



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

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



Cabinet

Minute of Decision

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Grocery Sector Regulator, Dispute Resolution Approach and Monitoring and Enforcement Framework

Portfolio **Commerce and Consumer Affairs**

On 4 July 2022, Cabinet:

Background

1 **noted** that on 23 May 2022, Cabinet:

- 1.1 agreed to establish a grocery sector regulator and one or more dispute resolution schemes;
- 1.2 invited the Minister of Commerce and Consumer Affairs to report back seeking decisions on the detailed design of these proposals, for inclusion in the Grocery Industry Competition Bill (the Bill);

[CAB-22-MIN-0186]

Grocery sector regulator

- 2 **agreed** that the Commerce Commission be appointed as the grocery sector regulator;
- 3 **agreed** that the Bill and regulations will bind the Crown;
- 4 **agreed** 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;
 - 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:
 - 4.6.1 how any designated grocery retailer should be regulated for wholesale grocery access;
 - 4.6.2 what record-keeping 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 the government with annual 'state of competition' reports on competition in the retail grocery sector;
- 5 **agreed** that the Commerce Commission administer the relevant provisions of the Bill as they relate to the functions set out in paragraph 4 above;
- 6 **agreed** that the Commerce 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 **agreed** that the Commerce 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 **agreed** that the Commerce Commission be accountable for the performance of grocery industry regulatory functions to the responsible Minister via existing accountability and reporting processes;
- 9 **agreed** that a Grocery Commissioner role be established within the Commerce Commission, who will have authority to carry out the powers and functions of the Commission referred to in paragraph 4 above, on their own or with two other members of the Commission to sit with the Grocery Commissioner for specified matters;
- 10 **agreed** that a Grocery Commissioner be appointed by the Governor General on the recommendation of the Minister of Commerce and Consumer Affairs;

11 **agreed** that, if for any reason there is no Grocery Commissioner or the Grocery Commissioner is unavailable, the Chair of the Commerce Commission may appoint a member of the Commission to carry out the Grocery Commissioner’s functions;

Financial implications

12 **agreed** to fund the Commerce Commission in undertaking the roles and functions set out in paragraph 4 above;

13 **agreed** 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 **approved** the following changes to appropriations to give effect to the policy decision in paragraph 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 **agreed** that the change to appropriations for 2022/23 above be included in the 2022/23 Supplementary Estimates and that, in the interim, the increase be met from Imprest Supply;

16 **agreed** that the expenses incurred under paragraph 14 above be charged against the Between-Budget Contingency established as part of Budget 2022;

17 **authorised** the Minister of Finance and the Minister of Commerce and Consumer Affairs to approve the transfer forward to future years of any underspend amounts set out in paragraph 14 above;

18 **agreed** that decisions on funding for the Commerce Commission to undertake the roles and functions set out in paragraph 4 above from 2023/24 onward will be sought from Cabinet later in 2022, along with decisions on cost recovery;

19 **agreed** that a baseline review be undertaken for the Commerce Commission’s grocery regulation, and other new market regulation functions as relevant, three years after commencing the grocery sector regulator role;

resolution scheme

20 **agreed** to create a dispute resolution scheme in the Bill to address disputes

Confidential advice to Government



Confidential advice to Government

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22 **agreed** that appropriate provisions in the Bill 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;

23 Confidential advice to Government

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Confidential advice to Government



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29 **noted** that the above proposal relating to dispute resolution for the Code of Conduct is being consulted on through July 2022, and that the decisions sought in relation to the paper under CAB-22-SUB-0259 are flexible to accommodate all options for the Code of Conduct dispute resolution;

Information gathering and disclosure tools

- 30 **agreed** that the Commerce Commission be provided with the information gathering and associated provisions of the Commerce Act 1986, including:
- 30.1 section 98 (the Commission may require persons to supply information or documents or give evidence);
 - 30.2 sections 98A and 98G (the Commission's powers of search and seizure);
 - 30.3 section 99 (powers of the Commission to take evidence);
 - 30.4 sections 99B to 99P (relating to assistance to overseas regulators);
 - 30.5 section 100 (powers of the Commission to prohibit disclosure of information, documents, and evidence);
 - 30.6 section 53ZD (powers of the Commission under Part 4, modified as necessary for the monitoring and regulatory functions in the Bill);
 - 30.7 section 106 (proceedings are privileged);
- 31 **agreed** that an offence similar to section 103 of the Commerce Act apply for breaches of the provisions referred to in paragraph 30 above;
- 32 **agreed** that the Bill empower the Commerce Commission to set requirements on one or more classes of major grocery industry participants for record-keeping and information disclosure to enable the Commission to perform its monitoring and reporting functions as grocery sector regulator;
- 33 **agreed** that the record-keeping and information disclosure requirements under paragraph 32 above 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;
 - 33.3 requirements must not override the Privacy Act 2020;

Penalties and remedies

- 34 **noted** that Cabinet has agreed that the 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];
- 35 **agreed** that the penalties and remedies set out in the table in Annex Two of the paper under CAB-22-SUB-0259 be provided for in the Bill, with any further modifications consistent with the agreed policy;

Legislative implications

- 36 **invited** the Minister of Commerce and Consumer Affairs to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above proposals;

- 37 **authorised** the Minister of Commerce and Consumer Affairs to make additional policy decisions and minor or technical changes to the above proposals, consistent with the general policy intent, on issues that arise in drafting and passage through the House.

Rachel Hayward
Acting Secretary of the Cabinet