



COVERSHEET

Minister	Hon Dr Duncan Webb	Portfolio	Commerce and Consumer Affairs
Title of Cabinet paper	Grocery Industry Competition Bill: Approval for Introduction	Date to be published	1 June 2023

List of documents that have been proactively released

Date	Title	Author
November 2022	Grocery Industry Competition Bill: Approval for Introduction	Office of the Minister of Commerce and Consumer Affairs
10 November 2022	Grocery Industry Competition Bill: Approval for Introduction – Minute of Decision	Cabinet Office
2 November 2022	Post-implementation Review: Commerce (Grocery Sector Covenants) Amendment Bill	MBIE

Information redacted

YES / NO [select one]

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Some information has been withheld for the reasons of free and frank opinions, confidential advice to government and confidentiality.

In Confidence

Office of the Minister of Commerce and Consumer Affairs

Cabinet Legislation Committee

Grocery Industry Competition Bill: Approval for introduction

Proposal

- 1 I propose that the Grocery Industry Competition Bill, including the additional policy matters that have been addressed since Cabinet in August, be approved for introduction to the House (Part One).
- 2 I also report back to Cabinet on the supplementary analysis required for the recent policy decisions to remove covenants and clauses in leases that prevent the development of land for grocery retail or the development of grocery retail in existing shopping centres or malls (Part Two).

Part One: Grocery Industry Competition Bill: policy approval and approval for introduction

Policy

- 3 On 8 March 2022, the Commerce Commission's (**the Commission**) market study found that competition is not working well for consumers in the retail grocery sector. If competition was more effective, the major grocery retailers (the major grocery retailers are Foodstuffs North Island, Foodstuffs South Island, and Woolworths New Zealand) would face stronger pressures to deliver lower grocery prices, better quality and a greater range of grocery products and services to satisfy the diverse preferences of New Zealand consumers.
- 4 The Commission made recommendations that can be grouped into three broad categories:
 - 4.1 improving the conditions for entry and expansion in relation to access to sites or land for grocery retail and access to wholesale groceries;
 - 4.2 constraining the ability of the major grocery retailers to use their advantage in negotiating power to push costs and risks onto suppliers;
 - 4.3 improving consumers' ability to make informed decisions when they are buying groceries.
- 5 The Commission also recommended creating a new regulator and providing it with the necessary powers and functions to monitor the implementation of reforms in the three categories above.
- 6 The Government responded to the Commission's findings and made policy decisions to develop a Grocery Industry Competition Bill (**the Bill**) in May,

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July and August, for introduction to Parliament in 2022 [CAB-22-MIN-0186, CAB-22-MIN-0259, and CAB-22-MIN-0303 refer]. The Bill will:

- 6.1 establish a new Grocery Commissioner within the Commission to regulate the grocery industry. The Grocery Commissioner will have the necessary powers and functions to monitor the state of competition and enforce compliance with the Bill, and may impose additional regulatory obligations on those within the regime (particularly in relation to some parts of the wholesale backstop regime and information disclosure);
 - 6.2 impose obligations on the major grocery retailers through the **wholesale supply regime** (comprising of the **quasi-regulatory regime** and the **wholesale backstop regime**) to incentivise them to create a commercial wholesale offering – and to give the Government the power to force wholesale supply if needed. Improving wholesale supply should improve the conditions in the market to enable new grocery retailers to enter the market, and encourage existing grocery retailers to expand their offerings, which will improve competition and benefit consumers;
 - 6.3 empower the creation of a Grocery Supply Code that the major grocery retailers will be required to comply with. The Grocery Supply Code will constrain retailers' ability to use their negotiating power advantage over their suppliers to force suppliers to accept unfavourable terms of supply that may involve them taking on costs and risks that are better addressed by the major grocery retailer;
 - 6.4 extend protections against the use of unfair contract terms in standard form small business contracts to a wider range of contracts between grocery retailers and suppliers to constrain the ability of the major grocery retailers to push costs and risks onto suppliers;
 - 6.5 establish a targeted collective bargaining exemption for certain suppliers, exempting them from obligations under Part 2 of the Commerce Act 1986, to allow them to collectively negotiate certain terms and conditions of supply with the major grocery retailers;
 - 6.6 provide for the approval of a dispute resolution scheme to address disputes that may arise between suppliers and the major grocery retailers or between wholesale customers and the major grocery retailers;
 - 6.7 enable the Commissioner to require information disclosure by participants in the industry (which includes major grocery retailers, other retailers such as wholesale customers, and suppliers) to improve transparency.
- 7 The Government has already passed legislation to improve access to sites or land for grocery retail by passing the Commerce (Grocery Sector Covenants) Amendment Act 2022. Further changes to improve access to sites will be

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considered as part of the planning reforms led by the Minister for the Environment.

- 8 Work is also underway to implement mandatory unit pricing to make it easier for consumers to make informed decisions. I expect to seek decisions from Cabinet before the end of 2022.

