



## COVERSHEET

<b>Minister</b>	Hon Dr David Clark	<b>Portfolio</b>	Commerce and Consumer Affairs
<b>Title of Cabinet paper</b>	Commerce (Grocery Sector Covenants) Amendment Bill – Approval for Introduction	<b>Date to be published</b>	6 July 2022

### List of documents that have been proactively released

<b>Date</b>	<b>Title</b>	<b>Author</b>
May 2022	Commerce (Grocery Sector Covenants) Amendment Bill – Approval for Introduction	Office of the Minister of Commerce and Consumer Affairs
11 May 2022	Commerce Amendment Bill: Approval for Introduction DEV-22-MIN-0109 Minute	Cabinet Office

### Information redacted

**YES**

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Some information has been withheld for the reason of Legal professional privilege.

## In Confidence

Office of the Minister of Commerce and Consumer Affairs

Cabinet Economic Development Committee

## Commerce (Grocery Sector Covenants) Amendment Bill – Approval for Introduction

### Proposal

- 1 I seek Cabinet's agreement to progress through Budget night legislation recommendations from the Commerce Commission's market study into the retail grocery sector to prohibit the use of restrictive covenants on land and exclusivity covenants on leases.

### Relation to government priorities

- 2 This paper relates to the Government's priority to support New Zealanders to respond to increasing costs of living by presenting actions to enhance competition in the retail grocery sector. More workable competition ultimately benefits New Zealand consumers, including lower income families, through lower grocery prices, better quality, larger ranges of goods, and better service.

### Executive Summary

- 3 On 8 March 2022, the Commerce Commission (the Commission) published its final report on the market study into the retail grocery sector (the report). The purpose of this study was to examine whether competition in the grocery sector was working well, and what could be done to improve it. A full summary of the Commission's recommendations is attached in **Appendix A**.
- 4 I consider that the recommendations to prohibit restrictive covenants on land (restrictive covenants) and exclusivity covenants in leases (exclusivity covenants) that lessen competition in the grocery sector (recommendation 2A and 2B) should be progressed now. This is because of their potential to have immediate impacts for competition through freeing up land to increase the likelihood of a large-scale competitor to the current supermarket duopoly to enter the grocery market.
- 5 I am seeking agreement to progress these recommendations urgently through introducing Budget night legislation amending the Commerce Act 1986.
- 6 Other legislative changes recommended by the report would be progressed via a further Bill focussed on grocery sector competition which I intend to introduce later this year. I will provide Cabinet with advice on that Bill and other measures taken to respond to the Commission's remaining recommendations later this month.

## Background

- 7 Groceries are an essential purchase as well as a major expense for most households. In the year to June 2019, food was the second largest expense for New Zealand households, with an average spend of \$234 per week.
- 8 Alongside other factors that contribute to higher prices, such as disruption to global supply chains and labour shortages throughout New Zealand, competition between the major grocery retailers is a key driver of the prices, quality, ranges, and services offered to New Zealanders.
- 9 On 8 March 2022, the Commission published its final report on the market study into the retail grocery sector. The report found that competition was not working well for consumers in the grocery retail sector. The major grocery retailers, Woolworths NZ, and Foodstuffs, operate as a duopoly with a fringe of other competing grocery retailers that have little impact on competition. Competitors wanting to enter the grocery market or expand their outlets face significant challenges, including a lack of suitable sites for development and difficulties sourcing wholesale grocery products.
- 10 The report made several recommendations for improving competition. These recommendations include:
  - 10.1 Freeing up land for grocery retail development through changes to planning laws and prohibiting the use of restrictive covenants on land (restrictive covenants) and exclusivity covenants on leases (exclusivity covenants);
  - 10.2 A regulatory framework to better facilitate commercial wholesale supply of groceries by the major grocery retailers;
  - 10.3 Addressing imbalances in bargaining power between the major grocery retailers and many of their suppliers by introducing a mandatory grocery code of conduct, considering enabling collective bargaining by some suppliers, and strengthening the Fair Trading Act 1986's business-to-business unfair contract terms provisions for grocery suppliers;
  - 10.4 Helping consumers make more informed purchasing decisions and enhancing competition at the retail level, by introducing mandatory unit pricing, as well as asking the major retailers to ensure that their pricing and promotional practices, and the terms and conditions relating to their loyalty programmes, are simple and easy to understand; and
  - 10.5 Establishing a grocery sector regulator and dispute resolution scheme.
- 11 A full summary of the Commission's recommendations is attached in **Appendix A**.
- 12 I have commenced work to progress actions in response to these recommendations that will directly improve competition in this vital sector for the benefit of New Zealand consumers.

