



COVERSHEET

Minister	Hon Dr David Clark	Portfolio	Commerce and Consumer Affairs
Title of Cabinet paper	Grocery sector regulator, dispute resolution approach and monitoring and enforcement framework	Date to be published	26 July 2022

List of documents that have been proactively released

Date	Title	Author
July 2022	Grocery sector regulator, dispute resolution approach and monitoring and enforcement framework	Office of the Minister of Commerce and Consumer Affairs
July 2022	Regulatory Impact Statement Addendum: Grocery sector regulator and dispute resolution scheme	<i>MBIE</i>
4 July 2022	CAB-22-MIN-0259 Minute	Cabinet Office

Information redacted

YES

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Some information has been withheld for the reasons of confidential advice to government.

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Office of the Minister of Commerce and Consumer Affairs

Chair, Cabinet

Grocery sector regulator, dispute resolution approach and monitoring and enforcement framework

Proposal

1. This paper seeks agreement to:
 - 1.1. appoint the Commerce Commission, led by a Grocery Commissioner, as the grocery sector regulator;
 - 1.2. establish dispute resolution arrangements in the Bill; and
 - 1.3. the monitoring and enforcement framework to be set out in the Grocery Industry Competition Bill.

Relation to government priorities

2. This paper relates to the priority of supporting New Zealanders in response to increasing costs of living (including grocery prices) by improving competition in the grocery sector. More workable competition in the grocery sector ultimately benefits New Zealand consumers by contributing to lower grocery prices, better quality products, increased innovation, a wider grocery product range and better service.

Executive Summary

3. The Commerce Commission's (the Commission) market study into the retail grocery sector recommended:
 - 3.1. establishing a grocery sector regulator to provide general oversight of the retail grocery sector and monitoring and reporting on its performance; and
 - 3.2. establishing a dispute resolution scheme to address disputes relating to the Grocery Code of Conduct and wholesale access.
4. On 23 May 2022, Cabinet agreed to these recommendations and that the Commission would act as an interim grocery sector regulator [CAB-22-MIN-0186 refers]. Work has since been undertaken to determine which agency would take the regulator role on an ongoing basis, and to consider dispute resolution options.
5. I propose to appoint the Commission as the grocery sector regulator on an ongoing basis. The Commission would have responsibilities under the Grocery Industry Competition Bill (the Bill) for oversight and monitoring of the sector and to undertake several monitoring, reporting and enforcement roles. A Grocery Commissioner will be appointed in the Commission to lead this role (acting alone or with other Commissioners). I am seeking funding for the Commission to implement and

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undertake the roles of the grocery sector regulator in 2022/23. I will bring decisions on funding from 2023/24 back to Cabinet later in 2022 along with decisions on potential cost recovery of certain functions.

6. I also propose that the Bill provide dispute resolution arrangements Confidential advice to Government

7. I am also seeking agreement to a suite of monitoring and enforcement tools (including penalties and remedies) for the Commission to be included in the Bill.

8. The decisions sought in this paper will enable drafting of related provisions in the Grocery Industry Competition Bill by Parliamentary Counsel Office (PCO).

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Background

9. On 8 March 2022, the Commission released its final report on competition in New Zealand's retail grocery sector. The Commission found that competition is not working well for consumers. The Commission made 14 recommendations, 12 of which have been accepted by the Government. On 23 May 2022, the Government agreed to [CAB-22-MIN-0186 refers]:

9.1. establish a grocery sector regulator and one or more dispute resolution schemes in the Grocery Industry Competition Bill (recommendation 13); and

9.2. appoint the Commission as interim grocery sector regulator while the permanent grocery sector regulator is established.

10. I have since written to the Commission asking them to prepare to undertake the interim grocery sector role. I am now seeking Cabinet decisions to confirm the Commission as grocery sector regulator on an ongoing basis.

11. Officials have also continued work to examine potential dispute resolution models for inclusion in the Bill, and the potential monitoring and enforcement tools needed to underpin the Bill.

Grocery sector regulator

12. The Commission recommended that a grocery sector regulator be established to provide general oversight of the retail grocery sector and monitoring and reporting – both publicly and to government – on its performance. Currently, the Commission's competition and fair trading regimes apply to the retail grocery sector, though there is no *specific* grocery sector oversight role in any Crown agency.

13. The market study's focus on the retail grocery sector has already had a positive impact on competition in the sector by bringing a focus to competition issues in the sector. Establishing a grocery sector regulator will ensure an ongoing focus is held on issues in the sector and can ensure the benefits of the market study and its recommendations are long lasting.

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Objective of the grocery sector regulator

14. The objective of the grocery sector regulator role would be to support competition, fair trading and transparency in the grocery sector for the long-term benefit of consumers. The roles, functions and powers of the regulator will align with and support this objective.

