and impose duties on, all regulated grocery retailers or a class of regulated grocery retailers.~~ 10
- (5) ~~Regulations made under this section are secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements).~~

## **12 Power to make grocery supply code**

- (1) The Commission may make a determination that sets out a grocery supply code. 15
- (2) The Commission may make a determination only—
- (a) after considering the purpose of the grocery supply code set out in **section 13**; and
- (b) after consulting the persons, or representatives of the persons, that the Commission considers will be substantially affected by the code. 20
- (3) The Commission's consultation under **subsection (2)(b)** must include consultation about a draft code and the matters referred to in **section 188(1)(ca)** (which relates to the level of pecuniary penalty for contraventions of the grocery supply code). 25
- (4) The grocery supply code may apply to, and impose duties on, all regulated grocery retailers or related parties referred to in **section 14A** or a class of regulated grocery retailers or those related parties.
- (5) A determination made under this section is secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements). 30

## **13 Purpose of grocery supply code**

~~The purpose of the grocery supply code is—~~

- (a) ~~to promote fair conduct, and prohibit unfair conduct, between regulated grocery retailers and their suppliers; and~~
- (b) ~~to ensure transparency and certainty about the terms of agreements between regulated grocery retailers and their suppliers.~~ 35



**13 Purpose of grocery supply code**

The purpose of the grocery supply code is to promote the purpose of this Act by—

- (a) promoting fair conduct, and prohibiting unfair conduct, between regulated grocery retailers, the related parties referred to in **section 14A**, and suppliers; and 5
- (b) promoting transparency and certainty about the terms of agreements between regulated grocery retailers, the related parties referred to in **section 14A**, and suppliers; and
- (c) contributing to a trading environment in the grocery industry— 10
  - (i) in which businesses compete effectively and consumers and businesses participate confidently; and
  - (ii) that includes a diverse range of suppliers.

**14 Content of grocery supply code**

The grocery supply code may contain any provisions that are necessary or desirable to promote the purpose of the code in connection with the supply of groceries, including to— 15

- (a) regulate or prohibit any conduct in connection with a regulated grocery retailer—
  - (i) entering into or arriving at an agreement with a supplier (a **supply agreement**); or 20
  - (ii) exercising a right or power, or complying with an obligation, under a supply agreement; or
  - (iii) otherwise dealing with a supplier:
- (b) specify any requirements about the content or form of a supply agreement, including— 25
  - (i) what terms or conditions must be included in the agreement, what terms or conditions must not be included, and what terms or conditions may only be included if certain requirements are met; and
  - (ii) how the terms or conditions of the agreement are expressed: 30
- (c) regulate or prohibit any conduct in connection with a regulated grocery retailer supplying groceries acquired under a supply agreement to a consumer (for example, in connection with shelf-space allocation or in connection with marketing or otherwise promoting the groceries supplied under that agreement to consumers): 35
- (d) regulate or prohibit any other conduct, or specify any other requirements, in connection with the supply of groceries under a supply agreement:

- (e) ~~prescribe whether a provision of the grocery supply code gives rise to a pecuniary penalty under **section 122, 123, or 125**:~~
- (f) prescribe modifications for the purposes of **clause 1 of Schedule 1**.

**14A Grocery supply code may extend to related parties of regulated grocery retailers** 5

- (1) This section applies if a related party (A) of a regulated grocery retailer is also a participant in the supply chain for the supply of groceries to the regulated grocery retailer.
- (2) The grocery supply code may contain any provisions that are necessary or desirable to promote the purpose of this Act in connection with the conduct, agreements, and relationships of A in relation to suppliers and the supply of those groceries. 10
- (3) In that case, this Act must be read—
  - (a) as if **section 14(a) to (d)** applied to A, or to any class of related parties, and to their conduct, agreements, and relationships, as if they were regulated grocery retailers and their agreements with suppliers were supply agreements; and 15
  - (b) with all other necessary modifications.
- (4) In this section, unless the context otherwise requires, **related party** means—
  - (a) an associated person of the regulated grocery retailer: 20
  - (b) a person (A) over whose business the regulated grocery retailer has material influence.
- (5) Without limiting the ordinary meaning of the expression, a regulated grocery retailer is treated as having **material influence** over A's business if it is all or any of the following: 25
  - (a) a director or senior manager of A:
  - (b) a person that exercises or is entitled to exercise, or controls or is entitled to control the exercise of, powers that would ordinarily be exercised by a director or senior manager of A:
  - (c) a person that can appoint or remove, or control the appointment or removal of, a director or senior manager of A: 30
  - (d) a person that has a power to influence a decision of the business that would ordinarily require the holding of the rights to vote attaching to 25% or more of the voting products of A:
  - (e) a person that, under a trust or agreement (whether or not the person is a party to it), may at any time have a power referred to in **paragraph (d)**. 35

- 15 ~~Regulated grocery retailer must~~ Obligation to comply with grocery supply code**
- (1) A regulated grocery retailer must comply with the grocery supply code.
- (1A) A related party referred to in **section 14A** must comply with the grocery supply code. 5
- (2) A person that contravenes this section is liable to a civil liability remedy (including an order to pay a pecuniary penalty or compensation).
- 
- Guidance note**  
See **subpart 3 of Part 4** for further provisions about civil liability.
- 
- 16 Commission must review and report on grocery supply code** 10
- (1) The Commission must—
- (a) complete a first review of the grocery supply code within 2 years after the date on which ~~on which~~ the code comes into force; and
- (b) give the Minister a report on that review as soon as practicable after completing it ~~(whether as a separate report or as part of its annual report under **section 168**)~~. 15
- (2) After the first review, the Commission—
- (a) must review the grocery supply code and give the Minister a report on that review at any subsequent time required by the Minister; and
- (b) may review the grocery supply code and give the Minister a report on that review at any other time ~~(whether as a separate report or as part of its annual report under **section 168**)~~. 20
- (2A) The Commission must ensure that there is an interval of no more than 5 years between the completion of reviews.
- (3) The purpose of a review is to— 25
- (a) assess the operation and effectiveness of the grocery supply code; and
- (b) assess whether the grocery supply code should be amended, revoked, or replaced.
- (4) The Commission—
- (a) may give the Minister a report under this section as a separate report or as part of its annual report under **section 168**; and 30
- (b) at least 10 working days later, must publish the report.

### Part 3

## Wholesale supply of groceries

## Subpart 1—Preliminary

**17 Purpose of this Part**

The purpose of this Part is to promote the purpose of this Act by enabling wholesale customers to—

- (a) have reliable and cost-effective wholesale supplies of groceries (either through wholesale supply provided by regulated grocery retailers, directly arranging supply from suppliers, or other channels, or any combination of those channels); and 5
- (b) have reasonable access to the benefits of ~~regulated grocery retailers' scale and efficiency~~ the scale, and the efficiency, of operations of regulated grocery retailers and their associated persons. 10

**18 Overview of regulation of wholesale supply of groceries**

- (1) **Subpart 2** imposes requirements to facilitate regulated grocery retailers and wholesale customers entering into commercial agreements for the wholesale supply of groceries. 15
- (2) The rest of this Part provides for additional regulation for the wholesale supply of groceries. The process for imposing additional regulation involves the following:
  - (a) the Commission may hold an inquiry under **subpart 3** 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: 20
  - (b) if the Commission is satisfied of the matters in **section 58(1)**, it may make a determination under **subpart 4** that imposes additional regulation (whether or not an inquiry has been held). The following 2 types of additional regulation may be imposed under that subpart: 25
    - (i) a requirement for 1 or more regulated grocery retailers to establish, implement, and maintain a wholesale framework for the wholesale supply of groceries. A framework provides 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: 30
    - (ii) a grocery wholesale industry participation code. The code provides rules in connection with the wholesale supply of groceries provided by regulated grocery retailers: 35
  - (c) the Commission may recommend to the Minister that additional regulation be imposed by an Order in Council under **subpart 5:** 35
  - (d) if the Minister is satisfied of the matters in **section 77(1)**, the Minister may decide to recommend additional regulation under **subpart 5**. The Minister may make a recommendation regardless of whether the Commission has recommended the additional regulation. If the Minister 40

makes a recommendation, an Order in Council may impose either or both of the following types of additional regulation:

- (i) a requirement for 1 or more regulated grocery retailers to supply groceries at wholesale on non-discriminatory terms. This ensures 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: 5
  - (ii) a requirement for 1 or more regulated grocery retailers to supply groceries at wholesale in accordance with specified access terms regulation. This ensures 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): 10
  - (e) the Commission must make a determination under **subpart 6** that specifies how the applicable type or types of additional regulation under **subpart 5** apply. 15
- (2A) Regulations may be made under **subpart 7A** to disapply requirements for facilitating commercial agreements for the wholesale supply of groceries.
- (3) This section is intended only as a guide to the general scheme and effect of this Part.

## **19 Main principle of this Part** 20

- (1) In deciding whether to perform or exercise their functions, powers, or duties under this Part, and in performing or exercising them, the Commission and the Minister must take into account the main principle of this Part.
- (2) The main principle is the importance of wholesale offerings to wholesale customers (including by regulated grocery retailers) being consistent with ~~outcomes produced~~ wholesale offerings provided in a competitive wholesale market. 25

## **20 Other principles of this Part**

- (1) In deciding whether to perform or exercise their functions, powers, or duties under this Part, and in performing or exercising them, the Commission and the Minister must also take into account the following principles to the extent that the Commission or Minister considers them relevant to the main principle: 30

### *Pricing*

- (a) the desirability that each regulated grocery retailer's wholesale prices reflect efficient costs, taking into account the following: 35
  - (i) the costs of the regulated grocery retailer and its associated persons when buying groceries from suppliers, using the ~~regulated grocery retailer's~~ scale of operations of the regulated grocery retailer and its associated persons:

- (ii) the efficiency of operations of the regulated grocery retailer and its associated persons:
- (iii) the regulated grocery retailer's reasonable expectation of recovering its efficient costs, including a reasonable return on investments ~~that it is required to make to provide~~ made in connection with a wholesale offering: 5
- (aa) the desirability that wholesale customers have reasonable access to any discounts, payments, or rebates made available to a regulated grocery retailer directly or indirectly by, or on behalf of, a supplier in connection with either or both of the following: 10
- (i) the scale of operations of the regulated grocery retailer and its associated persons:
- (ii) the efficiency of operations of the regulated grocery retailer and its associated persons:
- Range, quantity, and frequency* 15
- (b) ~~the desirability that each regulated grocery retailer's wholesale offering provides reliable access to the range of wholesale groceries that are or may be demanded by wholesale customers, taking into account the regulated grocery retailer's comparative advantage in wholesale supply compared with other participants in the grocery industry:~~ 20
- (b) the desirability that each regulated grocery retailer's wholesale offering provides reliable and cost-effective access to the range of wholesale groceries, at the quantity and frequency, that are or are likely to be demanded by wholesale customers (see **subsection (2)**):
- Quality* 25
- (ba) the desirability that the quality of groceries supplied under each regulated grocery retailer's wholesale offering, and the quality of any ancillary service, is reasonable, having regard to the price of the groceries or the charge for the service:
- Clear market signals* 30
- (c) the desirability that regulated grocery retailers, suppliers, and wholesale customers operate in an efficient wholesale market in which reliable, ~~transparent~~ clear, and comparable information about wholesale supply and demand is available:
- (d) the desirability of regulated grocery retailers, suppliers, and wholesale customers being able to invest and innovate for the long-term benefit of consumers: 35
- Commercial relationships*
- (e) the desirability of regulated grocery retailers and suppliers acting in a way that does not unduly hinder or obstruct wholesale customers and 40

	independent suppliers from developing and maintaining their own trading relationships for any commercial purpose, including—	
	(i) for the purpose of negotiating agreements for promotion and marketing; and	
	(ii) for the purpose of negotiating direct supply agreements:	5
(f)	the desirability of independent suppliers retaining reasonable control over the channels for the retail sale of their own products and brands;	
	<i>Diversity</i>	
(g)	<u>the desirability of the grocery industry including a diverse range of suppliers and wholesale customers.</u>	10
(2)	<u>When taking into account the principle in <b>subsection (1)(b)</b>, the Commission or Minister must have regard to other reasonably available channels of supply of groceries to wholesale customers (for example, wholesale customers directly arranging supply from suppliers).</u>	
<b>21</b>	<b>Interpretation in this Part</b>	15
(1)	In this Part, unless the context otherwise requires,—	
	<b>additional regulation</b> means any of the following:	
(a)	a requirement under <b>subpart 4</b> for 1 or more regulated grocery retailers to establish, implement, and maintain a wholesale framework for the wholesale supply of groceries:	20
(b)	a wholesale code under <b>subpart 4</b> :	
(c)	a requirement under <b>subparts 5 and 6</b> for 1 or more regulated grocery retailers to supply groceries on non-discriminatory terms:	
(d)	a requirement under <b>subparts 5 and 6</b> for 1 or more regulated grocery retailers to supply groceries in accordance with specified access terms regulation	25
	<b>ancillary services</b> includes services in connection with the distribution, delivery, or storage of groceries	
	<b>arrange</b> , in relation to an agreement, includes to negotiate, solicit, or procure the agreement	30
	<b>independent supplier</b> means a supplier to the extent that it supplies groceries (other than private label products) to a grocery retailer	
	<b>Example</b>	
	A company ( <b>A</b> ) is in the business of producing canned fruit.	
	A supplies a regulated grocery retailer ( <b>B</b> ) with canned fruit under A's own brand name.	35
	A also produces canned fruit for B under B's brand name. These are private label products.	

~~A is an independent supplier only in relation to the canned fruit produced under A's own brand name.~~

~~In relation to A, the principle in **section 20(f)** relates to the desirability of A retaining reasonable control over the channels for the retail sale of the canned fruit produced under A's own brand name.~~

5

**non-discrimination**, in relation to the wholesale supply of groceries, means that the regulated grocery retailer must not treat any wholesale customer differently from how it treats itself or its associated persons or any other wholesale customer, except to the extent that a particular difference in treatment is objectively justifiable and does not lessen, and is unlikely to lessen, competition in a grocery wholesale supply market any grocery market

10

**operational separation**—

(a) includes the way in which business units are managed or structured, and the type of relationships, dealings, and transactions the units have:

(b) does not include a requirement that any business unit must be operated by different owners:

15

(c) may include business units being operated in different companies but only if the regulated grocery retailer wishes

**regulated grocery retailer** has the meaning set out in **section 22**

**supply agreement** means an agreement between a regulated grocery retailer and a supplier

20

**wholesale agreement** means an agreement for the wholesale supply of groceries that a regulated grocery retailer enters into or arrives at in connection with a wholesale supply request

**wholesale code** means a grocery wholesale industry participation code set out in a determination made under **subpart 4**

25

**wholesale customer** means any person that receives the wholesale supply, or wants to obtain the wholesale supply, of groceries from a regulated grocery retailer for the purpose of supplying groceries, directly or indirectly, at retail to consumers

30

**wholesale supply request** has the meaning set out in **section 29**.

(2) For the purposes of this Part, a regulated grocery retailer supplies groceries if it—

(a) supplies (or resupplies) the groceries by way of sale or exchange; or

(b) arranges an agreement for the supply (or resupply) of the groceries by way of sale or exchange to 1 or more other persons.

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### Example

A regulated grocery retailer (**A**) ensures groceries are supplied at wholesale to its franchisees in the following 2 ways:



- it purchases groceries from suppliers and on-sells those groceries to its franchisees:
- it arranges agreements under which suppliers sell groceries to its franchisees.

A is treated as supplying groceries in both cases. 5

If A is required to supply groceries at non-discriminatory terms, A must not treat its franchisees differently from other wholesale customers in relation to either of these ways of supplying groceries (except to the extent that a particular difference in treatment is objectively justifiable and does not lessen, and is unlikely to lessen, competition in ~~a grocery wholesale supply~~ any grocery market). 10

## 22 Grocery retailers that have wholesale supply obligations

In this Part, **regulated grocery retailer** means each of the following:

- (a) Foodstuffs North Island Limited:
- (b) Foodstuffs South Island Limited:
- (c) Woolworths New Zealand Limited: 15
- (d) a person that is designated as a regulated grocery retailer under **section 23**:
- (e) a person that is any of the following in relation to a person (A) referred to in **paragraphs (a) to (d)**:
  - (i) a person that is an interconnected body corporate of A: 20
  - (ii) a person that is a successor to A:
  - (iii) a person that is a franchisee of A:
  - (iv) a person that is a transacting shareholder of A.

## 23 Power to designate grocery retailer as having wholesale supply obligations

- (1) The Governor-General may, on the recommendation of the Minister, make an Order in Council designating a person as a regulated grocery retailer for the purpose of this Part. 25
- (2) The order may specify periods for the purposes of **sections 31(2)(b), 33(3)(b), and 39(2)(b)**.
- (3) An order made under this section is secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements). 30

## 24 Minister's recommendation for designation under this Part

- (1) The Minister may recommend that a person (A) be designated as a regulated grocery retailer under this Part only if—
  - (a) the Commission has given the Minister a recommendation about whether A should be designated; and 35
  - (b) the Minister has had regard to the Commission's recommendation; and

- (c) A has been carrying on business as a grocery retailer in the whole or any part of New Zealand for 5 years or more.
- (2) In deciding whether to make a recommendation, the Minister may do any of the following:
- (a) accept the Commission’s recommendation that A be designated if the Minister is satisfied that the criteria set out in **section 25(2)(b)** are met: 5
  - (b) reject the Commission’s recommendation that A be designated:
  - (c) request that the Commission reconsider any matter (such as an error, an oversight, or competing policy interests):
  - (d) ~~make any other decision that the Minister considers is in the public interest.~~ 10
  - (d) reject the Commission’s recommendation that A not be designated and decide to recommend that A be designated if the Minister considers it is in the public interest:
  - (e) accept the Commission’s recommendation that A not be designated. 15
- (3) ~~For the purposes of **subsection (1)(c)**, A must be treated as carrying on a business referred to in that paragraph if—~~
- (a) ~~A is a member of a group of interconnected bodies corporate, and that group (or any part of it) has been carrying on business as a grocery retailer in the whole or any part of New Zealand for 5 years or more; or~~ 20
  - (b) ~~A acquires (directly or indirectly) the whole or any part of the business of a regulated grocery retailer.~~
- (3) For the purposes of **subsection (1)(c)**, A must be treated as carrying on a business referred to in that paragraph for 5 years or more if—
- (a) A acquires (directly or indirectly) the whole or any significant part of the business of a regulated grocery retailer referred to in **section 22(a) to (d)** (or of a successor of such a regulated grocery retailer); or 25
  - (b) a significant number of the franchisees or transacting shareholders of a regulated grocery retailer referred to in **section 22(a) to (d)** (or of a successor of such a regulated grocery retailer) become the franchisees or transacting shareholders of A. 30
- 25 Commission’s recommendation about designation under this Part**
- (1) This section applies when the Commission is deciding what recommendation to give to the Minister about whether a person (A) should be designated as a regulated grocery retailer under this Part. 35
- (2) The Commission must—
- (a) ~~consult A about whether it should be designated (including the Commission’s reasons for any proposal to recommend the designation); and~~

- (a) publish a statement of its reasons for proposing to make a recommendation; and
- (aa) consult the persons, or the representatives of the persons, that the Commission considers will be substantially affected by the recommendation (including A); and 5
- (b) be satisfied that—
- (i) A carries on, or is likely to carry on, a business of supplying all or a majority of categories of groceries to consumers; and
- (ii) the designation of A as a regulated grocery retailer would be likely to promote competitive neutrality (that is, a level playing field) or to otherwise promote competition, having regard to the extent to which A supplies, or is likely to supply, groceries in competition with 1 or more regulated grocery retailers. 10
- (3) The Commission must publish the recommendation as soon as practicable after making it, including a statement of its reasons for making the recommendation. 15
- 26 Application of Part to groups**
- Sections 27 and to 28** apply in relation to a group consisting of—
- (a) a person (A) referred to in **section 22(a) to (d)**; and
- (b) each person (B) that is any of the following:
- (i) an interconnected body corporate of A: 20
- (ii) a franchisee of A:
- (iii) a transacting shareholder of A.
- 27 Main regulated grocery retailer must take reasonable steps to ensure compliance**
- (1) If a person B is subject to a duty under this Part, A must— 25
- (a) take all reasonable steps to ensure that B complies with the duty; or
- (b) perform the duty on B's behalf.
- (2) If B contravenes any civil liability provision as a result of failing to comply with a duty under this Part, A must be treated as also having contravened the civil liability provision. 30
- (3) **Subsection (2)** does not apply if A proves that it complied with **subsection (1)(a)**.
- 27A Defence if interconnected body, franchisee, or transacting shareholder reasonably relies on main regulated grocery retailer**
- (1) This section applies to a proceeding under **subpart 3 of Part 4** against a person B for a contravention of any civil liability provision as a result of a failure to comply with a duty under this Part. 35