- 13 I consider that the recommendations on prohibiting restrictive and exclusivity covenants that lessen supermarket competition (recommendation 2A and 2B). should be progressed now due to their relative simplicity and potential to have immediate impacts for competition. Freeing up land in this way will increase the likelihood that a large-scale competitor to the current supermarket duopoly will enter the grocery market, both by increasing access to retail sites, as well as by signalling the Government's commitment to reform in this sector.
- 14 I am seeking agreement to introduce these prohibitions urgently through Budget night legislation.

## **Analysis and proposals**

### *Rationale for prohibiting the use of restrictive and exclusivity covenants*

- 15 In its report, the Commission noted that the best way to improve competition in the retail grocery sector is through measures that are likely to improve the conditions for entry and expansion, particularly where this enables a greater range of grocery retailers to offer a convenient one-stop shopping option. Land availability is one of the key conditions for entry and expansion.
- 16 The report identified that the availability of land for grocery store development is inhibited by major grocery retailers lodging and obtaining restrictive and exclusivity covenants to prevent other supermarkets from developing stores. Specifically, these covenants impact competition by reducing the scope of activities that can take place on a piece of land (restrictive covenants) or precluding competitors from operating in the same mall or shopping centre (exclusivity covenants).
- 17 In the report the Commission recommended directly prohibiting restrictive covenants (recommendation 2A) and exclusivity covenants (recommendation 2B) that impede the development of retail grocery stores, as well as making existing covenants unenforceable.
- 18 In its report, the Commission identified more than 90 restrictive covenants entered into by major grocery retailers throughout New Zealand, at least 60 of which are not time-limited or have terms of more than 20 years, and more than 100 exclusivity covenants. These covenants are mainly lodged in Auckland, Wellington, and Christchurch, but are present across the country.
- 19 I consider that prohibiting both restrictive and exclusivity covenants which exist solely for the benefit of grocery retailers would benefit competition in the grocery retail sector.
- 20 Major grocery retailers have already indicated that they are willing to remove (Foodstuffs North Island) or not enforce such covenants (Foodstuffs South Island), or support making them unenforceable (Woolworths NZ).
- 21 Despite these commitments, I consider that it is necessary to progress a prohibition of such covenants as voluntary commitments may not be enduring.

Grocery retailers may also face practical difficulties removing such covenants voluntarily. For example, removing each covenant requires;

- 21.1 In the case of prohibitive covenants on land titles, either the agreement of all parties affected by the covenant, including any mortgagee or an application to the Court under the Property Law Act 2007; and
  - 21.2 In the case of exclusivity covenants in lease agreements, a re-negotiation of terms.
- 22 Given the number of covenants and the potential number of affected persons, voluntarily removing each covenant will be time-consuming and costly. Prohibiting such covenants under the Commerce Act 1986 would provide a consistent and faster way to address the impacts on competition at a lower cost, whilst providing greater certainty to potential new entrants than a voluntary approach.
- 23 I intend to look more widely at covenants across the retail sector in the future, as an argument could be made that any such practice is anti-competitive, though further investigation is needed.