Options considered

15. Three options have been analysed for establishing the grocery sector regulator:
 - 15.1. **Option 1: a dedicated business unit within the Ministry of Business, Innovation and Employment (MBIE) with statutory functions.** This is similar to the United Kingdom Groceries Code Adjudicator, which is a unit located in the Department for Business, Energy and Industrial Strategy. This option builds on MBIE's experience with dispute resolution, regulatory enforcement, consumer protection and research and evaluation.
 - 15.2. **Option 2: the Commission as permanent grocery sector regulator.** This leverages and builds on the interim regulator role that the Commission has already been provided by Cabinet. This option aligns with the Commission's well-established sector monitoring and enforcement roles, and expertise in competition, fair trading and consumer protection.
 - 15.3. **Option 3: a newly-established independent Crown entity.** This option involves establishing a new independent entity with a dedicated focus on the grocery sector.
16. Based on analysis by officials¹, I have ruled out Option 1. I consider the grocery sector regulator is best situated in an entity with 'arm's length' from Government. Situating a specific grocery regulator role in MBIE may also result in a 'siloed' approach to grocery sector competition regulation, where MBIE holds specific competition responsibility for the grocery sector outside of the Commission's broader competition focus. I have also ruled out Option 3 as this option is higher cost and the longer implementation timeframes for establishing a new entity do not align with the fast pace of the reforms.
17. Option 2 allows establishment of the grocery sector regulator to occur reasonably quickly by establishing the role within an existing agency. The Commission, as an independent Crown entity, also has an appropriate amount of independence to undertake the regulation and enforcement roles envisaged. The Commission can also draw on its knowledge of economic and competition regulation, fair trading, consumer protection and the grocery sector itself. There is also precedent in the Commission undertaking sector-specific roles, such as for telecommunications.

¹ MBIE officials have considered machinery of government guidance from Te Kawa Mataaho Public Service Commission in undertaking this analysis.

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Recommended option: the Commerce Commission as grocery sector regulator

18. I propose that the Commission be appointed as the grocery sector regulator on an ongoing basis. Appointing the Commission as regulator is a strong option when considering the strategic fit within the system and sector, and particularly the competition regulatory system. Making the Commission the grocery sector regulator draws on its existing wider regulatory functions and strong existing knowledge of competition regulation, fair trading, consumer protection, and the retail grocery sector itself.
19. This option also aligns with Public Sector Commission guidance that if an agency exists that can take on the functions and roles being considered, then it should be used instead of establishing a new agency to undertake a similar role. Providing the Commission with sector-specific functions has precedent. Examples include fuel industry regulation and regulation of the retail payment system.
20. The Commission has also already been appointed as the interim grocery sector regulator. This option also avoids the potential inefficiency of the Commission securing resources to deliver the role on only a short term basis before then needing to either wind down or transition these resources to a new entity (as would be the case under Option 1 or 3). The Commission's status as an independent Crown entity ensures that functions can be undertaken with appropriate independence.
21. In terms of profile and sector focus, I acknowledge that the grocery sector regulator role will be one of several roles the Commission undertakes. I propose that a Grocery Commissioner be appointed within the Commission. The Commission already has a Telecommunications Commissioner with a similar sector-specific focus on telecommunications regulation and this is working effectively to lift the profile and priority of work in this sector. I propose that the Bill should similarly establish the Grocery Commissioner and its associated role.

Roles, functions and powers of the Commission as grocery sector regulator

22. The role of the Commission as grocery sector regulator would be to oversee and monitor the retail grocery sector. The functions and powers of the Commission as grocery sector regulator, to be established in the Bill, will be to:
 - 22.1. promote the confident and informed participation of suppliers, grocery retailers and consumers in grocery markets, including through:
 - 22.1.1. the dissemination of information and guidance to sector participants; and
 - 22.1.2. cooperation with other domestic agencies with an interest in the sector (e.g. the dispute resolution schemes).
 - 22.2. monitor compliance with and investigate conduct that constitutes or may constitute a contravention or involvement in a contravention of the obligations

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under the new regime, including in relation to the Grocery Code of Conduct and obligations under the quasi-regulatory² and regulatory wholesale grocery access regimes;