- (2) It is a defence if B proves that—
- (a) the contravention was due to the act or default of A; and
  - (b) B reasonably believed that A would perform the duty on B’s behalf; and
  - (c) B took all reasonable steps to ensure the duty was complied with.
- 28 Order in Council or determination may prescribe how powers or duties must or may be performed or exercised within group** 5
- (1) An Order in Council or a determination made under this Part may prescribe that, for the purposes of 1 or more provisions of this Part, powers or duties may or must be exercised or performed by—
- (a) A; or 10
  - (b) 1 or more persons that are a person B; or
  - (c) both A and 1 or more persons that are a person B.
- (2) An Order in Council or a determination made under this Part may also prescribe that a power or duty that is exercised or performed in accordance with **subsection (1)** must be treated as being exercised or performed by— 15
- (a) A; or
  - (b) 1 or more persons that are a person B; or
  - (c) both A and 1 or more persons that are a person B.
- (3) **Sections 27 and 27A** ~~is~~ are subject to this section.
- Subpart 2—Requirements for facilitating commercial agreements for 20  
wholesale supply of groceries
- 29 Wholesale customer may make wholesale supply request**
- (1) A wholesale customer may make a request to a regulated grocery retailer for the wholesale supply of groceries (a **wholesale supply request**).
- (2) The wholesale supply request must be made in the manner (if any) prescribed by a determination made under this subpart. 25
- 30 Regulated grocery retailer must consider wholesale supply request in good faith**
- (1) A regulated grocery retailer must consider a wholesale supply request in good faith (including negotiating in good faith). 30
- (2) The duty under **subsection (1)** includes requiring the regulated grocery retailer to—
- (a) consider the request in a reasonable manner; and
  - (b) respond to communications from the wholesale customer in a timely manner; and 35

- (c) ensure that communications about the request are not false or misleading, and are not likely to mislead or confuse, in a material particular.
- (3) **Subsection (2)** does not limit **subsection (1)**.
- 31 Regulated grocery retailer must establish and implement rules, criteria, and procedures for considering wholesale supply requests** 5
- (1) A regulated grocery retailer must—
- (a) establish and implement effective rules, criteria, and procedures for considering wholesale supply requests; and
- (b) give a copy of those rules, criteria, and procedures to the Commission; and 10
- (c) publish a copy of those rules, criteria, and procedures.
- (2) A regulated grocery retailer must comply with **subsection (1)**—
- (a) ~~before the close of the day on which this section comes into force if it is a regulated grocery retailer on that day; or~~
- (a) within 2 months after this section comes into force if it is a regulated grocery retailer on the day on which this section comes into force; or 15
- (aa) within 6 months after it becomes a regulated grocery retailer under **section 22(e)** after this section comes into force (otherwise than as a result of an Order in Council being made under **section 23**); or
- (b) within the period specified in an Order in Council made under **section 23** in any other case. 20
- 32 Regulated grocery retailer must comply with ongoing duties relating to rules, criteria, and procedures**
- A regulated grocery retailer must—
- (a) take all reasonable steps to comply with the rules, criteria, and procedures referred to in **section 31**; and 25
- (b) regularly review and, if necessary, amend those rules, criteria, and procedures to ensure that they continue to comply with this Act (including the requirements of any determination made under this subpart).
- 33 Regulated grocery retailer must establish and implement standard terms and conditions and principles for wholesale supply** 30
- (1) A regulated grocery retailer must,—
- (a) to the extent that is reasonably practicable, establish and implement standard terms and conditions for the wholesale supply of groceries; and
- (b) to the extent that particular terms and conditions for the wholesale supply of groceries are not standardised (for example, price), establish principles for determining the basis on which the regulated grocery retailer 35

- will make offers, or respond to offers, in relation to those terms and conditions; and
- (c) give a copy of those standard terms and conditions, and those principles, to the Commission; and
- (d) publish a copy of those standard terms and conditions and those principles. 5
- (2) A regulated grocery retailer may establish and implement different standard terms and conditions that apply in different circumstances (unless a determination made under this Part provides otherwise).
- (2A) A regulated grocery retailer is not required to publish particular information under **subsection (1)(d)** if it considers on reasonable grounds that the information is commercially sensitive (unless a determination made under this Part provides otherwise). 10
- (3) A regulated grocery retailer must comply with **subsection (1)**—
- (a) ~~before the close of the day on which this section comes into force if it is a regulated grocery retailer on that day; or~~ 15
- (a) within 2 months after this section comes into force if it is a regulated grocery retailer on the day on which this section comes into force; or
- (aa) within 6 months after it becomes a regulated grocery retailer under **section 22(e)** after this section comes into force (otherwise than as a result of an Order in Council being made under **section 23**); or 20
- (b) within the period specified in an Order in Council made under **section 23** in any other case.
- 34 Regulated grocery retailer must comply with ongoing duties relating to standard terms and conditions and principles** 25
- ~~A regulated grocery retailer must—~~
- (a) ~~take all reasonable steps to use—~~
- (i) ~~the standard terms and conditions referred to in **section 33**; or~~
- (ii) ~~terms and conditions that are customised in a particular case (where those customised terms and conditions are consistent with the principles referred to in that section); and~~ 30
- (b) ~~regularly review those standard terms and conditions and those principles to ensure that they continue to comply with this Act (including the requirements of a determination made under this subpart), and promptly make any amendments that are necessary or desirable to remedy any defects.~~ 35
- A regulated grocery retailer must—
- (a) take all reasonable steps to use the standard terms and conditions referred to in **section 33**; and

- (b) to the extent that particular terms and conditions are not standard, take all reasonable steps to use terms and conditions that are consistent with the principles referred to in **section 33**; and
- (c) regularly review and, if necessary, amend those standard terms and conditions and those principles to ensure that they continue to comply with this Act (including the requirements of any determination made under this subpart). 5
- 35 Regulated grocery retailer must notify Commission of wholesale supply request**
- (1) A regulated grocery retailer must— 10
- (a) notify the Commission of each wholesale supply request that it has received; and
- (b) notify the Commission of the outcome of the wholesale supply request; and
- (c) if the regulated grocery retailer accepts the wholesale supply request, give the Commission a copy of each wholesale agreement; and 15
- (d) if the regulated grocery retailer declines the wholesale supply request, notify the Commission of the reasons for declining the request.
- (2) The regulated grocery retailer must comply with **subsection (1)**—
- (a) ~~within 10 working days~~ 1 month after the request is received, the outcome is determined, or the request is accepted or declined (as the case may be); or 20
- (b) within a shorter or longer period prescribed in a determination made under this subpart.
- 36 Regulated grocery retailer must notify Commission of variation or cancellation** 25
- (1) If a wholesale agreement is varied, the regulated grocery retailer must, as soon as practicable,—
- (a) notify the Commission of—
- (i) the variation; and 30
- (ii) the reasons for the variation; and
- (b) give the Commission a copy of the variation or the agreement as varied.
- (2) If a wholesale agreement is cancelled, the regulated grocery retailer must, as soon as practicable, notify the Commission of—
- (a) the cancellation; and 35
- (b) the reasons for the cancellation (to the extent that the regulated grocery retailer knows the reasons).
- (3) The regulated grocery retailer must comply with this section—

- (a) ~~within 10 working days~~ 1 month after the agreement is varied or cancelled (as the case may be); or
- (b) within a shorter or longer period prescribed in a determination made under this subpart.
- 37 Regulated grocery retailer must ensure transparency of wholesale agreement** 5
- A regulated grocery retailer must ensure that each wholesale agreement—
- (a) is in writing; and
- (b) is expressed in plain language in a clear, concise, and intelligible manner. 10
- 38 Regulated grocery retailer must ensure transparent pricing under wholesale agreement**
- (1) A regulated grocery retailer must ensure that—
- (a) each wholesale agreement specifies a method or methods (a **pricing or charging method**) by which the prices of groceries, or charges for ancillary services (if any), supplied under the agreement are to be calculated; and 15
- (b) the prices of groceries, and the charges for ancillary services, supplied under the wholesale agreement are calculated using a pricing or charging method. 20
- ~~(2) A regulated grocery retailer must not vary or agree to vary a pricing or charging method specified in a wholesale agreement, except in accordance with a determination issued under this subpart.~~
- (2) A regulated grocery retailer must not vary a pricing or charging method specified in a wholesale agreement, except— 25
- (a) in a manner that is beneficial to the wholesale customer; or
- (b) in accordance with a determination issued under this subpart; or
- (c) in a manner that is not to the detriment of the wholesale customer and has the wholesale customer's agreement.
- 39 Regulated grocery retailer must put in place systems and processes for wholesale supply** 30
- (1) A regulated grocery retailer must ~~establish, implement, and maintain~~ and implement effective systems and the processes that are necessary or desirable to supply wholesale groceries to wholesale customers (for example, systems for ordering, billing, and managing confidentiality arrangements). 35
- (2) A regulated grocery retailer must comply with **subsection (1)**—
- (a) within 3 months after this section comes into force if it is a regulated grocery retailer on the day on which this section comes into force; or



- (aa) within 6 months after it becomes a regulated grocery retailer under **section 22(e)** after this section comes into force (otherwise than as a result of an Order in Council being made under **section 23**); or
- (b) within the period specified in an Order in Council made under **section 23** in any other case. 5
- (3) A regulated grocery retailer must maintain those systems and processes.
- 40 Regulated grocery retailer must ensure that its wholesale agreements and conduct do not hinder or obstruct trading relationships**
- (1) A regulated grocery retailer—
- (a) must ensure that its wholesale agreements do not unduly hinder or obstruct a wholesale customer from developing or maintaining its own trading relationship with any supplier; and 10
- (b) must not engage in any conduct that has the purpose, effect, or likely effect of unduly hindering or obstructing—
- (i) a wholesale customer from developing or maintaining its own trading relationship with any supplier; or 15
- (ii) a supplier from developing or maintaining a trading relationship with any wholesale customer; and
- (c) must not engage in any conduct that has the purpose, effect, or likely effect of— 20
- (i) unduly hindering or obstructing a supplier from participating in a wholesale offering; or
- (ii) inducing a supplier to refuse or fail to sell any groceries in connection with a wholesale offering; or
- (iii) inducing a supplier to opt out under **section 82**. 25
- (2) In this section and **section 40A**, **wholesale customer**, in relation to a regulated grocery retailer (A),—
- (a) has the meaning set out in **section 21(1)**; but
- (b) does not include a member of the same group as A (unless a determination made under this subpart provides otherwise). 30
- (3) In **subsection (2)** and **section 43(1)**, **group** means a group within the meaning of **section 26**.
- 40A Regulated grocery retailer must not engage in certain conduct relating to supplier discounts, payments, or rebates**
- (1) A regulated grocery retailer must not engage in conduct that has the purpose, effect, or likely effect of preventing or restricting a wholesale customer from receiving (directly or indirectly) the benefits of a range-, quantity-, or frequency-based discount, payment, or rebate. 35

- (2) In this section, **range-, quantity-, or frequency-based discount, payment, or rebate** means a discount, payment, or rebate made available to a regulated grocery retailer directly or indirectly by, or on behalf of, a supplier—
- (a) in connection with either or both of the following:
- (i) the scale of operations of the regulated grocery retailer and its associated persons: 5
- (ii) the efficiency of operations of the regulated grocery retailer and its associated persons; and
- (b) that meets the requirements specified in a determination made under this subpart (if any). 10
- 41 Regulated grocery retailer must comply with determination**
- A regulated grocery retailer must comply with a duty under **sections 30 to 40A** in the manner prescribed in a determination made under this subpart (if any).
- 42 Civil liability for contraventions** 15
- A person that contravenes any of **sections 30 to 41** is liable to a civil liability remedy (including an order to pay a pecuniary penalty or compensation).
- 
- Guidance note**
- See **subpart 3 of Part 4** for further provisions about civil liability.
- 
- 43 Commission may prescribe manner of complying with duty** 20
- (1) The Commission may make a determination prescribing the manner in which a person must comply with a duty under **section 29(2)** or any of **sections 30 to 40A**, including prescribing—
- (a) when, where, and how the duty must be complied with:
- (b) what information or other evidence or documents must be provided in connection with the duty: 25
- (c) requirements with which information, evidence, or documents that are provided in connection with the duty must comply:
- (ca) matters for the purposes of **section 33(2A)**:
- (cb) how a regulated grocery retailer may vary a pricing or charging method specified in a wholesale agreement (*see section 38*): 30
- (cc) for the purposes of **section 40 or 40A**, the circumstances in which a member of the same group as a regulated grocery retailer must be treated as being a wholesale customer:
- (cd) requirements for the purposes of **section 40A(2)(b)**: 35
- (d) modifications for the purposes of **clause 2 of Schedule 1**.

- (2) The Commission may make the determination only if the Commission is satisfied that it is necessary or desirable in order to promote the purpose of this Part.
- (3) A determination made under this section is secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements).

#### **43A Commission may grant exemption** 5

- (1) The Commission may make a determination that exempts any person or class of persons from compliance with any provision or provisions of this subpart if the Commission is satisfied that—
- (a) doing so is necessary or desirable in order to promote the purpose of this Part; and 10
- (b) the extent of the exemption is not broader than is reasonably necessary to address the matters that gave rise to the exemption.
- (2) The Commission may grant the exemption on the terms and conditions (if any) that it thinks fit.
- (3) The Commission’s reasons for making the determination (including why the exemption is appropriate) must be published together with the determination. 15
- (4) A determination made under this section may continue in force for not more than 5 years (and at the close of the date that is 5 years after the determination first comes into force, the determination must be treated as having been revoked unless it is sooner revoked). 20
- (5) A determination made under this section is secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements).

#### **44 Process for making determination under this subpart**

- The Commission may use any process that it considers appropriate to develop a determination under this subpart, but must— 25
- (a) publish a draft determination; and
- (b) publish a statement of its reasons for proposing to make a determination; and
- (c) consult persons, or representatives of the persons, that the Commission considers will be substantially affected by the determination. 30

#### **45 Process requirements do not apply to certain amendments**

- (1) **Section 44(a) to (c)** does not apply to an amendment of a determination if the Commission is satisfied on reasonable grounds that—
- (a) the nature of the amendment is technical and non-controversial; or
- (b) the amendment is necessary or desirable to ensure the determination is consistent with any other determination made under this Part; or 35
- (c) it is necessary or desirable in the public interest that the amendment be made urgently.

- (2) If the Commission relies on **subsection (1)(c)**,—
- (a) the Commission must publish a statement of its reasons for acting under that paragraph; and
  - (b) the amendment must be treated as revoked 9 months after ~~the date on which~~ it comes into force, unless it is earlier revoked (but this paragraph does not prevent the Commission from making the amendment again). 5

**46 Duties do not apply to extent that they are inconsistent with additional regulation**

A duty under this subpart that would otherwise apply to a person does not apply to the extent that it is inconsistent with a duty that applies to the person under **subparts 4 to 6**. 10

**47 Duties do not apply if additional regulation so provides**

A duty under this subpart that would otherwise apply to a person does not apply if a determination made under **subpart 4 or 6** provides that the duty does not apply to the person or to a class that includes the person. 15

Subpart 3—Commission inquiries

**48 How inquiry is triggered**

- (1) The Commission—
- (a) must carry out an inquiry if required to do so by the Minister; and
  - (b) may carry out an inquiry on its own initiative (whether when preparing a report under **section 168** or at any other time). 20
- (2) Any requirement by the Minister must—
- (a) be in writing; and
  - (b) specify the date by which the Commission must give a report under **section 53** to the Minister. 25

**49 Commission may inquire into whether and what additional regulation should apply**

- (1) The purpose of an inquiry is for the Commission to consider the following:
- (a) whether the wholesale supply of groceries should be subject to additional regulation and, if so, what additional regulation should apply: 30
  - (b) if additional regulation already applies, whether the additional regulation should be amended, revoked, or replaced and, if so, how the additional regulation should be amended, revoked, or replaced:
  - (c) whether any other regulation or action may be necessary or desirable to promote the purpose of this ~~Part Act~~. 35
- (2) However,—

- (a) the Commission may make a determination under **subpart 4** (wholesale frameworks and wholesale code) regardless of whether an inquiry has been held; and
- (b) *see sections 78(2) and 79*, which clarify that the Minister may make a recommendation under **subpart 5** in relation to non-discriminatory terms or specified access terms regulation regardless of whether the Commission has recommended that an Order in Council be made. 5

## 50 Commission inquiry

- (1) In carrying out an inquiry, the Commission must consider—
  - (a) whether any of the tests in **section 58(1) or 77(1)** are satisfied (or are still satisfied); and 10
  - (b) if the test or tests are satisfied (or are still satisfied), whether the wholesale supply of groceries should be subject to (or should continue to be subject to) additional regulation; and
  - (c) if so, what additional regulation should apply (or continue to apply), including— 15
    - (i) which type or types of regulation should apply (or continue to apply); and
    - (ii) which regulated grocery retailers should be subject to the additional regulation. 20
  - (d) if requested by the Minister, whether the test in **section 107B(1)(a)** is satisfied.
- (2) The Commission may also consider either or both of the following:
  - (a) how a type or types of additional regulation should apply (or continue to apply): 25
  - (b) whether any other regulation or action may be necessary or desirable to promote the purpose of this Part ~~Act~~ (*see section 51(2)*).
- (3) As part of an inquiry, the Commission must, when considering the matters under **subsection (1)(b) or (c)**,—
  - (a) assess the benefits of applying (or continuing) different types of additional regulation; and 30
  - (b) consider what would be the most cost-effective type or types of additional regulation in the circumstances.
- (4) The Commission may have regard to any other matters it considers necessary or desirable for the purpose of the inquiry. 35

## 51 Preparation of report

- (1) The Commission must prepare a report that—
  - (a) records its findings from the inquiry; and

- (b) sets out whether the Commission intends to impose, amend, revoke, or replace—
  - (i) any additional regulation under **subpart 4**; or
  - (ii) any determination under **subpart 6**; and
- (c) sets out any recommendation to the Minister in relation to an Order in Council under **subpart 5**. 5
- (d) sets out any recommendation to the Minister in relation to regulations under **subpart 7A**.
- (2) The Commission may include other recommendations that it thinks fit, including recommendations about 1 or more of the following: 10
  - (a) changes to legislation or other instruments:
  - (b) changes to the policies or practices of central or local government:
  - (c) changes to the amount or type of information made available by a person in relation to the grocery industry:
  - (d) a person researching or monitoring a specified matter: 15
  - (e) persons within the grocery industry changing their behaviour.

## **52 Consultation on draft report**

- (1) Before a report on the inquiry is finalised, the Commission must—
  - (a) publish a draft report; and
  - (b) allow a reasonable time for comments on the draft. 20
- (2) In preparing its final report, the Commission must have regard to any comments received on the draft report within the time allowed.

## **53 Commission must give report to Minister and publish it**

- (1) The Commission must—
  - (a) give the final report on the inquiry to the Minister as soon as practicable after completing it (whether as a separate report or as part of its annual report under **section 168**); and 25
  - (b) at least 10 working days later, publish the final report.
- (2) ~~The Commission may include the final report in its report under **section 168**.~~

## **54 Minister must present report to House of Representatives** 30

The Minister must, within 1 month after receiving the final report, present the report to the House of Representatives.

## **55 How Minister must or may respond to Commission's recommendation**

- (1) The Minister—

- (a) must have regard to any recommendation made to the Minister in the final report; and
- (b) may do 1 or more of the following:
  - (i) accept the recommendation in whole or in part:
  - (ii) reject the recommendation in whole or in part: 5
  - (iii) request the Commission to reconsider or clarify the recommendation in whole or in part.
- (2) The Commission must comply with a request made under **subsection (1)(b)(iii)** within a period and in a manner agreed between the Commission and the Minister. 10

#### **56 Minister must publish Government's response**

- (1) The Minister must, within a reasonable time after receiving a final report,—
  - (a) publish a response to the report that sets out the Government's intentions in relation to the report (including the Minister's intentions under **section 55(1)(b)**); and 15
  - (b) present the response to the House of Representatives.
- (2) This section does not apply if the final report contains no recommendations.

#### Subpart 4—Commission may impose additional regulation (wholesale frameworks and wholesale code)

- 57 Commission may impose additional regulation** 20
- (1) The Commission may make a determination that does 1 or more of the following:
  - (a) requires 1 or more regulated grocery retailers to establish, implement, and maintain, in the manner set out in the determination, a framework for the wholesale supply of groceries (a **wholesale framework**): 25
  - (b) sets out a grocery wholesale industry participation code (the **wholesale code**):
  - (c) provides that a wholesale framework is not required to include a matter under **section 64(1)(a) or (b)**:
  - (ca) provides for matters under **section 64(3)**: 30
  - (d) provides, for the purposes of **section 47**, that a duty under **subpart 2** does not apply to a specified person or class of persons:
  - (da) provides for when a regulated grocery retailer is allowed to act under **section 110** and any terms and conditions for acting under that section (for example, a condition requiring a regulated grocery retailer to resume supply after a specified period, after the wholesale customer complies with specified requirements, or in other specified circumstances): 35

- (e) prescribes modifications for the purposes of **clause 1 of Schedule 1**.
- (2) A wholesale code may apply to, and impose duties on, any of the following:
- (a) all regulated grocery retailers, a particular regulated grocery retailer, or a class of regulated grocery retailers:
- (b) all wholesale customers, a particular wholesale customer, or a class of wholesale customers. 5
- (3) The following applies to a determination under **subsection (1)(d)** that disappplies a duty to a specified person or class of persons:
- (a) the Commission may make the determination only if the Commission (in addition to being satisfied of the matters in **section 58(1)**) is satisfied that the duty is no longer necessary or desirable in order to promote the purpose of this Part (after taking into account any additional regulation that has been imposed): 10
- (b) the duty may be disappplied subject to the terms and conditions that the Commission thinks fit (if any). 15
- (4) A determination made under this section is secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements).