Overview of the Bill

Grocery Commissioner regulatory powers, including monitoring, compliance, and enforcement

- 9 The Bill provides for the appointment of a Grocery Commissioner within the Commission and provides the regulatory powers and functions to the Grocery Commissioner and Commission. A number of functions in the Bill may be carried out by the Grocery Commissioner alone, while others require collaboration with other Commissioners.
- 10 The regulatory powers and functions include monitoring powers similar to the Commerce Act 1986 and includes the ability to conduct inquiries into the state of competition in the grocery industry. The powers are broad, and are intended to ensure the Commission and Grocery Commissioner may investigate various aspects of the industry such as the retail grocery market (including consumer issues in the retail market), any wholesale market, and the supply market (including the margins of grocery retailers and suppliers over time).
- 11 The Bill also provides the Commission with enforcement powers, such as the ability to issue corrective notices and require warnings to be disclosed. A range of remedies may be sought from the court for failures to comply with the Bill, such as pecuniary penalties, orders to vary or cancel contracts and injunctions to stop certain conduct or require certain conduct to continue.
- 12 There are accountability and reporting obligations that align with the Commission's obligations as an Independent Crown Entity, as well as the specific obligation to report on competition in the industry annually.

Wholesale Supply of Groceries

- 13 The Bill develops a wholesale supply regime in two parts, with a purpose and principles that apply across the entire regime. The first part is the quasi-regulatory regime and the second part is the wholesale backstop regime.
- 14 Improving access to wholesale groceries should benefit consumers in the long term by giving them more choices when buying groceries from retailers that are competing to attract customers.
- 15 The principles of wholesale supply provide clarity of the Government's expectations for all participants in the wholesale market. They also guide the exercise of all regulatory functions in relation to both the quasi-regulatory regime, and the wholesale backstop regime.

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- 16 The quasi-regulatory regime is intended to support the development of commercial wholesale supply by the major grocery retailers with relatively light-touch regulatory obligations. Under the quasi-regulatory regime, the major grocery retailers must consider requests for wholesale supply in good faith; establish and apply rules, criteria, and procedures for considering wholesale supply requests; develop standard terms and conditions and principles of wholesale supply; and not hinder or obstruct relationships between a wholesale customer and a supplier.
- 17 The wholesale backstop regime will provide additional regulatory tools, including the ability to require the major grocery retailers to supply wholesale customers. The wholesale backstop regime has an activation process with a statutory test that must be met before further regulation is imposed. There are four different regulatory tools that may be implemented.
- 18 The activation process involves an inquiry by the Commission, and requires consultation. The inquiry may be conducted as part of the Commission's annual reporting requirements.
- 19 The statutory test has two independent limbs:
 - 19.1 A series of time-limited statutory tests that are designed to be evaluated by the Commission at three, six, and twelve months after the Bill comes into force.
 - 19.2 An ongoing test that involves an evaluation of whether the wholesale offering is what would be expected in a workably competitive market, and whether additional regulation will benefit consumers in the long term.
- 20 If the first limb of the test (paragraph 19.1) is met then the Commission may, by determination, apply additional obligations on the major grocery retailers. The obligations available to the Commission are a Framework for range and price or the Wholesale Code.
- 21 If the second limb of the test (paragraph 19.2) is met, then any of the four tools may be activated. As above, the Commission may impose a Framework for range and price or the Wholesale Code. Alternatively, the Commission could recommend to the Minister that the major grocery retailers be required to supply their wholesale customers on regulated terms (which could include controls on prices or margins and on the quality of the wholesale offering and associated service).
- 22 The major grocery retailers may be required to supply their wholesale customers by Order in Council, on recommendation of the Minister. The Minister may only seek an Order in Council following an inquiry by the Commission. Any Order in Council would need to specify how the terms of supply will be controlled – either non-discriminatory terms or specified access terms – for the Commission to implement in detail.

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Supplier focused interventions: the Grocery Supply Code, Unfair Contract Terms and Collective Bargaining

- 23 The Bill aims to constrain the ability of the major grocery retailers to push costs and risks onto suppliers in three ways: by empowering the development of a Grocery Supply Code, by creating a collective bargaining exemption for certain grocery suppliers, and by extending small business unfair contract terms protections to more grocery supply contracts.
- 24 Improving the balance of negotiating power between suppliers and retailers should benefit consumers in the long term. Stopping the practice of pushing costs and risks onto suppliers that would be more efficiently borne by retailers should improve efficiency in the market. A more balanced negotiating field should also result in more ability for suppliers to invest and innovate, as well as clearer price signals to suppliers (and retailers) that should guide investment and innovation decisions to cater to consumer preferences. This should improve productivity and better allow suppliers to bring new products to market that better meet the needs of consumers.
- 25 These additional protections should not reverse the current situation and give suppliers an advantage over retailers in negotiations, which could reduce the benefits to consumers in the long term.
- 26 The Bill includes empowering provisions so that a Grocery Supply Code can be prescribed as secondary legislation. The current major grocery retailers will be required to comply with the Code. A mechanism is provided to expand the Grocery Supply Code to other grocery retailers when they are likely to develop some form of negotiating power advantage over their suppliers (refer to paragraphs 54-57).
- 27 I expect that the Grocery Supply Code will focus on procedural elements of the trading relationship, similar to the Australian and United Kingdom examples, to manage the specific risk areas identified by the Commission's market study. It is intended to avoid substantive issues (like controlling prices) as regulating these may reduce the ability of the major grocery retailers to negotiate firmly and fairly to provide the grocery offering to consumers.
- 28 The collective bargaining exemption would exempt certain suppliers from prohibitions in Part 2 of the Commerce Act 1986 for the purpose of negotiating certain terms and conditions of supply with a major grocery retailer. Regulations would be used to manage the scope of the collective bargaining exemption, as agreed by Cabinet [CAB-22-MIN-0259 refers]. Smaller suppliers negotiating collectively with grocery retailers has the potential to reduce bargaining costs and result in more efficient contractual outcomes.
- 29 Extending protections against the use of unfair contract terms in standard form small business contracts to more grocery suppliers involves an amendment to the Fair Trading Act 1986. A new type of contract – a grocery supply contract – is defined to limit the additional protections to grocery suppliers. There is also a change to the enforcement mechanism of the unfair contract terms whereby a grocery supplier is able to apply to the court for a

declaration that a term in a grocery supply contract is unfair. The current default is that only the Commission can take action against unfair-contract terms.