- 22.3. take a range of enforcement actions, including issuing warnings, accepting undertakings, issuing stop or direction orders, applying to the court for pecuniary penalties, injunctions, or other orders, and seeking compensation or damages on behalf of parties (as outlined in this paper below);
 - 22.4. monitor, conduct studies, other enquires or reviews into any matter relating to the operation of grocery markets and the performance of this regime, including in relation to the Grocery Code of Conduct, wholesale grocery supply, retailers' pricing and loyalty programme terms and conditions, land banking or any other anticompetitive interests, use of best price clauses and exclusive supply agreements, and grocery supplier margins over time and compare these to benchmarks and international comparisons;
 - 22.5. inquire and make recommendations to the Minister as required on whether to designate any grocery retailer generally or specifically under the regulated wholesale grocery access regime (including whether to deregulate any designated grocery retailer);³
 - 22.6. inquire, set and review requirements or determinations for:
 - 22.6.1. how any designated grocery retailer should be regulated for wholesale grocery access;
 - 22.6.2. what recordkeeping and information disclosure requirements should apply to specified participants in the grocery sector;
 - 22.7. prepare and publish reports, summaries and information from time to time on the performance of the grocery sector, including an annual 'state of competition' report to government on competition in the grocery sector.
23. The Bill will provide these functions and powers to the Grocery Commissioner (acting alone or with two other Commissioners for specified matters) and provide that the Governor General, on the recommendation of the Minister of Commerce and Consumer Affairs, may appoint a Grocery Commissioner who is also a member of the Commission.
 24. In situations where no Grocery Commissioner is appointed or the Grocery Commissioner is unavailable, the Chair of the Commission may appoint a member of the Commission to carry out these functions. MBIE will work with the Commission to define the detail of the Grocery Commissioner's role and functions during the drafting process.

² The quasi-regulatory regime involves major grocery retailers offering wholesale access voluntarily, but subject to certain regulatory requirements relating to good faith, and information disclosure.

³ Noting that the detail of the regulatory regime is still being confirmed.

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25. While the Commission must act independently in carrying out these functions, I propose that I, as the responsible Minister, may convey statements of economic policies of Government to the Commission to which it must have regard. This is in line with section 26 of the Commerce Act 1986. This will enable the Commission to consider wider economic policies of the Government in a transparent manner.

Other establishment arrangements

26. In terms of other establishment matters, the Commission would be:
- 26.1. required to report on the performance of its grocery sector regulator role and functions as part of its Crown entity performance reporting obligations under the Crown Entities Act 2004;
 - 26.2. accountable for the performance of grocery industry regulatory functions to the Minister of Commerce and Consumer Affairs via existing accountability and reporting processes.

27.

Free and frank opinions

Dispute resolution

28. Cabinet agreed to establish a dispute resolution scheme (or schemes) to determine disputes relating to both the Code of Conduct and commercial wholesale supply arrangements. The proposed approach for dispute resolution in the Bill is set out below.
29. The dispute resolution scheme I propose will not prevent parties from voluntarily engaging in dispute resolution on a commercial basis. I also expect the regulator to create a way for suppliers or access seekers to make complaints confidentially if they want to raise issues but do not want to engage in dispute resolution due to commercial sensitivities or concerns about retaliation.

Proposed dispute resolution framework

30. My proposed dispute resolution schemes will cater to the needs of the parties that are most likely to have issues that they cannot resolve. Confidential advice to Government
31. The dispute resolution scheme will be able to address a range of different disputes from relatively simple disputes about a single issue to more complex disputes, which could potentially involve large retailers seeking wholesale access. The key parts of my preferred option includes the following components:

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Implementation of the dispute resolution scheme

37. The schemes will be required to collect data and information about disputes for continuous improvement of services and systems analysis. Information sharing between the scheme and the Commission will be provided for to ensure that insights from the sector inform the Commission's monitoring and enforcement functions. This information sharing regime will be subject to the Privacy Act 2020.

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39. Based on engagement with the Government Centre for Dispute Resolution, officials consider that the dispute resolution framework above is an effective and viable approach to dispute resolution, and that the market can likely provide the [REDACTED] Confidential advice to Government However, this will be further tested during legislative design and the Code of Conduct consultation (discussed below).

Other matters

40. The dispute resolution scheme for the Code of Conduct is being consulted on through July 2022, with decisions to be made on the detailed content of the Code in October 2022. Cabinet Economic Development Committee approved the release of a consultation document on the Code on 29 June 2022 [DEV-22-MIN-0149 refers].

41. This timing overlap is unavoidable due to the need to advance policy decisions for legislation at pace. I am addressing the timing overlap by ensuring the dispute resolution scheme outlined above is flexible enough to cater to the dispute resolution approaches being considered in the options for the Code of Conduct consultation.

42. To ensure the insights from consultation can be reflected in policy decisions, I am seeking delegated authority from Cabinet to make further decisions adjusting the dispute resolution scheme for the Code of Conduct to respond to relevant feedback from public consultation. I will report back on any changes to Cabinet when seeking approval to introduce the Bill to Parliament.