*Designing the prohibition*

- 24 In its report, the Commission recommended that the following restrictive covenants that relate to the development of retail grocery stores (including specialist retailers such as greengrocers or butchers) should be prohibited:
- 24.1 covenants that explicitly or directly impede the development of retail grocery stores, regardless of the purpose of the covenant or the person lodging the covenant;
  - 24.2 covenants that indirectly impede retail grocery store development such as by saying that only certain (non-grocery retail) activities may take place on the premises should be prohibited if they:
    - 24.2.1 have the purpose of impeding retail grocery store development; or
    - 24.2.2 are lodged by a grocery retailer, or a person interconnected, associated with, or otherwise assisted by a grocery retailer (regardless of the purpose or likely effect of the covenant).
- 25 In the report, the Commission also recommended that exclusivity covenants which provide that a condition of a lease is that no other tenant may operate a retail grocery store (including specialist retailers) in competition with the lessee, should be prohibited. The Commission considered whether this prohibition should be subject to a defence or exception and accepted that there may be a case for a backwards-looking exception (i.e., transitional period) for existing lease agreements.

- 26 I propose prohibiting covenants that have the purpose, effect, or likely effect of impeding the development or use of the land or site as a grocery retail store.
- 27 While the Commerce Act prohibits agreements and covenants that substantially lessen competition (sections 27 and 28), proving a substantial lessening of competition requires analysis of the relevant local market, including alternative available sites, and what would occur without the challenged agreement or covenant. This would be time consuming and expensive to undertake over the large number of restrictive covenants and exclusivity covenants identified by the Commission. There is also a cumulative effect to be considered (given the network of covenants in place).
- 28 To address this, the proposed Bill amends the Commerce Act 1986, expressly deeming these restrictive and exclusivity covenants to contravene section 27 (contracts, arrangements, or understanding substantially lessening competition prohibited) and section 28 (covenants substantially lessening competition prohibited). This would make such covenants unenforceable.
- 29 A covenant is an interest in land and therefore a property right. Prohibiting existing restrictive and exclusivity covenants would therefore affect existing property rights. It is retrospective in the weak sense that the arrangements that include the covenants that would be rendered unlawful were negotiated in the past. It is not retrospective in the strong sense of penalising persons for past actions.
- 30 The competition problems identified by the Commission pertain to existing covenants and cannot be addressed without affecting those existing property rights. I consider that this is justified in order to remove the constraints these covenants place on availability of sites across the country. I also note that the major grocery retailers support the removal of these covenants. In addition, there are also some measures to mitigate the impact on existing rights, discussed below.
- 31 There is one covenant that may affect grocery retail that I consider should be permitted. Businesses selling retail fuel often add a covenant to the land if they de-commission preventing future installation of fuel tanks. This guards against the potential for litigation over responsibility if there is a (future) leak and soil contamination. The proposed Bill would therefore not apply to covenants entered into for environmental impact reasons connected with a retail fuel site, as defined in section 4 of the Fuel Industry Act 2020. While the sale of fuel is not a grocery item, it is often sold alongside convenience stores or as part of supermarket offerings.

*Defining grocery retailers who are prohibited from creating and enforcing covenants*

- 32 The grocery sector is diverse. It includes specialist sole traders, such as butchers, specialist stores, bulk dry foods retailers, ethnic grocery stores, and large department stores that sell some grocery items.

- 33 To identify the activities impeded by the covenants at issue, the proposed Bill defines a *retail grocery store* as a place at which a material part of the business being carried on is the business of supplying one or more categories of grocery products to consumers. *Grocery products* are defined to mean goods in any of the following product categories: bread, dairy products, eggs or egg products, fruit, vegetables, meat, fish, rice, sugar, manufacturer-packaged food, and medicine other than prescription medicine (this list is based on the minimum basic goods list used by the Australian Competition and Consumer Commission).
- 34 This means that a grocery retailer would include both major grocery retailers and other stores selling a broad range of goods, including butchers, bakers, greengrocers, large specialty stores (ethnic grocery, dry food bulk stores, organic, etc), smaller supermarket chains, department stores with a grocery department, such as The Warehouse, and some pharmacies.
- 35 The Commission's report indicates that the immediate and most significant problem is with covenants that benefit our current incumbent major grocery retailers Woolworths NZ and Foodstuffs. I am proposing to apply the new prohibition to covenants created by these retailers, while also building in flexibility to respond to any similar actions by other grocery retailers in future.
- 36 The proposed Bill does this by identifying our current incumbent major grocery retailers Woolworths NZ and Foodstuffs as *designated grocery retailers* together with any of their franchisees or cooperative members.
- 37 The proposed Bill also provides that other grocery retailers may be designated by Order in Council following a process that includes consultation and a recommendation from the Commission. This will future proof the new provisions and ensure that due consideration is given to applying these prohibitions more broadly.
- 38 To designate another grocery retailer, the Minister of Commerce and Consumer Affairs would need to be satisfied that:
- 38.1 the business supplies all or most of the categories of grocery products to consumers; and
- 38.2 designating the business would promote competitive neutrality (a level playing field between retailers).
- 39 The intended effect of this regime is illustrated by business type in **Appendix B**.

