



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 Grocery industry Code of Conduct – approval to release consultation paper	Date to be published	26 July 2022

List of documents that have been proactively released

Date	Title	Author
June 2022	Grocery industry Code of Conduct – approval to release consultation paper	Office of the Minister of Commerce and Consumer Affairs
29 June 2022	DEV-22-MIN-0149 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 free and frank opinions and confidential advice to government.

In Confidence

Office of the Minister of Commerce and Consumer Affairs

Chair, Cabinet Economic Development Committee

Grocery Industry Code of Conduct – approval to release consultation paper

Proposal

1. This paper seeks approval to release the attached Grocery Industry Code of Conduct consultation paper for a five week public consultation period as part of the Government's response to the Commerce Commission's recommendations in the retail grocery sector market study.

Relation to government priorities

2. The proposal to release the consultation paper relates to the priority of supporting New Zealanders in response to increasing costs of living (including increasing grocery prices) by addressing competition issues in the retail grocery sector. In the long-run, more workable competition in the retail grocery sector benefits New Zealand consumers by contributing to lower grocery prices, better quality products, increased innovation, a wider grocery product range and better service.

Executive Summary

3. On 8 March 2022, the Commerce Commission (the Commission) released its final report on competition in the retail grocery sector. One of the recommendations was to develop a mandatory Code of conduct (the Code) to govern relationships between the major grocery retailers and their suppliers.
4. On 23 May 2022, Cabinet agreed to a Government response to the Commission's market study which included creating powers for a mandatory Code in the Grocery Industry Competition Bill, while the content of the Code itself would be implemented through secondary legislation.
5. This paper seeks approval to release the attached *Grocery Industry Code of Conduct consultation paper* for a five week public consultation. The purpose of the consultation is to seek feedback on options for the details of the Code, which will be implemented by secondary legislation under the Grocery Industry Competition Bill.
6. Following public consultation, policy decisions on the Code and approval to begin drafting will be sought from Cabinet Economic Development Committee in October.

Background

7. On 8 March 2022, the Commission published its final report on competition in the retail grocery sector. The Commission found that a lack of workable competition is

impacting on the price, quality, range and service of the retail grocery offering to consumers.

8. The Commission also found that for most suppliers, particularly smaller ones, there appears to be an imbalance in bargaining power in favour of major grocery retailers. This appears to also impact Māori suppliers, which own a significant proportion of primary production, including 50% of the fishing quota; 30% of lamb, sheep, and beef production; and 10% of dairy production and kiwifruit.¹
9. The Commission's sixth recommendation (out of 14) was to introduce a mandatory code of conduct to govern relationships between major grocery retailers and suppliers.
10. On 23 May 2022, the Government agreed to a comprehensive response to the Commission's market study, intended to improve competition in the retail grocery sector so that new competitors have a real prospect of entering the market and providing competition. Cabinet agreed that the ability to create a mandatory Code will be provided in the Grocery Industry Competition Bill, while the content of the Code itself would be implemented through secondary legislation [CAB-22-MIN-0186 refers].

The Commission's finding in relation to the acquisition of groceries

11. The Commission found evidence of imbalances in bargaining power between major grocery retailers and their suppliers due to the major grocery retailers being the key route to market for many suppliers who are dependent on them for sales of their products. This imbalance affects the terms on which retailers acquire groceries from suppliers, where the major grocery retailers are using their stronger negotiating position to transfer costs and risks to suppliers and to reduce transparency and certainty over terms of supply.
12. The result of this imbalance is that suppliers have reduced incentives to invest and innovate – including developing new products to bring to market. Over the long-term this has a detrimental impact on the prices, quality, and range of products available to consumers.
13. To address this finding and rebalance negotiating positions, the Commission made three recommendations, all of which have been agreed by the Government:
 - 13.1. To introduce a mandatory grocery code of conduct to govern relationships between the major grocery retailers and their suppliers;
 - 13.2. To consider a statutory authorisation or exception for collective bargaining by grocery suppliers;
 - 13.3. Amending the Fair Trading Act to strengthen the business-to-business unfair contract terms regime.

¹ Commerce Commission, Final report, at 2.61.

14. In relation to the mandatory code of conduct, the Commission recommended any code should include:
 - 14.1. an overarching principle of good faith;
 - 14.2. provisions to improve the transparency of supply agreements;
 - 14.3. prohibitions or limits on certain forms of conduct; and
 - 14.4. an independent dispute resolution scheme to address any issues that arise under the Grocery Code of Conduct.

15. Free and frank opinions

16.

Grocery Industry Code of Conduct consultation paper

17. Officials have developed the *Grocery Industry Code of Conduct consultation paper* outlining options for the content of a mandatory Code to seek feedback including from suppliers and major grocery retailers, iwi Māori, and the public more generally. This paper is attached as Annex One.
18. The consultation paper was developed with input from MBIE’s Grocery Code of Conduct Advisory Group. The membership of this group includes the major grocery retailers, supplier representatives (the New Zealand Food and Grocery Industry and United Fresh), as well as Consumer NZ. Separately, the National Māori Authority and the Iwi Chairs Forum – Pou Tahua were invited to provide feedback on the draft consultation paper.
19. The Code is proposed to apply to major grocery retailers (via a future-proofed designation process) and all their trading relationships with suppliers. Suppliers will not be regulated by the Code, nor will other smaller grocery retailers that do not have the same advantage in negotiating/bargaining power over their suppliers.
20. The consultation paper presents three options for the form of the Code, all of which meet the Commerce Commission’s recommendation for a mandatory Code. These options have been developed with reference to the existing regimes in the United Kingdom and in Australia, which both have some form of Grocery Code of Conduct:
 - 20.1. Option 1: a principles-based Code that presents elements at a high level, while still establishing clear requirements on the conduct of retailers (more closely aligned to the United Kingdom approach);