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Information gathering and disclosure tools

43. The Commission will need information gathering powers to undertake the roles and functions of grocery sector regulator. I propose that the Commission be provided with the information gathering and associated provisions of the Commerce Act to support it in undertaking these roles and functions, including:
 - 43.1. section 98 (Commission may require person to supply information or documents or give evidence);
 - 43.2. sections 98A and 98G (Commission's powers of search and seizure);
 - 43.3. section 99 (powers of Commission to take evidence);
 - 43.4. sections 99B to 99P (which relate to assistance to overseas regulators);
 - 43.5. section 100 (powers of Commission to prohibit disclosure of information, documents, and evidence);
 - 43.6. section 53ZD (powers of Commission under Part 4) modified as necessary for the monitoring and regulatory functions in this Bill; and
 - 43.7. section 106 (proceedings privileged).
44. I also propose that an offence similar to section 103 of the Commerce Act should apply in relation to contravention of any demands or orders made by the Commission. This would result in liability for contraventions:
 - 44.1. in the case of an individual, a fine not exceeding \$100,000; and
 - 44.2. in any other case, a fine not exceeding \$300,000.

Recordkeeping and information disclosure requirements

45. The Commission may also need to set detailed recordkeeping and information disclosure requirements to require industry participants to collect and disclose information to inform the Commission's roles. The nature of this information is likely to be technical and the Commission is best placed to determine the information requirements it needs to inform its functions.
46. I propose that the Bill include a delegated power to enable the Commission to set specific requirements for major grocery industry participants relating to the collection and disclosure of information for the purposes of undertaking its regulatory functions. These requirements would relate to commercial information and would not override requirements under the Privacy Act 2020. There would be safeguards such as any requirements relating to a class of persons being subject to publication and disallowance in the same way as secondary legislation, and the Commission being required to consult before setting the requirements. Similar provisions apply in the Retail Payment System Act 2022.

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Penalties and remedies

47. I propose that the Bill include a flexible and graduated suite of penalties and remedies to support appropriate enforcement of the Bill. I intend to draw on other legislation in providing these tools to the Commission – such as the Commerce Act 1986 and Retail Payment System Act 2022.
48. A summary of these penalties and remedies is set out at Annex Two.

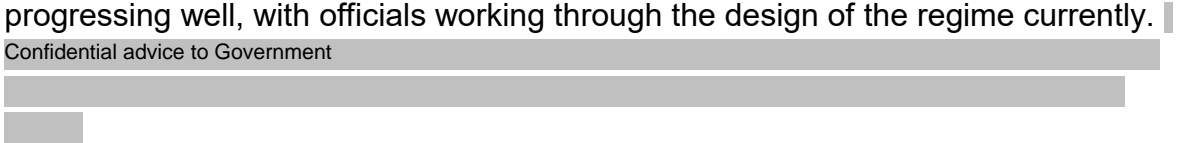
Pecuniary Penalties

49. Breaches of the Code of Conduct could result in significant negative commercial outcomes for parties to the Code, such as suppliers. In addition, the mandatory application of the Code to major grocery retailers and their suppliers necessitates appropriate enforcement tools to ensure compliance with its provisions.
50. I propose that the Bill include pecuniary penalties for breaches of the Grocery Code of Conduct in line with section 80 of the Commerce Act where the amount of any pecuniary penalty must not, in respect of each omission, exceed:
 - 50.1. in the case of an individual, \$500,000; or
 - 50.2. in any other case, the greater of the following:
 - 50.2.1. \$10 million; or
 - 50.2.2. either —
 - 50.2.2.1. if it can be readily ascertained and if the court is satisfied that the contravention occurred in the course of producing a commercial gain, three times the value of any commercial gain resulting from the contravention; or
 - 50.2.2.2. if the commercial gain cannot readily be ascertained, 10% of the turnover of the person and all its interconnected bodies corporate (if any) in each accounting period in which the contravention occurred.
51. The effectiveness of the proposed recordkeeping and disclosure requirements rely on there being appropriate tools to enforce them. I propose that pecuniary penalties are provided for breaches of the recordkeeping and information disclosure requirements discussed in paragraphs 45 and 46. These would be set in line with section 86 of the Commerce Act where pecuniary penalties for contravening information disclosure requirements must not, in respect of each act or omission, exceed \$500,000 in the case of an individual or \$5,000,000 in any other case.
52. Decisions on the detailed tiers for how specific pecuniary penalties above may apply to specific provisions will be addressed as part of drafting. I will confirm these when I return to Cabinet with the draft Bill in October. I will report separately on the proposed pecuniary penalties for the quasi-regulatory wholesale grocery access regime and regulated wholesale grocery access regime, as discussed below.

Other penalties and remedies

- 53. I consider that the Commission as grocery sector regulator should be able to accept enforceable undertakings in connection with any matter relating to ensuring compliance with the provisions of the Bill and associated regulations. The process for accepting and enforcing undertakings should align with sections 74A to 74C of the Commerce Act 1986.
- 54. I also propose that the Bill provide for the Commission to be able to issue stop and direction orders, seek injunctions, issue warnings, seek compensation and damages, and for the Commission or private party to seek other orders of a court.

Regulatory wholesale access regime

- 55. Officials assure me that work on the regulatory wholesale access backstop is progressing well, with officials working through the design of the regime currently. 