#### **58 Test for additional regulation (wholesale frameworks and wholesale code)**

- (1) The Commission may make a determination under this subpart only if it is satisfied— 20
- (a) that doing so is necessary or desirable in order to promote the purpose of this Part; and
- (b) that—
- (i) 1 or more of the paragraphs in **subsection (2)** apply; or
- (ii) the wholesale offerings of groceries provided by 1 or more regulated grocery retailers (in relation to any 1 or more of ~~price, range, or terms~~ price, range, quantity, frequency, or any terms and conditions) are not consistent with ~~outcomes produced~~ wholesale offerings provided in a competitive wholesale market. 25
- (2) For the purposes of **subsection (1)(b)(i)**, the paragraphs are as follows: 30
- (a) a regulated grocery retailer has failed to do either or both of the following within 3 months after **subpart 2** comes into force:
- (i) comply with **section 31(1)** (which relates to establishing and implementing effective rules, criteria, and procedures):
- (ii) comply with **section 33(1)** (which relates to establishing and implementing standard terms and conditions and principles for the wholesale supply of groceries): 35



- (b) a regulated grocery retailer has failed to comply with **section 39(1)** (putting in place systems and processes for the wholesale supply of groceries) within 6 months after **subpart 2** comes into force:
- (c) on the first anniversary of **subpart 2** coming into force, a regulated grocery retailer (A) has not entered into or arrived at any wholesale agreements at all, in circumstances where— 5
- (i) 1 or more wholesale customers have made wholesale supply requests to A; and
- (ii) 1 or more of those wholesale customers have taken all reasonable steps to enter into or arrive at a wholesale agreement with A but have been unable to do so within a reasonable period of time: 10
- (d) on the first anniversary of **subpart 2** coming into force,—
- (i) a regulated grocery retailer has entered into 1 or more wholesale agreements; but
- (ii) those wholesale agreements do not materially contribute towards achieving the purpose of this Part. 15
- (3) **Subsection (2)(c) and (d)** does not apply to a regulated grocery retailer (A) if the Commission is satisfied that—
- (a) A has taken all reasonable steps to enter into or arrive at 1 or more wholesale agreements that materially contribute towards achieving the purpose of this Part; but 20
- (b) ~~A has failed to do so because 1 or more wholesale customers have entered into or arrived at agreements for the wholesale supply of groceries with 1 or more other persons.~~
- (b) A has failed to do so— 25
- (i) because 1 or more wholesale customers have entered into or arrived at agreements for the wholesale supply of groceries with 1 or more other persons; or
- (ii) because of some other cause beyond A's control.
- (4) If the Commission is satisfied that a regulated grocery retailer has seriously or persistently contravened 1 or more of the duties in **sections 30, 32, 34, and 38 to 41**, the Commission may treat **subsection (1)(b)(ii)** as being satisfied. 30
- (5) Before making a determination under this subpart, the Commission must have regard to whether any matter dealt with in the determination would be more appropriately dealt with by way of an Order in Council under **subpart 5** and a determination under **subpart 6**. 35

- 59 Commission may act in relation to regulated grocery retailer even if retailer complies with subpart 2**
- (1) If the Commission is satisfied under **section 58(1)(b)(i)** in relation to a particular regulated grocery retailer (**A**), the Commission may make a determination under this subpart that applies to— 5
- (a) **A**; or
- (b) **A** and some or all other regulated grocery retailers (regardless of whether the other regulated grocery retailers have failed to comply with any obligations under **subpart 2**).
- (2) If the Commission is satisfied under **section 58(1)(b)(ii)**, the Commission may make a determination under this subpart that applies to 1, some, or all regulated grocery retailers (regardless of whether any of those regulated grocery retailers have failed to comply with any duties under **subpart 2**). 10
- 60 Process for making determination under this subpart**
- (1) The Commission may use any process that it considers appropriate to develop a determination under this subpart, but must— 15
- (a) publish a draft determination; and
- (b) publish a statement of its reasons for proposing to make a determination; and
- (c) consult persons, or representatives of the persons, that the Commission considers will be substantially affected by a determination. 20
- (2) In the case of a determination that sets out a wholesale code, the Commission's consultation under **subsection (1)(c)** must include consultation about a recommendation referred to in **section 188(4)(b)(i)** (which relates to the level of pecuniary penalty for contraventions of the wholesale code). 25
- 61 Process requirements do not apply to certain amendments**
- (1) **Section 60(1)(a) to (c)** does not apply to an amendment of a determination if the Commission is satisfied on reasonable grounds that—
- (a) the nature of the amendment is technical and non-controversial; or
- (b) the amendment is necessary or desirable to ensure the determination is consistent with any other determination made under this Part; or 30
- (c) it is necessary or desirable in the public interest that the amendment be made urgently.
- (2) If the Commission relies on **subsection (1)(c)**,—
- (a) the Commission must publish a statement of its reasons for acting under that paragraph; and 35

- (b) the amendment must be treated as revoked 9 months after ~~the date on which~~ it comes into force, unless it is earlier revoked (but this paragraph does not prevent the Commission from making the amendment again).

### *Wholesale framework*

- 62 Purpose of wholesale framework** 5
- The purpose of a regulated grocery retailer's wholesale framework is to promote the purpose of this Part by—
- (a) ~~providing transparency for wholesale customers and the Commission about how the regulated grocery retailer will make decisions about pricing, range, or terms for the wholesale supply of groceries; and~~ 10
- (b) ~~providing an incentive to the regulated grocery retailer to make those decisions in a manner that is consistent with outcomes produced in a competitive wholesale market.~~
- 63 Process for developing wholesale framework**
- (1) A regulated grocery retailer must, within the time frame, and in the manner, specified in a determination under **section 57(1)(a)**,— 15
- (a) prepare a draft wholesale framework; and
- (b) consult the following on the draft wholesale framework:
- (i) the persons, or representatives of the persons, specified in the determination; and 20
- (ii) the Commission; and
- (c) provide a final wholesale framework to the Commission; and
- (d) ensure that the final wholesale framework complies with **section 64**.
- (2) A regulated grocery retailer may amend or replace its wholesale framework.
- (3) Requirements that apply in relation to developing the wholesale framework also apply, with all necessary modifications, in relation to its amendment or replacement. 25
- 64 Contents of wholesale framework**
- (1) A regulated grocery retailer's wholesale framework must—
- (a) set out how it will make decisions about ~~pricing, range, and terms~~ pricing, range, quantity, frequency, and terms and conditions in connection with the wholesale supply of groceries, including specifying the basis for all costs that it will use to arrive at wholesale prices for groceries and charges for ancillary services (if any); and 30
- (b) specify all inputs, assumptions, and processes in connection with those decisions; and 35

- (c) comply with all requirements set out in a direction under **section 66**; and
- (d) comply with all other requirements set out in the determination under **section 57(1)(a)**.
- (2) However, a regulated grocery retailer's wholesale framework is not required to include a matter under **subsection (1)(a) or (b)** if a determination made under this subpart provides that the matter is not required. 5
- (3) A regulated grocery retailer's wholesale framework may regulate, deal with, or otherwise relate to any of the matters referred to in **sections 29 to 40A** (unless a determination made under this subpart provides otherwise). 10
- 65 Regulated grocery retailer must comply with wholesale framework**
- A regulated grocery retailer must ensure that its decisions about ~~pricing, range, and terms for pricing, range, quantity, frequency, and terms and conditions in connection with~~ the wholesale supply of groceries are made in accordance with its wholesale framework. 15
- 66 Commission may direct inputs, assumptions, processes, and requirements to be included, amended, or revoked**
- (1) The Commission may, by written notice, direct a regulated grocery retailer to include, amend, or revoke any inputs, assumptions, processes, or requirements in its wholesale framework. 20
- (2) The Commission may give the direction only if—
- (a) it is satisfied that it is necessary or desirable to do so in order to promote the purpose of this Part or to achieve closer alignment of the wholesale framework with the principle set out in **section 19**; and
- (b) it has consulted the regulated grocery retailer. 25
- (3) The regulated grocery retailer must comply with the direction within the time frame, and in the manner, specified in the direction.
- 67 Civil liability for contraventions**
- A person that contravenes **section 63, 65, or 66(3)** is liable to a civil liability remedy (including an order to pay a pecuniary penalty or compensation). 30
- 
- Guidance note**
- See **subpart 3 of Part 4** for further provisions about civil liability.
- 
- 68 Commission must review and report on wholesale frameworks**
- (1) The Commission must—
- (a) complete a first review of each wholesale framework within ~~2~~ 3 years after the date on which the framework comes into effect; and 35

- (b) give the Minister a report on that review as soon as practicable after completing it ~~(whether as a separate report or as part of its annual report under **section 168**)~~.
- (2) After the first review, the Commission—
- (a) must review a wholesale framework and give the Minister a report on that review at any subsequent time required by the Minister; and 5
- (b) may review a wholesale framework and give the Minister a report on that review at any other time ~~(whether as a separate report or as part of its annual report under **section 168**)~~.
- (3) The purpose of a review of a wholesale framework is to— 10
- (a) assess the operation and effectiveness of the wholesale framework; and
- (b) assess whether a determination or direction under this subpart should be made or amended, revoked, or replaced.
- (4) The Commission—
- (a) may give the Minister a report under this section as a separate report or as part of its annual report under **section 168**; and 15
- (b) at least 10 working days later, must publish the report.

### *Wholesale code*

#### **69 Purpose of wholesale code**

~~The purpose of a wholesale code is to promote the purpose of this Part by providing rules in connection with the wholesale supply of groceries provided by regulated grocery retailers.~~ 20

#### **70 Content of wholesale code**

- (1) The wholesale code may contain any provisions that are necessary or desirable to promote the purpose of this Part, including provisions that— 25
- Wholesale agreements and conduct*
- (a) regulate or prohibit any conduct in connection with—
- (i) a wholesale supply request; or
- (ii) entering into or arriving at a wholesale agreement; or
- (iii) exercising a right or power, or complying with an obligation, under a wholesale agreement (whether the right, power, or obligation is exercised or performed by a regulated grocery retailer or a wholesale customer); or 30
- (iv) a regulated grocery retailer otherwise dealing with a wholesale customer (or vice versa): 35
- (b) specify any requirements about the content or form of a wholesale agreement, including—

- (i) what terms or conditions must be included in the agreement, what terms or conditions must not be included, and what terms or conditions may only be included if certain requirements are met; and
- (ii) how the terms and conditions of the agreement are expressed:
- (c) regulate or prohibit any conduct in connection with supplying groceries under a wholesale agreement: 5
- Supply agreements and conduct*
- (ca) regulate or prohibit any conduct in connection with—
- (i) entering into or arriving at a supply agreement; or
- (ii) exercising a right or power, or complying with an obligation, under a supply agreement (whether the right, power, or obligation is exercised or performed by a regulated grocery retailer or a supplier); or 10
- (iii) a regulated grocery retailer otherwise dealing with a supplier (or vice versa): 15
- (cb) specify in relation to a supply agreement what terms or conditions must be included, what terms or conditions must not be included, and what terms or conditions may only be included if certain requirements are met:
- (cc) impose any other duty on a regulated grocery retailer or supplier to ensure that they act in a manner that is consistent with— 20
- (i) the principle set out in **section 20(1)(aa)**; or
- (ii) the principle set out in **section 20(1)(b)**:
- General*
- (d) regulate, deal with, or otherwise relate to any of the matters referred to in **sections 29 to 40A**: 25
- (e) impose any other duty on a regulated grocery retailer or wholesale customer to ensure that they act in a manner that is consistent with the principle set out in **section 19**.
- (2) The Commission may include provisions in the wholesale code for the purposes of **subsection (1)(ca) to (cc)** only if— 30
- (a) it is satisfied that the provisions are necessary or desirable to promote the principle set out in **section 20(1)(aa)** (wholesale customers having reasonable access to certain discounts, payments, or rebates); or
- (b) it is satisfied that— 35
- (i) the conduct of suppliers (whether individually or collectively) has been, or is likely to have been, lessening competition in a wholesale or retail grocery market; and

- (ii) the provisions are necessary or desirable to promote the principle set out in **section 20(1)(b)** (wholesale customers having reliable and cost-effective access to wholesale groceries).

## **71 Regulated grocery retailer and supplier must comply with wholesale code**

- (1) A regulated grocery retailer must comply with the wholesale code. 5
- (1A) A supplier must comply with the provisions of the wholesale code imposed under **section 70(1)(ca) to (cc)**.
- (2) A person that contravenes this section is liable to a civil liability remedy (including an order to pay a pecuniary penalty or compensation).

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### **Guidance note**

See **subpart 3 of Part 4** for further provisions about civil liability.

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## **72 Wholesale customer must comply with wholesale code**

- (1) A wholesale customer must comply with the wholesale code.
- (2) This section is not a civil liability provision (and, accordingly, there is no civil liability remedy for a contravention of this section). However, *see* **sections 110 and 111** for matters relating to a contravention of this section. 15

## **73 Commission must review and report on wholesale code**

- (1) The Commission must—
- (a) complete a first review of the wholesale code within ~~2~~ 3 years after ~~the date on which~~ the code comes into force; and 20
- (b) give the Minister a report on that review as soon as practicable after completing it ~~(whether as a separate report or as part of its annual report under **section 168**)~~.
- (2) After the first review, the Commission—
- (a) must review the wholesale code and give the Minister a report on that review at any subsequent time required by the Minister; and 25
- (b) may review the wholesale code and give the Minister a report on that review at any other time ~~(whether as a separate report or as part of its annual report under **section 168**)~~.
- (3) The purpose of a review is to— 30
- (a) assess the operation and effectiveness of the wholesale code; and
- (b) assess whether the wholesale code should be amended, revoked, or replaced.
- (4) The Commission—
- (a) may give the Minister a report under this section as a separate report or as part of its annual report under **section 168**; and 35

- (b) at least 10 working days later, must publish the report.

*When duties do not apply*

**74 Duties do not apply to extent that they are inconsistent with other additional regulation**

A duty under this subpart that would otherwise apply to a person does not apply to the extent that it is inconsistent with a duty that applies to the person under **subparts 5 and 6**. 5

**75 Duties do not apply if additional regulation so provides**

A duty under this subpart that would otherwise apply to a person does not apply if a determination made under **subpart 6** provides that the duty does not apply to the person or to a class that includes the person. 10

Subpart 5—Order in Council (non-discriminatory terms and specified access terms)

**76 Order in Council may require regulated grocery retailers to supply wholesale customers** 15

- (1) The Governor-General may, on the recommendation of the Minister, make an Order in Council that does 1 or more of the following in relation to the wholesale supply of groceries to wholesale customers:

(a) requires 1 or more regulated grocery retailers to supply groceries, or specified classes of groceries, on non-discriminatory terms in accordance with a determination made under **section 84**: 20

(b) requires 1 or more regulated grocery retailers to supply groceries, or specified classes of groceries, in accordance with specified access terms regulation (as specified in a determination made under **section 90**):

(c) imposes requirements to facilitate the operation of any requirements under **paragraph (a) or (b)**, including any accounting, financial reporting, and operational separation requirements: 25

(d) prescribes modifications for the purposes of **clause 1 of Schedule 1**.

- (2) An order made under this section is secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements). 30

**77 Test for additional regulation (non-discriminatory terms and specified access terms regulation)**

- (1) The Minister may recommend that an Order in Council be made under this subpart only if the Minister is satisfied that—

(a) making the order is necessary or desirable in order to promote the purpose of this Part; and 35



- (b) the wholesale offerings of groceries provided by 1 or more regulated grocery retailers (in relation to any 1 or more of ~~price, range, or terms~~ price, range, quantity, frequency, or any terms or conditions) are not consistent with ~~outcomes produced~~ wholesale offerings provided in a competitive wholesale market. 5
- (2) If the Minister is satisfied that a regulated grocery retailer has seriously or persistently contravened 1 or more of the duties in **sections 30, 32, 34, and 38 to 41**, the Minister may treat **subsection (1)(b)** as being satisfied.
- (3) However, the Minister may recommend that the order applies to 1, some, or all regulated grocery retailers regardless of whether any of those regulated grocery retailers have failed to comply with any duties under **subpart 2**. 10
- 78 Order may be made only after inquiry**
- (1) In addition to the requirements of **section 77**, the Minister may recommend that an Order in Council be made under this subpart only if—
- (a) the Commission has carried out an inquiry under **subpart 3** (including giving a final report under **section 53**); and 15
- (b) the Minister has had regard to the recommendations made to the Minister in the final report (as required by **section 55(1)(a)**); and
- (c) in a case where the Minister makes a request under **section 79(1A)**, the Minister has received the Commission’s advice following the request. 20
- (2) However, the Minister may make a recommendation regardless of whether the Commission has recommended that an Order in Council be made (*see **section 79***).
- 79 Minister’s decision on additional regulation under this subpart may be same as, or different from, Commission’s recommendation** 25
- (1) The Minister’s decision on whether to make a recommendation for an Order in Council under this subpart may be the same as, or different from, the Commission’s recommendation in relation to additional regulation under this subpart (if any).
- (1A) However, if the Minister proposes, contrary to the recommendation of the Commission, to make a recommendation for an Order in Council, the Minister must request that the Commission give written advice on what the material provisions of the determination under **subpart 6** would be likely to be if the Order in Council were to be made. 30
- (1B) The Minister must publish a request under **subsection (1A)** and the Commission’s advice given following the request. 35
- (2) ~~However, if that decision~~ In addition, if the Minister’s final decision is different from the Commission’s recommendation, the Minister must set out in the response under **section 56** the reasons for the Minister’s decision.

<b>80</b>	<b>Inquiry requirements do not apply to certain amendments</b>	
(1)	<b>Section 78</b> does not apply to an amendment of an Order in Council if the Minister is satisfied on reasonable grounds that—	
	(a) the nature of the amendment is technical and non-controversial; or	
	(b) it is necessary or desirable in the public interest that the amendment be made urgently.	5
(2)	If the Minister relies on <b>subsection (1)(b)</b> ,—	
	(a) the Minister must publish a statement of the Minister’s reasons for acting under that paragraph; and	
	(b) the amendment must be treated as revoked 9 months after <del>the date on which</del> it comes into force, unless it is earlier revoked (but this paragraph does not prevent an Order in Council from making the amendment again).	10
<b>81</b>	<b>Regulated grocery retailer must comply with Order in Council and associated determinations</b>	15
(1)	A regulated grocery retailer must comply with the following:	
	(a) an Order in Council made under this subpart; and	
	(b) a determination made under <b>subpart 6</b> .	
(2)	A person that contravenes this section is liable to a civil liability remedy (including an order to pay a pecuniary penalty or compensation).	20
	<b>Guidance note</b>	
	See <b>subpart 3</b> of <b>Part 4</b> for further provisions about civil liability.	
<b>82</b>	<del><b>Order in Council or determination may allow independent suppliers to opt out</b></del>	
(1)	<del>An Order in Council made under this subpart or a determination made under <b>subpart 6</b> may provide for an independent supplier, or a class of independent suppliers, to opt out of the wholesale supply of groceries under the order or determination, including providing for—</del>	25
	<del>(a) when and how independent suppliers or classes of independent suppliers may opt out; and</del>	30
	<del>(b) the power to opt out to be subject to terms and conditions.</del>	
(2)	<del>For the purposes of applying an Order in Council or a determination, an independent supplier must be disregarded to the extent that it opts out in accordance with the order or determination.</del>	
	<b>Example</b>	35
	A supplier ( <b>S</b> ) is in the business of supplying 2 types of groceries (class A and class B) to a regulated grocery retailer ( <b>R</b> ).	

~~S opts out in accordance with a determination in relation to class A. S complies with the terms and conditions referred to in **subsection (1)(b)**.~~

~~R's wholesale offering in accordance with the determination is not required to include class A (but is required to include class B).~~

- 82** **When suppliers may opt out** 5
- (1) A supplier may opt out of participating in the wholesale supply of groceries under an Order in Council made under this subpart if—
- (a) the grounds set out in a determination for the purposes of this section apply; and
- (b) the supplier opts out in the manner specified in the determination. 10
- (2) The power to opt out is subject to the terms and conditions (if any) specified in a determination.
- (3) A supplier ceases to opt out if any of those terms and conditions are no longer complied with.
- (4) In this section, **determination** means a determination made under **subpart 6**. 15

**Example**

A supplier (**S**) is in the business of supplying 2 types of groceries (class A and class B) to a regulated grocery retailer (**R**).