*Using the existing competition regime*

- 40 The regime will sit within the Commerce Act 1986 and will use much of the standard competition infrastructure to support it, including authorisations, information-gathering powers, undertakings, and other enforcement, remedies, and appeals matters.

- 41 Using the existing competition regime ensures that the grocery sector is already familiar with the framework and mitigates against unintended consequences. In particular:
- 41.1 Businesses can apply to the Commission for an authorisation for a contract or covenant, on the basis of any wider public interests that outweigh the competition considerations. This may mitigate against unintended consequences, such as new stores not establishing themselves in small towns or outlying suburbs. Each request is considered on its merits.
- 41.2 Section 89 provides for court-imposed variations of contracts or covenants and/or compensation for losses where a contract or covenant is in contravention of the Commerce Act 1986. This will allow for exclusive leases that include a premium for that exclusivity to be renegotiated, for example.

### **Proposal for Budget night legislation**

- 42 I am recommending that this Bill be introduced and have its first reading on Budget night, followed by a one month Select Committee period. I consider that there is some urgency in addressing competition in the grocery retail sector, given the impact grocery costs have on consumers and particularly on lower income groups.
- 43 The restrictive and exclusivity covenants will be prohibited immediately once the Bill comes into effect, and I anticipate that competitors will begin to consider new sites shortly thereafter. By progressing this component of the grocery sector reforms through budget legislation, we will also:
- 43.1 bring forward the most straightforward part of the reforms by around 12 months, enabling some earlier gains; and
- 43.2 send a clear signal of the Government's intentions in this area, thereby encouraging potential market entrants, or expansion by smaller retailers sooner than would otherwise be the case.
- 44 However, I consider it is important to act now where we can, given the impacts poor competition is having on the cost of living for everyday New Zealanders. I also consider that the issues have been carefully assessed by the Commission, including through stakeholder engagement, and that the recommendations around covenants are relatively straightforward. Supermarkets have also publicly indicated support for the Commission's recommendation to remove covenants.
- 45 I will be bringing recommendations on further reform of the grocery sector to Cabinet later this month.

### **Treaty of Waitangi Implications**

- 46 Officials are not aware of any Māori-owned land that is affected by restrictive covenants, or exclusive leases. However, should this be the case, and the



landowners wish to maintain these covenants, they can seek an authorisation from the Commission.

- 47 I also note that low-income groups are the most affected by high grocery prices, which disproportionately includes Māori. By taking steps to improve grocery sector competition, all consumers, including Māori, will have access to a wider range of goods, including greater choice on quality and price of products.

### **Financial Implications**

- 48 There are no direct financial implications from the proposals in this paper. However, the Commission will be required to enforce the new prohibitions and consider applications for authorisations from time to time. The Commission is expected to meet these costs from within its existing appropriations.

### **Legislative Implications**

- 49 The proposed Bill amends the Commerce Act 1986, primarily adding an additional section to Part 2 – Restrictive Trade Practices.
- 50 This Bill does not currently have a place on the legislative programme. I am seeking to introduce this Bill as a legislation category 2, and for it to be passed urgently this year.

