

To: New Zealand Commerce Commission

Submission - Market study into the retail grocery sector - Draft report published 29 July 2021

Introduction

I welcome the opportunity to comment on the draft report.

I acknowledge the New Zealand Commerce Commission (**Commission**) has undertaken the study into the retail grocery sector in accordance with the terms of reference issued by the Minister of Commerce and Consumer Affairs on behalf of the NZ government. Further, I acknowledge the Commission is constrained by the powers available to it in terms of the Commerce Act 1986 (the **Act**), the Crown Entities Act 2004 and associated legislation. On that basis the Commission has understandably remained focused on consideration of the retail grocery sector strictly in terms of the purpose of the Act, being the promotion of competition in the markets for the long-term benefit of NZ consumers.

This submission is structured into two parts. In the first part, I comment on the current limitations of the study. I suggest the Commission recommend to the government that it initiates a whole of government response to address the accessibility to food amongst NZ citizens. In the second part, I focus on making comments on options for recommendations that the Commission could consider to improve competition.

Whole of Government Response – Accessibility to Food

As required by the government, the Commission has undertaken the study through the lens of the Act, utilising the tool of the promotion of competition as its device to examine the retail grocery sector. This has resulted in the Commission understandably omitting to examine and consider matters beyond the framework of the Act. For example, clause 10 of the draft report records that the Commission ‘does not enquire into wider policy issues which may impact on food and alcohol supply and retail within’ NZ. The terms of reference issued to the Commission were limited by the government, presumably in part due to the empowering provisions of the Act.

Access to food and food insecurity are significant issues in NZ. For example, the 2019 Ministry of Health survey entitled *Household Food Insecurity Among Children in New Zealand* identifies that 19% of children were found to live in food-insecure households in 2015/16. The current labour government has claimed it focuses on a wide range of social justice issues such as child poverty, Maori health and housing. The interconnection of these social justice and other issues has long been recognised by the labour party. However, despite this acknowledgement, the current government appears to have avoided initiating a broader social justice examination of food insecurity in NZ.

If the current labour government remains committed to its social justice focus, then I contend it needs to examine access to food and food security in NZ. The Commission is unable to undertake such an examination within the framework of the Act and the narrow lens of competition. The draft report reveals the Commission has ably identified factors affecting competition within the retail grocery sector. However, the Commission has avoided a critical examination and consideration of such matters as, for example, the impact of pandemics and climate change. The limited lens of competition also prevents a critical examination of power imbalances arising as a consequence of future health and environmental changes arising from pandemics and climate change.

I suggest the government should take the opportunity presented by the publication of the draft report to highlight the importance of food to the health of all New Zealanders. A whole of government approach should be undertaken to examine food security in NZ. This would enable the government to meaningfully examine and consider wider social, economic and political inequalities relating to food security. Policies to improve access to food and food security could subsequently be developed. The government should instruct other government agencies and departments such as, but not limited to, the Ministry of Social Development, the Ministry of Health and the Ministry for the Environment and Ministry of Education to be involved in this whole of government approach. Broad and interlinked terms of reference should require these agencies and the Commission to identify, examine and consider other interconnected factors beyond the narrow focus on competition in the retail grocery sector.

Access to food is not a luxury but a fundamental human right. Through the lens of human rights we can recognise the right to food and examine food security and accessibility to food from a wider viewpoint. The NZ government has an obligation to protect all humans over whom it has responsibility. The international normative human rights rules founded by the Universal Declaration of Human Rights (1948) identifies the right to food. The International Covenant on Civil and Political Rights (1966) (**ICCPR**) reinforces this right. General Comment 12 adopted by the Committee on Economic, Social and Cultural Rights in 1999 specifies the core contents of the right to adequate food in the ICCPR include economic accessibility. Further international human rights instruments ratified by NZ recognising the human right to adequate food include the International Covenant on Economic, Social and Cultural Rights (1966), the Convention on the Elimination of All Forms of Discrimination Against Women (1979), the Convention on the Rights of the Child (1989) and the Convention on the Rights of Persons with Disabilities (2006).

