

Legislative statement: Grocery Industry Competition Bill Third Reading

Overview of the Grocery Industry Competition Bill

The Grocery Industry Competition Bill (**the Bill**) introduces a regulatory regime to promote competition and efficiency in the grocery sector for the long-term benefit of consumers in New Zealand, and to contribute to a trading environment in which businesses can participate confidently.

The key components of the Bill are unchanged from the legislative statements provided for in the First Reading and the Second Reading. They are:

- Establishing a Grocery Commissioner, within the Commerce Commission, as an industry regulator to monitor competition, enforce compliance with the regulation, and report on the state of competition in the industry.
- Imposing a wholesale supply regime to encourage entry and expansion in the retail grocery market by (1) facilitating commercial agreements for the wholesale supply of groceries, and (2) providing four “regulatory backstop” tools that may be applied to improve wholesale supply if the commercial arrangements are not what would be expected in a workably competitive market and additional regulation is likely to benefit consumers in the long-term.
- Constraining the regulated grocery retailers’ ability to use their bargaining power over suppliers by enabling the creation of a grocery supply code (as secondary legislation), extending protections in the Fair Trading Act 1986 against the use of unfair contract terms in standard form contracts, and exempting certain suppliers from prohibitions in Part 2 of the Commerce Act 1986, so that they can collectively negotiate terms and conditions of supply.
- Creating a dispute resolution scheme that will have jurisdiction to hear disputes where the amount claimed is less than \$5 million between a grocery supplier or a wholesale customer and a regulated grocery retailer.

Changes made by Committee of the Whole House

The Bill, as agreed by the Committee of the Whole House, includes those amendments proposed by the Select Committee, and four further amendments through my Supplementary Order Paper. The key changes that I would draw to Parliament’s attention are as follows.

Making the initial grocery supply code by Order in Council

The Bill now provides that the initial version of the grocery supply code may be made by Order in Council on recommendation of the Minister. This Code will stay in place until the Commission exercises its determination power and makes a new Code, which will also have the effect of revoking the initial code.

The amendment will allow the initial version of the grocery supply code to be made expeditiously.

Aligning the Commission's power to make a grocery supply code with other determination powers and providing a disapplication power

Changes to clauses 12A and 12B better align the Commission's processes for making the grocery supply code by determination with other determination powers in the Bill (such as the wholesale code, in clause 60), including providing limited exemptions to the process that must be followed for minor and technical changes (like clause 61).

Additionally, the inclusion of clauses 12(1)(b) and 12C provide a disapplication power for the grocery supply code which is similar to the exemption power in relation to the wholesale supply regime in clause 43A.

The disapplication power is intended to ensure the Commission may make a strong grocery supply code that addresses the particular pressure points facing suppliers – especially the majority of suppliers that are smaller or medium sized businesses – without giving an undue advantage to particularly large suppliers or classes of suppliers, where the undue advantage may come at a cost to consumers.

There are four safeguards around this power built into the Bill, namely that the disapplication:

- May be used only where it promotes competition and efficiency in the grocery industry for the long-term benefit of consumers.
- Must be unlikely to stop a supplier (or class of suppliers) from participating confidently in their dealings with a regulated grocery retailer. This test uses similar considerations to when the Commission may recommend a retailer be designated (refer to clause 11(3)(b)(iii)(A)).
- Must not be broader than is reasonably necessary.
- Must not exceed five years in duration (although there is no restriction on making a new exemption at the end of 5 years).

Tightening the dispute resolution scheme

The Bill now includes several changes to the dispute resolution scheme, to:

- Specify that former and actively intending suppliers and wholesale customers may raise disputes.
- Provide that any binding decision must be implemented pending any appeal or judicial review, unless the Court orders otherwise.
- Require leave of the first appeal body to bring a second or subsequent appeal.
- Provide for as little formality and technicality as is necessary in the dispute resolution processes.
- Provide that the dispute resolution scheme may receive in evidence any statement, document, information, or matter that may assist it to deal with the matter before it, whether or not the same would be otherwise admissible in a Court.
- Provide that the dispute resolution scheme rules may also include/provide for other matters of process/procedure, consistent with the purpose of the scheme.