Dispute resolution

- 30 The Bill includes provisions to appoint a dispute resolution scheme. The Bill sets out the jurisdiction of the dispute resolution scheme and requires the major grocery retailers to comply with the scheme.
- 31 The scheme may hear disputes from suppliers (to the major grocery retailers) or wholesale customers (of the major grocery retailers) and is able to employ dispute resolution tools as provided by the scheme rules.
- 32 The Bill provides for both consensual dispute resolution processes that result in settlement agreements and determinative processes (like adjudication) that result in a binding determination. Binding determinations may not exceed \$5 million in financial value, to align with the Australian Grocery Code.
- 33 The Bill allows participants to appeal binding determinations on points of law.
- 34 The Minister of Commerce and Consumer Affairs may appoint the dispute resolution scheme and must approve the scheme rules. Requirements for the scheme rules are set out a schedule to the Bill.

Information disclosure powers

- 35 The Bill creates broad information disclosure powers. The Commission may create information disclosure standards and then require any participants in the industry to comply with those standards. This includes grocery retailers, wholesale customers, and suppliers.
- 36 Information disclosure standards may require the certification of info disclosed to the Commission (for example it could require director certification on forms), set requirements relating to record keeping, and require the retention of information.
- 37 While it is not expected that personal information will be required to be disclosed, the Privacy Act will apply and therefore adequate privacy protections will be in place.

Changes in policy intent since Cabinet

- 38 Cabinet provided a relatively broad authorisation for the Minister of Commerce and Consumer Affairs to make minor and technical policy decisions, and decisions consistent with the general policy intent, as these issues arise during drafting [CAB-22-MIN-0186, CAB-22-MIN-0259, and CAB-22-MIN-0303 refer].
- 39 However, there are two matters that have arisen in drafting that I want to draw to Cabinet's attention. In the interests of timeliness, these matters are already

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included in the Bill, subject to Cabinet approval. Refer to Annex One for a table of prior Cabinet decisions that these policy decisions rescind or modify.

Improving consistency of civil and criminal penalties

- 40 Cabinet agreed to a number of different civil and criminal penalties for the Bill, modelled on relevant legislation such as the Commerce Act 1986 [CAB-22-MIN-0186, CAB-22-MIN-0259, and CAB-22-MIN-0303 refer].
- 41 Subject to Cabinet approval, I recommend three changes to the penalties to improve consistency with the Legislation Guidelines 2021. These include:
- 41.1 rationalising the number of penalty levels (tiers) from eight to five to reduce complexity, while also ensuring the strongest deterrent (i.e., a high penalty) is consistently applied to the contraventions with the greatest risk of an impact on competition.
 - 41.2 adding a tier four penalty (up to \$30,000 for an individual and up to \$300,000 for a corporate) for a supplier failing to meet any requirements attached to the collective bargaining exemption, rather than making the supplier lose the benefit of the exemption and exposed to potential liability under section 27 and/or 30 of the Commerce Act [CAB-22-MIN-0303, recommendation 31 refers];
 - 41.3 removing the daily penalties that Cabinet agreed to for the wholesale access regime [CAB-22-MIN-0303 refers]. Daily penalties are not necessary to provide a strong deterrent to encourage compliance by the major grocery retailers. I note in removing the daily penalties that the courts will be able to impose a meaningful penalty in the event of non-compliance on the basis of the pecuniary penalties that are the highest of \$10 million, 3 times the commercial gain, or 10% of the turnover.
- 42 Subject to Cabinet approval, I recommend a power to allow the penalty tier for non-compliance with the Grocery Supply Code and the Wholesale Code in the Wholesale backstop regime to be set (and varied) by Order in Council, with appropriate safeguards. This is necessary because the scope of these Codes is broad and therefore the correct deterrent cannot be accurately determined in advance.
- 43 My decision to allow flexibility for the Grocery Supply Code and Wholesale Code is pragmatic and still provides a high level of certainty for regulated parties. This approach is similar to that in the Financial Markets Conduct Act 2013, and is generally supported by LDAC (refer to paragraph 76.1).

Dispute resolution – detail of processes to be in scheme rules and jurisdiction changes

- 44 Cabinet agreed to develop a dispute resolution scheme envisaging that the detail of the process would be in primary legislation, with a jurisdiction limited to disputes arising from the Grocery Supply Code or in relation to wholesale supply [CAB-22-MIN-0259 refers].