A human rights approach will assist in identifying and examining food insecurity in NZ. It will contribute to a better understanding of the social and political origins of food hunger. It will encourage measures to be implemented to confront the root causes of food insecurity and not simply some of its effects.

A whole of government critical examination of food security will draw attention to competition in terms of the Act having an ambiguous effect on the human right to food. Competition effectively restrains the human right to food, leads to the legitimisation of barriers being imposed on the right to food, and promotes the flow of violence against those most vulnerable in our society. A narrow focus on competition renders hunger apolitical, it minimises the structural causes of hunger in society, it removes from debate the lived experiences of our most vulnerable. Without a human rights focus, food hunger can become obscured; food can be rendered as a mere element in the economic system operated by the retail grocery sector. Food is effectively manipulated into an apolitical matter whereby political debate in a traditional sense is removed. Food hunger becomes an issue of economic management rather than a political and social issue. Political debate is stripped away from where it should be. This avoids the identification and consideration of suffering by the most vulnerable members of our community.

A critical examination and consideration of food security questions the control of food. In terms of the retail grocery sector, it encourages the identification and examination of the structural causes that enable participants within that sector to control the price of food, which contributes to poverty and inequality. I view the structure of the retail grocery sector in wider terms than the Commission does in terms of the Act. The government has a human rights responsibility to do the same.

Intervention in the Retail Grocery Sector

I agree with the Commission that improvements for the long-term benefit of NZ consumers cannot occur without some form of intervention. However, unlike the Commission, I suggest the extent of the intervention needs to have a broader social justice focus. The Commission describes in the draft report their narrow conception of the legal definition of competition in terms of the Act. A consequence of this restricted interpretation is that the contested nature of competition is diluted and a wider socioeconomic conception of competition is avoided by the Commission. This prevents a broader range of options for recommendations from being considered to improve competition.

As the Commission has identified, the NZ High Court in *Wellington International Airport Ltd and Others V Commerce Commission* [2013] NZHC 3289 has recognised intervention is not required in circumstances where ‘socially desirable outcomes generated by competition already exist to a satisfactory degree.’ I suggest socially desirable outcomes include matters of social justice. On that basis, I contend that competition within the retail grocery sector has failed to achieve socially desirable outcomes, and therefore the Commission should consider a wider range of options for recommendation.

I suggest the Commission includes a broader social and community focus in its recommendations. The existing socially constructed economic and political structures need to be altered to remove the current control of food by the retail grocery sector. I suggest the recommendations should include direct and indirect institutional arrangements that reduce the structural violence of food hunger, poverty and inequality amongst the most vulnerable members of our community. In particular, there should be:

1. Explicit protection of the right to adequate food and freedom from hunger included in retail grocery sector legislation. This should include express obligations imposed on the retail grocery sector to develop, support and implement pragmatic strategies to prioritise and enhance accessibility to nutritious food, with a focus on supporting the most vulnerable.

2. Express obligations should be imposed on the retail grocery sector to reduce carbon and other greenhouse gases and meet specified meet climate protection targets. This should extend to the retail grocery sector being required to contribute towards obligations imposed on primary producers to reduce agricultural emissions. The retail sector should also be required to direct support for the transition to renewables.
3. The limitation of liability of shareholders in retail grocery sector companies should be removed. I suggest all companies within this sector must be unlimited companies in which shareholders have ultimate and personal liability.
4. There should be an overarching obligation on retail grocery sector companies to keep the general public informed. This should include real-time financial reporting and six-monthly publication of financial results. The existing corporate structures need to be altered to increase transparency and liability.
5. In circumstances of human or natural disasters, the retail grocery sector should be required to sell food at reduced prices and without surplus profit.
6. Significantly greater government support should be available for the Not-for-profit sector, research and tertiary sectors in advancing food security in NZ. This should be funded by the retail grocery sector.
7. Closer connections between NZ primary producers and consumers with a particular focus on supporting and educating children in the production of healthy food.
8. Significant barriers should be imposed on parties responsible for promoting unhealthy food.

These obligations should be imposed by legislative mechanisms with strictly enforceable provisions and significant penalties where applicable. If the government is committed to social justice, then it needs to implement wider social justice obligations in respect to the accessibility to food and food security.