



COVERSHEET

Minister	Hon Dr Duncan Webb	Portfolio	Commerce and Consumer Affairs
Title of Cabinet paper	Grocery Industry Competition Regulations 2023	Date to be published	14 September 2023

List of documents that have been proactively released

Date	Title	Author
May 2023	Grocery Industry Competition Regulations 2023	Office of the Minister of Commerce and Consumer Affairs
29 May 2023	Grocery Industry Competition Regulations 2023 LEG-23-MIN-0135 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 being commercially confidential.

In Confidence

Office of the Minister of Commerce and Consumer Affairs

Cabinet Legislation Committee

Grocery Industry Competition Regulations 2023

Proposal

- 1 This paper seeks authorisation for submission to the Executive Council of the Grocery Industry Competition Regulations 2023 (**the proposed Regulations**).

Background

- 2 On 26 June 2023, the Government passed the Grocery Industry Competition Act 2023 (**the Act**) to promote competition in the grocery industry for the long-term benefit of consumers. The Act was in response to, and informed by, the Commerce Commission's (**the Commission**) market study into the retail grocery sector.
- 3 The Act takes a broad regulatory approach and imposes duties on the main regulated grocery retailers (**main RGRs**), which are Foodstuffs North Island Limited and Foodstuffs South Island Limited (**Foodstuffs**) and Woolworths New Zealand Limited (**Woolworths**), and on all franchisees, transacting shareholders, and interconnected business of the main RGRs.
- 4 While the Grocery Industry Competition Bill was at the Committee of the Whole House it was drawn to my attention that there was a legislative gap that meant that entities which did not have a direct relationship with a main RGR are unregulated. This means that in some cases there are supermarkets which fall outside of the regime because they have a relationship with a subsidiary of a main RGR rather than a direct relationship.
- 5 To avoid delay which may have put the progression of this reform at risk a regulation making power was inserted into the Bill by Supplementary Order Paper (**SOP**) at the Committee stage. This power allows regulations to treat these franchisees and transacting shareholders of any interconnected business to a main RGR as a RGR for the purposes of some provisions in the Act.

Policy

The proposed Regulations give effect to the policy intent agreed by Cabinet

- 6 The proposed Regulations are necessary to deliver on the policy intent of Cabinet, which was to promote competition by imposing duties broadly on the entire Foodstuffs and Woolworths groups – including franchisees or

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transacting shareholders that are one step removed from the main RGRs – and providing flexibility to Foodstuffs and Woolworths to meet those duties as effectively and efficiently as possible [CAB-22-MIN-0186, CAB-22-MIN-0259, and CAB-22-MIN-0303 refer].

- 7 The proposed Regulations are also needed to ensure that Parts 2 and 3 of the Act (the grocery supply code and the wholesale supply regime) apply to all corporate forms that are currently used by Foodstuffs and Woolworths in the grocery market. Without the proposed Regulations, there would be inconsistent treatment of businesses that are one step removed from the main RGRs, such as franchisees to a subsidiary company. The change will ensure the consistent application of the Act across RGRs.
- 8 I am confident in taking the proposed Regulations straight to the Cabinet Legislation Committee because changes are entirely within the policy intent agreed by Cabinet.

This change is being made by regulation rather than in the Act due to timing considerations

- 9 This issue was not known until after Parliament had concluded debate on Parts 2 and 3 of the Act as part of the Committee of the Whole House stage of the legislative process.
- 10 During Select Committee it was understood – based on submissions at that time – that the Act would apply to all of the retail banners of the RGRs. This includes Foodstuffs' PAK'nSAVE, New World, and 4Square, and Woolworth's Countdown, FreshChoice and SuperValue.
- 11 However, on 25 May Woolworths raised an issue that the Act does not apply to its SuperValue and FreshChoice franchisees because they are technically franchisees of a Woolworths interconnected company, not of Woolworths itself. Effectively SuperValue and FreshChoice franchisees are more than one step removed from Woolworths. The impact of this on Woolworths is discussed further below.
- 12 It was, however, possible to advance an SOP to provide a new regulation making power in Part 5 of the Act. That regulation making power allows for Parts 2 and 3 of the Act to apply to these franchisees or transacting shareholders that are one step removed from the main RGRs.