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- 45 Subject to Cabinet approval, I have decided that the scheme will be most effective over the long-term if:
- 45.1 Primary legislation is only used to create the minimum necessary framework and the details of the dispute resolution scheme – particularly the envisaged ‘adjudication’ pathway – are set out in scheme rules to be approved by the Minister of Commerce and Consumer Affairs; and
 - 45.2 The dispute resolution scheme will have jurisdiction to consider disputes raised by a supplier or wholesale customer, and an ability to adjust the jurisdiction by regulations, if needed.
 - 45.3 I have clarified that any binding determinations made by the dispute resolution scheme may not exceed \$5 million in financial value. These determinations may be appealed on points of law by either party to the dispute. This is broadly in keeping with the policy intent agreed by Cabinet [CAB-22-MIN-0259 refers].
- 46 The decisions above ensure the design of the dispute resolution scheme caters to the needs of suppliers and wholesale customers, in particular suppliers, that may otherwise face barriers to accessing justice due to the imbalance in negotiating power with the major grocery retailers.
- 47 The Bill provides for a single dispute resolution scheme to be appointed by the Minister of Commerce and Consumer Affairs and requires the major grocery retailers to comply with any scheme that is appointed. The back-up option is for the Ministry of Business, Innovation and Employment to run the scheme.
- 48 I am aware that the \$5 million financial value threshold is high for a dispute resolution scheme and may raise natural justice issues. However, my approach generally aligns with that of the Australian Grocery Code dispute resolution threshold of AUD\$5 million. I note that Woolworths Australia (the owner of Woolworths NZ) is a signatory of the Australian Grocery Code.
- 49 I have sought to mitigate some of these natural justice issues by providing appeal rights for the major grocery retailers to appeal a determination they are not satisfied with on a point of law. I look forward to submissions on this issue at Select Committee.
- 50 My approach prioritises the needs of suppliers and wholesale customers, and will give them a dispute resolution scheme that is efficient and effective, and able to hear and resolve their disputes in a timely and affordable way. It also reflects my concerns that the major grocery retailers’ financial size and capability means they have an advantage over most suppliers and wholesale customers if any issues escalate into disputes.

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Clarification of policy intent since Cabinet

- 51 There are three instances where I have clarified the policy intent agreed by Cabinet as part of drafting. In the interests of timeliness, these matters are already included in the Bill, subject to Cabinet approval. Refer to Annex One for a table of prior Cabinet decisions that these policy decisions rescind or modify.

Wholesale backstop regime

- 52 Cabinet agreed to the wholesale backstop regime including two tools that could be used to require the major grocery retailers to provide wholesale supply, and to regulate the terms of that supply. These tools would only be activated if the wholesale offerings of the major grocery retailers are not consistent with what would be expected in a workably competitive wholesale market and further regulation will benefit consumers [CAB-22-MIN-0303 refers].
- 53 I have clarified that both these tools are intended to focus primarily on opening-up the sale of wholesale groceries (effectively access regulation), and secondarily on setting the necessary terms and conditions of supply. Therefore, the two tools are to be called 'non-discriminatory terms' and 'specified access terms', with the latter being modelled on sub-part 2A of Part 2 of the Telecommunications Act 2001.

Grocery Supply Code – including a designation process in the Bill

- 54 Cabinet agreed that the Grocery Supply Code should be mandatory for the current major grocery retailers and there should be a power to make the Grocery Supply Code mandatory for designated retailers [CAB-22-MIN-0186 refers].
- 55 I am of the view that the policy intent is for a grocery retailer to comply with the Grocery Supply Code if it is of a size that they may have negotiating power over suppliers, similar to the major grocery retailers.
- 56 Therefore, I have included in the Bill a way to require any other grocery retailers to comply with the Grocery Supply Code in the future. The Commission may recommend a grocery retailer be required to comply with the Code if it has an annual grocery revenue over \$750 million, or if requiring compliance would promote competition in the industry.
- 57 An Order in Council is required to designate a grocery retailer and require them to comply with the Grocery Supply Code.

Providing appeals for administrative powers and disallowance of legislative powers

- 58 Cabinet agreed to create new statutory decision-making powers however did not consider whether there should be any appeal or review rights provided in relation to most of these powers [CAB-22-MIN-0186, CAB-22-MIN-0259, and CAB-22-MIN-0303 refer].

- 59 Most decision-making powers in relation to the Grocery Supply Code and the wholesale supply obligations are legislative and are therefore not subject to appeal rights.
- 60 I have clarified these powers will be subject to disallowance or appeal in keeping with the Legislation Guidelines 2021. Where a decision-making power is legislative (e.g. secondary legislation), that power is subject to parliamentary disallowance but not appeal. Where a decision-making power is administrative then it is subject to appropriate appeal rights.

Policy decisions made under delegated authority

- 61 In keeping with my authorisation by Cabinet, I made several minor or technical policy decisions, or policy decisions consistent with the general policy intent. I outline these below.

Incorporating the Grocery Commissioner function into the Commission's governance structure

- 62 Cabinet agreed that the Commission be the agency responsible for implementing and enforcing the new grocery industry regulation, and that a position of a Groceries Commissioner be established [CAB-22-MIN-0259 refers].
- 63 I have made additional detailed decisions, under my authorisation, to clarify how the Grocery Commissioner function fits within the Commission's governance structure. I have clarified when and how the Grocery Commissioner may act alone, and when they are required to act in collaboration with other Commissioners (normally two other Commissioners). I have also clarified how the exercise of powers and functions by the Grocery Commissioner will align with the duties in the Crown Entities Act.
- 64 The Grocery Commissioner is modelled on the Telecommunications Commissioner, set up under the Telecommunications Act 2001. The approach is similar to the proposed Water Services Commissioner in the Water Services Economic Regulation and Consumer Protection Bill, which will soon be introduced to Parliament.

Quasi-regulatory regime obligation to not hinder wholesale customers developing relationships

- 65 Cabinet agreed that one of the principles of the wholesale regime should be that wholesale customers are not to be hindered from developing their own trading relationships with suppliers [CAB-22-MIN-0303 refers].
- 66 The principle was developed because the competitiveness of a wholesale customer's grocery offering may well depend on their ability to form a relationship with suppliers. This is critical to negotiate promotions and marketing, and if a new grocery retailer wants to vertically integrate in the long-term.