Financial Implications

- 56. Decisions in this Cabinet paper have financial implications for the Crown. The Commission is not currently funded to undertake the grocery sector regulator role. Without additional funding, the Commission would need to reprioritise resources away from other functions (such as regulation of retail payments, consumer credit, or competition) and these would suffer as a result.

Estimated costs

- 57. The Commission has estimated the following costs of undertaking the grocery sector regulator functions set out in this paper – with the assumption that activities commence and scale up over 18 months. Assuming core regulatory functions come into force on 1 January 2023, the Commission has estimated:

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Proposed funding approach

59. The Commission needs funding to start implementing the regulator role as soon as possible. I also recognise that further work should be undertaken to confirm the estimated costs to the Commission once decisions like the detail of the regulatory wholesale access regime are confirmed. There may also be a case to explore cost recovery from certain sector participants.
60. I am seeking \$4.79 million for the Commission to implement and undertake the grocery sector regulator functions for 2022/23. This funding will allow the Commission to begin establishing and operating the necessary roles and functions. This funding would be met from the Between-Budget Contingency. I will return to Cabinet later in 2022 to seek funding for the Commission from 2023/24 onwards and to seek decisions on potential cost recovery.
61. I also propose that a baseline review of the Commission's grocery sector regulator function (and other new market regulation functions) is undertaken three years after the Commission commences the regulator role. This will be informed by any work looking at how the Commission's functions are structured, as noted in paragraph 27.

Legislative Implications

62. Legislation is required to implement several of the proposals outlined in this paper.
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. Secondary legislation will implement certain matters. This Bill, and regulations made under this Bill, will bind the Crown.

Regulatory Impact Analysis

63. Regulatory Impact Analysis requirements apply to the policy proposals in this Cabinet paper. MBIE has previously prepared a Regulatory Impact Statement assessing the Commission's recommendations – *Government Response to the Commerce Commission Grocery Sector Market Study – Policy decisions*. MBIE has developed an addendum to its earlier RIS to consider options for the grocery sector regulator and dispute resolution scheme. This addendum is attached to this paper.
64. MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached *Regulatory Impact Statement Addendum: Grocery sector regulator and dispute resolution scheme*, as an addendum to the Regulatory Impact Statement *Government Response to the Commerce Commission Grocery Sector Market Study – Policy decisions*, both prepared by MBIE.
65. The Panel considers that the information and analysis summarised in the Regulatory Impact Statement Addendum **meets** the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

Climate Implications of Policy Assessment

66. The Ministry for the Environment 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.

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Population Implications

67. There are no specific 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 may spend a greater proportion of their incomes on groceries on average.
68. Changes will impact on Māori both as grocery suppliers and consumers. Māori have a strong role in grocery supply as primary producers and grocery suppliers. Changes to address imbalances between major grocery retailers and suppliers will benefit Māori producers in their negotiations and dealings with major grocery retailers. In addition, Māori whānau on average spend a higher proportion of their income on grocery products, so will benefit from the price benefits of increased competition.

Human Rights

69. The regime set out in this paper engages a number of human rights, including the right to be free from unreasonable search and seizure and freedom of expression. Consistency of the Bill with the New Zealand Bill of Rights Act 1990 will be further considered as the Bill is drafted, with a view to ensuring that any limits on rights are no more than can be demonstrably justified in a free and democratic society.

Consultation

70. The Treasury, Ministry of Justice, Commerce Commission, Ministry for Primary Industries, and Public Service Commission have been consulted on this paper. The Department of Prime Minister and Cabinet and Parliamentary Counsel Office have been informed.
71. MBIE officials will engage with the Legislative Design and Advisory Committee (LDAC) on detailed considerations for drafting the elements of the Bill relating to the regulator and dispute resolution.
72. Officials also engaged with the major grocery retailers, other grocery retailers, and supplier groups as part of testing policy proposals in this paper.

Communications

73. I intend to announce decisions on the grocery sector regulator, and the release of the Grocery Code of Conduct consultation paper, in the week of 4 July 2022.

Proactive Release

74. I propose to proactively release this Cabinet paper and minute within 30 business days, subject to any information withheld as appropriate under the Official Information Act 1982. This Cabinet paper and minute will be published on MBIE's website.