S opts out in accordance with a determination in relation to class A. S complies with the terms and conditions referred to in **subsection (2)**. 20

R's wholesale offering in accordance with the determination is not required to include class A (but is required to include class B).

Subpart 6—Determinations to support Order in Council

*Non-discriminatory terms*

- 83** **Purpose of non-discriminatory regulation** 25
- ~~The purpose of non-discriminatory regulation is to promote the purpose of this Part by ensuring 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 to the extent that a particular difference in treatment is objectively justifiable and does not lessen, and is unlikely to lessen, competition in a grocery wholesale supply market.~~ 30
- 84** **Commission must make determination relating to non-discriminatory terms**
- (1) This section applies if an Order in Council is made under **section 76(1)(a)** to require 1 or more regulated grocery retailers to supply groceries, or specified classes of groceries, on non-discriminatory terms. 35

- (2) The Commission must, as soon as practicable after the Order in Council is made, make 1 or more determinations specifying how that requirement applies to those regulated grocery retailers.
- (3) A determination may regulate, deal with, or otherwise relate to 1 or more of the following matters: 5
- (a) the operational separation of a regulated grocery retailer (A), including any of the following:
- (i) requiring A to establish and maintain 1 or more business units with particular functions:
- (ii) providing for how those business units may or must operate (for example, requiring A to operate a business unit on a stand-alone basis, at arm's length from any other business units): 10
- (b) A supplying groceries, or specified classes of groceries, to 1 or more wholesale customers on terms and conditions that are transparent and equivalent to terms and conditions on which A supplies itself or associated persons or other wholesale customers, ~~(except to the extent that a particular difference in treatment is objectively justifiable and does not lessen, and is unlikely to lessen, competition in any grocery-wholesale supply market) market:~~ 15
- 
- Guidance note** 20
- See **section 21(2)(b)**, which provides that supplying groceries includes arranging agreements for the supply of groceries.
- 
- (c) A's systems, procedures, and processes ~~that require~~ in connection with 1 or more of the following:
- (i) compliance with the determination and the Order in Council; and 25
- (ii) monitoring of, and reporting on, compliance with the determination and that order by an independent oversight group that has a majority of members that are independent of A; and
- (iii) the development of performance measures relating to compliance with the determination and that order; and 30
- (iv) audit, and other checks, of compliance with the determination and that order:
- (d) any other duties on A or 1 or more wholesale customers to facilitate or support the operation of any matters under **paragraphs (a) to (c)** (for example, duties relating to minimum standards of demand forecasting, the duration of purchases, and minimum orders): 35
- (e) matters for the purposes of **section 82**, including—
- (i) the grounds on which and how a supplier may opt out of the wholesale supply of groceries under an Order in Council made under **subpart 5**; and 40

- (ii) the terms and conditions of that power to opt out (which may include requirements for the supplier, a regulated grocery retailer, or both):
- (f) when a regulated grocery retailer is allowed to act under **section 110** and any terms and conditions for acting under that section (for example, a condition requiring a regulated grocery retailer to resume supply after a specified period, after the wholesale customer complies with specified requirements, or in other specified circumstances). 5
- (4) A determination may prescribe modifications for the purposes of **clause 1 of Schedule 1**. 10
- (5) A determination made under this section is secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements).
- 85 Process for making determination for non-discriminatory terms**
- The Commission may use any process that it considers appropriate to develop a determination under **section 84**, but must— 15
- (a) publish a draft determination; and
- (b) publish a statement of its reasons for proposing to make a determination; and
- (c) consult persons, or representatives of the persons, that the Commission considers will be substantially affected by the determination. 20
- 86 Process requirements do not apply to certain amendments**
- (1) **Section 85(a) to (c)** does not apply to an amendment of a determination if the Commission is satisfied on reasonable grounds that—
- (a) the nature of the amendment is technical and non-controversial; or
- (b) the amendment is necessary or desirable to ensure the determination is consistent with any other determination made under this Part; or 25
- (c) it is necessary or desirable in the public interest that the amendment be made urgently.
- (2) If the Commission relies on **subsection (1)(c)**,—
- (a) the Commission must publish a statement of its reasons for acting under that paragraph; and 30
- (b) the amendment must be treated as revoked 9 months after ~~the date on which~~ it comes into force, unless it is earlier revoked (but this paragraph does not prevent the Commission from making the amendment again).
- 87 Employees** 35
- (1) This section has effect only to the extent that—

- (a) an employee is transferred within a regulated grocery retailer (A) to a new business unit on the implementation of a requirement for operational separation under a determination made under this subpart; and
- (b) the determination applies this section to the employee (whether by reference to a class of employees or otherwise). 5
- (2) The following apply:
- (a) implementing the operational separation does not affect any employment agreement between A and an employee of A; and
- (b) the employee of A continues to be an employee of A and, for the purposes of every Act or other law, award, determination, and agreement relating to the employment of the employee,— 10
- (i) their employment agreement is unbroken; and
- (ii) the period of their service with A and every other period of service that A recognises as their continuous service continue to be recognised; and 15
- (c) the terms and conditions of the employment of the employee with A are (until varied) identical to the terms and conditions of their employment before the operational separation is implemented; and
- (d) the employee is not entitled to receive any payment or other benefit by reason only of A implementing the operational separation. 20

**87A Commission must review and report on determination for non-discriminatory terms**

- (1) The Commission must—
- (a) complete a first review of a determination under **section 84** within 3 years after the determination comes into force; and 25
- (b) give the Minister a report on that review as soon as practicable after completing it.
- (2) After the first review, the Commission—
- (a) must review a determination under **section 84** and give the Minister a report on that review at any subsequent time required by the Minister; and 30
- (b) may review that determination and give the Minister a report on that review at any other time.
- (3) The purpose of a review of a determination under **section 84** is to—
- (a) assess the operation and effectiveness of the determination; and 35
- (b) assess whether the determination should be amended, revoked, or replaced.
- (4) The Commission—

- (a) may give the Minister a report under this section as a separate report or as part of its annual report under **section 168**; and
- (b) at least 10 working days later, must publish the report.

*Specified access terms regulation*

<b>88</b>	<b>Purpose of specified access terms regulation</b>	5
	The purpose of specified access terms regulation is to promote the purpose of this Part by providing for the wholesale supply of groceries on regulated terms and conditions (whether relating to price, range, quality, or any other matter).	
<b>89</b>	<b>Overview of specified access terms regulation</b>	
(1)	If the wholesale supply of groceries is subject to specified access terms regulation, the Commission sets the terms and conditions on which wholesale supply must be provided, and all regulated grocery retailers to which it applies must supply groceries on those terms and conditions.	10
(2)	This section is intended only as a guide.	
<b>90</b>	<b>Commission must make determination for specified access terms regulation</b>	15
(1)	This section applies if an Order in Council is made under <b>section 76(1)(b)</b> to require 1 or more regulated grocery retailers to supply groceries, or specified classes of groceries, in accordance with specified access terms regulation.	
(2)	The Commission must, as soon as practicable after the Order in Council is made, make 1 or more determinations specifying how the specified access terms regulation applies to those regulated grocery retailers.	20
(3)	A determination made under this section is secondary legislation ( <i>see</i> Part 3 of the Legislation Act 2019 for publication requirements).	
<b>91</b>	<b>Content of determination for specified access terms regulation</b>	25
(1)	A determination under <b>section 90</b> must—	
(a)	<del>specify sufficient terms to allow the wholesale supply of groceries to be made available by a regulated grocery retailer within the time frames specified under <b>paragraph (c)</b>, without the need for a wholesale customer to enter into an agreement with the regulated grocery retailer; and</del>	30
(a)	<u>specify sufficient terms and conditions to ensure that—</u>	
(i)	<u>a regulated grocery retailer makes available the wholesale supply of groceries without the need for a wholesale customer to enter into an agreement with the regulated grocery retailer; and</u>	
(ii)	<u>the wholesale supply of groceries is made available within the time frames specified under <b>paragraph (c)</b>; and</u>	35

- (b) identify the wholesale customers or classes of wholesale customers that are eligible to make a request to a regulated grocery retailer for the wholesale supply of groceries under the determination; and
- (c) state the time frames within which a regulated grocery retailer must make available the wholesale supply of groceries under the determination; and 5
- ~~(d) specify the terms and conditions on which a regulated grocery retailer must make available the wholesale supply of groceries under the determination; and~~
- (e) specify the duration of the determination, which must be not more than 7 years (but *see* **subsection (3)**). 10
- (2) For the purposes of **subsection (1)(b)**, the determination may identify wholesale customers in any of the following ways:
- (a) by name:
- (b) by description: 15
- (c) by specifying eligibility criteria:
- (d) any other way the Commission thinks fit.
- (3) **Subsection (1)(e)** does not limit the Commission's power to amend, revoke, or replace the determination at any time.
- 92 Other matters that may be included in determination for specified access terms regulation 20**
- (1) A determination under **section 90** may regulate, deal with, or otherwise relate to 1 or more of the following matters:
- (a) 1 or more of the following with respect to supplying groceries or ancillary services: 25
- (i) the maximum price or prices (or charge or charges) that a regulated grocery retailer may charge:
- (ii) the maximum wholesale margin that a regulated grocery retailer may recover:
- (iii) the maximum revenues that a regulated grocery retailer may derive: 30
- (iv) principles for determining prices, charges, wholesale margins, or revenues:
- (b) the quality standards that a regulated grocery retailer must meet (for example, delivery time frames and out-of-stock frequency): 35
- (c) terms and conditions relating to access to wholesale supply from a regulated grocery retailer (for example, terms or conditions relating to payment, credit, minimum purchase amounts or quantities, and demand forecasting):



- (d) a regulated grocery retailer's systems, procedures, and processes in connection with 1 or more of the following:
- (i) compliance with the determination and the Order in Council made under **subpart 5**; and
  - (ii) monitoring of, and reporting on, compliance with the determination and that order by an independent oversight group that has a majority of members that are independent of the regulated grocery retailer; and 5
  - (iii) the development of performance measures relating to compliance with the determination and that order; and 10
  - (iv) an audit, and other checks, of compliance with the determination and that order:
- (e) any other duties on 1 or more regulated grocery retailers or wholesale customers to facilitate or support the operation of the determination:
- (f) any other duties on 1 or more regulated grocery retailers or wholesale customers to ensure that they act in a manner that is consistent with the principle set out in **section 19**;
- (g) matters for the purposes of **section 82**, including—
- (i) the grounds on which and how a supplier may opt out of the wholesale supply of groceries under an Order in Council made under **subpart 5**; and 20
  - (ii) the terms and conditions of that power to opt out (which may include requirements for the supplier, a regulated grocery retailer, or both):
- (h) when a regulated grocery retailer is allowed to act under **section 110** and any terms and conditions for acting under that section (for example, a condition requiring a regulated grocery retailer to resume supply after a specified period, after the wholesale customer complies with specified requirements, or in other specified circumstances). 25
- (2) A determination under **section 90** may do 1 or more of the following: 30
- (a) include incentives for a particular regulated grocery retailer to maintain or improve its quality of wholesale supply of groceries:
  - (b) include any matter contained in a specified access terms proposal:
  - (c) prescribe modifications for the purposes of **clause 1 of Schedule 1**.
- (3) Quality standards may be prescribed in any way the Commission considers appropriate (such as targets, bands, or formulas). Those standards may relate to the quality of groceries supplied or the quality of any ancillary service provided in connection with the wholesale supply of groceries. 35

- 93 Process for making determination for specified access terms regulation**
- The Commission may use any process that it considers appropriate to develop a determination under **section 90**, but must comply with any requirements under **sections 95 to 99** (subject to **section 94**).
- 94 Process requirements do not apply to certain amendments** 5
- (1) **Sections 95 to 99** do not apply to an amendment of a determination if the Commission is satisfied on reasonable grounds that—
- (a) the nature of the amendment is technical and non-controversial; or
  - (b) the amendment is necessary or desirable to ensure the determination is consistent with any other determination made under this Part; or 10
  - (c) it is necessary or desirable in the public interest that the amendment be made urgently.
- (2) If the Commission relies on **subsection (1)(c)**,—
- (a) the Commission must publish a statement of its reasons for acting under that paragraph; and 15
  - (b) the amendment must be treated as revoked 9 months after ~~the date on which~~ it comes into force, unless it is earlier revoked (but this paragraph does not prevent the Commission from making the amendment again).
- 95 Call for specified access terms proposal**
- (1) The Commission must— 20
- (a) give written notice to 1 or more regulated grocery retailers requiring them to submit to the Commission, by the date specified in the notice, a specified access terms proposal that complies with **section 96**; and
  - (b) publish the notice.
- (2) The Commission may include in the written notice any additional requirements that it thinks fit to specify, having regard to any relevant matters (for example, the terms and conditions of any commercial agreement for the wholesale supply of groceries in New Zealand or overseas). 25
- (3) A regulated grocery retailer to whom written notice is given must comply with the notice. 30
- 96 Requirements for specified access terms proposal**
- (1) A specified access terms proposal must—
- (a) specify sufficient terms and conditions that cover the matters set out in **section 91**; and
  - (b) provide an explanation of, and reasons for, those terms and conditions; 35  
and
  - (c) be consistent with the principle set out in **section 19**; and

- (d) comply with any additional requirements that the Commission has specified under **section 95**.
- (2) A specified access terms proposal may also specify terms and conditions that cover 1 or more of the matters set out in **section 92**, but in that case the proposal must provide an explanation of, and reasons for, those terms and conditions. 5
- (3) The Commission may refuse to consider a specified access terms proposal that—
- (a) fails to comply with this section; or
- (b) is submitted late. 10
- 97 Commission must publish and consult on specified access terms proposal**
- (1) This section applies if the Commission receives, by the date specified in the notice under **section 95**, a specified access terms proposal that complies with **section 96**.
- (2) The Commission must— 15
- (a) publish the specified access terms proposal; and
- (b) consult on the specified access terms proposal with the persons, or representatives of the persons, that the Commission considers will be substantially affected by the determination.
- 98 Failure to submit specified access terms proposal** 20
- If a regulated grocery retailer (A) fails to submit a specified access terms proposal that complies with **section 96** by the date specified under **section 95**, the Commission may do 1 or more of the following:
- (a) give written notice to 1 or more other regulated grocery retailers under **section 95**: 25
- (b) act under **section 97** in relation to any other specified access terms proposal submitted by any regulated grocery retailer:
- (c) publish and consult on a draft determination under **section 99** even though it has not received a compliant specified access terms proposal from A. 30
- 99 Commission must consult on draft determination**
- The Commission must, after acting under **sections 95 to 97** (as applicable),—
- (a) publish a draft determination; and
- (b) publish a statement of its reasons for proposing to make a determination; 35  
and
- (c) consult the persons, or representatives of the persons, that the Commission considers will be substantially affected by the determination.

**99A Commission must review and report on determination for specified access terms**

- (1) The Commission must—
- (a) complete a first review of a determination under **section 90** within 3 years after the determination comes into force; and 5
- (b) give the Minister a report on that review as soon as practicable after completing it.
- (2) After the first review, the Commission—
- (a) must review a determination under **section 90** and give the Minister a report on that review at any subsequent time required by the Minister; and 10
- (b) may review that determination and give the Minister a report on that review at any other time.
- (3) The purpose of a review of a determination under **section 90** is to—
- (a) assess the operation and effectiveness of the determination; and 15
- (b) assess whether the determination should be amended, revoked, or replaced.
- (4) The Commission—
- (a) may give the Minister a report under this section as a separate report or as part of its annual report under **section 168**; and 20
- (b) at least 10 working days later, must publish the report.

*Wholesale customer requirements***100 Wholesale customers must comply with requirements to facilitate operation of additional regulation**

- (1) A wholesale customer must comply with the requirements imposed on it under a determination made under this subpart (if any). 25
- (2) This section is not a civil liability provision (and, accordingly, there is no civil liability remedy for a contravention of this provision). However,—
- (a) any amount payable by a wholesale customer to a regulated grocery retailer (**A**) under the determination is recoverable by A in any court of competent jurisdiction as a debt due to A; and 30

**Example**

A regulated grocery retailer (**A**) must supply groceries (and certain ancillary services) to a wholesale customer (**B**) under specified access terms (without the need for B to enter into an agreement with A). 35

B neglects to pay for some of those groceries (or ancillary services) in accordance with the specified access terms.

A may recover the amount owing as a debt due.

- (b) *see sections 110 and 111* for other matters relating to a contravention of a determination.
- (3) Any amount payable by A to a wholesale customer under the determination is recoverable by the wholesale customer in any court of competent jurisdiction as a debt due to the wholesale customer. 5

*Power to disapply requirements*

**101 Determination may disapply other requirements**

- (1) A determination made under this subpart may provide, for the purposes of **section 47 or 75**, that a duty under **subpart 2 or 4** does not apply to a specified person or class of persons. 10
- (2) The following apply to a determination made under this subpart that disapplies a duty to a specified person or class of persons:
- (a) the Commission may make the determination only if the Commission is satisfied that the duty is no longer necessary or desirable in order to promote the purpose of this Part (after taking into account any additional regulation that has been imposed): 15
- (b) the duty may be disapplied subject to the terms and conditions that the Commission thinks fit.

**102 ~~Determination may disapply requirements to private label products~~**

- (1) ~~A determination made under this subpart may provide that all or any requirements imposed under the determination (or an Order in Council made under **subpart 5**) do not apply in relation to all or any private label products of a regulated grocery retailer if the Commission is satisfied that doing so is necessary or desirable to promote the purpose of the Part.~~ 20
- (2) ~~The determination may disapply the requirements subject to the terms and conditions that the Commission thinks fit.~~ 25

Subpart 7—Review of regulation of access to grocery wholesale

**103 Order in Council may set market concentration threshold that triggers review**

- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister, ~~make an Order in Council that sets~~ set a retail grocery market concentration threshold for the purposes of this subpart. 30
- (2) An order made under this section is secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements).

**104 Commission must monitor market concentration levels** 35

- (1) The Commission must—
- (a) monitor the level of retail grocery market concentration; and

- (b) promptly notify the Minister if the retail grocery market concentration is at or below the threshold prescribed under **section 103** for 2 consecutive years; and
- (c) after it notifies the Minister under **paragraph (b)**, start to carry out a review of competition in the grocery industry. 5
- (2) The purpose of the review is for the Commission to consider the following:
- (a) the operation and effectiveness of this Part:
- (b) whether any amendments to this Part are necessary or desirable to promote the purpose of this Act:
- (c) the operation and effectiveness of any additional regulation: 10
- (d) whether additional regulation is necessary or desirable or whether it is necessary or desirable to amend or revoke any additional regulation.
- 105 Commission must give report to Minister**
- (1) The Commission must, within 1 year after starting a review under this subpart, give to the Minister a report on the review. 15
- (2) The report must—
- (a) describe the state of competition that exists in the New Zealand grocery industry, including retail and wholesale parts; and
- (b) set out the Commission’s views on the following: matters set out in **section 104(2)**. 20
- (i) ~~the operation and effectiveness of this Part:~~
- (ii) ~~whether any amendments to this Part are necessary or desirable to promote the purpose of this Act:~~
- (iii) ~~the operation and effectiveness of any additional regulation:~~
- (iv) ~~whether additional regulation is necessary or desirable or whether it is necessary or desirable to amend or revoke any additional regulation.~~ 25
- (3) The report may set out any other matters that the Commission thinks fit.
- (4) ~~The Commission may include a report under this section in its report under **section 168**.~~ 30
- (4) The Commission—
- (a) may give the Minister a report under this section as a separate report or as part of its annual report under **section 168**; and
- (b) at least 10 working days later, must publish the report.
- 106 Minister must present report to House of Representatives** 35
- The Minister must, within 1 month after receiving a report under this subpart, present the report to the House of Representatives.

**107 Minister must issue Government's response**

The Minister must, within a reasonable time after receiving a report under this subpart,—

- (a) issue a response to the report that sets out the Government's intentions in relation to this Part; and
- (b) present the response to the House of Representatives.

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Subpart 7A—Regulations may disapply requirements for facilitating commercial agreements for wholesale supply of groceries

**107A Regulations may disapply subpart 2**

- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations for the following purposes:
  - (a) providing for any provision or provisions of **subpart 2** to not apply in relation to 1 or more regulated grocery retailers and 1 or more categories of groceries;
  - (b) provide for terms and conditions of a disapplication under **paragraph (a)**.
- (2) The regulations may apply to all regulated grocery retailers, a particular regulated grocery retailer, or a class of regulated grocery retailers.
- (3) Regulations made under this section are secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements).

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**107B Test for regulations under this subpart**

- (1) The Minister may recommend that regulations be made under this subpart only if—
  - (a) the Minister is satisfied that making the regulations is necessary or desirable in order to promote the purpose of this Act; and
  - (b) the Commission has carried out an inquiry under **subpart 3** (including giving a final report under **section 53**); and
  - (c) the Commission has recommended that the regulations be made in that final report.
- (2) The Minister and the Commission may recommend that regulations be made under this subpart regardless of whether the regulations are necessary or desirable in order to promote the purpose of this Part.