- 67 As part of drafting, I have strengthened the principle by adding a specific obligation to the quasi-regulatory regime that will stop major grocery retailers from engaging in conduct that hinders wholesale customers from developing relationships with suppliers and vice-versa.
- 68 This expanded obligation overlaps with some provisions that are likely to be in the Grocery Supply Code, however it is included in the Bill to ensure the operation of the wholesale supply regime.

Clarifying the processes before the Minister may seek an Order in Council to implement the wholesale backstop regime

- 69 Cabinet agreed that the Minister of Commerce and Consumer Affairs may seek an Order in Council to require the major grocery retailers to supply wholesale customers on regulated terms if the Minister is satisfied of two things. Firstly, that the wholesale offerings are not consistent with what would be expected in a workably competitive wholesale market. Secondly, that additional regulatory intervention would benefit consumers in the long term.
- 70 I have clarified that the Minister may only seek an Order in Council after the Commission has conducted an inquiry, to ensure that the Minister has access to information necessary to make their decision. However, the Minister may seek an Order in Council regardless of whether the Commission recommends it or not.
- 71 There are safeguards provided in relation to this decision, such as that the Minister must provide reasons for their decision, and that any Order in Council may be disallowed by Parliament and the Minister's decision may be judicially reviewed too.

Impact analysis

- 72 The Treasury's Regulatory Impact Analysis Team has determined that the details identified above in paragraphs 38-60 as part of drafting the Grocery Industry Competition Bill are exempt from providing a Regulatory Impact Statement (RIS) on the grounds that they have no or only minor impacts on businesses, individuals and not-for-profit entities, in the context of the broader set of policy changes supported by the previous regulatory impact statements prepared by the Ministry of Business, Innovation and Employment to support Cabinet policy decisions:
- 72.1 *Government Response to the Commerce Commission Grocery Sector Market Study* to support Cabinet decisions in May [CAB-22-MIN-0186 refers];
- 72.2 *A Regulatory Impact Statement Addendum: Grocery sector regulator and dispute resolution scheme* to support Cabinet decisions on the Groceries Commissioner, dispute resolution, and penalties in July [CAB-22-MIN-0259 refers]; and

72.3 *A Regulatory Impact Statement Addendum: Grocery sector regulatory backstop to the quasi-regulated wholesale access regime to support Cabinet decisions on the wholesale regulatory regime in August [CAB-22-MIN-0303 refers].*

73 The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that the CIPA requirements do not apply to this proposal (in paragraphs 38-60) as the threshold for significance is not met.

Compliance

74 The Bill complies with:

74.1 the principles of the Treaty of Waitangi;

74.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;

74.3 the disclosure statement requirements (a disclosure statement has been prepared and is attached to this paper);

74.4 relevant international standards and obligations.

The principles and guidelines set out in the Privacy Act 2020

75 The Bill includes a provision that may override to the principles of the Privacy Act 2020 in that it enables the Commission to set information disclosure standards which may include requiring personal information. The Privacy Commissioner considers that this is a justified override to the Privacy Act 2020 based on information provided.

Legislation Guidelines published by the Legislation Design and Advisory Committee

76 The Legislation Design and Advisory Committee (LDAC) has been consulted while the policy was being developed and as part of the drafting process. Consideration has been given to the advice provided by LDAC resulting in changes to the Bill including:

76.1 In relation to allowing the penalty tier for non-compliance with the Grocery Supply Code and the Wholesale Code in the Wholesale backstop regime to be varied by regulation, I have ensured that the power to set the penalty tiers is done by Order in Council, to ensure adequate oversight and separation of functions.

76.2 In relation to process requirements for making secondary legislation, I have sought to ensure that consultation requirements, a key safeguard, are in place with a few exceptions to enable the Commission to regulate the fast-moving grocery industry.

77 LDAC noted the number of functions the Bill delegates to the Commission (including monitoring, carrying out inquiries and reviews, implementing regulation or recommending additional regulation, and compliance and

enforcement functions) and suggested that having so many functions within one entity can create risks and decrease opportunities for democratic debate. I am of the view that the delegation of functions in the Bill is the best approach to implement the Government's response to the Commission's market study and is generally consistent with other legislation the Commission operates under.

78 LDAC raised concerns with the policy design of the dispute resolution scheme. I have addressed some of these concerns – such as:

78.1 clarifying that concurrent proceedings by the Commission may halt dispute resolution but proceedings raised by a party to the dispute resolution are stayed until the dispute resolution is resolved.

78.2 providing appeal rights on points of law in relation to any binding determination of the dispute resolution scheme.

Consultation

79 Throughout the development of policy that is included in the Bill, and this cabinet paper, officials have consulted with The Treasury, Te Kawa Maataho Public Service Commission, Commerce Commission, Ministry for the Environment, Ministry for Primary Industries, Ministry of Justice, and Office for Māori Crown Relations – Te Arawhiti. The Department of Prime Minister and Cabinet has been informed.

80 The Legislation Design and Advisory Committee provided feedback on the policy proposals that informed the drafting of the Bill, and have provided advice on key aspects of the Bill, this has been discussed above.

