



COVERSHEET

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| Minister | Hon Dr David Clark | Portfolio | Commerce and Consumer Affairs |
| Title of Cabinet paper | Response to the Commerce Commissions Retail Grocery Sector Market Study | Date to be published | 8 June 2022 |

List of documents that have been proactively released

| Date | Title | Author |
|-------------|--|---|
| May 2022 | Response to the Commerce Commission's Retail Grocery Sector Market Study | Office of the Minister of Commerce and Consumer Affairs |
| 23 May 2022 | Response to the Commerce Commission's Retail Grocery Sector Market Study CAB-22-MIN-0186 Minute | Cabinet Office |
| May 2022 | Regulatory Impact Statement: Government response to the Commerce Commission Grocery Sector Market Study – Policy decisions | MBIE (Published 5 July 2022) |

Information redacted

YES / NO [select one]

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 under the grounds of confidential advice to government and constitutional conventions.



Cabinet

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Response to the Commerce Commission's Retail Grocery Sector Market Study

Portfolio Commerce and Consumer Affairs

On 23 May 2022, following reference from the Cabinet Economic Development Committee (DEV), Cabinet:

Response to the Commerce Commission's recommendations

- 1 **noted** that the Commerce Commission's market study into the retail grocery sector has found that competition is not working well for consumers;
- 2 **noted** that on 7 March 2022, Cabinet invited the Minister of Commerce and Consumer Affairs to prepare the government response to the Commerce Commission's final report, and to report back in May 2022 [CAB-22-MIN-0061];
- 3 **agreed** to the proposed government response to the Commerce Commission's recommendations, as set out in Annex One to the paper under CAB-22-SUB-0186, which accepts 12 of the Commission's 14 recommendations;
- 4 **invited** the Minister of Commerce and Consumer Affairs to publicly announce the government response;
- 5 **agreed** that the Minister of Commerce and Consumer Affairs progress reforms with the purpose of improving competition in the retail grocery sector for the benefit of consumers;
- 6 **agreed** that a new regulatory regime for the retail grocery sector be developed and implemented through the Grocery Industry Competition Bill (the Bill), to provide for the legislative changes needed to implement the paragraphs outlined below;

7 Constitutional conventions

Wholesale access to grocery supply

- 8 **agreed** to establish an initial 'quasi-regulatory' access regime for wholesale grocery supply, with provisions included in the Bill to require major grocery retailers to:
 - 8.1 consider requests for supply in good faith;

- 8.2 notify the regulator of all requests for supply, the outcome of the request, and the reasons if declined;
 - 8.3 put in place formalised rules, criteria and procedures for considering requests;
 - 8.4 put in place standardised terms and conditions of wholesale supply or, to the extent that particular terms and conditions are not standardised (such as price), principles for determining how such terms and conditions will be decided;
 - 8.5 provide a copy of their standardised terms to the regulator and to any person who requests them for the purpose of considering or making a request for commercial wholesale supply;
- 9 **noted** that work is underway to develop a mandatory wholesale grocery access regime to provide a ‘regulatory backstop’ to the wholesale access regime referred to in paragraph 8 above;
- 10 **agreed** that details of a mandatory wholesale access regime will be included in the Bill;

Grocery Code of Conduct for major grocery retailers and suppliers

- 11 **agreed** to establish a mandatory grocery code of conduct, with provisions in the Bill setting out:
- 11.1 powers to prescribe a mandatory code of conduct for major grocery retailers and their suppliers (the Grocery Code of Conduct), and the content as set out in paragraph 11.4 below;
 - 11.2 powers to make the Grocery Code of Conduct mandatory for designated retailers;
 - 11.3 transitional arrangements clarifying how the Grocery Code of Conduct applies to existing contracts;
 - 11.4 that the Grocery Code of Conduct may include the following content:
 - 11.4.1 an overarching expectation of conduct in regard to commercial dealings between suppliers and retailers in the grocery industry;
 - 11.4.2 minimum requirements for grocery supply agreements between suppliers and retailers;
 - 11.4.3 conduct obligations on retailers in relation to issues of product supply and placement, including to changes in supply chain processes, fresh produce standards and quality specifications, range reviews, shelf allocation and delisting;
 - 11.4.4 conduct obligations on retailers in relation to issues of payment, price increases and promotions, including timing of payments and responsiveness to price increases, limiting payments for retailers’ business activities, product placement and other costs, limiting payments in relation to shrinkage, wastage and consumer complaints, promotional pricing, investment buying and forecasting errors;
 - 11.4.5 a dispute resolution scheme to be available to suppliers in the event they have an issue in relation to a provision covered by the Grocery Code of Conduct;

- 11.4.6 obligations on retailers in relation to the Grocery Code of Conduct, including a duty to keep records, train staff and provide reporting information to the regulator;
- 11.5 the high-level framework for a dispute resolution process in relation to the Grocery Code of Conduct, including the rights of a supplier to take a dispute and the ability for the dispute resolution process to make binding decisions;
- 11.6 the necessary powers and functions for the regulator to monitor and enforce the Grocery Code of Conduct, including an investigation power that enables the regulator to require a retailer or supplier to provide information and appropriate protections for whistle-blowers and complainants;

