

## Legislative statement: Grocery Industry Competition Bill Second Reading

---

### Overview of the Grocery Industry Competition Bill as introduced

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 as follows.

#### *Establishing a Grocery Commissioner to provide general oversight of the grocery industry*

The Bill provides for a Grocery Commissioner to be appointed to the Commerce Commission (**the Commission**) and gives the Commissioner broad regulatory functions, duties and powers. These include monitoring, enforcing compliance (including through taking court action), reporting on the grocery industry, and the ability to impose further regulation by determination such as disclosure standards and wholesale supply regulation.

#### *Imposing a wholesale supply regime to encourage entry and expansion in the retail grocery market*

The Bill creates a two-part wholesale supply regime intended to ensure that other grocery retailers and potential grocery retailers have access to wholesale groceries so that they can enter the market and expand their offerings. This should promote competition in the retail market for the long-term benefit of consumers.

The first part of the wholesale supply regime imposes duties on the major grocery retailers to facilitate commercial agreements for the supply of groceries. This includes a range of broadly framed duties and obligations on the regulated grocery retailers, which may be clarified by a Commission determination.

The second part of the wholesale supply regime is a “regulatory backstop” of four regulatory tools. These tools provide new obligations or duties that may be applied to improve wholesale supply. The trigger to impose the “regulatory backstop” is 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 provides for two forms of secondary regulation – a wholesale framework or wholesale code – that may be applied by a Commission determination. Two other forms of secondary regulation – non discriminatory terms and specified access terms – may be applied by the Government by Order in Council, on recommendation of the Minister of Commerce and Consumer Affairs following a Commission inquiry.

*Constraining the major grocery retailers' ability to use their bargaining power over suppliers*

The Bill enables the creation of a Grocery Supply Code, as secondary legislation, that the major grocery retailers will be required to comply with.

The Grocery Supply Code may regulate or prohibit conduct in relation to suppliers and the terms and conditions in supply agreements. It may do this to promote fair conduct between the regulated grocery retailers and their suppliers and to improve transparency and certainty over the terms and conditions of supply.

The Bill also 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.

*Creating a dispute resolution scheme for suppliers and wholesale customers*

The Bill provides for the Minister of Commerce and Consumer Affairs to approve a dispute resolution scheme and its rules. The scheme 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. If a dispute is resolved by an order or other decision of an adjudicator or other decision maker, the decision is binding. 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 binding decisions on question of law.

**Changes recommended by Select Committee**

The Revised Tracked version of the Bill prepared by Select Committee includes a number of recommendations. The key recommendations I would draw to Parliament's attention are as follows:

*Tighter purpose clauses*

The purpose clauses in the Bill have been refined to make them clearer, more streamlined and better connected. The overall purpose of the Bill is singularly focused on improving competition and efficiency in the grocery industry for the long-term benefit of consumers. Refer to clause 3.

The purpose of the grocery supply code is linked to the purpose of the Bill and now includes creating a trading environment in which businesses compete effectively and consumers and businesses participate confidently, refer to clause 13.

The purpose clause in Part 3 (the wholesale supply regime) has been retained with minor amendments, but the additional purpose clauses in relation to each of the four backstop tools have been removed and the relevant content shifted to the overview clause (refer to clauses 18, 62, 69, 83, and 88).

*Wholesale supply regime – new 'other principles' and duties to facilitate wholesale agreements with enhanced powers for the wholesale code*

The wholesale supply regime is improved by adding new 'other principles' of wholesale supply. There is one new principle that sets out the desirability that wholesale customers have reasonable access to 'scale or efficiency' payments or rebates provided by a supplier to a regulated grocery retailer; and another new principle that sets out the desirability that regulated grocery retailers will provide the wholesale groceries that are demanded or are

likely to be demanded, having consideration to other reasonably available channels of supply (eg, direct supply), refer to clause 20. Overall, the principles are now a clear articulation of the matters that should be considered by the Commission and Ministers when exercising powers and functions under the wholesale supply regime.

There is a new duty on the regulated grocery retailers to ensure they do not prevent a wholesale customer from receiving any 'scale or efficiency' payments or rebates provided by a supplier to a regulated grocery retailer, refer to clause 40A.

The wholesale code is enhanced to allow the Commission to regulate some matters in relation to supply agreements (between a regulated grocery retailer and supplier) to ensure it can achieve the new principles (clause 20). This additional regulation may be imposed only if the Commission is satisfied of the grounds set out in clause 70(2). If this additional regulation is imposed, then suppliers face a civil liability if they fail to comply, including a tier two penalty. Refer to clause 70.

There is also a new power to disapply the duties in subpart 2 of part 3 by Order in Council, but this may be used only following a Commission recommendation after an inquiry. Refer to clause 107A.

#### *Amendments to the grocery supply code*

The power to make the grocery supply code now resides with the Commission (by determination), rather than the Governor-General (by Order in Council). The grocery supply code will still be secondary legislation, and there are transitional provisions to allow for the Minister to undertake processes such as consultation on an exposure draft leading up to the creation of the first grocery supply code. Refer to clause 12 and Schedule 1, clause 4.

The grocery supply code may now also regulate the conduct of select persons that are materially influenced by, or associated with, the regulated grocery retailers. This is an extension of the reach of the grocery supply code beyond regulated grocery retailers to persons that may be 'related parties' to the grocery supply markets. Refer to clause 14A.

#### *Other changes*

The Select Committee report back includes the detail of the full changes recommended to be made to the Bill. The other changes that I would mention briefly, are that the Bill now has:

- A new exemption power, in clause 43A, to allow the Commission to exempt regulated grocery retailers from some of the duties in subpart 2 of part 3, in the event that the market is operating well and these are not needed.
- A number of improvements to the dispute resolution scheme provisions in Part 4, clause 151, and also in Schedule 2, clause 8A. These improve the empowering framework in legislation and will ensure a scheme can operate effectively and efficiently.
- Enhanced monitoring and reporting powers and functions for the Grocery Commissioner, in clauses 4 and 168 and 173A. These changes are to ensure that there is an effective regulator with strong powers to monitor conduct in the industry and to report on what is observed.