



## COVERSHEET

<b>Minister</b>	Hon Dr David Clark	<b>Portfolio</b>	Commerce and Consumer Affairs
<b>Title of Cabinet paper</b>	Grocery sector reform: regulation of access to grocery wholesale and collective bargaining exemption	<b>Date to be published</b>	Friday 2 September

### List of documents that have been proactively released

<b>Date</b>	<b>Title</b>	<b>Author</b>
August 2022	Grocery sector reform: regulation of access to grocery wholesale and collective bargaining exemption	Office of the Minister of Commerce and Consumer Affairs
8 August 2022	CAB-22-MIN-0186 Minute	Cabinet Office

### Information redacted

**YES**

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Some information has been withheld for the reasons of confidential information entrusted to the Government.

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



# Cabinet

## Minute of Decision

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### Grocery Sector Reform: Regulation of Access to Grocery Wholesale and Collective Bargaining Exemption

**Portfolio** Commerce and Consumer Affairs

On 8 August 2022, following reference from the Cabinet Economic Development Committee, Cabinet:

#### Part One: Regulation of access to grocery wholesale

##### Background

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

- 1.1 to establish an initial ‘quasi-regulatory’ regime for wholesale grocery supply to be implemented by the major grocery retailers;
- 1.2 that details of a mandatory wholesale access regime, to act as a ‘regulatory backstop’, will be included in the Grocery Industry Competition Bill (the Bill);

[CAB-22-MIN-0186]

2 **noted** that under the Bill, the powers and functions relating to wholesale regulation will be given to the Commerce Commission, and that the ‘Commissioner’ will have the authority to carry out those powers and functions, either alone or with two other members of the Commission;

##### Purpose and proposed approach to regulation of access to grocery wholesale

3 **noted** that the regulation of access to grocery wholesale is intended to improve competition in the retail grocery sector for the long-term benefits of consumers;

4 **noted** that:

- 4.1 the regulatory backstop is intended to further incentivise competitive wholesale offerings by enabling the government to place additional regulation on major grocery retailers;
- 4.2 a flexible toolkit of additional forms of regulation is proposed to provide for an escalating level of intervention without a formal hierarchy;

**Proposed set of operationally-focused principles**

- 5 **agreed** that the Bill set out principles intended to guide decision-making both under the quasi-regulatory regime and in the development of any further regulation as a backstop, which are likely to be along the following lines:
- 5.1 wholesale customers seeking to operate as grocery retailers in the New Zealand market have access to a comprehensive range of wholesale product offerings, either through the major grocery retailers or other channels;
  - 5.2 major grocery retailers and wholesale customers have sufficient certainty to make efficient investments, including credible demand and supply for wholesale products, respectively;
  - 5.3 major grocery retailers can reasonably expect to recover efficient costs, including investments they are required to make;
  - 5.4 the wholesale offering by major grocery retailers – in terms of access terms and conditions, range and price – is consistent with what would be expected in a workably competitive wholesale market;
  - 5.5 the prices provided under the wholesale offering by major grocery retailers are transparent to wholesale customers;
  - 5.6 retail-focused promotion and marketing is generally to be negotiated between suppliers and retailers, unless the supplier wants to make them available through wholesale;
  - 5.7 independent suppliers retain control over the channels for the retail sale of their products and brands;
  - 5.8 wholesale customers, and other major grocery retailers, are not hindered from developing their own trading relationships with suppliers (e.g., by exclusivity arrangements and/or restrictive clauses in trading arrangements between major grocery retailers and wholesale customers);

**Proposed designation process**

- 6 **agreed** that only those major grocery retailers who are also subject to the quasi-regulatory regime can be subject to the regulatory backstop regime;
- 7 **agreed** that the quasi-regulatory regime have a similar designation process to that adopted in the Commerce (Grocery Sector Covenants) Amendment Act 2022, with modifications to suit the quasi-regulatory regime as appropriate (including a regulatory holiday for the first five years of trading in New Zealand);

**Proposals relating to the regulatory backstop regime**

- 8 **agreed** that the Commissioner may impose additional regulatory requirements on major grocery retailers if they would better meet the purpose of the Bill and any of the following grounds are met:
- 8.1 after three months from the quasi-regulatory regime provisions in the Bill coming into force, a major grocery retailer has not put in place the formalised rules, criteria and procedures, or the standard terms and conditions, required by the quasi-regulatory regime;

- 8.2 after six months from the quasi-regulatory regime provisions in the Bill coming into force, a major grocery retailer has not put in place the systems necessary (e.g., ordering, billing, and confidentiality management) to provide wholesale groceries to wholesale customers;
- 8.3 after twelve months from the quasi-regulatory regime provisions in the Bill coming into force, prospective wholesale customers have sought access, good faith negotiations have concluded, and no substantial agreements have been reached;
- 8.4 the wholesale offerings – in relation to price, range, and terms – are not consistent with what may be expected in a workably competitive wholesale market;
- 9 **agreed** that if the above grounds are met, the Commissioner can impose additional regulation by publishing a determination:
- 9.1 requiring a major grocery retailer to put in place an enforceable framework for commercial wholesale supply of a comprehensive range of grocery products at competitive prices and make directions relating to a framework; and/or
- 9.2 making an enforceable Grocery Wholesale Industry Participation Code that applies to major grocery retailers, and to all retailers that seek access to wholesale groceries;
- 10 **agreed** that the Minister may, after considering a recommendation of the Commissioner, seek an Order in Council that requires major grocery retailers to supply wholesale customers if the wholesale offerings are not consistent with what may be expected in a workably competitive wholesale market, and the overall purpose of the Bill could be better delivered by additional regulatory intervention;
- 11 **agreed** that the additional regulatory intervention referred to above include the two following regulatory tools:
- 11.1 require (one or more) major grocery retailers to supply at non-discriminatory terms;
- 11.2 price-quality regulation;
- 12 **agreed** that when considering either of the tools referred to in paragraph 11 above, the Commissioner may recommend any other form of regulation that it thinks, in the circumstances, would best meet the purpose of the Bill;
- 13 **agreed** that in terms of the process for recommending either of the tools referred to in paragraph 11 above, or other form of regulation they think may better achieve the purpose of the Bill, the Commissioner:
- 13.1 may make a recommendation of their own initiative, or at the request of the Minister, or as part of its annual reporting function;
- 13.2 may, at the same time, consider whether to require a Framework or make a Wholesale Code;
- 13.3 must consult prior to making a recommendation;
- 13.4 must recommend which major grocery retailer(s) to apply the recommended regulation to;
- 13.5 may take into account other matters it considers to be relevant when considering whether to make a recommendation to the Minister;