- 20.2. Option 2: a prescriptive Code which includes more detailed elements with prescriptions against conduct and direction to retailers (using an Australian model with some provisions from the United Kingdom); or
 - 20.3. Option 3: an alternative Code, that both builds on option 2 (to provide strong protections to suppliers) and is more targeted to address the issues observed in the New Zealand market.
21. Each of the three options for the proposed Code will regulate conduct in several ways:
- 21.1. Establishing general conduct obligations of either fair dealing or good faith, to apply to major grocery retailers at all times and in all interactions;
 - 21.2. Clarifying expectations that any grocery supply agreements should be written and contain a minimum set of content in order to properly be a grocery supply agreement;
 - 21.3. Setting obligations on the conduct of retailers in relation to:
 - 21.3.1. Matters of product supply and placement, including delisting, and supply chain processes;
 - 21.3.2. Matters of payment terms, requests for price increases and promotional processes; and
 - 21.4. Establishing a dispute resolution process for any issues arising under the Code.
22. I propose releasing the attached consultation paper, subject to any further minor and editorial changes, for a five week period of public consultation.
23. My officials will engage with a range of parties, including major grocery retailers, supplier representative groups, and iwi Māori groups to hear their views during consultation.

Next steps following consultation

24. Next steps following engagement will be to seek policy decisions and approval to begin drafting from Cabinet Economic Development Committee in October.
25. Subject to drafting by Parliamentary Counsel Office, and the progress of the Grocery Industry Competition Bill, I expect to seek Cabinet approval of the Code of Conduct as secondary legislation (regulations) in early 2023.

Financial Implications

26. There are no direct financial implications from releasing the consultation paper.
27. The financial implications of developing a mandatory Code were previously indicated to Cabinet, and decisions on funding arrangements will be sought at Cabinet by October 2022 [CAB-22-MIN-0186 refers].

Legislative Implications

28. Enabling provisions to create a mandatory Code will be provided for in the Grocery Industry Competition Bill, Confidential advice to Government .
29. Secondary legislation will be required to implement the proposals outlined in this paper, subject to policy decisions. This secondary legislation will be implemented under the Grocery Industry Competition Bill.

Impact Analysis

30. The Ministry of Business, Innovation and Employment's Regulatory Impact Analysis Review Panel has reviewed the attached Discussion Document *New Zealand Grocery Industry Code of Conduct* and confirms that it substitutes as an interim Regulatory Impact Statement.
31. The Discussion Document is likely to lead to effective consultation and support the delivery of Regulatory Impact Analysis to inform subsequent decisions.

Climate Implications of Policy Assessment

32. The Ministry for the Environment Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that the CIPA requirements do not apply to this proposal as the threshold for significance is not met.

Population Implications

33. There are no population-specific implications from the proposals in this paper. However, Māori have a strong role in grocery supply as producers and suppliers. Changes to address imbalances between major grocery retailers and suppliers will benefit Māori producers in their dealings with major grocery retailers.

Human Rights

34. The proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Consultation

35. The Treasury, Commerce Commission, Te Arawhiti, and Ministry for Primary Industries have been consulted on this paper. The Department of Prime Minister and Cabinet and Parliamentary Counsel Office has been informed.
36. Officials engaged with the major grocery retailers, supplier groups, consumer groups and Māori organisations as part developing the consultation paper.

Communications

37. I intend to issue a press release to announce the release of the Grocery Industry Code of Conduct consultation paper and encourage interested parties to provide a submission to MBIE in the week of 4 July 2022.

Proactive Release

38. I propose to proactively release this Cabinet paper and minute within 30 business days.

Recommendations

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

1. **note** that on 23 May 2022, Cabinet agreed to establish a mandatory Grocery Code of Conduct for major grocery retailers and their suppliers [CAB-22-MIN-0186 refers];
2. **note** that the attached *Grocery Industry Code of Conduct consultation paper* seeks feedback on three options for a possible Code of Conduct to govern relationships between major grocery retailers and suppliers, including by:
 - 2.1. establishing general conduct obligations to apply to major grocery retailers at all times and in all interactions;
 - 2.2. clarifying minimum expectations of grocery supply agreements;
 - 2.3. setting obligations on the conduct of retailers in relation to matters of product supply and placement, payment terms, and promotions; and
 - 2.4. establishing a dispute resolution process for Code-related issues;
3. **note** that the *Grocery Industry Code of Conduct consultation paper* was developed with input from MBIE's Grocery Code Advisory Group, and was shared with the National Māori Authority and the Iwi Chairs Forum;
4. **agree** to release the attached *Grocery Industry Code of Conduct consultation paper*, subject to further minor and editorial changes, for a five week period of public consultation;
5. **invite** the Minister of Commerce and Consumer Affairs to report back to the Cabinet Economic Development Committee to seek policy decisions following consultation in October 2022.

Authorised for lodgement

Hon David Clark

Minister of Commerce and Consumer Affairs