

Legislative statement: Grocery Industry Competition Bill First Reading

Introduction

Competition within the grocery sector in New Zealand is not working well for consumers. The retail grocery market is dominated by three major grocery retailers (Foodstuffs North Island Limited, Foodstuffs South Island Limited, and Woolworths New Zealand Limited) that operate as a duopoly. These retailers are collectively making between \$365-\$430 million more profit per year than would be expected in a competitive market. At the same time the grocery prices consumers pay appear high by international standards and the scale and pace of innovation in the sector is lower than expected.

Competitors wanting to enter the retail grocery market, or expand their offering in the market, face significant challenges. These include difficulties accessing groceries for resale and flow-on impacts of the imbalance in negotiating power between major grocery retailers and their suppliers.

More competition should put stronger pressures on grocery retailers to deliver lower grocery prices, better quality and a greater range of grocery products and services to satisfy the diverse preferences of New Zealand consumers.

A more competitive grocery industry is more conducive to productivity improvements over time and should result in a more level playing field for all businesses, as well as enabling clearer signals to suppliers and retailers that will guide investment and innovation to cater to consumer preferences.

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, and why they have been included, are:

- **A Grocery Commissioner to provide general oversight of the grocery industry:** A Grocery Commissioner is needed to provide general oversight of the grocery industry, monitor and report on the industry's performance, and ensure compliance with the regulatory regime.
- **Improve access to wholesale groceries to enable entry and expansion in the retail grocery market:** With some exceptions, such as the supply of fresh produce, meat, and international products, a new competitor is unlikely to be able to secure the wide range of products directly from suppliers at a comparable cost to the major grocery retailers. An improved wholesale market should allow new entrants and expanding competitors to provide a competitive offering to New Zealand consumers – who want the convenience of a one-stop shop and are relatively price-sensitive.

- **Constrain the major grocery retailers' use of their bargaining power over suppliers:** the major grocery retailers are using their advantage in negotiating power to push costs and risks that they are better placed to address onto suppliers, and to reduce the transparency and certainty over terms and conditions of supply. Constraining the ability of the major grocery retailers to leverage their advantage in negotiating power should benefit suppliers and also generate dynamic efficiency benefits as suppliers are able to invest to enhance their productivity and to innovate and bring new products to consumers.
- **Create a dispute resolution scheme for suppliers and wholesale customers:** An alternative dispute resolution scheme is needed to provide independent, prompt, and cost-effective resolution of any dispute that a grocery supplier or a wholesale customer may have with a major grocery retailer. Any scheme must be accessible to grocery suppliers and wholesale customers, particularly smaller businesses.

The Grocery Commissioner

The Bill provides the Grocery Commissioner and the Commerce Commission with broad functions, duties and powers to monitor compliance with the regulatory regime, to enforce compliance (including through taking court action), and to report regularly on the state of competition in the grocery industry.

In addition to broad monitoring powers, the Commerce Commission may require (by regulation) information to be disclosed by a wide range of participants in the grocery industry, such as major grocery retailers, wholesale customers, and grocery suppliers. Any information that is connected to the grocery industry may be required to be disclosed, which covers both commercial information and some non-commercial information. The Privacy Act 2020 will apply to any information disclosure requirements, ensuring adequate safeguards are in place.

The Commerce Commission may use a range of enforcement tools in the event of non-compliance, including the ability to issue corrective notices and require warnings to be disclosed. A range of remedies may be sought from the court for failures to comply with the Bill, such as pecuniary penalties (comprising four tiers of penalty levels, with higher tier penalties applied to contraventions that may have potentially more serious impacts), orders to vary or cancel contracts and injunctions to stop certain conduct or require certain conduct to continue.

Additionally, the Commerce Commission has functions to recommend additional regulation (for example, recommending an Order in Council to require major grocery retailers to sell groceries to wholesale customers) or to recommend that new parties be required to comply with the regime (for example the Grocery Supply Code). The Commerce Commission may also impose additional regulatory obligations on those major grocery retailers that are already regulated by the regime (information disclosure obligations and some components of the wholesale backstop).