81 During the policy development process, there has been targeted engagement with the major grocery retailers, other grocery retailers, suppliers or supplier representative groups, and consumer representative groups. This engagement has included a wide range of policy matters in the Bill and has helped to inform the development of policy advice as indicated in the prior Cabinet papers [CAB-22-SUB-0186, CAB-22-SUB-0259, and CAB-22-SUB-0303 refer].

Binding on the Crown

82 The changes proposed by the Bill will be binding on the Crown.

Creating new agencies or amending law relating to existing agencies.

83 The Bill does not create any new agencies. Once passed, the Bill will amend the law relating to existing agencies. The Ministry of Business, Innovation and Employment would administer the Act.

84 Under the Act, the Commission's functions would be broadened to include monitoring and enforcement of a grocery-industry specific framework to regulate competition.

- 85 The Act will create a new Grocery Commissioner, to be part of the existing governance structure of the Commission. The Grocery Commissioner will be a member of the Board of the Commission, however will also have some statutory decision-making powers that are independent of the Commission (or other Commissioners) in relation to matters specified in the Bill. In other instances, the Grocery Commissioner will need to collaborate with other Commissioners to exercise powers and functions.
- 86 The Act would not amend the existing coverage of the Ombudsmen Act 1975, the Official Information Act 1982, or the Local Government Official Information and Meetings Act 1987.

Allocation of decision making powers

- 87 The Commerce Commission and the Grocery Commissioner will be given decision-making powers (such as the power to issue determinations, which are secondary legislation) consistent with the regulatory functions.
- 88 The Executive will be empowered to make regulations by Order in Council, for the following matters:
- 88.1 Requiring a grocery retailer (by designation) to comply with either the Grocery Supply Code, or the wholesale supply regime;
 - 88.2 Imposing the Grocery Supply Code on relevant grocery retailers;
 - 88.3 Implementing the wholesale backstop and requiring grocery retailers to sell groceries to wholesale customers;
 - 88.4 In relation to the wholesale supply regime, setting a market concentration threshold that will be monitored by the Commission;
 - 88.5 The development of a regulated dispute resolution scheme (the backstop option to appointing a dispute resolution scheme) rules by regulation;
 - 88.6 The ability to adjust the jurisdiction of the dispute resolution scheme by regulations if needed;
 - 88.7 An exemption (from certain prohibitions in Part 2 of the Commerce Act) for agreements for collective negotiation by grocery suppliers, including prescribing limitations on the scope of the collective negotiation exemption and obligations on the negotiating group;
 - 88.8 Any other matter that the Bill says may or must be provided for by regulations.
- 89 The Bill also modifies the existing regulation making power in the Fair Trading Act 1986, in relation to the unfair contract terms.
- 90 The courts will be able to make decisions about contraventions and pecuniary penalties, and other enforcement matters. Their powers under the Bill are

based on existing powers under the Commerce Act 1986 and Telecommunications Act 2001.

- 91 The proposed dispute resolution scheme will be given powers to make binding determinations of disputes within its jurisdiction, and must be complied with by the major grocery retailers. There are appeal rights provided.
- 92 The criteria relating to the qualifications and responsibilities of decision makers and the procedures that they follow have been applied.

Associated regulations

- 93 Regulations will be needed to bring the following into effect:
 - 93.1 The Grocery Supply Code: these regulations will regulate the conduct of a major grocery retailer in relation to their suppliers, including requirements for the grocery supply agreements. It is expected that these regulations will be of moderate size and complexity,
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 - 93.2 The collective bargaining exemption. These regulations may prescribe (among other things) the eligible suppliers, the collective negotiations that are allowed, and any terms and conditions that the negotiating group must meet.

Other instruments

- 94 The Bill includes provisions empowering the Commission to make instruments that are deemed to be legislative and are subject to Parliamentary disallowance. In each instance the Commission is required to consult affected persons and must publish a statement of reasons. The Commission may make secondary legislation in the following instances:
 - 94.1 A determination prescribing how a grocery retailer must comply with their obligations under the quasi-regulatory regime;
 - 94.2 A determination to impose additional wholesale backstop regulation in the form of the Wholesale Code or Framework, which may only be made if the Commission is satisfied a statutory test is met (in addition to the consultation requirements);
 - 94.3 A determination to impose either non-discriminatory terms or specified access terms as part of the wholesale backstop. This regulation may only be imposed if the major grocery retailers have been required to sell groceries to wholesale customers by Order in Council (in addition to consultation and other process requirements);
 - 94.4 Issuing disclosure standards that must be complied with by any of suppliers, the major grocery retailers, and/or other grocery retailers. Disclosure standards may cover a broad range of information including prices, financial statements, revenues, and costs.

Definition of Minister/department

- 95 The Bill defines the following terms:
- 95.1 Chief Executive means the chief executive of the Ministry of Business, Innovation and Employment;
 - 95.2 Minister means the Minister of the Crown who, under the authority of any warrant or with the authority of the Prime Minister, is responsible for the administration of this Act;
 - 95.3 Ministry means the department of State that, with the authority of the Prime Minister, is responsible for the administration of this Act.
- 96 The Bill provides that the Minister responsible for appointing the Grocery Commissioner is the 'responsible Minister' for the Commission, as defined by the Crown Entities Act. This is to ensure that coherence and consistency with the appointment of rest of the Board is taken into account when the Grocery Commissioner appointment is made.