### **Impact Analysis**

#### **Regulatory Impact Statement**

- 51 Cabinet's impact analysis requirements apply to the proposals on prohibiting covenants. However, there is no accompanying Regulatory Impact Statement, and The Treasury has not exempted the proposals from Impact Analysis requirements. Therefore, it does not meet Cabinet's requirements for regulatory proposals.
- 52 On behalf of respective Ministers, the Regulatory Impact Analysis Team at The Treasury and the Ministry of Business, Innovation and Employment have agreed that supplementary analysis will be provided on these proposals when Cabinet makes further decisions on the wider Retail Grocery Market Government Response will be sought. This advice will be provided no later than October 2022.

#### **Climate Implications of Policy Assessment**

- 53 The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that the CIPA requirements do not apply to this proposal as the threshold for significance is not met.

## Population Implications

- 54 There are no significant population-specific implications from the proposals in this paper. However, improving competition in the grocery sector will be of greatest benefit to lower socio-economic groups who spend a greater proportion of their incomes on groceries. Prohibiting restrictive and exclusive covenants could also support households and individuals who do not have the means or ability to travel large distances to obtain the best price, quality and range of groceries.

## Human Rights

- 55 There are no significant human rights implications from the proposals in this paper. The impact on property rights is further discussed below.

## Compliance

### *Principles of the Treaty of Waitangi*

- 56 As noted above, there are no implications for the Treaty of Waitangi

### *Rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993*

- 57 I acknowledge that new legislation should generally not have retrospective effect. Altering property rights after they have been negotiated has the potential to reduce people's general confidence to acquire or invest in property rights.
- 58 As noted earlier, the proposed Bill addresses a problem that is associated with existing property rights of major grocery retailers listed in the Bill (and any other retailers designated in the future).
- 59 I consider this impact on existing rights is justified by the competition problems those rights cause, which were carefully assessed by the Commission during its eighteen-month market study. It is also worth noting that the major grocery retailers who would be immediately affected have publicly indicated their support for the removal of those rights, and that this is a cost-effective mechanism for doing so.
- 60 There are also a number of mitigating factors I would like to note:
- 60.1 First, where a party to a covenant or contract considers that it may lessen competition, but the benefits from it outweigh the harms it causes, they may apply to the Commission under the Commerce Act for authorisation. If the Commission grants authorisation, the prohibition will not apply to that covenant or contract.
- 60.2 Secondly, where a covenant or contract is found to be unlawful, the Commerce Act enables the Court to amend the covenant or contract and/or make orders requiring the payment of restitution or compensation to a party to the covenant or contract (section 89). This

could occur where, for example, a lease included a higher rental to reflect an exclusivity covenant. That is to say, there is the possibility of compensation for the impact of this legislation on property rights.

- 61 The Ministry of Justice has completed a BORA vet for this legislation (attached)

*Disclosure statement requirements*

- 62 A disclosure statement is attached. The key element is the weak retrospective implications of the Bill.

*Principles and guidelines set out in the Privacy Act 2020*

- 63 There are no privacy implications from this proposal

*International standards and obligations*

- 64 There are no implications from this proposal

*Legislation Guidelines (2018 edition)*

- 65 The Legislation Design and Advisory Committee (LDAC) provided the following advice on the draft Bill:
- 65.1 Cabinet should consider any retrospective provisions carefully: LDAC noted that generally, legislation should not impact on private property rights or have retrospective effects.
  - 65.2 LDAC indicated a preference for the Minister of Commerce and Consumer Affairs to create an exemption regime to mitigate the unintended consequences of removing private property rights.

**Consultation**

- 66 The following agencies were consulted on the proposals in this paper: the Department of the Prime Minister and Cabinet, the Ministry of Justice, Ministry of Housing and Urban Development, Land Information New Zealand, the Commerce Commission, the Treasury, Ministry of Social Development, Ministry for the Environment, Ministry of Primary Industries.
- 67 The Ministry of Justice notes that the proposed Bill would retrospectively impact private property rights. Retrospective legislation is contrary to fundamental legal principles and should only be used in extraordinary circumstances. The Ministry of Justice considers that, while the covenants lodged by major grocery retailers may have an anti-competitive effect, further policy work is needed to determine whether there are other options available that would not involve the same impairment of property rights and/or require retrospective application.
- 68 The proposed Bill also provides for an order in council mechanism to add additional grocery retailers to those prohibited from creating and enforcing

covenants. The Ministry of Justice notes that this effectively removes property rights and is an unusual use of the Order in Council mechanism. The Ministry considers it more appropriate that the Order in Council be 'confirmable secondary legislation', and subject to being affirmed by the House.