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Recommendations

The Minister of Commerce and Consumer Affairs recommends that Cabinet:

1. **note** that on 23 May 2022, Cabinet agreed to establish a grocery sector regulator and one or more dispute resolution schemes [CAB-22-MIN-0186 refers];
2. **agree** that the Commerce Commission be appointed as grocery sector regulator in the Grocery Industry Competition Bill;
3. **agree** that the Grocery Industry Competition Bill, and regulations, will bind the Crown;
4. **agree** that the Commerce Commission's powers and functions as grocery sector regulator be to:
 - 4.1. promote the confident and informed participation of suppliers, grocery retailers and consumers in grocery markets, including through:
 - 4.1.1. the dissemination of information and guidance to sector participants; and
 - 4.1.2. cooperation with other domestic agencies with an interest in the sector (e.g. the dispute resolution schemes).
 - 4.2. monitor compliance with and investigate conduct that constitutes or may constitute a contravention or involvement in a contravention of the obligations under the new regime, including in relation to the Grocery Code of Conduct and obligations under the quasi-regulatory and regulatory wholesale grocery access regimes;
 - 4.3. take a range of enforcement actions, including issuing warnings, accepting undertakings, issuing stop or direction orders, applying to the court for pecuniary penalties, injunctions, or other orders, and seeking compensation or damages on behalf of parties;
 - 4.4. monitor, conduct studies, other enquires or reviews into any matter relating to the operation of grocery markets and the performance of this regime, including in relation to the Grocery Code of Conduct, wholesale grocery supply, retailers' pricing and loyalty programme terms and conditions, land banking or any other anticompetitive interests, use of best price clauses and exclusive supply agreements, and grocery supplier margins over time and compare these to benchmarks and international comparisons;
 - 4.5. inquire and make recommendations to the Minister as required on whether to designate any grocery retailer generally or specifically for regulated wholesale grocery access (including whether to deregulate any designated grocery retailer);
 - 4.6. inquire, set and review requirements or determinations for:

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- 4.6.1. how any designated grocery retailer should be regulated for wholesale grocery access;
- 4.6.2. what recordkeeping and information disclosure requirements should apply to specified participants in the grocery sector;
- 4.7. prepare and publish reports, summaries and information from time to time on the performance of the grocery sector, including an annual report to government with annual 'state of competition' reports on competition in the retail grocery sector.
5. **agree** that the Commission administer the relevant provisions of the Grocery Industry Competition Bill as they relate to the functions set out in recommendation 4 above;
6. **agree** that the Commission must have regard to economic policies of the Government that may be transmitted in writing to it from time to time by the Minister responsible for the administration of the Act (the responsible Minister);
7. **agree** that the Commission report to the responsible Minister in relation to the performance of its grocery industry regulatory functions as part of its existing reporting obligations under the Crown Entities Act 2004;
8. **agree** that the Commission be accountable for the performance of grocery industry regulatory functions to the responsible Minister via existing accountability and reporting processes;
9. **agree** that a Grocery Commissioner role be established within the Commission, who will have authority to carry out the powers and functions of the Commission in recommendation 4, on their own or with two other members of the Commission to sit with the Grocery Commissioner for specified matters;
10. **agree** that a Grocery Commissioner be appointed by the Governor General on the recommendation of the Minister of Commerce and Consumer Affairs;
11. **agree** that, if for any reason there is no Grocery Commissioner or the Grocery Commissioner is unavailable, the Chair of the Commission may appoint a member of the Commission to carry out the Grocery Commissioner's functions;

Financial recommendations

12. **agree** to fund the Commerce Commission in undertaking the roles and functions set out at recommendation 4 above;

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13. **agree** to establish the following new appropriation:

Vote	Appropriation Minister	Title	Type	Scope
Vote Business, Science and Innovation	Minister of Commerce and Consumer Affairs	Grocery Sector Regulation	Non-Departmental Output Expense	This appropriation is limited to preparation and implementation of the grocery industry-specific competition regulatory regime.

14. **approve** the following changes to appropriations to give effect to the policy decisions in recommendation 12 above, with a corresponding impact on the operating balance:

Vote Business, Science and Innovation Minister of Commerce and Consumer Affairs	\$million – increase/(decrease)				
	2022/23	2023/24	2024/25	2025/26	2026/27 & Outyears
Non-Departmental Output Expense: Grocery Sector Regulation	4.790				
Total	4.790				

15. **agree** that the proposed change to appropriations for 2022/23 be included in the 2022/23 Supplementary Estimates and that, in the interim, the increase be met from Imprest Supply;
16. **agree** that the expenses incurred under recommendation 14 above be charged against the Between-Budget Contingency established as part of Budget 2022;
17. **agree** to provide the Minister of Commerce and Consumer Affairs and Minister of Finance with authority to approve the transfer forward to future years any underspend amounts set out in recommendation 14;
18. **agree** that decisions on funding for the Commerce Commission to undertake the roles and functions set out at recommendation 4 from 2023/24 onward will be sought at Cabinet later in 2022, along with decisions on cost recovery;
19. **agree** that a baseline review is undertaken for the Commission’s grocery regulation and other new market regulation functions as relevant three years after commencing the grocery sector regulator role;

Dispute resolution scheme

20. **agree** to create a dispute resolution scheme in the Bill to address disputes that

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21.