Commencement of legislation

- 97 The Bill will come into force on the day after Royal assent, except for the provisions relating to the Grocery Supply Code, which will come into effect when the Grocery Supply Code is made by Order in Council.
- 98 The commencement date is justified because it reflects the importance of action to improve competition. The Government has been clear in explaining what the new requirements will be and equally clear in stating that we expect quick action from the major grocery retailers.
- 99 The Prime Minister and I were explicit in stating that the wholesale obligations would come into force as soon as the Grocery Industry Competition Bill is passed and receives Royal assent in the 24 August 2022 press conference announcing the policy decisions on the wholesale backstop.

Parliamentary stages

- 100 I intend to introduce the Bill in the week of 14 November 2022, and depending on the availability of House time, will move the first reading of the Bill on 17 November 2022. s 9(2)(f)(iv) The Bill has a Category 3 priority on the 2022 Legislation Programme (to be referred to a select committee in 2022), and s 9(2)(f)(iv)
- 101 I propose the Bill be referred to the Economic Development, Science and Innovation Select Committee for a period of four months.
- 102 I am aware Parliament Counsel Office considers that a truncated Select Committee process of four months may compromise the quality of the Bill, particularly given its size and complexity. However, it is important to advance the Bill at pace due to the impact that improving competition in the grocery

industry can have for New Zealand consumers. I think the four month Select Committee process be adequate for submissions – noting the consultation phases of the Commission’s market study – and any refining of the Bill that occurs as a result.

Part Two: Supplementary Analysis on the Commerce (Grocery Sector Covenants) Amendment Bill

Background

- 103 On 11 May 2022, Cabinet Economic Development Committee agreed to progress Budget night legislation to prohibit covenants identified by the Commission as inhibiting access to suitable land for grocery retail activities [DEV-22-MIN-0109 Minute refers]. The Commerce (Grocery Sector Covenants) Amendment Bill was introduced on Budget night, and after a one month select committee, it came into force on 30 June 2022.
- 104 These reforms directly addressed the Commission’s recommendation to free up land and increase the availability of sites that may be used by a competitor – particularly a large-scale competitor – entering the grocery market to compete with the incumbent major grocery retailers.
- 105 As this legislation was advanced through Budget night, the policy decisions were not supported by Regulatory Impact Analysis. Instead, the Ministry of Business, Innovation and Employment (MBIE) agreed to undertake supplementary analysis of the proposals, in the form of a post-implementation review, to be provided to Cabinet later in the year.

Supplementary Analysis

- 106 The required post-implementation review has been completed and is summarised in the attached paper.
- 107 MBIE’s Regulatory Impact Analysis Review Panel is reviewing the attached Post-implementation Review: *Commerce (Grocery Sector Covenants) Amendment Bill*, prepared by MBIE. MBIE has consulted with the following agencies on the paper: the Treasury, Ministry of Justice, Land Information New Zealand and the Commerce Commission.
- 108 MBIE intends to publish this post-implementation review, as if it were a Regulatory Impact Statement, on introduction of the present Bill.

Proactive Release

- 109 I intend to proactively release this paper within 30 business days, subject to redactions as appropriate in line with the Official Information Act 1982.

Recommendations

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

Part One: Grocery Industry Competition Bill: Policy Approval and Approval for Introduction

Approve additional policy matters that have been addressed since Cabinet in August

- 1 agree to the following changes and clarifications in policy intent that have been made since Cabinet in August 2022 and their inclusion in the Bill:
 - 1.1 rationalisation of civil and criminal penalties;
 - 1.2 adding a tier four penalty for a supplier failing to notify the Commission of an agreement for collective negotiation;
 - 1.3 removing the daily penalties for the wholesale supply regime;
 - 1.4 allowing flexibility to apply different penalty tiers to the Wholesale Code and the Grocery Supply Code with appropriate safeguards;
 - 1.5 making the jurisdiction of the dispute resolution scheme cover any dispute between a supplier or wholesale customer, with an ability to adjust the jurisdiction by regulations if needed;
 - 1.6 the dispute resolution scheme may make binding determinations, but these may not exceed \$5,000,000 in financial value;
 - 1.7 providing appeal rights on points of law in relation to binding determinations of the dispute resolution scheme;
 - 1.8 setting the details of the dispute resolution scheme in scheme rules in the Bill and requiring the scheme and its rules to be approved by the Minister of Commerce and Consumer Affairs;
 - 1.9 focusing the wholesale backstop regime on the sale of wholesale groceries by the major grocery retailers and that it should include a 'specified access terms' tool to be modelled on sub-part 2A of Part 2 of the Telecommunications Act 2001;
 - 1.10 providing appeal rights to affected parties in relation to administrative powers, while legislative powers are subject to disallowance and not appeal;
- 2 note that under delegated authority, the following changes have been made to:
 - 2.1 clarify how the Grocery Commissioner function fits within the Commission's governance structure, modelled on the Telecommunications Commissioner in the Telecommunications Act 2001;

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- 2.2 require, as part of the quasi-regulatory regime, that a major grocery retailer must not hinder wholesale customers from developing relationships with suppliers and vice-versa;
- 2.3 clarify that, as part of the wholesale backstop regime, the Minister of Commerce and Consumer Affairs may only seek an Order in Council following an inquiry by the Commission, but is not limited by the recommendations (if any) of that inquiry;
- 3 note the summary of prior Cabinet decisions that are rescinded or modified by the policy changes above in Annex One.