- 69 The Treasury considers that the case for progressing these recommendations urgently through Budget night legislation, in advance of other changes, is relatively weak. They suggest that, while prohibiting restrictive covenants at this stage may have immediate impacts for competition, it is only one of the factors that impede large-scale entry or expansion, and material benefits will still likely take some time to arise. There are also risks of progressing legislation urgently without undergoing, for example, usual public consultation, including with affected parties. In particular, any legislative changes that retrospectively affect property rights should be carefully considered. However, on this last point, we acknowledge that major grocery retailers that will be subject to the legislative changes have already indicated that they are willing to voluntarily remove or not enforce such covenants, or support making them unenforceable, which minimises some risks. I am also proposing a one month select committee process to allow for public consultation.

### Other risks and mitigations

Legally Privilege

- 71 Another concern that has been raised by some of the agencies consulted is that progressing these proposals with urgency may not have allowed sufficient time to consider the unintended impacts. I consider that the proposed Select Committee process, albeit shortened, will provide further opportunities for key interested parties to comment and for any concerns to be considered. In addition, the use of the Commerce Act as the vehicle for this proposal means that several safeguards are also built in.

### Communications

- 72 I intend to issue a press release, following budget night covering the key aspects of the legislation/bill

### Proactive Release

- 73 I intend to proactively release this paper subject to any appropriate redactions under the Official Information Act 1982 within 30 business days of decisions being confirmed by Cabinet.

**Recommendations:**

The Minister for Commerce and Consumer Affairs recommends that the Committee:

- 1 **note** that on 8 March 2022, the Commerce Commission (the Commission) published its final report on the market study into the retail grocery sector.
- 2 **note** that the Commission found competition was not working well for consumers in the grocery retail sector and that the Commission made several recommendations to improve competition.
- 3 **agree** to define a grocery retail store as a place at which a material part of the business is selling one or more of the following categories of basic goods to consumers: bread, dairy produce, eggs or egg products, fruit, vegetables, meat, rice, sugar, manufacturer packaged food, and medicine other than prescription medicine.
- 4 **agree** to prohibit any of the following covenants in which a designated grocery retailer has an interest, by deeming them to be anti-competitive:
  - 4.1 restrictive covenants that have the purpose, effect, or likely effect impeding the development or use of the land or site as a grocery retail store (restrictive covenants)
  - 4.2 exclusivity covenants in lease agreements that have the purpose, effect, or likely effect of impeding other tenants from operating a retail grocery store in competition with the lessee (exclusivity covenants).
- 5 **agree** that covenants entered into for environmental impact reasons connected with a 'retail fuel site', as defined in section 4 of the Fuel Industry Act 2020 should not be prohibited.
- 6 **agree** that prohibiting the restrictive and exclusivity covenants described above makes any such covenants unenforceable.
- 7 **agree** that Foodstuffs North Island Limited, Foodstuffs South Island Limited, and Woolworths New Zealand Limited be specified as designated grocery retailers.
- 8 **agree** that this list of designated grocery retailers can be added to by Order in Council, on the recommendation of the Minister of Commerce and Consumer Affairs following consultation and a recommendation by the Commerce Commission.
- 9 **note** that the proposed Bill gives effect to these decisions by amending the Commerce Act 1986.
- 10 **note** that the supporting mechanisms in the Commerce Act 1986 will apply to the grocery regime, including authorisations, and the ability for a court to vary contracts that have been deemed unlawful.