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Subpart 8—Miscellaneous

**108 Monitoring compliance with additional regulation**

- (1) For the purpose of monitoring compliance with an Order in Council or a determination made under this Part, the Commission may, in addition to exercising

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- ~~its powers under this Act and under the Commerce Act 1986, issue a written notice to a regulated grocery retailer requiring it to provide any or all of the following:~~
- ~~(a) a written statement that states whether the regulated grocery retailer has complied with the order or determination: 5~~
  - ~~(b) a report on the written statement that is signed by an auditor or other assurance practitioner in accordance with any form specified by the Commission:~~
  - ~~(c) sufficient information to enable the Commission to properly determine whether all applicable requirements have been complied with: 10~~
  - ~~(d) a certificate, in the form specified by the Commission and signed by at least 1 director of the regulated grocery retailer, confirming the truth and accuracy of any information provided under this section.~~
- ~~(2) The regulated grocery retailer must comply with the notice within the time frame, and in the manner, specified in the notice. 15~~
  - ~~(3) See **section 175** for an offence relating to this section.~~
- 109 Commission may develop determination at same time that it acts under other provisions or before Order in Council is made**
- (1) Nothing in this Act prevents the Commission from developing a determination under this Part at the same time as it performs or exercises any other function, power, or duty under this Act, including when it does any of the following: 20
    - (a) carries out an inquiry under **subpart 3**:
    - (b) develops any other determination under this Part:
    - (c) prepares a report under **section 168**.
  - (2) In addition, nothing in this Act prevents the Commission from developing a determination under **subpart 6** before an Order in Council is made under **subpart 5**. 25
- 110 Regulated grocery retailer may stop supply if wholesale customer's failure is serious or persistent**
- (1) A regulated grocery retailer may stop supplying groceries, or classes of groceries, to a wholesale customer in accordance with a determination made under **subpart 4 or 6** if— 30
    - (a) the wholesale customer has seriously or persistently contravened requirements imposed on it under the determination; and
    - (b) either— 35
      - (i) the regulated grocery retailer is allowed to act in that manner under the determination and complies with the terms and conditions imposed by the determination in relation to acting under this section (if any); or



- (ii) the Commission has given its prior approval to the regulated grocery retailer acting in that manner and the regulated grocery retailer complies with the terms and conditions of the Commission's approval (if any).
- (b) ~~the Commission has given its prior approval to the regulated grocery retailer acting in that manner; and~~ 5
- (c) ~~the regulated grocery retailer complies with the terms and conditions of the Commission's approval (if any).~~
- (2) The Commission may give its approval on the terms and conditions it thinks fit (for example, a condition requiring the regulated grocery retailer to resume supply after a specified period, after the wholesale customer complies with specified requirements, or in other specified circumstances). 10
- 111 Defence if wholesale customer's failure causes contravention**
- In a proceeding under **subpart 3 of Part 4** against a regulated grocery retailer (A) for a contravention of **section 65, 71 or 81**, it is a defence if A proves that— 15
- (a) A's contravention was caused by a wholesale customer contravening 1 or more requirements imposed under a determination made under **subpart 4 or 6**; and
- (b) A took all reasonable steps to comply with **section 65, 71 or 81**. 20
- 112 Application of Commerce Act 1986**
- Part 2 of the Commerce Act 1986 does not apply in respect of an Order in Council or a determination made under this Part or any matter necessary for giving effect to an Order in Council or a determination made under this Part.

## Part 4 25

### Enforcement and dispute resolution

#### Subpart 1—Power to issue corrective notices

- 113 Commission may give notice to take corrective action**
- (1) This section applies if the Commission is satisfied that a person— 30
- (a) has contravened a civil liability provision; or
- (b) is likely to contravene a civil liability provision; or
- (c) has attempted to contravene a civil liability provision; or
- (d) has been involved in a contravention of a civil liability provision.
- (2) The Commission may, by written notice given to the person, require the person to take any steps specified in the notice to— 35

- (a) avoid, remedy, or mitigate any actual or likely adverse effects arising from a contravention or possible contravention; or
  - (b) ensure that a contravention is not continued or repeated; or
  - (c) ensure that a contravention does not occur.
- (3) The notice must specify a reasonable period within which the required steps must be taken. 5
- (4) If the Commission is satisfied that, by engaging in any conduct, the person is contravening or is likely to, or is attempting to, contravene a civil liability provision, the Commission may act under **subsection (2)**—
- (a) whether or not the person has previously contravened the provision; and 10
  - (b) whether or not there is an imminent danger of substantial damage to any person if the provision is contravened.

Compare: 2022 No 21 s 35(1), (2)

#### **114 Person must comply with corrective notice**

- (1) A person that is given a notice under this subpart must comply with the notice within the time frame, and in the manner, specified in the notice. 15
- (2) A person that contravenes this section is liable to a civil liability remedy (including an order to pay a pecuniary penalty or compensation).

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#### **Guidance note**

**See subpart 3** for further provisions about civil liability. 20

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Compare: 2022 No 21 s 35(3)–(5)

#### **115 Procedural matters relating to corrective notice**

The Commission may exercise a power under **section 113** only if—

- (a) the Commission has had regard to whether exercising the power promotes the purpose of this Act; and 25
- (b) the Commission gives the person to whom the notice is proposed to be directed (A) at least ~~3~~ 5 working days' written notice of the following matters before Commission exercises the power:
  - (i) that the Commission may exercise the power; and
  - (ii) the reasons why it is considering exercising that power; and 30
- (c) the Commission gives A or A's representative an opportunity to make written submissions and to be heard on the matter within that notice period.

Compare: 2011 No 5 s 49(5)

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## Subpart 2—Power to require warning to be disclosed

### 116 Commission may require its warning to be disclosed

- (1) If the Commission has issued a warning about any matter relating to a relevant person, the Commission may, by written notice given to the relevant person, require them to do either or both of the following: 5
- (a) prominently disclose a copy of the warning on 1 or more Internet sites maintained by or on behalf of the relevant person:
  - (b) ensure that every document or other communication of the kind that is specified in the notice and that is distributed by or on behalf of the relevant person contains a copy of the warning in a prominent position or is accompanied by a copy of the warning. 10
- (2) The Commission may impose the requirement on the terms and conditions (if any) that it thinks fit.
- (3) In this subpart, **relevant person** means a person who is or has been a participant. 15
- Compare: 2011 No 5 s 49(1), (2), (7)

### 117 Person must comply with disclosure notice

- (1) A person that is given a notice under this subpart must comply with the notice within the time frame, and in the manner, specified in the notice.
- (2) A person that contravenes this section is liable to a civil liability remedy (including an order to pay a pecuniary penalty or compensation). 20

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#### Guidance note

See **subpart 3** for further provisions about civil liability.

Compare: 2022 No 21 s 35(3)–(5)

### 118 Procedural matters relating to disclosure notice 25

The Commission may exercise a power under **section 116** only if—

- (a) the Commission has had regard to whether exercising the power promotes the purpose of this Act; and
- (b) the Commission gives the relevant person at least ~~3~~ 5 working days' written notice of the following matters before Commission exercises the power: 30
  - (i) that the Commission may exercise the power; and
  - (ii) the reasons why it is considering exercising that power; and
- (c) the Commission gives the relevant person or the relevant person's representative an opportunity to make written submissions and to be heard on the matter within that notice period. 35

Compare: 2011 No 5 s 49(5)

**119 Commission must publish disclosure notice**

If the Commission gives a notice under this subpart,—

- (a) it must, immediately after exercising that power, publish the following:
  - (i) the notice:
  - (ii) the reasons for giving the notice: 5
  - (iii) any other information the Commission thinks relevant in the circumstances; and
- (b) it may make the matters in **paragraph (a)** publicly available by any other means; and
- (c) it may notify any other person of the matters in **paragraph (a)**. 10

Compare: 2011 No 5 s 50

### Subpart 3—Civil liability

**120 Civil liability remedies available under this subpart**

- (1) The following remedies (**civil liability remedies**) are available under this subpart: 15
  - (a) a pecuniary penalty order (with 4 tiers of penalties):
  - (b) a declaration of contravention:
  - (c) a compensatory order:
  - (d) an order to vary or cancel a contract:
  - (e) an injunction. 20
- (2) Those remedies are available for contraventions of civil liability provisions. A **civil liability provision** is any of the following:
  - (a) **section 15** (grocery supply code):
  - (b) **sections 30 to 41** (facilitating commercial agreements):
  - (c) **sections 63, 65, and 66(3)** (wholesale frameworks): 25
  - (d) **section 71** (wholesale code):
  - (e) **section 81** (non-discriminatory terms or specified access terms regulation):
  - (f) **section 114** (corrective notices):
  - (g) **section 117** (disclosure of warning): 30
  - (h) **section 180** (conditions of exemption for collective negotiation):
  - (i) **section 182** (disclosure standards).

*Pecuniary penalty order***121 When High Court may make pecuniary penalty order**

- (1) The High Court may, on the application of the Commission, order a person to pay to the Crown the pecuniary penalty that the court determines to be appropriate if the court is satisfied that the person has— 5
- (a) contravened a civil liability provision; or
  - (b) attempted to contravene a civil liability provision; or
  - (c) been involved in a contravention of a civil liability provision.
- (2) In this subpart, the **relevant conduct** is the conduct giving rise to the contravention, attempted contravention, or involvement in the contravention referred to in **subsection (1)**. 10

**122 Maximum penalty (Tier 1)**

- (1) This section applies to a contravention, an attempted contravention, or an involvement in a contravention of any of the following:
- (a) **section 15** (grocery supply code), to the extent that it relates to a provision of the grocery supply code that is ~~stated by that code~~ prescribed by the regulations to give rise to a pecuniary penalty under this section: 15
  - (b) any provision of **sections 30 to 41** (facilitating commercial agreements), if any additional regulation is in force at the time that the relevant conduct occurred: 20
  - (c) **section 63** (developing a wholesale framework):
  - (d) **section 65** (complying with a wholesale framework):
  - (e) **section 66(3)** (complying with the Commission's directions about a framework):
  - (f) **section 71** (wholesale code), to the extent that it relates to a provision of the wholesale code that is prescribed by the regulations to give rise to a pecuniary penalty under this section: 25
  - (g) **section 81** (non-discriminatory terms or specified access terms regulation).
- (2) However, this section does not apply in relation to **sections 31(1)(b) and (c), 33(1)(c) and (d), 35, and 36** (*see instead section 125*). 30
- (3) The maximum amount of a pecuniary penalty is—
- (a) \$500,000 for a contravention, an attempted contravention, or an involvement in a contravention by an individual; or
  - (b) in any other case, the greater of— 35
    - (i) \$10 million; and

- (ii) either the amount referred to in **subsection (4)(a)** or the amount referred to in **subsection (4)(b)**.
- (4) For the purposes of **subsection (3)(b)(ii)**, the amounts are as follows:
- (a) if it can be readily ascertained and if the court is satisfied that the contravention (if any) occurred in the course of producing a commercial gain, 3 times the value of any commercial gain resulting from the contravention; or 5
- (b) if the commercial gain cannot readily be ascertained, 10% of the turnover of the person that is liable to pay the penalty and all its interconnected bodies corporate (if any) in each accounting period in which the contravention (if any) occurred. 10
- 123 Maximum penalty (Tier 2)**
- (1) This section applies to a contravention, an attempted contravention, or an involvement in a contravention of any of the following:
- (a) **section 15** (grocery supply code), to the extent that it relates to a provision of the grocery supply code that is ~~stated by that code~~ prescribed by the regulations to give rise to a pecuniary penalty under this section: 15
- (b) any provision of **sections 30 to 41** (facilitating commercial agreements), if no additional regulation is in force at the time that the relevant conduct occurred (if additional regulation is in force, *see instead section 122*): 20
- (c) **section 71** (wholesale code), to the extent that it relates to a provision of the wholesale code that is prescribed by the regulations to give rise to a pecuniary penalty under this section.
- (2) However, this section does not apply in relation to **sections 31(1)(b) and (c), 33(1)(c) and (d), 35, and 36** (*see instead section 125*). 25
- (3) The maximum amount of a pecuniary penalty is—
- (a) \$200,000 for a contravention, an attempted contravention, or an involvement in a contravention by an individual; or
- (b) in any other case, the greater of— 30
- (i) \$3 million; and
- (ii) either the amount referred to in **subsection (4)(a)** or the amount referred to in **subsection (4)(b)**.
- (4) For the purposes of **subsection (3)(b)(ii)**, the amounts are as follows:
- (a) if it can be readily ascertained and if the court is satisfied that the contravention (if any) occurred in the course of producing a commercial gain, the value of any commercial gain resulting from the contravention; or 35

- (b) if the commercial gain cannot readily be ascertained, 3% of the turnover of the person and all its interconnected bodies corporate (if any) in each accounting period in which the contravention (if any) occurred.

#### 124 Maximum penalty (Tier 3)

- (1) This section applies to a contravention, an attempted contravention, or an involvement in a contravention of **section 182** (complying with disclosure standard). 5
- (2) The maximum amount of a pecuniary penalty is—
- (a) \$250,000 for a contravention, an attempted contravention, or an involvement in a contravention by an individual; or 10
- (b) in any other case, \$5 million.

#### 125 Maximum penalty (Tier 4)

- (1) This section applies to a contravention, an attempted contravention, or an involvement in a contravention of any of the following:
- (a) **section 15** (grocery supply code), to the extent that it relates to a provision of the grocery supply code that is ~~stated by that code~~ prescribed by the regulations to give rise to a pecuniary penalty under this section: 15
- (b) **section 31(1)(b) and (c)** (giving and publishing copy of rules, criteria, and procedures):
- (c) **section 33(1)(c) and (d)** (giving and publishing copy of standard terms and conditions and principles): 20
- (d) **sections 35 and 36** (notifying wholesale supply requests and changes):
- (e) **section 71** (wholesale code), to the extent that it relates to a provision of the wholesale code that is prescribed by the regulations to give rise to a pecuniary penalty under this section: 25
- (f) **section 114** (corrective notices):
- (g) **section 117** (disclosure of warning):
- (h) **section 180** (conditions of exemption for collective negotiation).
- (2) The maximum amount of a pecuniary penalty is— 30
- (a) \$30,000 for a contravention, an attempted contravention, or an involvement in a contravention by an individual; or
- (b) \$300,000 in any other case.

#### 126 Considerations for court in determining pecuniary penalty

- (1) In determining an appropriate pecuniary penalty that a person (A) must pay, the court must have regard to all relevant matters, including— 35
- (a) the nature and extent of A's conduct; and

- (b) the nature and extent of any loss or damage suffered by any person because of A's conduct; and
  - (c) any gains made or losses avoided by A; and
  - (d) whether a person has paid an amount of compensation, reparation, or restitution, or taken other steps to avoid or mitigate any actual or potential adverse effects arising from A's conduct; and 5
  - (e) the circumstances in which A's conduct took place; and
  - (f) whether A has previously been found by a court in a proceeding under this Act, or any other legislation, to have engaged in any similar conduct; and 10
  - (g) the status of, or outcome from, any proceeding before the dispute resolution scheme under **subpart 5** in relation to A's conduct.
- (2) In this section, **A's conduct** means the conduct of A for which A is liable to the pecuniary penalty.

*Declaration of contravention* 15

**127 Declaration of contravention**

The High Court must, on an application under **section 121(1)**, make a declaration of contravention if it is satisfied that the person has contravened, or been involved in a contravention of, a civil liability provision.

**128 Purpose and effect of declaration of contravention** 20

- (1) The purpose of a declaration of contravention is to enable an applicant for a compensatory order to rely on the declaration of contravention in the proceeding for that order, and not be required to prove the contravention or involvement in the contravention.
- (2) Accordingly, a declaration of contravention is conclusive evidence of the matters that must be stated in it under **section 129**. 25

**129 What declarations of contravention must state**

A declaration of contravention must state the following:

- (a) the provision to which the contravention or involvement in the contravention relates; and 30
- (b) the person who engaged in the contravention or was involved in the contravention; and
- (c) the conduct that constituted the contravention or involvement in the contravention.



*Compensatory orders***130 When court may make compensatory orders**

- (1) The court may make a compensatory order, on application by the Commission or any other person, if the court is satisfied that—
- (a) a person has contravened a civil liability provision; and 5
  - (b) another person (the **aggrieved person**) has suffered, or is likely to suffer, loss or damage because of the contravention.
- (2) The court may make a compensatory order whether or not the aggrieved person is a party to the proceeding. 10
- Compare: 2013 No 69 s 494

**131 Terms of compensatory orders**

- (1) If **section 130** applies, the court may make any order it thinks just to compensate an aggrieved person in whole or in part for the loss or damage, or to prevent or reduce the loss or damage, referred to in that section.
- (2) An order may include an order to direct a relevant person to pay to the aggrieved person the amount of the loss or damage (in whole or in part). 15
- (3) **Subsection (2)** does not limit **subsection (1)**.
- (4) In this section, **relevant person** means—
- (a) any person in contravention; or
  - (b) any person involved in the contravention. 20
- Compare: 2013 No 69 s 495

*Variation or cancellation orders***132 Court may vary or cancel contract**

- (1) The court may, on application by the Commission or any other person, make 1 or more of the orders set out in **subsection (2)** if the court is satisfied that— 25
- (a) a contract has been entered into in contravention of a civil liability provision; or
  - (b) a contract contains a provision that, if given effect to, would contravene a civil liability provision or would result in a person contravening a civil liability provision. 30
- (2) An order may—
- (a) vary the contract in the manner the court thinks fit; or
  - (b) cancel the contract; or
  - (c) require a person who is a party to the contract to make restitution or pay compensation to any other person who is a party to the contract. 35
- Compare: 1986 No 5 s 89(2)

### *Injunctions*

#### **133 Court may grant injunctions**

The court may, on application by the Commission or any other person, grant an injunction—

- (a) restraining a person from engaging or continuing to engage in conduct that constitutes or would constitute a contravention, attempted contravention, or an involvement in a contravention of a civil liability provision; or 5
- (b) requiring a person to do an act or a thing if—
  - (i) that person has refused or failed, is refusing or failing, or is proposing to refuse or fail to do that act or thing; and 10
  - (ii) the refusal or failure was, is, or would be a contravention of a civil liability provision.

Compare: 2013 No 69 s 480; 2022 No 21 s 47

#### **134 When court may grant restraining injunctions** 15

- (1) The court may grant an injunction restraining a person from engaging in conduct of a particular kind if—
  - (a) it is satisfied that the person has engaged in conduct of that kind; or
  - (b) it appears to the court that, if an injunction is not granted, it is likely that the person will engage in conduct of that kind. 20
- (2) The court may grant an interim injunction restraining a person from engaging in conduct of a particular kind if in its opinion it is desirable to do so.
- (3) **Subsections (1)(a) and (2)** apply whether or not it appears to the court that the person intends to engage again, or to continue to engage, in conduct of that kind. 25
- (4) **Subsections (1)(b) and (2)** apply whether or not—
  - (a) the person has previously engaged in conduct of that kind; or
  - (b) there is an imminent danger of substantial damage to any other person if that person engages in conduct of that kind.

Compare: 2013 No 69 s 481; 2022 No 21 s 48 30

#### **135 When court may grant performance injunctions**

- (1) A court may grant an injunction requiring a person to do an act or a thing that they are required to do under a civil liability provision if—
  - (a) it is satisfied that the person has refused or failed to do that act or thing; or 35
  - (b) it appears to the court that, if an injunction is not granted, it is likely that the person will refuse or fail to do that act or thing.

- (2) The court may grant an interim injunction requiring a person to do an act or a thing that they are required to do under a civil liability provision if in its opinion it is desirable to do so.
- (3) **Subsections (1)(a) and (2)** apply whether or not it appears to the court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing. 5
- (4) **Subsections (1)(b) and (2)** apply whether or not—
- (a) the person has previously refused or failed to do that act or thing; or
- (b) there is an imminent danger of substantial damage to any other person if the person refuses or fails to do that act or thing. 10

Compare: 2022 No 21 s 49

### **136 Commission's undertaking as to damages not required**

- (1) If the Commission applies to the court for the grant of an interim injunction under this subpart, the court must not, as a condition of granting an interim injunction, require the Commission to give an undertaking as to damages. 15
- (2) In determining the Commission's application for the grant of an interim injunction, the court must not take into account that the Commission is not required to give an undertaking as to damages.

Compare: 2013 No 69 s 482; 2022 No 21 s 50

### *Rules of procedure* 20

### **137 Rules of civil procedure and civil standard of proof apply**

A proceeding under this subpart is a civil proceeding and the usual rules of court and rules of evidence and procedure for civil proceedings apply (including the standard of proof).