The proposed Regulations deliver more consistent treatment of Woolworths and Foodstuffs retail stores and provide for Woolworths' retail franchises

- 13 The proposed Regulations apply equally to Woolworths (which raised the issue) and Foodstuffs to ensure a level competitive playing field.
- 14 In relation to wholesale supply (Part 3 of the Act), there are two notable impacts of the proposed Regulations:

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14.1 The arms-length franchisees will need to comply with the wholesale duties in Part 3. This ensures similar treatment of retail stores between Foodstuffs and Woolworths. Any duties may be met by the main RGR (Foodstuffs and Woolworths), so the likely impact is that the franchisees will simply need to pass on wholesale supply requests from potential wholesale customers to the main RGR. Technically, the duties apply to Foodstuffs' Liquorland stores in relation to non-alcoholic groceries (like snack food and soft-drinks), but any duty on Liquorland could be met by Foodstuffs.

14.2 Commercial Information
[Redacted]

15 In relation to the grocery supply code (Part 2 of the Act), the practical impact of the proposed Regulations is to extend protections to any suppliers selling directly to grocery retailers that are arms-length franchisees of a main RGR:

15.1 For Foodstuffs, this could mean that Liquorland franchisees must comply with the grocery supply code when buying direct from suppliers. However, this would only apply to non-alcohol products.

15.2 For Woolworths, this means that its SuperValue and FreshChoice franchisees would need to comply with the grocery supply code when buying direct from suppliers. This is an important requirement to ensure all suppliers to the RGRs receive the protections in the grocery supply code and to ensure that some of Woolworths' retail stores are not treated differently to Foodstuffs' retail stores.

Engagement with Woolworths and Foodstuffs on the change in the Regulations indicates it will achieve the intended result with safeguards to manage any risks

16 Officials sought comment from Woolworths and Foodstuffs on the change which is contained in the proposed Regulations when the issue was raised in May 2023.

17 Woolworths supported the change because it would ensure its SuperValue and FreshChoice franchisees (that are technically franchisees of a Woolworths' subsidiary) are within the Woolworths' group and the provisions to allow for existing franchise agreements would apply.

18 Foodstuffs do not consider the change to be necessary. It thought that regulating the 'parent' company would be sufficient. It thinks the Act is already broader than necessary to achieve its intent.

19 Foodstuffs North Island raised a concern that its Liquorland franchisees may be captured by the proposed Regulations. The possible impact on Liquorland that Foodstuffs raised has been discussed above.

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- 20 Any impact is considered to be minimal because the Act does not apply to alcohol and provides flexibility for the main RGR to meet wholesale supply regime obligations placed on franchisees. Furthermore, sections 49 and 50 in the Act allow the Commission to clarify the legislative obligations or provide exemptions from some obligations using a determination.

Timing and 28-day rule

- 21 I intend for the clauses in these Regulations that are required to address the issue raised by Woolworths to come into force the day after the Regulations being notified in the New Zealand Gazette, on 11 August 2023. All other clauses in the Regulations, such as clause 6, will come into force 28-days after being notified in the New Zealand Gazette, on 7 September 2023.
- 22 I am seeking the waiver of the 28-day rule because, as per the Cabinet manual 7.101(a) the relevant clauses in the regulations have little or no effect on the public.
- 23 These clauses are sought by Woolworths to address an existing concern of a possible breach of the Act because – by virtue of corporate form – its SuperValue and FreshChoice franchise agreements are not provided for under the current section 45(2) of the Act as was intended. Woolworths does not need 28 days of notice to comply with the Regulations.
- 24 Waiving the 28-day rule is entirely consistent with our approach to fix this issue as promptly as possible. This is the earliest opportunity available to us to fix the issue Woolworths' raised on 25 May 2023.
- 25 Adhering to the 28-day rule will extend the risk to Woolworths that it may face action around a possible breach of section 45 of the Act from its franchisee agreements.

Compliance

- 26 The Regulations comply with the following:
- 26.1 the principles of the Treaty of Waitangi;
 - 26.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;
 - 26.3 the principles and guidelines set out in the Privacy Act 2020;
 - 26.4 relevant international standards and obligations;
 - 26.5 the Legislation Guidelines (2021 edition), which are maintained by the Legislation Design and Advisory Committee.