**I N C O N F I D E N C E**

- 11 **note** that I am seeking a category 2 legislative priority for this Bill, and for it be passed urgently this year.
- 12 **note** that I will be providing Cabinet with further advice on actions to respond to the Commission's other recommendations on 18 May 2022, including legislative changes to be progressed via a further Bill due to be introduced in October 2022.
- 13 **approve** the Commerce (Grocery Sector Covenants) Amendment Bill for introduction
- 14 **authorise** the Minister of Commerce and Consumer Affairs to make any final adjustments to the legislation, including minor policy decisions
- 15 **agree** that the Bill be introduced and complete its first reading under urgency as part of Budget night legislation
- 16 **note** that I will be seeking a shortened Select Committee phase of one month, to enable submissions, but also advance this reform as quickly as possible
- 17 **agree** that the Bill be referred to the Economic Development, Science, and Innovation Select Committee

Authorised for lodgement

Hon David Clark

Minister of Commerce and Consumer Affairs

Appendix A: Summary of the Commerce Commission’s recommendations

Category	#	Commerce Commission Recommendation	#	Sub-recommendation	Implementing party
Recommendations to improve conditions for entry and expansion at the grocery wholesale and retail level	1	Improve the availability of sites for retail grocery stores under planning law.	1A	District plans should include sufficient land that is zoned to enable choice in sites for the development of retail grocery stores.	Territorial authorities
			1B	The new planning system should require Regional Spatial Strategies to provide sufficient spare capacity to enable choice in sites for the development of retail grocery stores.	Strategic Planning Reform Board
			1C	The new planning system should require every Natural and Built Environment Plan to include a minimum proportion of urban land that is zoned for retail grocery stores.	Ministry for the Environment (MfE)
			1D	The new planning system should limit the discretion available to decision-makers regarding the approval of retail grocery stores.	MfE
			1E	The positive outcomes of trade competition should be able to be considered in planning instruments under the Natural and Built Environments Act.	MfE
			1F	Retail grocery store development should not be able to be declined based on adverse retail distribution effects on existing commercial centres.	MfE
	2	Prohibit restrictive and exclusive covenants that inhibit retail grocery store development and monitor land banking by the major grocery retailers.	2A	Prohibit restrictive covenants that relate to the development of retail grocery stores.	Ministry of Business, Innovation and Employment (MBIE)
			2B	Prohibit exclusive covenants in leases that relate to the operation of retail grocery stores.	MBIE
			2C	Monitor land banking by the major grocery retailers.	MBIE/New grocery regulator
	3	Require the major grocery retailers to consider requests for wholesale supply in good faith and meet associated disclosure obligations.	3A	Require the major grocery retailers to consider all requests for commercial wholesale supply in good faith.	MBIE
			3B	Require the major grocery retailers to put in place and disclose principles and terms and conditions of wholesale supply.	MBIE
			3C	<b>Establish a formal dispute resolution mechanism for wholesale supply disputes.</b>	MBIE



IN CONFIDENCE

Category	#	Commerce Commission Recommendation	#	Sub-recommendation	Implementing party
Recommendations to improve conditions for entry and expansion at the grocery wholesale and retail level (continued)	4	The next reviews of the Overseas Investment Act and Sale and Supply of Alcohol Act should consider whether they unduly impede entry or expansion by grocery retailers.	4A	The next review of the Overseas Investment Act should consider its impacts on grocery sector competition.	Treasury, Land Information New Zealand
			4B	The next review of the Sale and Supply of Alcohol Act should consider its impacts on grocery sector competition.	Ministry of Justice
	5	Monitor strategic conduct that affects the conditions of entry or expansion.	5A	Monitor the use of best price clauses.	MBIE/New grocery regulator
			5B	Monitor the use of exclusive supply agreements.	MBIE/New grocery regulator
	Recommendations to improve competition for the acquisition of groceries (i.e., the relationship with suppliers)	6	Introduce a mandatory grocery code of conduct to govern relationships between the major grocery retailers and their suppliers.	6A	Supply relationships should be subject to an overarching principle of good faith.
6B				A grocery code of conduct should include provisions to improve the transparency of supply agreements.	MBIE
6C				A grocery code of conduct should prohibit or limit a range of conduct.	MBIE
6D				Establish a formal dispute resolution mechanism for grocery code of conduct disputes.	MBIE
7		Consider a statutory authorisation or exception for collective bargaining by grocery suppliers.	MBIE		
8		Amend the Fair Trading Act to strengthen the business-to-business unfair contract terms regime.	8A	Allow private action in respect of unfair contract terms.	MBIE
			8B	Simplify the mechanism for imposing penalties and other remedies in relation to the use of unfair contract terms.	MBIE
			8C	Consider raising the transaction value cap for unfair contract terms.	MBIE