- Provide an ability to refer a question of law to the High Court for determination if it might produce substantial savings in costs and might substantially affect the rights of one or more parties. This ability may be exercised by the dispute resolution scheme, by any party with the consent of the scheme, or by any party with the consent of every other party.
- Protect witnesses, counsel, and experts from suit for their involvement in the dispute resolution process, as if the proceedings were before a Court.

These changes are to address risks of possible delays that were identified to ensure the scheme adequately provides for suppliers and wholesale customers to settle disputes with regulated grocery retailers.

The Commission's monitoring and reporting powers

The Bill makes clear – with the inclusion of clause 4(3) that the Commission's monitoring and reporting powers in clause 4 is not limited to 'groceries' and that the Commission may monitor and report on any product carried by a regulated grocery retailer and may monitor or report on other grocery retailers to a similar extent.

This extends the Commission's monitoring and reporting power to the extent necessary to avoid any doubt or confusion and to ensure it may appropriately monitor how the grocery retailers are competing with each other while avoiding affecting other matters in the Bill such as the grocery supply code or wholesale supply regime.

Considering ancillary services in the wholesale regime

The Bill now considers ancillary services (defined in clause 21) in several places:

- In the requirements to facilitate commercial wholesale agreements where any ancillary services are included in a wholesale agreement (refer to clause 21 and 29, where the changes connect 'ancillary services' to 'wholesale agreements').
- In the inquiry provisions, so that the competitiveness of any ancillary services provided by a regulated grocery retailer may be examined (refer to clauses 49 and 50).
- In the wholesale framework, wholesale code, the non-discriminatory terms regulation, and the specified access terms regulation as something that may be regulated if needed (refer to clauses 57, 64, 65, 70, 76, 84, 90, and 92).

This change is to ensure that, to the extent that ancillary services are provided by the regulated grocery retailers as part of a commercial agreement, they may be examined by the Commission. And the change also ensures that if there are issues with ancillary services the backstop regulation must be able to regulate ancillary services alongside groceries if needed. The Commission will be able to address any competition issues that may arise if a regulated grocery retailer ties access to wholesale groceries with related ancillary services – such as transportation or other logistics services.

The change avoids including ancillary services within either the requirements to facilitate commercial wholesale agreements or the backstop regulation as a default. This is because the access issues identified by the Commission largely appeared in the 'goods' side of the market. Many ancillary services can be provided by third parties and there is already a range of firms competing in these markets.

Regulation making power to ensure application of Parts 2 and 3 of the Bill to regulated grocery retailers is not affected by corporate structure

The Bill now includes a regulation making power to allow for provisions in Parts 2 and 3 of the Bill to apply to franchisees and transacting shareholders of interconnected body corporates of the regulated grocery retailers as if they were a franchisee or transacting shareholder of the regulated grocery retailer itself.

This change is to meet the policy intent of broadly applying the regulation to the regulated grocery retailers and ensuring that corporate form cannot be used to circumvent the legislation. It also allows the regulated grocery retailers to operate as a cohesive business unit to meet their regulatory obligations.

This change also means the Bill better meets the intent of Select Committee to:

- Regulate Woolworths and Foodstuffs broadly, including Woolworths' FreshChoice and SuperValue franchisees, and
- Respect the provisions in existing franchisee agreements within the Woolworths and Foodstuffs groups by excluding them from the provision in clause 40 (to not unduly hinder or obstruct the wholesale customer from developing or maintaining its own trading relationship with any supplier).

In particular, it allows for regulations to remedy the situation where franchisees of a subsidiary of Woolworths (SuperValue and FreshChoice) could be put into the same position as the franchisees of Woolworths New Zealand Limited.