Exception for collective bargaining

- 12 **agreed** to introduce an exception from prohibitions in Part 2 (restrictive trade practices) of the Commerce Act 1986 for collective bargaining by grocery suppliers, with provisions included in the Bill setting out:
 - 12.1 which grocery suppliers the exception applies to;
 - 12.2 the scope of activities that are permitted by the exception (and certain activities that are not so permitted);
 - 12.3 any disclosure obligations necessary for transparency;

Strengthening unfair contract terms

- 13 **agreed** to strengthen business-to-business contract terms protections for grocery suppliers, with provisions included in the Bill to:
 - 13.1 create a new category of 'grocery supply contract' to appropriately target the new unfair contract terms provisions to business-to-business contracts for the supply of groceries to a major grocery retailer;
 - 13.2 increase the transaction cap for a grocery supply contract to \$1 million (in a financial year), meaning that all grocery supply contracts below that amount have the added protection of the unfair contract terms regime;
 - 13.3 allow any party to a grocery supply contract to seek a declaration from the relevant court that a contract term in a grocery supply contract is an unfair contract term;
 - 13.4 provide that all other relevant provisions of the Fair Trading Act 1986 are applicable to the unfair contract terms provisions (including penalties and Commerce Commission powers) apply to these grocery supply contracts;

Establishing a grocery regulator and dispute resolution scheme and other matters

- 14 **agreed** that the Bill establish a retail grocery sector regulator and one or more dispute resolution schemes, with provisions included in the Bill setting out:
 - 14.1 the role of the regulator to oversee and monitor the retail grocery sector and enforce any obligations imposed on major grocery retailers;
 - 14.2 the functions and powers of the regulator (as set out in paragraph 58 of the paper under CAB-22-SUB-0186);

- 14.3 the role and function of a dispute resolution scheme to determine disputes between the major grocery retailers and suppliers in relation to the Grocery Code of Conduct and/or disputes in relation to wholesale grocery supply arrangements;
- 15 **agreed** that the Bill 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, including relating to wholesale grocery supply and the Grocery Code of Conduct;
- 16 **agreed** that the Bill include a regulation-making power to provide for record-keeping and reporting by major grocery retailers to improve monitoring of the state of competition in the sector;
- 17 **agreed** that the regulator will be required to prepare annual reports on the state of competition in the grocery sector and the performance of the regime;
- 18 **agreed** that the Commerce Commission act as an interim grocery regulator while final decisions are taken on the design of the proposed grocery sector regulator and the permanent grocery sector regulator function is established;

Development of legislation

- 19 **authorised** the Minister of Commerce and Consumer Affairs to make additional policy decisions and minor or technical changes to the policy decisions outlined above, consistent with the general policy intent, on issues that arise in drafting and passage through the House;
- 20 **invited** the Minister of Commerce and Consumer Affairs to report back to Cabinet seeking decisions on:
- 20.1 the detailed design of the proposed grocery sector regulator and dispute resolution scheme;
- 20.2 the detailed design of a quasi-regulatory wholesale access regime, and the criteria, requirements and trigger for a mandatory wholesale grocery access regime to include in the Bill as a regulatory backstop;
- 21 **invited** the Minister of Commerce and Consumer Affairs to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above paragraphs;
- 22 **authorised** the Minister of Commerce and Consumer Affairs to release drafts of the Bill, in accordance with the Attorney-General's *Protocol for Release of Draft Government Legislation Outside the Crown*, for targeted consultation with key stakeholders, if satisfied that this would improve the workability and effectiveness of the regime;

Other proposals

- 23 **noted** that the impacts of planning laws on retail grocery sector competition will be considered as part of planning law reforms;
- 24 **noted** that the next review of the Sale and Supply of Alcohol Act 2012, to commence this Parliamentary term, will consider whether the impact of this Act unduly impedes entry or expansion by grocery retailers;
- 25 **noted** that the Overseas Investment Act 2005 has just been reviewed and that no further review is currently planned, but that Treasury will monitor performance of this Act;

- 26 **noted** that the Minister of Commerce and Consumer Affairs has written to each major grocery retailer asking them to implement recommendations relating to them and to provide monthly progress updates to the Minister;
- 27 **agreed** to implement mandatory unit pricing for grocery products;
- 28 **agreed** to release the consultation paper on mandatory unit pricing for grocery products, attached to the paper under CAB-22-SUB-0186, subject to any minor and editorial changes that may be required;
- 29 **noted** that the Minister of Commerce and Consumer Affairs will direct officials to continue examining retail divestment, and will report back to DEV in October 2022 with a detailed cost-benefit analysis on retail divestment to inform decisions on progressing further work on retail divestment options;
- 30 **noted** that this Cabinet paper will be proactively released within 30 business days of final Cabinet decisions;
- 31 **invited** the Minister of Commerce and Consumer Affairs to report back to DEV in October 2022 seeking agreement on:
- 31.1 the form and content of mandatory unit pricing regulation following consultation;
 - 31.2 policy decisions on the content of the Code of Conduct.

Michael Webster
Secretary of the Cabinet