22. **agree** that appropriate provisions in the Bill will be created to allow for information sharing between the dispute resolution service provider and the regulator, including requirements around the confidentiality of information that is shared, and that this information sharing be subject to the Privacy Act 2020;

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28. Confidential advice to Government
29. **note** that the decision above in relation to dispute resolution for the Code of Conduct is being consulted on through July 2022, and that the decisions sought in this paper are flexible to accommodate all options for the Code of Conduct dispute resolution;

Information gathering and disclosure tools

30. **agree** that the Commission be provided with the information gathering and associated provisions of the Commerce Act, including:
- 30.1. section 98 (Commission may require person to supply information or documents or give evidence);
 - 30.2. sections 98A and 98G (Commission's powers of search and seizure);
 - 30.3. section 99 (powers of Commission to take evidence);
 - 30.4. sections 99B to 99P (which relate to assistance to overseas regulators);
 - 30.5. section 100 (powers of Commission to prohibit disclosure of information, documents, and evidence);
 - 30.6. section 53ZD (powers of Commission under Part 4) modified as necessary for the monitoring and regulatory functions in this Bill; and
 - 30.7. section 106 (proceedings privileged).
31. **agree** that an offence similar to section 103 of the Commerce Act apply for breaches of the provisions in recommendation 30;
32. **agree** that the Grocery Industry Competition Bill empower the Commission to set requirements on one or more classes of major grocery industry participants for recordkeeping and information disclosure to enable the Commission to perform its monitoring and reporting functions as grocery sector regulator;
33. **agree** that the recordkeeping and information disclosure requirements under recommendation 32 be subject to the following safeguards:
- 33.1. disallowance and publication requirements as secondary legislation;
 - 33.2. consultation on the proposed requirements with affected parties; and
 - 33.3. requirements must not override the Privacy Act 2020.

Penalties and remedies

34. **note** that Cabinet has agreed that the Grocery Industry Competition Bill will provide for civil penalties (including penalties based on percentage of turnover) and remedies (including injunctions, undertakings and damages) for failure to comply with the obligations imposed under the new regulatory regime [CAB-22-MIN-0186 refers];

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35. **agree** that the penalties and remedies set out in the table in Annex Two of this Cabinet paper be provided for in the Bill, with any further modifications consistent with the policy intent of this paper;

Other recommendations

36. **invite** the Minister of Commerce and Consumer Affairs to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above recommendations;
37. **authorise** the Minister of Commerce and Consumer Affairs to make additional policy decisions and minor or technical changes to the policy decisions in this paper, consistent with the general policy intent, on issues that arise in drafting and passage through the House;
38. **note** that this Cabinet paper and minute will be proactively released within 30 business days of final Cabinet decisions.

Authorised for lodgement

Hon Dr David Clark

Minister of Commerce and Consumer Affairs



IN CONFIDENCE

Annex Two: Penalties and remedies regime for inclusion in the Grocery Industry Competition Bill