### **138 Limit on proceedings** 25

- (1) A proceeding under this subpart may be commenced within 3 years after the conduct giving rise to the contravention, attempted contravention, or involvement in the contravention was discovered or ought reasonably to have been discovered.
- (2) However, no proceeding under this subpart may be commenced 10 years or more after the conduct giving rise to the contravention, attempted contravention, or involvement in the contravention occurred. 30

*Relationship between proceedings and orders*

- 139 More than 1 civil liability remedy may be given for same conduct**
- The court may grant a civil liability remedy of one kind against a person even though the court has granted another civil liability remedy of a different kind against the person for the same conduct. 5
- 
- Example**
- The court may make a compensatory order and a pecuniary penalty order for the same conduct.
- 
- 140 Only 1 pecuniary penalty order may be made for same conduct**
- If conduct by a person constitutes a contravention, an attempted contravention, or an involvement in the contravention of 2 or more provisions,— 10
- (a) a proceeding may be brought against that person for the contravention, attempted contravention, or involvement in the contravention of any 1 or more of the provisions; but
- (b) no person is liable to more than 1 pecuniary penalty order for the same conduct. 15
- 141 No pecuniary penalty and criminal penalty for same conduct**
- A person cannot be ordered to pay a pecuniary penalty and be liable for a fine or to imprisonment under this Act or any other Act for the same conduct.
- Subpart 4—Miscellaneous provisions relating to enforcement 20
- 142 Jurisdiction of High Court**
- (1) The High Court may hear and determine the following matters:
- (a) applications for orders, or for a court to exercise any other power, under any provision of **subpart 3**:
- (b) appeals arising from any proceeding in the District Court under **subpart 3**. 25
- (2) Section 75 of the Commerce Act 1986 applies with any necessary modifications to the extent that a provision referred to in that section applies for the purposes of this Act.
- 143 Jurisdiction of District Court** 30
- (1) The District Court may hear and determine applications for orders, or for a court to exercise any other power, under any of the provisions of **sections 130 to 141** if—
- (a) the amount claimed does not exceed \$350,000; or
- (b) no amount is claimed; or 35

- (c) the occasion for the making of the order or the exercise of the power arises in the course of civil proceedings properly before the court; or
- (d) the parties consent, under section 81 of the District Court Act 2016, to the District Court having jurisdiction to hear and determine the application. 5
- (2) Section 76 of the Commerce Act 1986 applies with any necessary modifications to the extent that a provision referred to in that section applies for the purposes of this Act.
- 144 Involvement in contravention**
- In this Act, a person is **involved in a contravention** if the person— 10
- (a) has aided, abetted, counselled, or procured the contravention; or
- (b) has induced, whether by threats or promises or otherwise, the contravention; or
- (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or 15
- (d) has conspired with others to effect the contravention.
- 145 Illegal contracts provisions do not apply**
- Subpart 5 of Part 2 of the Contract and Commercial Law Act 2017 does not apply to a contract that—
- (a) is entered into in contravention of a civil liability provision; or 20
- (b) contains a particular provision that if given effect to would contravene a civil liability provision or would result in a person contravening a civil liability provision.
- Compare: 1986 No 5 s 89(5)
- 146 Enforceability of other provisions not affected** 25
- (1) This section applies if a contract—
- (a) is entered into in contravention of a civil liability provision by reason that the contract contains a particular provision; or
- (b) contains a particular provision that if given effect to would contravene a civil liability provision or would result in a person contravening a civil liability provision. 30
- (2) Despite any legislation or rule of law, the existence of the particular provision does not affect the enforceability of any other provision of the contract.
- Compare: 1986 No 5 s 89(6)

## Subpart 5—Dispute resolution

**147 Overview**

- (1) This subpart provides that every regulated grocery retailer must comply with the dispute resolution scheme established under **Schedule 2**.
- (2) The dispute resolution scheme is either— 5
- (a) a scheme approved by the Minister and delivered by the provider of the scheme (an **approved scheme**); or
- (b) if there is no approved scheme, a scheme that is delivered by the chief executive of the Ministry (a **regulated scheme**).
- (3) A dispute may be referred to the scheme if— 10
- (a) the amount claimed under the dispute is less than \$5 million; and
- (b) the dispute—
- (i) arises from requirements under the grocery supply code; or
- (ii) arises from requirements under **Part 3** (wholesale supply of groceries); or 15
- (iii) falls within a class of eligible disputes prescribed by the regulations.
- (4) However, only a supplier or a wholesale customer (not a regulated grocery retailer) may refer a dispute to the scheme.
- (5) This section is intended only as a guide to the general scheme and effect of this subpart. 20

**148 Interpretation**

In this subpart, unless the context otherwise requires,—

**binding decision** has the meaning set out in **section 156**

**dispute resolution scheme** means the dispute resolution scheme under **Schedule 2** 25

**provider** has the meaning set out in **clause 2 of Schedule 2**

**regulated grocery retailer** means—

- (a) a regulated grocery retailer within the meaning of **Part 2** (grocery supply code); and 30
- (b) a regulated grocery retailer within the meaning of **Part 3** (wholesale supply of groceries); and
- (c) a person that is no longer a regulated grocery retailer under **paragraph (a) or (b)** but who was a regulated grocery retailer at the time of the conduct giving rise to the dispute 35

**rules** means the rules,—

- (a) in relation to an approved scheme, described in **clause 13 of Schedule 2**; and
- (b) in relation to a regulated scheme, prescribed under **clause 18 of Schedule 2**

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**settlement agreement** has the meaning set out in **section 155**.

*Referral to dispute resolution scheme*

**149 Supplier or wholesale customer may refer certain disputes to dispute resolution scheme**

A supplier or wholesale customer who is party to a dispute with a regulated grocery retailer may refer the dispute to the dispute resolution scheme if—

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- (a) the amount claimed under the dispute does not exceed \$5 million or no amount is claimed; and
- (b) the dispute—
  - (i) arises from the performance or non-performance of a requirement, or the exercise of a power, under the grocery supply code; or
  - (ii) arises from the performance or non-performance of a requirement, or the exercise of a power, under **Part 3** (wholesale supply of groceries); or
  - (iii) falls within a class of eligible disputes prescribed by regulations made under **section 150** (if any); and
- (c) the dispute has not been finally resolved by proceedings in any court or tribunal.

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**Guidance note**

The procedure for making a referral is set out in the rules of the scheme.

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**150 Regulations prescribing classes of eligible disputes**

- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations prescribing 1 or more further classes of disputes between a supplier or wholesale customer and a regulated grocery retailer that may be referred to the dispute resolution scheme (**eligible disputes**).
- (2) The Minister may make a recommendation only if the Minister is satisfied—
  - (a) that prescribing those disputes as eligible disputes is necessary or desirable in order to promote the purpose of the dispute resolution scheme set out in **clause 1 of Schedule 2**; and
  - (b) that those disputes are of a kind, or likely to be of a kind, appropriate for resolution through the dispute resolution scheme.

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- (3) For the purposes of **subsection (2)(b)**, the Minister may consider any factors that the Minister considers relevant, including the following:
- (a) the likely size of those disputes:
  - (b) the likely complexity of those disputes:
  - (c) the kinds of remedial action that would likely be needed to resolve those disputes: 5
  - (d) the characteristics of the dispute resolution scheme.
- (4) Regulations made under this section are secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements).
- 151 Other proceedings stayed unless court or tribunal orders otherwise** 10
- (1) The referral of a dispute to the dispute resolution scheme does not affect any right any person may have to commence a proceeding in any court or tribunal (a **concurrent proceeding**).
- (2) ~~However, if a concurrent proceeding is commenced in relation to the matters that are the subject of a dispute that has been referred to the scheme, the concurrent proceeding is stayed until the proceeding before the dispute resolution scheme is determined and all appeal rights exhausted.~~ 15
- (2) However, if a concurrent proceeding is, or has been, commenced in relation to the matters that are the subject of a dispute referred to the scheme, the concurrent proceeding is stayed— 20
- (a) while the proceeding before the dispute resolution scheme and any appeal rights continue; and
  - (b) while a binding decision or a settlement agreement is in force.
- (2A) However, **subsection (2)** does not apply to proceedings brought by the Commission under this Part. 25
- (3) Despite **subsection (2)**, the court or tribunal may, on its own initiative or on application of the Commission, make an order to do either or both of the following:
- (a) allow the concurrent proceeding to commence or continue in that court or tribunal: 30
  - (b) stay the proceeding before the dispute resolution scheme.
- (4) The grounds on which the Commission may apply for a stay under **subsection (3)(b)** include the following:
- (a) the Commission has, or is likely soon to have, a relevant investigation in progress: 35
  - (b) the Commission is considering taking relevant compliance or enforcement action:



- (c) the Commission considers that there are reasons why 1 or more of the matters that are the subject of the dispute would be better dealt with in the concurrent proceedings rather than by the dispute resolution scheme.

*Rules of dispute resolution scheme*

- 152 Regulated grocery retailers must comply with rules of dispute resolution scheme** 5
- A regulated grocery retailer must comply with the rules of the dispute resolution scheme.
- 153 District Court may order compliance with rules of dispute resolution scheme** 10
- On the application of the provider of the dispute resolution scheme, the District Court may make an order requiring a regulated grocery retailer to comply with the rules of the scheme.
- 154 Decision maker may draw inferences from failure to comply with rules of dispute resolution scheme** 15
- (1) This section applies if—
- (a) a dispute comes before an adjudicator or other decision maker for resolution under the dispute resolution scheme; and
- (b) the adjudicator or other decision maker is satisfied that, in the course of the dispute resolution proceedings, a regulated grocery retailer has failed to comply with a rule of the dispute resolution scheme. 20
- (2) The adjudicator or other decision maker may—
- (a) draw from the failure any reasonable inferences it thinks fit; and
- (b) determine the claim concerned on the basis of the information available to it; and 25
- (c) give any weight it thinks fit to information that—
- (i) it asked for, or directed to be provided; but
- (ii) was provided later than requested or directed.

*Enforcement and appeals*

- 155 Enforcement of settlement agreements** 30
- (1) This section applies if a dispute is resolved under the dispute resolution scheme by mediation or other process the outcome of which the parties have agreed will be binding (a **settlement agreement**).
- (2) A party to the dispute resolution proceedings must comply with the settlement agreement. 35

- (3) On the application of a party or the provider of the scheme, the District Court may make an order requiring a party to comply with the settlement agreement.
- (4) If the court is satisfied that the terms of the settlement agreement are manifestly unreasonable, the court's order under **subsection (3)** may modify the terms of the settlement agreement, but only to the extent that the modification results in an agreement that could have been entered into under the dispute resolution scheme. 5

### 156 Enforcement of binding decisions

- (1) This section applies if a dispute is resolved under the dispute resolution scheme by an order or other decision of an adjudicator or other decision maker (a **binding decision**). 10
- (2) A party to the dispute resolution proceedings must comply with the binding decision.
- (3) The binding decision must be treated as an order of the District Court and may be enforced accordingly. 15

### 157 Appeals against binding decisions

- (1) A party who is not satisfied with a binding decision may appeal to—
- (a) the District Court, if the amount at issue does not exceed \$350,000, or if no amount was claimed; or
  - (b) the High Court, if the amount at issue exceeds \$350,000. 20
- (2) However, the decision may be appealed only on a question of law.
- (3) In this section, **amount at issue** means—
- (a) the amount of money required to be paid under the decision by the person filing the appeal; or
  - (b) if **subsection (4)** applies, the amount claimed unsuccessfully by the party who referred the dispute to the dispute resolution scheme (the **claimant**). 25
- (4) This subsection applies if the appeal relates to a decision—
- (a) in which the decision maker has declined to require payment of money; or 30
  - (b) in which the decision maker has required payment of money that is less than the amount claimed by the claimant.

### *Miscellaneous*

### 158 Binding decision must be made in accordance with principles of law

- (1) This section applies if a dispute comes before an adjudicator or other decision maker for resolution under the dispute resolution scheme. 35

- (2) Any binding decision issued by the adjudicator or other decision maker must be made in accordance with principles of law.

**159 Parties may not contract out of dispute resolution scheme**

- (1) This subpart has effect despite any provision to the contrary in any agreement.
- (2) A provision of an agreement that has the effect of overriding a provision of this subpart (whether directly or indirectly) is unenforceable. 5
- (3) **Subsections (1) and (2)** do not apply in respect of a provision that imposes a stricter duty on a regulated grocery retailer than would be imposed under this subpart.

**Part 5**

10

**Miscellaneous**

Subpart 1—Commerce Commission

*Grocery Commissioner*

**160 Appointment of Grocery Commissioner**

- (1) There must be a Grocery Commissioner. 15
- (2) The Grocery Commissioner must be appointed by the Governor-General on the recommendation of the responsible Minister.
- (3) The appointment must be made by written notice to the appointee.
- (4) The responsible Minister must ensure that the following are notified in the *Gazette* as soon as practicable after an appointment is made: 20
- (a) the name of the appointee; and
- (b) the date on which the appointment takes effect; and
- (c) the term of the appointment.
- (5) In this section and **section 161**, **responsible Minister** means the responsible Minister, in relation to the Commission, within the meaning of section 10(1) of the Crown Entities Act 2004. 25

**161 Minister's recommendation**

- (1) The responsible Minister may recommend that a person be appointed as the Grocery Commissioner only if— 30
- (a) ~~the person is a member of the Commission appointed under section 9(2) of the Commerce Act 1986; and~~
- (a) the person is or will be a member of the Commission (see section 9 of the Commerce Act 1986); and

- (b) in the opinion of the responsible Minister, the person is qualified for appointment, having regard to the functions and powers of the Commission under this Act and any other legislation.
- (2) For the purposes of **subsection (1)(b)**, a person is qualified for appointment by virtue of that person's knowledge of, or experience in, the grocery industry or any other industry, commerce, economics, law, accountancy, public administration, or consumer affairs. 5
- 162 Further provisions relating to Grocery Commissioner**
- (1) A person may be removed from office as the Grocery Commissioner only for just cause (within the meaning of section 40 of the Crown Entities Act 2004). 10
- (2) If a person is removed under **subsection (1)**, they are also removed from office as a member of the Commission as if they had been removed under section 13(1) of the Commerce Act 1986 (and the notice requirements under section 39 of the Crown Entities Act 2004 apply).
- (3) If a person's term of office as the Grocery Commissioner expires, or the person resigns from that office, the person— 15
- (a) may continue to act as if they were the Grocery Commissioner for the purpose of completing the determination of any matter before that person, as the Grocery Commissioner, that commenced before the term of office expired or the resignation took effect; and 20
- (b) must be treated as if they were the Grocery Commissioner for that purpose.
- (4) In other respects, the following provisions of the Crown Entities Act 2004 apply in relation to a Grocery Commissioner with all necessary modifications: 25
- (a) section 34 (validity of members' acts):
- (b) section 35 (validity of appointments):
- (c) clause 2 of Schedule 5 (term of appointment):
- (d) clause 3 of Schedule 5 (resignation):
- (e) clause 4(2) and (3) of Schedule 5 (removal).
- 163 Who performs or exercises functions, duties, and powers of Commission** 30
- (1) The functions, duties, and powers of the Commission under this Act must be performed or exercised by—
- (a) the Grocery Commissioner alone; or
- (b) if the Grocery Commissioner requests and the chairperson of the Commission agrees, the Grocery Commissioner with 2 or more other members of the Commission. 35

- (2) However, if, in the opinion of the Grocery Commissioner, a function, duty, or power is any of the following, it must be performed or exercised by the Grocery Commissioner with 2 or more other members of the Commission:
- (a) recommending the designation of a regulated grocery retailer under either of the following: 5
    - (i) **section 11** (grocery supply code):
    - (ii) **section 25** (wholesale supply of groceries):
  - (b) giving a report under any of the following:
    - (i) **section 53** (report following inquiry into whether and what additional regulation should apply): 10
    - (ii) **section 68** (report on review of wholesale framework):
    - (iii) **section 105** (report on state of competition):
  - (c) prescribing the manner of complying with certain duties under **section 43**:
  - (d) making a determination under any of the following: 15
    - (ia) **section 12** (grocery supply code):
    - (i) **section 57** (wholesale framework or wholesale code):
    - (ii) **section 84** (non-discriminatory terms):
    - (iii) **section 90** (specified access terms regulation):
  - (e) giving a direction under **section 66**: 20
  - (f) issuing a disclosure standard under **section 183**.
- (3) The quorum requirement in section 15(4) of the Commerce Act 1986 does not apply if the Grocery Commissioner is performing functions alone under this section.
- 164 Further provisions relating to when Grocery Commissioner acts with 2 or more other members** 25
- (1) This section applies if, under **section 163(1)(b) or (2)**, the Grocery Commissioner is performing or exercising a function, duty, or power with 2 or more other members of the Commission.
  - (2) The chairperson of the Commission must determine which other members must perform or exercise that function, duty, or power with the Grocery Commissioner. 30
  - (3) ~~Clauses 6 to 13 of Schedule 5 of the Crown Entities Act 2004 (with all necessary modifications) apply to the proceedings of the Grocery Commissioner with those other members, except that —~~ 35
    - (a) ~~the chairperson is the Grocery Commissioner; and~~
    - (b) ~~the quorum for a meeting is the same as in section 15 of the Commerce Act 1986.~~

- (3) In addition to their general vote, the Grocery Commissioner has, in the case of an equality of votes, a casting vote (and clause 12(2) of Schedule 5 of the Crown Entities Act 2004 does not apply).

**165 Alternate member to act instead of Grocery Commissioner in certain circumstances** 5

- (1) This section applies if—
- (a) there is no Grocery Commissioner; or
  - (b) the Grocery Commissioner is for any reason unable to perform or exercise a function, duty, or power of the Commission that would otherwise have been performed by them under this Act. 10
- (2) That function, duty, or power must be performed by a member of the Commission who is appointed by the chairperson of the Commission for that purpose.
- (3) Every reference in this Act to the Grocery Commissioner must, unless the context otherwise requires, be read as a reference to that member.

**166 Ability to delegate** 15

- (1) ~~A function, duty, or power that, under **section 163(2)**, the Grocery Commissioner must perform with 2 or more other members of the Commission is not capable of delegation.~~
- (2) ~~In the case of any other function, duty, or power of the Commission under this Act, the Grocery Commissioner's consent must be obtained before a delegation, under section 73 of the Crown Entities Act 2004, is made of that function, duty, or power.~~ 20
- (3) ~~**Subsection (2)** is an exception to section 73 of the Crown Entities Act 2004.~~
- (1) The consent of both the Grocery Commissioner and the chairperson of the Commission must be obtained before a delegation, under section 73 of the Crown Entities Act 2004, is made of any function, duty, or power that, under **section 163(2)**, the Grocery Commissioner must perform or exercise with 2 or more other members of the Commission. 25
- (2) The consent of the Grocery Commissioner must be obtained before a delegation, under section 73 of the Crown Entities Act 2004, is made of any other function, duty, or power of the Commission under this Act. 30

*Economic policies of Government*

**167 Commission must have regard to economic policies of Government**

- (1) In the performance or exercise of its functions, duties, and powers under this Act, the Commission must have regard to any economic policies of the Government that the Minister gives, in writing, to the Commission. 35
- (2) The Minister must, as soon as practicable after giving a statement of economic policy of the Government to the Commission,—

- (a) arrange for a copy of the statement to be published in the *Gazette*; and
  - (b) present a copy of the statement to the House of Representatives.
- (3) A statement of economic policy of the Government is not a direction for the purposes of Part 3 of the Crown Entities Act 2004.

*Annual report* 5

**168 Commission must prepare annual report on grocery industry**

- (1) The Commission must prepare an annual report on the grocery industry.
- (1A) The purpose of an annual report is to—
- (a) report on the state of competition in the grocery industry, including—
    - (i) any changes to the level of competition and outcomes for consumers; and 10
    - (ii) any monitoring of any retail grocery market concentration threshold that has been set for the purposes of **subpart 7 of Part 3**; and
  - (b) raise awareness of emerging (or likely future) trends or issues; and 15
  - (c) inform the public and Government about the performance or exercise of the Commission’s functions, duties, and powers under this Act; and
  - (d) demonstrate how any Government direction or statement of economic policy of the Government given to the Commission has been considered in the performance or exercise of the Commission’s functions, duties, and powers under this Act. 20
- (2) In preparing the report, the Commission may consider any information that the Commission considers relevant, including any of the following:
- (a) the state of competition that exists in the grocery industry, including the conditions of entry and expansion for grocery retailers: 25
  - (b) the operation and effectiveness of this Act and any other legislation relevant to the grocery industry (for example, the Commerce Act 1986 and the Fair Trading Act 1986):
  - (c) any information that may or must be included as part of a report under any of the following: 30
    - (i) **section 16** (report on review of grocery supply code):
    - (ii) **section 53** (report following inquiry into whether and what additional regulation should apply):
    - (iii) **section 68** (report on review of wholesale framework):
    - (iv) **section 73** (report on review of wholesale code): 35
    - (iva) **section 87A** (report on determination for non-discriminatory terms):

- (ivb) **section 99A** (report on determination for specified access terms):
- (v) **section 105** (report on state of competition):
- (d) any information that the Commission has received or obtained under this Act or any other legislation. 5
- 169 Commission must give report to Minister and publish it**
- (1) The Commission must,—
- (a) as soon as practicable after the end of each financial year, give the annual report on the grocery industry to the Minister; and
- (b) at least ~~5~~ 10 working days later, publish the report. 10
- (2) In this section, **financial year** has the same meaning as in section 2(1) of the Public Finance Act 1989.
- 170 Minister must present report to House of Representatives**
- The Minister must, within 1 month after receiving the final report, present the annual report on the grocery industry to the House of Representatives. 15
- 171 Additional requirements relating to first report**
- (1) This section applies in relation to the first annual report prepared under **section 168** (the **first report**).
- (2) The first report must include the Commission’s assessment of whether there has been a material improvement in the state of competition that exists in the grocery industry since 8 March 2022 (the date of the Commission’s *Market study into the retail grocery sector: final report*). 20
- (3) Despite **section 169**, the Commission is only required to give the first report after the end of the first financial year that begins after this section comes into force. 25
- Subpart 2—Application of Commerce Act 1986**
- Application of Commerce Act 1986*
- 172 Application of Part 6 of Commerce Act 1986 (enforcement, remedies, and appeals)**
- The following provisions of the Commerce Act 1986 apply with any necessary modifications: 30
- (a) section 74A (Commission may accept undertakings):
- (b) section 74B (matters included in undertakings):
- (c) section 74C (enforcement of undertakings):
- (d) section 79 (evidence not otherwise admissible): 35



- (e) section 90 (conduct by employees, agents, and others).