Wholesale groceries

The Bill creates a two-part wholesale supply regulatory regime. The first part imposes regulatory requirements on the major grocery retailers to facilitate commercial supply of groceries. The second part of the wholesale supply regime creates a regulatory backstop that may be applied to require 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.

The Bill requires that the major grocery retailers must consider wholesale supply requests in good faith; have in place effective rules, criteria, and procedures for considering wholesale supply requests; create standard terms and conditions (or principles) for the wholesale supply of groceries; and have in place the necessary systems and processes to provide wholesale supply. These duties are relatively broad so the Commission is able to make determinations (secondary legislation) clarifying how the duty is to be complied with.

The Bill's regulatory backstop provides for further obligations to be placed on the major grocery retailers by the Commission or the Government:

- The Commission may impose additional regulation, in the form of a wholesale framework or wholesale code, if duties are not complied with after 3, 6, and 12 months of the Bill coming into force. The Commission may also impose a wholesale framework or wholesale code if the major grocery retailer's wholesale offerings are not consistent with what would be expected in a competitive wholesale market.
- The Government may, by Order in Council on the recommendation of the Minister, require the major grocery retailers to supply wholesale customers following an inquiry by the Commission. This is a statutory decision and requires the Minister of Commerce and Consumer Affairs to be satisfied that the major grocery retailers' commercial offerings are not what would be expected in a workably competitive market and additional regulation is likely to benefit consumers in the long-term. Any Order in Council would be supported by a Commission determination to regulate the terms and conditions of the wholesale supply (including matters such as prices or margins on products) using either non-discriminatory terms or specified access terms.

Constrain the major grocery retailers' use of their bargaining power over suppliers

The Bill addresses the imbalance in negotiating power in three ways. It creates a Grocery Supply Code that the major grocery retailers will be required to comply with; it extends protections in the Fair Trading Act 1986 against the use of unfair contract terms in standard form contracts; and it establishes the means to exempt certain suppliers from prohibitions in Part 2 of the Commerce Act 1986, so that they can collectively negotiate terms and conditions of supply.

The major grocery retailers will be required to comply with any Grocery Supply Code that is created by Order in Council. The Grocery Supply Code may constrain the major grocery retailer's ability to use their negotiating power advantage to force suppliers to accept unfavourable terms of supply that may involve them taking on costs and risks that are better addressed by the major grocery retailers. There are relatively broad empowering provisions for what may be included in a Code in the Bill.

The Bill amends the Fair Trading Act 1986 to extent protections against the use of unfair contract terms in standard form small business contracts to a wider range of grocery contracts (under \$1 million per annum) to constrain the ability of the major grocery retailers to push costs and risks onto suppliers.

The Bill also establishes a power to exempt suppliers from prohibitions in sections 27 and 30 of Part 2 of the Commerce Act 1986 by Order in Council, and prescribe terms and conditions of the exemption if needed. This allows the exempt suppliers to collectively negotiate terms and conditions of supply with the major grocery retailers within appropriate constraints.

Dispute resolution

The Bill provides for the Minister of Commerce and Consumer Affairs to appoint a dispute resolution scheme and approve that scheme's rules. The scheme will have jurisdiction to hear disputes up to a value of \$5 million between a grocery supplier or a wholesale customer and a major grocery retailer and may make binding determinations on disputes. Parties will not have the ability to go to court until the dispute is resolved. Parties to the dispute will, however, be able to appeal the dispute resolution decision on question of law.

Commencement and transitional arrangements

The Bill has commencement provisions that allow for the majority of the provisions to come into force 14 days after Royal assent. An exception to this is the obligation on the major grocery retailers to comply with a Grocery Supply Code which comes into force when a Grocery Supply Code is made by Order in Council.

The Bill also provides for transitional arrangements to allow the Grocery Supply Code (Part 2 of the Bill) and the first part of the wholesale supply regime (in Subpart 1 and 2 of Part 3 of the Bill) to regulate existing agreements as if those agreements are made after the commencement of the secondary legislation.