Penalty or remedy	Description and area of application
Notices of corrective action	<p>If satisfied of non-compliance or likely non-compliance with the Grocery Code of Conduct, the Commission will be able to require, by written notice, the non-compliant party to take specified steps to remedy the non-compliance or ensure the non-compliance is not continued. The specific provisions of the Grocery Code of Conduct to which the notices would apply will be determined as part of drafting. Failure to comply with a notice is subject to a pecuniary penalty.</p> <p>This provision is in line with sections 35 and 41 of the Retail Payment System Act, but modified as necessary (such as to include 'likely non-compliance'). It will provide a timely and cost effective means to incentivise compliance for lower level contraventions of the Code.</p>
Restraining and performance injunctions	<p>The court, on the application of the Commission or any other party, may grant an injunction to:</p> <ul style="list-style-type: none"> - stop conduct a party is engaging in that is or would constitute a contravention of the Act or Grocery Code of Conduct; or - require a party to do an act or thing that they have refused or failed to do, where that refusal or failure is or would be a contravention of the Act or Grocery Code of Conduct. <p>These restraining and performance injunctions would be based on sections 47 to 51 of the Retail Payment System Act, with any necessary modifications.</p>
Interim or preliminary orders in relation to disputes	<p>In relation to the dispute resolution processes under the Grocery Code of Conduct, the Commission or dispute resolution expert will be able to make an interim or preliminary order, to:</p> <ul style="list-style-type: none"> - preserve the status quo while a dispute goes through resolution processes; or - stop conduct a party is engaging in to preserve the status quo while a dispute goes through the resolution process. <p>These provisions would be based on Chapter 4A of the Arbitration Act 1996, with any necessary modifications. The intention is that the orders would allow the Commission or dispute resolution expert to provide an interim position until the dispute is resolved (e.g. ensuring that the supplier is not cut off from supplying the supermarket in the interim). Given the need for timely and cost effective resolution of disputes, the alternative option of seeking injunctions from the court is likely to be impracticable.</p>
Undertakings	<p>The Commission will be able to accept undertakings in relation to any matter relating to enforcement under the Act or regulations. This regime is intended to be similar to the undertakings regime in the Commerce Act 1986, at sections 74A to 74C, setting out that the Commission may accept undertakings, the matters to be included, and enforcement of undertakings. This is a cost effective and timely means to resolve enforcement cases.</p>
Issue warnings and require their disclosure	<p>The Commission will be able to issue warnings relating to any matter relating to a relevant person, and may require its warning to be disclosed. This regime is intended to align with equivalent powers of the Financial Markets Authority to issue warnings to promote the confident and informed participation of persons in markets. Refer sections 9(1)(ii), 23, 49 to 51 of the Financial Markets Authority Act 2011. Failure to comply with a disclosure order would be an offence.</p>
Pecuniary penalties	<p>The court will be able to make orders, on application of the Commission, for pecuniary penalties for contraventions of the Grocery Code of Conduct, recordkeeping or information disclosure requirements set by the Commission, and notices of corrective action. Pecuniary penalties may be ordered for contravention of the obligations, for attempting to contravene the obligations, or otherwise being an accessory (refer section 80 of the Commerce Act).</p> <p>There would be at least three tiers of pecuniary penalties, drawing on similar pecuniary penalty regimes in the Commerce and Retail Payment System Acts. The application of these to particular obligations will be further refined as part of the drafting process.</p> <p>For most contraventions of the Grocery Code of Conduct, it is envisaged the amount of the pecuniary penalty must not, in respect of each act or omission, exceed,—</p> <p>(a) in the case of an individual, \$500,000; or</p> <p>(b) in any other case, the greater of the following:</p> <ul style="list-style-type: none"> (i) \$10 million; (ii) either,— <ul style="list-style-type: none"> (A) if it can be readily ascertained and if the court is satisfied that the contravention occurred in the course of producing a commercial gain, 3 times the value of any commercial gain resulting from the contravention; or (B) if the commercial gain cannot readily be ascertained, 10% of the turnover of the person and all its interconnected bodies corporate (if any) in each accounting period in which the contravention occurred. <p>For most contraventions of the recordkeeping and information disclosure requirements, it is envisaged the amount of the pecuniary penalty must not, in respect of each act or omission, exceed \$500,000 for an individual or \$5,000,000 in any other case. This is based on section 86A of the Commerce Act.</p> <p>For contraventions of the notices of corrective action, it is envisaged the amount of the pecuniary penalty must not, in respect of each act or omission, exceed</p>

IN CONFIDENCE

Penalty or remedy	Description and area of application
	\$10,000 for an individual or \$30,000 in any other case. This is based on section 41 of the Retail Payment System Act.
Compensation / damages	<p><i>Grocery Code of Conduct</i> The court may grant, on application of the any person, compensation or damages for failure to comply with Code (refer section 82 of the Commerce Act, modified as necessary). The Commission may seek damages/ compensation (on behalf of another party) in the course of an enforcement action before the court or as part of an enforceable undertaking.</p> <p><i>Dispute resolution</i> Compensation or damages can be sought for failure to comply with a binding dispute resolution (either agreement under mediation or determination under arbitration or adjudication). Commission may seek damages/ compensation (on behalf of another party) in the course of an enforcement action.</p>
Other orders of a Court	<p><i>Grocery Code of Conduct</i> The court may also grant, on application of the Commission or any person, an order requiring a contract that breaches the Code to be varied or cancelled. Refer section 89 of the Commerce Act 1986, with any necessary modifications.</p> <p><i>Recordkeeping and information disclosure requirements</i> The court may, on application of the Commission, issue an order to comply with the information disclosure requirements that apply to the party and specify the date by which (or period within which) the party must comply. This is in line with section 86A of the Commerce Act 1986.</p> <p><i>Dispute resolution</i> The Commission, or private party to a dispute, may seek an order from the court for a party to comply with a decision or direction from a dispute resolution scheme.</p>
Offences	<p><i>Breaches of information gathering powers</i> The Commission would be provided with a number of information-gathering powers under the Commerce Act to support it in undertaking its roles and functions (sections 98, 98A, 98G, 99, 99B to 99P, 100, 53ZD, 106). An offence for breaching these powers, similar to sections 100 and 103 of the Commerce Act, is proposed to be included in the Bill. This results in liability for contraventions of a fine:</p> <ul style="list-style-type: none"> - in the case of confidentiality orders (e.g. section 100) not exceeding \$4,000 for an individual or \$12,000 for any other case; or - in other cases, not exceeding \$100,000 for an individual or \$300,000 for any other case. <p><i>Breaches of disclosure orders for warnings</i> The offence for failure to comply with a Commission disclosure order for a warning would be aligned with section 51 of the Financial Markets Authority Act. This results in liability for contraventions of a fine not exceeding \$300,000.</p>