**173 Application of Part 7 of Commerce Act 1986 (miscellaneous provisions)**

The following provisions of the Commerce Act 1986 apply with any necessary modifications:

- (a) section 98 (Commission may require person to supply information or documents or give evidence): 5
- (b) section 98A (power to search), as if the reference to regulation under Part 4 of the Commerce Act 1986 were a reference to secondary legislation made under this Act:
- (c) section 98G (Commission may exercise powers notwithstanding other proceedings): 10
- (d) section 99 (powers of Commission to take evidence):
- (e) sections 99B to 99P of the Commerce Act 1986,—
- (i) as if references to an overseas regulator were references to an overseas body that has functions in relation to a grocery industry corresponding to those of the Commission under this Act; and 15
- (ii) as if references to competition law were references to a grocery industry:
- (f) section 100 (powers of Commission to prohibit disclosure of information, documents, and evidence): 20
- (g) section 100A (Commission may state case for opinion of High Court):
- (h) section 101 (notices):
- (i) section 102 (service of notices):
- (j) section 104 (determinations of Commission):
- (k) section 106 (proceedings privileged), as if the reference to section 103 of the Commerce Act 1986 were a reference to **section 175** of this Act: 25
- (l) section 106A (judicial notice):
- (m) section 109 (Commission may prescribe forms).

*Provisions based on Commerce Act 1986*

**173A Monitoring compliance with duties** 30

(1) For the purpose of monitoring compliance with any duty imposed by or under this Act, the Commission may, in addition to exercising its powers under this Act and under the Commerce Act 1986, issue a written notice to a participant in the grocery industry requiring it to provide any or all of the following:

- (a) a written statement that states whether the participant has complied with the duty: 35

- (b) a report on the written statement that is signed by an auditor or other assurance practitioner in accordance with any form specified by the Commission:
  - (c) sufficient information to enable the Commission to properly determine whether all applicable requirements have been complied with: 5
  - (d) a certificate, in the form specified by the Commission and signed by at least 1 director of the participant, confirming the truth and accuracy of any information provided under this section.
- (2) The participant must comply with the notice within the time frame, and in the manner, specified in the notice. 10
- Compare: 1986 No 5 s 53N

#### 174 Investigation and information-gathering powers

For the purpose of performing or exercising its functions, duties, and powers under this Act, the Commission may, in addition to exercising its powers under this Act and the Commerce Act 1986, do any of the following: 15

- (a) investigate any of the following:
  - (i) how effectively and efficiently participants in the grocery industry (both individually and as a collective) are facilitating the supply of groceries to consumers:
  - (ii) how effectively and efficiently participants in the grocery industry (both individually and as a collective) are facilitating the supply of groceries to grocery retailers that are not regulated grocery retailers (within the meaning of **Part 3**): 20
  - (iii) how any determination, code, standard, direction, or other regulatory measure being considered by the Commission may be applied, or how any regulatory measure has been applied, in considering proposed regulatory measures: 25
- (b) examine, consider, or investigate any activity, cost, revenue, margin, transfer, asset valuation, circumstance, or event that is occurring or that has occurred during the previous 7 years: 30
- (c) by notice in writing, require any person—
  - (i) to prepare and produce forecasts, forward plans, or other information; and
  - (ii) to apply any methodology specified by the Commission in the preparation of forecasts, forward plans, or other information: 35
- (d) by notice in writing, require any person that the Commission has reason to believe may have information or documents relevant to an investigation, audit, or inquiry to do either or both of the following:

- (i) produce or supply to the Commission any documents or information that the Commission has reason to believe may be relevant to the investigation, audit, or inquiry:
- (ii) answer any questions about any matter that the Commission has reason to believe may be relevant to the investigation, audit, or inquiry: 5
- (e) by notice in writing, require any person, at the time and place specified in the notice, to produce or supply to the Commission an expert opinion from an appropriately qualified person, or a member of a class of appropriately qualified persons, as determined by the Commission in relation to the matters in **paragraphs (a), (b), (c), and (d)(i)**. 10

Compare: 1986 No 5 s 53ZD

### **175 Offences relating to certain investigation and information-gathering powers**

- (1) A person must not,— 15
  - (a) without reasonable excuse, refuse or fail to comply with a notice under **section ~~108~~ 173A or 174** of this Act or section 98 of the Commerce Act 1986; or
  - (b) in purported compliance with such a notice, provide information, or produce a document, or give evidence, knowing it to be false or misleading; or 20
  - (c) resist, obstruct, or delay an employee of the Commission acting under a warrant issued under section 98A of the Commerce Act 1986.
- (2) A person must not attempt to deceive or knowingly mislead the Commission in relation to any matter before it. 25
- (3) A person must not, having been required to appear before the Commission in accordance with section 98(1)(c) of the Commerce Act 1986,—
  - (a) without reasonable excuse, refuse or fail to appear before the Commission to give evidence; or
  - (b) refuse to take an oath or make an affirmation as a witness; or 30
  - (c) refuse to answer any question; or
  - (d) refuse to produce to the Commission any document that that person is required to produce.
- (4) A person who contravenes **subsection (1), (2), or (3)** commits an offence and is liable on conviction to,— 35
  - (a) in the case of an individual, a fine not exceeding \$100,000; or
  - (b) in any other case, a fine not exceeding \$300,000.

- (5) A proceeding for an offence against **subsection (4)** may be commenced within 3 years after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered.

Compare: 1986 No 5 s 103

*Exemption for agreements for collective negotiation* 5

**176 Power to exempt from sections 27 and 30 of Commerce Act 1986**

- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations—
- (a) exempting a specified person or class of persons from sections 27 and 30 of the Commerce Act 1986; and 10
- (b) prescribing the terms and conditions (if any) of the exemption.
- (2) The Minister’s reasons for making the recommendation (including why the exemption is appropriate) must be published together with the regulations.
- (3) Regulations made under this section are secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements). 15

**177 Minister’s recommendation about granting exemption**

- (1) The Minister may recommend that regulations under **section 176** be made only—
- (a) for the purpose of enabling the specified person or class of persons to enter into, or arrive at, an agreement to collectively negotiate 1 or more supply agreements with 1 or more regulated grocery retailers; and 20
- (b) after taking account of the following criteria:
- (i) any efficiencies that are likely to result from enabling specified persons or classes of persons to enter into, or arrive at, agreements for collective negotiation in accordance with the exemption: 25
- (ii) any lessening in competition that may result from granting the exemption; and
- (c) after consulting with—
- (i) the Commission; and
- (ii) the persons, or representatives of the persons, that the Minister considers will be substantially affected by the regulations. 30
- (2) In this section, **regulated grocery retailer** has the same meaning as in **Part 2** (grocery supply code).

**178 Agreement for collective negotiation must not contain prohibited provision**

- (1) If an exemption is granted by regulations made under **section 176**, the exemption is subject to the term in **subsection (2)**. 35
- (2) The term is that the exemption applies in relation to—

- (a) an agreement for collective negotiation only if that agreement does not contain a prohibited provision; and
  - (b) a provision in an agreement for collective negotiation only if that provision is not a prohibited provision.
- (3) In this section, a provision is a **prohibited provision** if the provision has the purpose, or has or is likely to have the effect, of any of the following: 5
- (a) preventing, restricting, or limiting the supply of goods or services from a party to the agreement for collective negotiation to a regulated grocery retailer:
  - (b) preventing, restricting, or limiting a party to the agreement for collective negotiation from entering into or arriving at an agreement with a regulated grocery retailer other than in accordance with the agreement for collective negotiation. 10

#### **179 Effect of contravention of exemption conditions generally**

- (1) The contravention of a term or condition of an exemption provided by regulations made under **section 176** is a contravention of the obligation to which the exemption applies. 15
- (2) Despite **subsection (1)**, the regulations may provide that a contravention of a specified term or condition is not a contravention of that obligation.

#### **180 Effect of contravention of specified exemption conditions** 20

- (1) This section applies if the regulations provide that a contravention of a specified term or condition is not a contravention of the obligation to which the exemption applies.
- (2) A person that contravenes the specified term or condition is liable to a civil liability remedy (including an order to pay a pecuniary penalty or compensation). 25

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#### **Guidance note**

See **subpart 3 of Part 4** for further provisions about civil liability.

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#### **181 Register of agreements for collective negotiation**

- (1) This section applies if an exemption is granted by regulations made under **section 176**. 30
- (2) The Commission must maintain and publish a register that lists all current agreements for collective negotiation that are notified to the Commission (if any).
- (3) The register must contain the information prescribed by the regulations (if any). 35
- (4) The regulations must require a copy of the collective negotiation agreement to be provided to the Commission, as a condition of the exemption.

### Subpart 3—Disclosure standards

#### 182 Participant must comply with disclosure standard

- (1) A participant to which a disclosure standard applies must comply with the standard.
- (2) A person that contravenes this section is liable to a civil liability remedy (including an order to pay a pecuniary penalty or compensation). 5

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#### Guidance note

See **subpart 3 of Part 4** for further provisions about civil liability.

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#### 183 Commission may issue disclosure standards

- (1) The Commission may issue disclosure standards. 10
- (2) A disclosure standard may apply to all participants, a particular participant, or a class of participants.
- (3) A disclosure standard issued under this section is secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements).

#### 184 Criteria for issuing disclosure standards 15

The Commission may issue a disclosure standard only if the Commission is satisfied that the standard is necessary or desirable for either or both of the following purposes:

- (a) to enable the Commission to monitor competition and efficiency in the grocery industry: 20
- (b) to ensure that sufficient information is readily available to the Commission to assess whether the purpose of this Act is being met.

#### 185 Process for issuing disclosure standards

- (1) The Commission may use any process that it considers appropriate to develop a disclosure standard, but must— 25
  - (a) publish a draft disclosure standard; and
  - (b) publish a statement of its reasons for proposing to issue a disclosure standard; and
  - (c) consult the persons, or representatives of the persons, that the Commission considers will be substantially affected by the disclosure standard. 30
- (2) After issuing a draft standard, the Commission must publish a statement of its reasons for issuing a disclosure standard.

#### 186 Subject matter of disclosure standards

- (1) A disclosure standard may deal with, or otherwise relate to, 1 or more of the following matters: 35

- 
- (a) the disclosure of information to the Commission about any matter in connection with the grocery industry, including information about any of the following:
- (i) any agreements that a participant has entered into or arrived at:
  - (ii) prices, terms, and conditions for the wholesale supply of groceries: 5
  - (iii) financial statements (including projected financial statements):
  - (iv) financial and non-financial performance measures:
  - (v) costs, revenues, and margins:
  - (vi) quality performance measures and statistics: 10
  - (vii) private label products (for example, information about the proportion of retail sales of particular categories that are of private label products):
  - (viii) store details (*see* **subsection (2)**):
  - (ix) sales of groceries (for example, the amount of total sales and the amount of sales of different categories of groceries): 15
  - (x) number and details of complaints received from consumers, suppliers, wholesale customers, or other persons:
- (b) assumptions, policies, and methodologies used or applied in any area referred to in **paragraph (a)** or any other areas: 20
- (c) the circumstances in which the information must be disclosed (for example, specifying the frequency with which information must be disclosed or requiring information to be disclosed on the occurrence of a specified event):
- (d) requirements relating to publishing, or otherwise making available, information to the Commission, particular persons or classes of persons, or the public generally: 25
- (e) requirements for certifying the information by statutory declaration or otherwise:
- (f) requirements for how information must be provided: 30
- (g) requirements with which information that is provided must comply:
- (h) requirements relating to record keeping and the retention of information (including the methodologies that must be applied in recording information).
- (2) For the purposes of **subsection (1)(a)(viii)**, **store details** includes (without limitation) information with respect to particular stores, or groups of stores, about any of the following: 35
- (a) address and brand:

- (b) revenue for each stock-keeping unit, number of stock-keeping units sold, and cost of groceries sold for each stock-keeping unit:
- (c) characteristics of each stock-keeping unit, such as the barcode, article description, units of measurement, and product category:
- (d) financial position or performance: 5
- (e) store characteristics, such as the store size, opening hours, date of store opening, date of most-recent renovation, and number of checkouts (self-service and assisted).

### 187 Amendment and revocation of disclosure standards

A disclosure standard may be amended or revoked under **section 183**, except that— 10

- (a) **sections 184 and 185** do not apply to an amendment of a disclosure standard if the Commission is satisfied that the amendment is only correcting a minor error or is otherwise of a minor nature only:
- (b) **section 184** does not apply to the revocation of a disclosure standard. 15

## Subpart 4—Regulations

### 188 Regulations

- (1) The Governor-General may, by Order in Council, make regulations—
  - (a) providing for anything this Act says may or must be provided for by regulations: 20
  - (b) prescribing fees and charges payable in respect of any matter under this Act or the manner in which fees and charges may be calculated:
  - (c) prescribing goods or a product category as being excluded from the definition of groceries under **section 5(1)**:
  - (ca) prescribing whether a provision of the grocery supply code gives rise to a pecuniary penalty under **section 122, 123, or 125**: 25
  - (d) prescribing whether a provision of the wholesale code gives rise to a pecuniary penalty under **section 122, 123, or 125**:
  - (e) prescribing that a contravention of a term or condition of an exemption made under **section 176** is not a contravention of the obligation to which the exemption applies (in which case, **section 180** applies): 30
  - (f) providing for anything incidental that is necessary for carrying out, or giving full effect to, this Act.
- (2) Regulations made under this section are secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements). 35
- (3) The following applies to regulations under **subsection (1)(c)** (which relates to the definition of groceries):



- (a) the regulations may be made only on the recommendation of the Minister:
- (b) the Minister may make a recommendation only if the Minister—
- (i) has had regard to the purpose of this Act; and
  - (ii) is satisfied that the extent of the exclusion is not broader than is reasonably necessary to address the matters that gave rise to the regulations. 5
- (4) ~~The following applies to regulations under **subsection (1)(d)** (which relates to the level of pecuniary penalty for contraventions of the wholesale code)~~The following applies to regulations under **subsection (1)(ca) or (d)** (which relate to the level of pecuniary penalty for contravention of the grocery supply code and the wholesale code): 10
- (a) the regulations may be made only on the recommendation of the Minister:
- (b) the Minister may make a recommendation only if— 15
- (i) the Commission has given the Minister a recommendation about those regulations; and
  - (ii) the Minister has had regard to the Commission’s recommendation:
- (c) in deciding whether to make a recommendation, the Minister may do any of the following: 20
- (i) accept or reject the Commission’s recommendation:
  - (ii) request that the Commission reconsider any matter (such as an error, an oversight, or competing policy interests):
  - (iii) make any other decision that the Minister considers is in the public interest. 25

### **189 Regulations relating to levy for dispute resolution scheme**

- (1) Every regulated grocery retailer that is included in a prescribed class of specified regulated grocery retailers must pay to the Minister in each financial year or part financial year (as the case may require) a prescribed levy.
- (2) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations providing for the levy. 30
- (3) The levy must be prescribed on the basis that the following costs should be met fully out of the levy:
- (a) a portion of the costs of the provider of the disputes resolution scheme, where the size of the portion to be met by the levy under this Act is determined by the Minister; and 35
  - (b) the cost of collecting the levy money.

- (4) The levy may be prescribed on the basis that any actual cost that could have been, but has not been, recovered as a levy shortfall for a year may be recovered (along with any financing charge) over any period of up to 5 years.
- (5) The regulations may—
- (a) specify the class or classes of specified regulated grocery retailers that are required to pay a levy: 5
  - (b) specify the amount of the levy, or method of calculating or ascertaining the amount of the levy:
  - (c) include in the levy, or provide for the inclusion in the levy, any shortfall in recovering the actual costs: 10
  - (d) refund, or provide for refunds of, any over-recovery of the actual costs:
  - (e) provide for the payment and collection of the levy:
  - (f) provide different levies for different classes of regulated grocery retailers:
  - (g) specify the financial year or part financial year to which a levy applies, and apply that levy to that financial year or part financial year and each subsequent financial year until the levy is revoked or replaced: 15
  - (h) require payment of a levy for a financial year or part financial year:
  - (i) ~~provide for waivers or refunds of the whole or any part of a levy for any case or class of cases.~~ 20
  - (i) authorise a person to whom a levy is payable to refund or waive, in whole or in part and on the conditions that may be prescribed, payment of the levy by 1 or more named persons.
- (6) The amount of any unpaid levy is recoverable in any court of competent jurisdiction as a debt due to the Minister on behalf of the Crown. 25
- (7) The Minister must ensure that each levy payment is paid into a Crown Bank Account and is separately accounted for.
- (8) Regulations made under this section are secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements).
- (9) ~~If regulations made under this section authorise a person to grant waivers or refunds referred to in **subsection (5)(i)**,—~~ 30
- (a) ~~an instrument granting a waiver or refund is secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements), unless it applies only to 1 or more named persons; and~~
  - (b) ~~the regulations must contain a statement to that effect.~~ 35

Compare: 1986 No 5 s 53ZE; 2001 No 103 s 155ZN(2), (4); 2011 No 5 s 68

**190 Miscellaneous provisions relating to fees**

- (1) Regulations may authorise a person to whom a fee is payable to refund or waive, in whole or in part and on any conditions that may be prescribed, payment of the fee ~~in relation to any person or class of person by 1 or more named persons.~~ 5
- (2) A person to whom a fee is payable may refuse to perform or exercise a function, duty, or power until the fee is paid.
- (3) Any fee or other amount payable to a person under this Act is recoverable by the person in any court of competent jurisdiction as a debt due to the person.
- (4) ~~If regulations authorise a person to grant a refund or waiver to a class of persons,—~~ 10
- ~~(a) the instrument granting the refund or waiver is secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements); and~~
- ~~(b) the regulations must contain a statement to that effect.~~

**Part 6** 15**Amendments to other legislation***Amendments to Commerce Act 1986***190A Principal Act**

**Sections 190B and 190C** amend the Commerce Act 1986.

**190B Section 2 amended (Interpretation)** 20

In section 2(1), definition of **member of the Commission**, after paragraph (b), insert:

- (ba) means the Grocery Commissioner appointed under **section 160** of the Grocery Industry Competition Act **2022**; and

**190C Section 9 amended (Membership of Commission)** 25

After section 9(3), insert:

- (3A) One of the members must be appointed by the Governor-General as Grocery Commissioner under **section 160** of the Grocery Industry Competition Act **2022**.

*Amendments to Fair Trading Act 1986* 30**191 Principal Act**

**Sections 192 to 204** amend the Fair Trading Act 1986.

**192 Section 2 amended (Interpretation)**

- (1) In section 2(1), repeal the definition of **standard form small trade contract**.