IN CONFIDENCE



IN CONFIDENCE

Category	#	Commerce Commission Recommendation	#	Sub-recommendation	Implementing party
Recommendations to improve the ability of consumers to make informed decisions	9	The major grocery retailers should ensure their pricing and promotional practices are simple and easy to understand.			Major grocery retailers
	10	Mandate the consistent display of unit pricing.			MBIE
	11	The major grocery retailers should ensure disclosure relating to loyalty programmes and data collection and use practices is clear and transparent.	11A	The major grocery retailers should ensure disclosure of loyalty programme terms and conditions is clear and transparent.	Major grocery retailers
			11B	The major grocery retailers should ensure disclosure of consumer data collection and use practices is clear and transparent.	Major grocery retailers
	12	The major grocery retailers should cooperate with price comparison services.			Major grocery retailers
Institutional arrangements	13	Establish a grocery regulator and dispute resolution scheme.	13A	Establish a grocery sector regulator.	MBIE
			13B	Establish a dispute resolution scheme.	MBIE
Monitoring and review	14	Review the state of competition in the grocery sector three years after implementation of the recommended regime and collect information in the interim to support this review.	14A	Undertake a further review of competition three years after implementation of the recommended regime.	MBIE/New grocery regulator
			14B	Collect information to support a further review of competition.	MBIE

**Appendix B: Application of regime by business type**

<b>Business type</b>	<b>Who benefits from the restrictive covenants and exclusivity in leases that would be prohibited</b>	<b>Development/operation of stores may not be impeded by such covenants or leases</b>	<b>Rationale</b>
Major grocery retailers including Foodstuffs and Woolworths NZ	✓	✓	Major grocery stores are prohibited from using their scale to prevent competitors using land/stores
Other grocery retailers that are designated by Order in Council	✓	✓	Other retailers would only be designated if the prospect of them pursuing similar covenants threatens availability of sites to competitors.
Small grocery stores who are not affiliated with the major grocery retailers, including dairies, ethnic grocery stores, organic grocery stores and smaller grocery chains and not designated by Order in Council	✗	✓	Smaller competitors are not having a substantial impact on competition through such covenants, but their potential expansion is affected.
New grocery sector retailers (entrants) that are not designated by Order in Council	✗	✓	These stores sell categories of goods listed in the Bill as “retail groceries” but are not currently holding significant market power in the grocery retail sector. On that basis, it is not necessary to prohibit them from creating covenants. This Bill will remove a barrier to their expansion, which will contribute to improving competition in this sector.
Specialist grocery retail, such as butchers, bakers, greengrocers and fishmongers	✗	✓	
Bulk dry foods suppliers	✗	✓	
Petrol Stations with convenience stores	✗	✓	
Pharmacies	✗	✓	
Department stores with some grocery offerings, such as The Warehouse	✗	✓	
Department stores who may sell some products found in supermarkets, such as beauty products, but not goods listed in the Bill as ‘grocery retail products’, for example, Farmers	✗	✗	
Pet stores	✗	✗	These stores sell some products found in supermarkets, but not goods listed in the Bill as ‘grocery retail products’. They are not likely to contribute to greater competition in the grocery sector, and so are not in scope.
Liquor retailers	✗	✗	There is already a strong regulatory regime in place to manage the location and nature of

**IN CONFIDENCE**

			the sale of alcohol. It's not necessary or desirable to add additional layers to that.
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