Regulations Review Committee

- 27 The Regulations Review Committee may consider that the Regulations be drawn to the attention of the House under SO 327(2)(f) – that the regulation

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“contains matter more appropriate for parliament enactment’. This is because the regulations appear to extend the scope of the Act to those entities named in the regulations.

- 28 However, I am satisfied that the content of the regulations is appropriate. The regulations are consistent with the policy of the Act to treat RGRs consistently, irrespective of their corporate form. In addition, Parliament has explicitly authorised the regulation-making power that I am relying on.

Certification by Parliamentary Counsel

- 29 The Regulations have been certified by the Parliamentary Counsel Office as being in order for submission to Cabinet.

Impact Analysis

- 30 The Treasury's Regulatory Impact Analysis team has determined that this proposal is exempt from the requirement to provide a Regulatory Impact Statement on the grounds that it has been addressed by existing impact analysis [CAB-22-MIN-0186, CAB-22-MIN-0259, CAB-22-MIN-0303 and the relevant regulatory impact analysis¹].
- 31 This proposal is further exempt from the requirement to provide a Regulatory Impact Statement on the grounds that it has no or only minor impacts on businesses, individuals, and not-for-profit entities given the decisions that have already been made.
- 32 The Climate Implications of Policy Assessment (**CIPA**) team has been consulted and confirms that CIPA requirements do not apply to this proposal as it not expected to result in any significant, direct emissions impacts.

Publicity

- 33 The Ministry of Business, Innovation and Employment (**MBIE**) intends to notify stakeholders of the approval of the Regulations.

Proactive release

- 34 I intend to release this paper proactively in whole within 30 business days. MBIE will publish a copy on its website.

¹ The Regulatory Impact Analysis for CAB-22-MIN-0186:
<https://www.mbie.govt.nz/dmsdocument/22638-regulatory-impact-statement-government-response-to-the-commerce-commission-grocery-sector-market-study-policy-decisions-proactiverelease-pdf>,
The Regulatory Impact Analysis for CAB-22-MIN-0259:
<https://www.mbie.govt.nz/dmsdocument/22923-regulatory-impact-statement-addendum-grocery-sector-regulator-and-dispute-resolution-scheme-proactiverelease-pdf>,
The Regulatory Impact Analysis for CAB-22-MIN-0303:
<https://www.mbie.govt.nz/dmsdocument/25463-regulatory-impact-statement-addendum-grocery-sector-regulatory-backstop-to-the-quasi-regulated-wholesale-access-regime-proactiverelease-pdf>.

Consultation

- 35 The Treasury, and the Commerce Commission were consulted on this paper. The Department of Prime Minister and Cabinet was informed.

Recommendations

I recommend that the Cabinet Legislation Committee:

- 1 **note** that the Government responded to the Commerce Commission's findings and made policy decisions in May, July and August, to develop a Grocery Industry Competition Bill for introduction to Parliament in 2022 [CAB-22-MIN-0186, CAB-22-MIN-0259, and CAB-22-MIN-0303 refer];
- 2 **note** that the Governor General may, by Order in Council, make regulations to provide that the Act applies to named corporate forms of regulated grocery retailers;
- 3 **note** that the Grocery Industry Competition Regulations 2023 have the effect of treating franchisees and transacting shareholders of any interconnected business to a main RGR as if they are franchisees or transacting shareholders of the main RGR itself for the purposes of Parts 2 and 3 of the Act are needed to give effect to the decision referred to in recommendation 1 above;
- 4 **authorise** the submission to the Executive Council of the Grocery Industry Competition Regulations 2023;
- 5 **note** that a waiver of the 28-day rule is sought:
 - 5.1 so that clause 5 of the Grocery Industry Competition Regulations 2023 (and other relevant clauses) can come into force as soon as possible;
 - 5.2 on the grounds that these clauses in the regulations have little or no effect on the public, are sought (and expected) by Woolworths New Zealand Limited to address concerns it raised, and that a waiver of the 28-day rule is consistent with the approach to address Woolworths New Zealand Limited's concerns as soon as possible;
- 6 **agree** to waive the 28-day rule so that the regulations can come into force on 11 August 2023.

Authorised for lodgement

Hon Dr Duncan Webb

Minister of Commerce and Consumer Affairs