Approve the Grocery Industry Competition Bill for Introduction to Parliament

- 4 note that the Grocery Industry Competition Bill holds a category 3 priority on the 2022 Legislation Programme (to be referred to a select committee in 2022);
- 5 note that the Grocery Industry Competition Bill is intended to promote, for the long-term benefit of consumers in New Zealand, competition and efficiency in the grocery industry;
- 6 approve the Grocery Industry Competition Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;
- 7 agree that the Bill be introduced in the week of 14 November 2022;
- 8 agree that the government propose that the Bill be:
 - 8.1 referred to the Economic Development, Science and Innovation Select Committee for consideration for a period of four months and reported back no later than 23 March 2023;
 - 8.2 s 9(2)(f)(iv)

Part Two: Supplementary Analysis on the Commerce (Grocery Sector Covenants) Amendment Bill

- 9 note the attached supplementary analysis on the policy proposals that were implemented in the Commerce (Grocery Sector Covenants) Amendment Bill.

Authorised for lodgement

Hon Dr David Clark
Minister of Commerce and Consumer Affairs

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Annex One: Prior Cabinet decisions that are rescinded or modified

Policy matter	Rationale	Prior Cabinet decisions being rescinded or modified
<p>Rationalisation of civil and criminal penalties.</p>	<p>Cabinet agreed to specific and detailed penalties set out in Annex Two of CAB-22-MIN-0259.</p> <p>As part of drafting, a number of these penalty tiers have been rationalised so that the Bill now includes 4 different ‘tiers’ of civil penalties, rather than the original 6 tiers. The criminal penalties have also been rationalised down from 2 to 1. This improves consistency with the Legislation Guidelines and also usability of the legislation.</p>	<p>Modify recommendation 35 of CAB-22-MIN-0259</p>
<p>Adding a tier four penalty for a supplier failing to notify the Commission of an agreement for collective negotiation.</p>	<p>Cabinet agreed that suppliers eligible to make use of the collective bargaining exemption would have certain disclosure obligations that they would have to fulfil within 15 working days of entering into an agreement to collectively negotiate with a grocery retailer. The details of the disclosure obligations and other procedural matters are proposed to be dealt with by regulations.</p> <p>My view is it would make more sense to prescribe the timeframes for these disclosure obligations by regulations, rather than in the Bill. This would afford greater flexibility to specify when disclosure obligations arise, for whom and when they must be observed by.</p>	<p>Rescind recommendation 28 and 31 in CAB-22-MIN-0303.</p>
<p>Removing the daily penalties for the wholesale supply regime.</p>	<p>Cabinet agreed to impose daily penalties as part of the wholesale supply regime.</p> <p>As the penalties and enforcement tools have been developed, I have determined that removing the daily penalties results in a deterrent that is more aligned with the Legislation Guidelines while still providing a meaningful deterrent to non-compliance.</p>	<p>Modify recommendation 22 in CAB-22-MIN-0303.</p>

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Policy matter	Rationale	Prior Cabinet decisions being rescinded or modified
<p>Allowing flexibility to apply different penalty tiers to the Wholesale Code and the Grocery Supply Code with appropriate safeguards.</p>	<p>Cabinet agreed to specific and detailed penalties set out in Annex Two of CAB-22-MIN-0259, these included penalties for contraventions of the Grocery Supply Code</p> <p>Cabinet also agreed to specific penalties for contraventions of the Wholesale Code, in CAB-22-MIN-0303.</p>	<p>Modify recommendation 35 of CAB-22-MIN-0259</p> <p>Modify recommendation 22 in CAB-22-MIN-0303.</p>
<p>Making the jurisdiction of the dispute resolution scheme able to cover any dispute between a supplier or wholesale customer, with an ability to adjust the jurisdiction by regulations if needed.</p> <p>The dispute resolution scheme may make binding determinations, but these may not exceed \$5,000,000 in financial value.</p>	<p>Cabinet agreed that a dispute would be raised in relation to either the Grocery Supply Code (between a supplier and major grocery retailer) or wholesale supply (between the major grocery retailer and a wholesale customer).</p> <p>I have determined that the regime should be broader to address any dispute raised by a supplier or wholesale customer, with the exact details of the jurisdiction set by regulations</p>	<p>Modify recommendation 20 of CAB-22-MIN-0259</p>
<p>Providing appeal rights, on points of law, in relation to binding determinations of the dispute resolution scheme.</p>	<p>Cabinet agreed that the major grocery retailer’s appeal rights in relation to a binding determination would be limited for a dispute with a financial component under \$500,000.</p> <p>I have decided to extent appeal rights as a reflection of the jurisdiction of the scheme.</p>	<p>Modify recommendation 26 of CAB-22-MIN-0259</p>
<p>Setting the details of the dispute resolution scheme in scheme rules in the Bill and requiring the scheme and its rules to be approved by the</p>	<p>Cabinet agreed to detailed recommendations about how some of the dispute resolution scheme processes would operate.</p>	<p>Modify recommendation 20-26 of CAB-22-MIN-0259</p>

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Policy matter	Rationale	Prior Cabinet decisions being rescinded or modified
Minister of Commerce and Consumer Affairs.	As part of drafting, I have decided to shift to a more flexible scheme-rules based approach, and have therefore moved more of the detail out of primary legislation.	
Focusing the wholesale backstop regime on the sale of wholesale groceries by the major grocery retailers and that it should include a 'specified access terms' tool to be modelled on sub-part 2A of Part 2 of the Telecommunications Act 2001.	Cabinet agreed to the wholesale backstop including a 'price and quality regulation'. I have determined as part of drafting that this should be better called 'specified access terms'.	Modify recommendation 17 in CAB-22-MIN-0303.