- (2) In section 2(1), insert in their appropriate alphabetical order:
- grocery supply contract** has the meaning given in **section 26C**  
**specified trade contract** has the meaning given in **section 26C**  
**standard form trade contract** means a specified trade contract that a court, in the course of proceedings for a declaration under section 46I, and in accordance with section 46J, determines is a standard form contract 5
- (3) In section 2(1), definition of **unfair contract term**, replace “small trade contract” with “specified trade contract”.
- 193 Section 26B amended (Unfair contract terms in standard form small trade contracts)** 10
- (1) In the heading to section 26B, replace “**standard form small trade contracts**” with “**standard form trade contracts**”.
- (2) In section 26B, replace “standard form small trade contract” with “standard form trade contract”.
- 194 Section 26C replaced (Definition of small trade contract)** 15
- Replace section 26C with:
- 26C Definition of specified trade contract**
- (1) In this Act, unless the context otherwise requires, a contract is a **specified trade contract** if **subsection (2) or (3)** applies to the contract.
- (2) This subsection applies to a contract (a **small trade contract**) if— 20
- (a) each party to it is engaged in trade; and
- (b) it is not a consumer contract; and
- (c) it does not comprise or form part of a trading relationship that exceeds the annual value threshold when the relationship first arises.
- (3) This subsection applies to a contract (a **grocery supply contract**) if— 25
- (a) each party to it is engaged in trade; and
- (b) it is not a consumer contract; and
- (c) it is a contract between—
- (i) at least 1 regulated grocery retailer (within the meaning of **Part 2** of the Grocery Industry Competition Act **2022**; and 30
- (ii) at least 1 supplier; and
- (d) it relates to the acquisition of goods in respect of which the end-user is a consumer; and
- (e) it does not comprise or form part of a trading relationship that exceeds the annual value threshold when the relationship first arises. 35

- (4) If a party to a proceeding alleges that a contract is a specified trade contract, the contract is presumed to be a specified trade contract unless any other party to the proceeding proves otherwise.
- (5) This section is subject to section 26E.
- 195 Section 26D amended (Small trade contracts: trading relationship, annual value threshold, and other definitions) 5**
- (1) In the heading to section 26D, replace “**Small trade contracts**” with “**Specified trade contracts**”.
- (2) In section 26D(1), replace “section 26C(1)(c)” with “**section 26C**”.
- (3) Replace section 26D(3)(b) with: 10
- (b) **exceeds an annual value threshold when the relationship first arises**, in relation to the specified amount, if, at that time,—
- (i) it includes a transparent term or transparent terms providing for consideration (including GST, if applicable) of at least the specified amount to be paid under it, in relation to any annual period, for the goods, services, or interest in land concerned; or 15
- (ii) consideration (including GST, if applicable) of at least the specified amount is more likely than not to become payable under the relationship, in relation to any annual period, for the goods, services, or interest in land concerned. 20
- (4) After section 26D(4)(c), insert:
- (d) **specified amount**,—
- (i) in relation to a small trade contract, means \$250,000; and
- (ii) in relation to a grocery supply contract, means \$1 million.
- (5) In section 26D(4), examples 1, 2, and 3, replace “annual value threshold” with “annual value threshold of \$250,000”. 25
- 196 Section 26E amended (Regulations relating to definition of small trade contract)**
- (1) In the heading to section 26E, replace “**small trade contract**” with “**specified trade contract**”. 30
- (2) In section 26E(1), replace “small trade contract” with “small trade contract or grocery supply contract” in each place.
- 197 Section 37 amended (Jurisdiction of High Court)**
- In section 37(1)(g), delete “by the Commission”.
- 198 Section 38 amended (Jurisdiction of District Court) 35**
- In section 38(1)(e), delete “by the Commission”.

- 199 Section 46H amended (Application by Commission for declaration of unfair contract term)**
- (1AAA) In the heading to section 46H, delete “by Commission”.
- (1) In section 46H(1), replace “standard form small trade contract” with “standard form trade contract”. 5
- (2) After section 46H(2), insert:
- (3) Any person may apply to the High Court or the District Court (at their choice) for a declaration under section 46I that a term in a grocery supply contract that is a standard form trade contract is an unfair contract term.
- 200 Section 46I amended (Declaration of unfair contract terms)** 10
- (1) Replace section 46I(1) with:
- (1) The High Court or the District Court may,—
- (a) on application by the Commission, declare that a term in a standard form consumer contract or standard form trade contract is an unfair contract term; or 15
- (b) on application by any person, declare that a term in a grocery supply contract that is a standard form trade contract is an unfair contract term.
- (2) In section 46I(2), replace “small trade contract” with “specified trade contract” in each place.
- 201 Section 46K amended (Terms that may not be declared to be unfair contract terms)** 20
- In section 46K(1), replace “standard form small trade contract” with “standard form trade contract”.
- 202 Section 46L amended (When term in consumer contract or small trade contract is unfair)** 25
- (1) In the heading to section 46L, replace “**small trade contract**” with “**specified trade contract**”.
- (2) In section 46L(1), (2), and (3), replace “small trade contract” with “specified trade contract”.
- 203 Section 46M amended (Examples of unfair contract terms)** 30
- In section 46M, replace “small trade contract” with “specified trade contract”.
- 204 Schedule 1AA amended**
- In Schedule 1AA,—
- (a) insert the Part set out in **Schedule 3** of this Act as the last Part; and
- (b) make all necessary consequential amendments. 35

## Schedule 1

### Transitional, savings, and related provisions

s 6

#### Part 1

##### Provisions relating to this Act as enacted

5

#### 1 Secondary legislation may apply to existing agreements

- (1) Any secondary legislation made under **Part 2 or 3** of this Act may—
- (a) regulate or prohibit any conduct, or specify any other requirements, in connection with an existing agreement, with any modifications prescribed by that legislation and any other necessary modifications, as if the agreement were entered into or arrived at after the commencement of the secondary legislation: 10
  - (b) specify any requirements about the content or form of an existing agreement, with any modifications prescribed by that legislation and any other necessary modifications, as if the agreement were entered into or arrived at after the commencement of the secondary legislation. 15
- (2) If the secondary legislation applies to an existing agreement, compliance with that legislation does not—
- (a) place any party to the agreement or any other person in breach of the agreement, or make any of them liable for a civil wrong; or 20
  - (b) entitle any person to terminate or cancel the agreement, or to accelerate the performance of an obligation, or to impose a penalty or an increased charge, unless the secondary legislation provides otherwise.
- (3) In this clause, **existing agreement**, in relation to any secondary legislation, means any agreement of the following kinds that is entered into or arrived at before the commencement of the secondary legislation (including agreements entered into or arrived at before the enactment of this Act): 25
- (a) an agreement for the supply of groceries between a regulated grocery retailer and a supplier:
  - (b) an agreement for the wholesale supply of groceries between a regulated grocery retailer and a wholesale customer. 30

#### 2 Subpart 2 of Part 3 applies to existing agreements

- (1) **Sections 36, 37, 38, and 40** apply to an existing agreement—
- (a) with any modifications prescribed under **section 43**; and
  - (b) any other necessary modifications. 35
- (2) Compliance with those sections does not—

- (a) place any party to an existing agreement or any other person in breach of the agreement, or make any of them liable for a civil wrong; or
- (b) entitle any person to terminate or cancel the existing agreement, or to accelerate the performance of an obligation, or to impose a penalty or an increased charge, unless the determination made under **section 43** provides otherwise. 5
- (3) In this clause, **existing agreement** means any agreement for the wholesale supply of groceries between a regulated grocery retailer and a wholesale customer that was entered into or arrived at before the commencement of any of those sections (including agreements entered into or arrived at before the enactment of this Act). 10
- 3 Monitoring market concentration levels**
- For the purposes of **section 104**, the Commission is not required to monitor the level of retail grocery market concentration in any year that starts before an Order in Council is made under **section 103**. 15
- ~~**4 Minister may consult on grocery supply code before commencement**~~
- ~~(1) The Minister may carry out consultation under **section 12** before the date on which that section comes into force.~~
- ~~(2) Consultation carried out before that date must be treated as the consultation required for the purposes of that section (even if the consultation occurs before the enactment of this Act).~~ 20
- 4 Initial grocery supply code**
- (1) This clause applies to the first grocery supply code made after the commencement of this clause.
- (2) The first grocery supply code must, before it comes into force, be approved by the Governor-General by Order in Council made on the recommendation of the Minister. 25
- (3) Any consideration or consultation done by the Minister of a type referred to in **section 12(2) or (3)** must be treated as having been done by the Commission under that section. 30
- (4) The Minister or the Commission may carry out consultation under **section 12** before the date on which that section comes into force.
- (5) Consultation carried out before that date must be treated as the consultation required for the purposes of that section (even if the consultation occurs before the enactment of this Act). 35
- (6) An order made under this section is secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements).



## Schedule 2

### Dispute resolution scheme

s 148

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#### 1 Purpose of dispute resolution scheme

- The purpose of the dispute resolution scheme is to ensure that— 5
- (a) suppliers and wholesale customers that are party to an eligible dispute with a regulated grocery retailer have access to a scheme to resolve their dispute; and
- (b) the scheme is user-focused, accessible, independent, fair, accountable, efficient, and effective. 10

## 2 Interpretation

In this schedule, unless the context otherwise requires,—

**approved scheme** has the meaning set out in **clause 3**

**dispute resolution scheme** means—

(a) the approved scheme; or 5

(b) if there is no approved scheme, the regulated scheme

**provider**, in relation to a scheme, means the person responsible for the scheme

**regulated scheme** means the scheme set out in regulations made under **clause 18**.

*Approved scheme: application for approval* 10

## 3 Meaning of approved scheme

A scheme is the **approved scheme** if it has been approved by the Minister in accordance with this schedule and that approval has not been withdrawn.

## 4 Application for approval

(1) A person (the **applicant**) may apply to the Minister for approval of a scheme as the approved scheme. 15

(2) The applicant must submit the following with the application:

(a) the rules of the scheme (or the proposed rules that the provider intends to issue if the scheme is approved):

(b) the information prescribed by the regulations (if any) (for example, information about the considerations described in **clause 5**): 20

(c) the fee prescribed by the regulations (if any).

(3) The Minister may request the applicant to supply further information or documents relating to the matters referred to in **subclause (2)**.

Compare: 2008 No 97 s 51 25

## 5 Mandatory considerations for approval

When considering an application under **clause 4**, the Minister must have regard to the following considerations:

(a) whether the scheme is capable of meeting the purpose set out in **clause 1**: 30

(b) whether the applicant has consulted the persons, or representatives of the persons, that the Minister considers will be substantially affected by the scheme or whether it is proposed that consultation should take place (either by the applicant or the Ministry) after the scheme is approved:

- (c) whether the applicant has adequate funding to enable it to operate the scheme according to the scheme's purpose and in accordance with the rules of the scheme:
- (d) whether any proposed fees are not more than necessary to enable the provider of the scheme to make a reasonable profit: 5
- (e) whether the applicant's directors and senior managers are competent to manage a dispute resolution scheme:
- (f) whether the scheme has, or how the scheme will develop or access, expertise in matters specific to the grocery industry:
- (g) whether the rules (or the proposed rules) of the scheme comply with **clause 13**: 10
- (h) any other applications for approval that have been made:;
- (i) if 2 or more applications have been made, the desirability of a scheme that offers adjudication processes over a scheme that offers only arbitration. 15
- Compare: 2008 No 97 s 52
- 6 Minister must decide application for approval**
- (1) The Minister must decide an application under **clause 4** by approving it or by rejecting it.
- (2) The Minister may make a decision under **subclause (1)** ~~only after consultation with the Commission. only~~ 20
- (a) after consultation with the Commission; and
- (b) if satisfied that the persons, or the representatives of the persons, that the Minister considers will be substantially affected by the scheme have been consulted (or will be consulted before the scheme rules are issued). 25
- (3) The Minister may approve a scheme if there is already another approved scheme, but in that case the approval does not take effect until the approval of the other scheme is withdrawn.
- Compare: 2008 No 97 s 53
- 7 Notification and publication of decision** 30
- The Minister must, as soon as practicable after deciding an application,—
- (a) notify the applicant of the decision; and
- (b) if the decision is to approve the application, ensure that the approval is published by the Ministry. 35
- Compare: 2008 No 97 s 54

**8 Reapplication by unsuccessful applicant**

An applicant whose application has been rejected may at any time reapply under **clause 4**.

Compare: 2008 No 97 s 55

**8A Issue of scheme rules after approval of scheme** 5

- (1) This clause applies if an applicant submits only proposed draft rules of the scheme with their application under **clause 4**.
- (2) The applicant may apply for approval of the rules of the scheme at any time.
- (3) **Clauses 4 to 8** apply as if an application under this clause were an application for approval of the scheme and with other necessary modifications. 10
- (4) The applicant must not issue the rules until they have been approved by the Minister.

*Approved scheme: withdrawal of approval*

**9 Withdrawal of approval**

- (1) The Minister may, at any time after the expiry of the notice period, withdraw the approval of an approved scheme for any or all of the following reasons: 15
- (a) the scheme is not, or is no longer, capable of meeting the purpose set out in **clause 1**:
- (b) there are low levels of support for the scheme among persons that the Minister considers are substantially affected by the scheme: 20
- (c) there has been a failure to comply with the rules of the scheme:
- (d) the provider has not published the rules of the scheme as required by **clause 13**:
- (e) the provider has not notified the Minister before changing the rules of the scheme as required by **clause 14**: 25
- (f) the provider has not supplied the Minister with an annual report as required by **clause 16**:
- (g) the provider has not supplied the Minister with information as required by **clause 17**.
- (2) If the Minister withdraws a scheme's approval under **subclause (1)**, the withdrawal takes effect from the date the provider of the scheme is notified under **clause 12**. 30
- (3) In addition, the Minister must withdraw the approval of an approved scheme if the provider of the scheme so requests, in which case the withdrawal takes effect from the date that is 3 months after the date of the request. 35
- (4) If approval of an approved scheme (the **old scheme**) is withdrawn, any dispute that was referred to the old scheme is transferred to the new approved scheme

on the date that the withdrawal takes effect, unless the party that referred the dispute to the old scheme agrees otherwise.

- (5) For the purposes of this clause and **clauses 10 and 11**, **notice period** means the notice period identified in the Minister's notice of intention to withdraw approval under **clause 10**. 5

Compare: 2008 No 97 s 56

### **10 Notice of intention to withdraw approval**

- (1) The Minister must notify the provider of the scheme of the Minister's intention to withdraw the scheme's approval.
- (2) The Minister's notice must— 10
- (a) state that the Minister intends to withdraw the scheme's approval; and
  - (b) identify which of the grounds described in **clause 9** apply; and
  - (c) state why the Minister considers that those grounds apply; and
  - (d) identify the notice period, which must be at least 3 months, during which the provider may object, under **clause 11**, to the intended withdrawal. 15

Compare: 2008 No 97 s 57

### **11 Objection to intended withdrawal of approval**

- (1) During the notice period, the provider may object (with reasons) to the intended withdrawal of approval.
- (2) The Minister must consider any objection that is received before the end of the notice period. 20

Compare: 2008 No 97 s 58(1)

### **12 Notification and publication of withdrawal of approval**

The Minister must, as soon as practicable after withdrawing a scheme's approval,— 25

- (a) notify the provider of the scheme; and
- (b) ensure that notice of the withdrawal is published by the Ministry.

Compare: 2008 No 97 s 60

### *Approved scheme: rules of scheme*

### **13 Rules of approved scheme** 30

- (1) The provider of an approved scheme must publish the rules of the scheme.
- (2) The rules of the scheme must provide for, or set out, the following:
- (a) a summary of the matters set out in **subpart 5 of Part 4** (dispute resolution):

- (b) how the provider will promote knowledge about, and accessibility to, the scheme (which must include requirements for the provider to work with other parties such as the Grocery Commissioner to do so):
- (c) how disputes may be referred for resolution by the scheme:
- (d) the kinds of dispute resolution processes offered by the scheme (for example, adjudication or mediation), including at least 1 determinative process that results in an order or other decision of an adjudicator or other decision maker (a **binding decision**): 5
- (e) that disputes must be resolved in a way that is consistent with the rules of natural justice: 10
- (f) the kinds of remedial action that the scheme can impose on a party to resolve the dispute:
- (g) the circumstances in which the scheme may make an order (a **costs order**) requiring a party to pay all or part of another party's expenses in relation to a dispute resolution proceeding: 15
- (h) that disputes must be resolved within—
- (i) ~~the period prescribed in the regulations or, if no period is prescribed,~~ 25 working days after the dispute is referred to the scheme; or
- (ii) any further time that the parties agree; or 20
- (iii) any further time that the adjudicator or other decision maker (if any), or the provider, allows:
- (i) that the parties to the dispute must comply with a reasonable request made by an adjudicator or other decision maker (if any) for submissions, documents, or other information: 25
- (j) that the matters shared or covered in, or in the course of, dispute resolution proceedings are confidential:
- (k) the amount payable (if any) by either or both parties to a dispute in connection with that particular dispute:
- (l) that an independent review of the scheme must occur at least once every 3 years after the date of the scheme's approval and must be supplied to the Minister within 3 months of completion: 30
- (la) a code of ethics, a complaints process, and continuing professional development requirements for mediators, adjudicators, or other decision-makers (including requirements for membership of, or accreditation by, a relevant body): 35
- (m) the matters prescribed by the regulations (if any).
- (3) The rules of an approved scheme must be treated as containing any provision that is implied into those rules by the regulations (if any).

- (4) A rule of an approved scheme has no effect to the extent that it is inconsistent with any provision implied into the rules by the regulations.

Compare: 2008 No 97 ss 63, 64

#### 14 Provider must notify Minister of proposed change of rules

The provider of an approved scheme must notify the Minister if the provider wishes to change the rules of the scheme. 5

Compare: 2008 No 97 s 65

#### 15 Minister's consideration of change of rules

- (1) After receiving a notification under **clause 14**, the Minister must notify the provider of the scheme that the Minister— 10

- (a) approves the change; or  
 (b) considers the proposed change—  
     (i) does not comply with **clause 13**; or  
     (ii) for any other reason does not promote the purpose set out in **clause 1**. 15

- (2) If **subclause (1)(b)** applies, the rule change must not be made.

- (3) The Minister must comply with **subclause (1)** within 45 working days after the notification of the change of rules unless the Minister, within those 45 working days,—

- (a) requests further information from the provider of the scheme (in which case, the Minister must comply with **subclause (1)** within 45 working days after receipt of that further information); or 20  
 (b) advises the provider of the scheme that a period of more than 45 working days is required to consider the change (in which case, the Minister must specify the time within which they will comply with **subclause (1)**). 25

Compare: 2008 No 97 s 66

#### *Approved scheme: reports and other information*

#### 16 Annual report

- (1) The provider of an approved scheme must— 30

- (a) supply an annual report to the Minister within 3 months after the end of the financial year applying to the scheme; and  
 (b) publish the report.

- (2) The report must contain information about the scheme, identified by the Minister by notice to the provider, in relation to that financial year. 35

Compare: 2008 No 97 s 68

**17 Minister may request further information**

- (1) The provider of an approved scheme must, on request by the Minister, provide information about the following:
- (a) matters relating to the last annual report:
  - (b) how the scheme is meeting the purpose set out in **clause 1**: 5
  - (c) the scheme's compliance with **clause 13**.
- (2) In supplying the information to the Minister, the provider of an approved scheme must disclose personal information in accordance with the Privacy Act 2020 and protect information that is subject to an obligation of confidentiality. 10
- Compare: 2008 No 97 s 69

*Regulated scheme***18 Regulations setting out rules of regulated scheme**

- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations—
- (a) establishing the regulated scheme; and 15
  - (b) prescribing the rules of the scheme; and
  - (c) providing for anything incidental that is necessary for carrying out, or giving full effect to, the scheme.
- (2) The Minister may make a recommendation only—
- (a) if the Minister is satisfied that the rules of the regulated scheme broadly provide for equivalent matters to those required under **clause 13**; and 20
  - (b) after consulting—
    - (i) the Commission; and
    - (ii) the persons, or representatives of such persons, that the Minister considers will be substantially affected by the regulations. 25
- (3) Regulations made under this clause are secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements).
- Compare: 2010 No 116 Schedule 4 cl 18

**19 Chief executive is provider of regulated scheme**

If regulations are made under **clause 18**, the provider of the regulated scheme is the chief executive. 30



**Schedule 3**  
**New Part 2 inserted into Schedule 1AA of Fair Trading Act 1986**

s 204

<b>Part 2</b>	
<b>Provision relating to Grocery Industry Competition Act 2022</b>	5
<b>2 Unfair contract terms in standard form trade contracts</b>	
(1) New sections 26B to 26E do not apply to the following contracts:	
(a) a contract entered into before the commencement date and not varied or renewed on or after that date:	
(b) a relevant insurance agreement.	10
(2) In addition, old sections 26B to 26E continue to apply to a contract if those sections applied to the contract immediately before the commencement date.	
(3) If a contract entered into before the commencement date is varied or renewed on or after that date and is not a relevant insurance agreement, the contract (as varied or renewed) must be treated for the purposes of new sections 26B to 26E as a new contract entered into on the date of the variation or renewal.	15
(4) In this clause,—	
<b>commencement date</b> means the date on which <b>sections 191 to 204</b> of the Grocery Industry Competition Act <b>2022</b> come into force	
<b>new</b> , in relation to a provision of this Act, means the provision as in force on and after the commencement date	20
<b>old</b> , in relation to a provision of this Act, means the provision as in force immediately before the commencement date	
<b>relevant insurance agreement</b> has the same meaning as in clause 1 of this schedule.	25

**Legislative history**

21 November 2022  
 22 November 2022

Introduction (Bill 191–1)  
 First reading and referral to Economic Development, Science  
 and Innovation Committee