- 14 **agreed** that any requirements on a major grocery retailer to provide products under the regulated wholesale access regime may also place requirements on wholesale customers that are necessary to ensure the effective operation of the regulated wholesale access regime;
- 15 **agreed** that any requirements on a major grocery retailer to provide products under the regulated wholesale access regime may allow for a supplier to opt out of the wholesale offering;
- 16 **agreed** that in the event additional intervention is implemented by Order in Council, the Commissioner may require a major grocery retailer to include private label products under that regime if they determine that doing so is consistent with the purpose of the Bill;
- 17 **agreed** that if a regulatory backstop tool is implemented:
- 17.1 it would be reviewed by the Commissioner in circumstances and using a process as may be specified by the Commissioner (for example, by using a market concentration threshold);
- 17.2 any additional regulatory requirements imposed by the Commissioner could be amended or deactivated by the Commissioner, after reviewing them against the purpose of the Bill;
- 17.3 regulation of supply on non-discriminatory terms or price-quality regulation could be amended or deactivated by Order in Council, following a recommendation by the Commissioner;

#### **Proposed review of the regulation of access to grocery wholesale**

- 18 **agreed** that a review of the regulation of access to grocery wholesale be triggered if the Commissioner's monitoring of New Zealand grocery sectors reveals that the market concentration has likely been at or below the threshold for two consecutive years;
- 19 **agreed** that the Minister can, on their own volition or following a recommendation made by the Commissioner, seek an Order in Council setting market concentration thresholds that trigger that review;
- 20 **agreed** that the Commissioner then be required to notify the Minister and to provide the Minister, within a further one year, with a report covering:
- 20.1 the state of competition that exists in New Zealand grocery sectors, including retail and wholesale sectors;
- 20.2 whether the Commissioner considers that:
- 20.2.1 the regulatory backstop regime should be repealed;
- 20.2.2 the quasi-regulatory regime should continue; and
- 20.2.3 if so, what changes, if any, should be made;
- 21 **agreed** that within three months of receiving the Commissioner's report, the government must publish its response to the Commissioner's report outlining its intentions in relation to the wholesale regulatory regime;

**Proposed compliance and enforcement for the regulation of access to grocery wholesale**

22 **agreed** to the proposed range of compliance and enforcement provisions for quasi-regulatory regime and regulatory backstop regime, including the use of notices to take corrective actions, court orders, enforceable undertakings and pecuniary penalties, as set out in Annex Two to the paper under CAB-22-SUB-0303;

**Part Two: Implementing an exemption to facilitate greater collective bargaining by certain suppliers**

23 **noted** that on 23 May 2022, Cabinet agreed to introduce an exception to the Commerce Act 1986 for grocery suppliers to collectively bargain with retailers [CAB-22-MIN-0186, paragraph 12];

24 **rescinded** the part of the decision referred to above that implies the provisions of this exemption would be wholly set out in the Bill;

25 **agreed** that this be an exemption by way of secondary legislation to sections 27 and 30 of the Commerce Act;

26 **agreed** that certain conduct or provisions be excluded from the exemption, including collective boycott and any other conduct or provisions specified in regulations;

27 **agreed** that regulations may also be made specifying:

27.1 the class or classes of suppliers who can make use of the exemption;

27.2 which class or classes of grocery retailer they may collectively negotiate with;

27.3 any conditions on suppliers entering into collective bargaining arrangements;

28 **agreed** that suppliers intending to make use of the exception be required to disclose certain information in the manner prescribed by the Commerce Commission before the exemption takes effect, and within 15 working days of entering into the arrangement, and that these disclosures be published by the Commission;

29 **agreed** that the power to make any regulations referred to above be on the recommendation of the responsible Minister following consultation with the Commerce Commission and affected parties, and only if considered consistent with the purpose of the Commerce Act (to promote competition in sectors for the long-term benefit of consumers within New Zealand);


30 **noted** that on 4 July 2022, Cabinet agreed that the Commerce Commission's powers and functions as the grocery sector regulator will include monitoring, among other things, the use of best price clauses and exclusive supply agreements, and grocery supplier margins over time, and to compare these to benchmarks and international comparisons [CAB-22-MIN-0259];

31 **agreed** that the consequences of any supplier failing to act in accordance with the exemption is that they, and any other supplier participating in that collective bargaining process who knows or ought reasonably to know of the failure, would lose the benefit of the exemption and be exposed to potential liability under section 27 and/or section 30 of the Commerce Act;

**Financial implications**

32 **noted** that the wholesale access regime has financial costs on the Commerce Commission that are not funded beyond financial year 2022/23;

33 Confidential advice to Government

**Legislative implications**

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

35 **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.

Rachel Hayward  
Acting Secretary of the Cabinet