

26 August 2021

Market Studies Team  
Commerce Commission  
PO Box 2351  
Wellington 6140

Dear Sir/Madam

## **MTA Submission: Market study into the retail grocery sector – Draft report**

Thank you for the opportunity to comment on the draft report of the market study into the retail grocery sector (“**the Grocery Sector Study**”/“**the Draft Grocery Sector Report**”). The limited opportunity for submissions arises during a nationwide Level 4 Covid19 Lockdown, which adversely impacts on MTA’s capacity to take soundings from MTA’s members before providing these comments: we have done what we can in the time that is available.

In broad terms, on the basis set out in the Submission in the schedule to this letter, MTA endorses and supports:

- the proposed broad recommendations in the Draft Grocery Sector Report regarding the inclusion of a general provision in the Commerce Act providing for the creation of sector Codes of Practice, and the reference to collective bargaining options; and
- the suggestion that mandatory sector Codes of Practice along those lines could benefit a range of sectors in which similar issues arise – including several motor trade sectors in which MTA’s members are market participants.

Should you require any clarification or elaboration of any aspect of these comments, please do not hesitate to get in touch.

Yours sincerely



Greig Epps  
**Advocacy & Strategy Manager**  
**Motor Trade Association**

This submission is from:

Motor Trade Association ("**MTA**")  
PO Box 9244  
Marion Square  
Wellington 6141.

The contact person in respect of this submission is:

Name: Greig Epps  
Title: Advocacy and Strategy Manager  
Ph: +64 (4) 381 8816  
Email: [greig.epps@mta.org.nz](mailto:greig.epps@mta.org.nz)

## Schedule - MTA's Submission:

### Introduction:

The Motor Trade Association (Inc) (MTA) was founded in 1917 and in 2017 celebrated 100 years of trust with the NZ motoring community. MTA is an incorporated society, with over 3800 members, across a broad range of motor trade businesses. MTA's members operate businesses including service stations, vehicle and parts importers, distributors and dealers, automotive repairers, and collision repairers. As of 2020, the automotive industry employs over 60,000 New Zealanders and contributes more than \$3.5 billion to the New Zealand economy. In that context, MTA welcomes the opportunity to comment on one key aspect of the Draft Grocery Market Report that impacts on many MTA members, not just members that include grocery-related Convenience Store businesses (generally service stations).

### The key findings in the Draft Grocery Market Report:

The Executive Summary to the Draft Grocery Market Report includes the following:

*"We consider that the power imbalance between the major grocery retailers and their suppliers could be addressed through a number of measures, **including a mandatory code of conduct and changes to allow collective bargaining by suppliers.**" [pg. 6, emphasis added]*

*"Supplier Code of Conduct*

*We consider that it would be **beneficial to introduce a mandatory Code of Conduct** to help strengthen suppliers' bargaining power with retailers and prevent current conduct which reduces the ability and incentive of suppliers to invest and innovate. An effective Code of Conduct may need to be determined by Government, rather than industry self-regulation.*

*Our options for recommendations also include a recommendation for a general code-making power built into the Commerce Act which may produce more consistent and predictable codes over time in different sectors with similar needs.*

...

*We also recommend consideration of methods to **authorise collective bargaining** by suppliers in relation to supply contracts entered into with major grocery retailers in appropriate circumstances." [pg. 20, emphasis added]*

This is covered in more detail in the Draft Grocery Market Report itself, at paragraphs 9.113-9.133, with paragraph 9.119 providing as follows:

*"In our fuel market study we recommended **the enactment of a generic regulatory regime in the Commerce Act for the adoption and enforcement of industry codes**, like Part IVB of the Australian Competition and Consumer Act 2010 (Cth) (CCA). This recommendation has not been adopted at this time. We remain of the view that **a regime of this type may produce more consistent and predictable outcomes over time than the development of one-off regulatory regimes for different sectors.**" [emphasis added]*

### MTA's view:

MTA strongly endorses and supports the essence of the broader general propositions above and, in particular, that:

- a general code of conduct making power should be included in the Commerce Act;
- statutory/regulatory input into mandatory sector codes is appropriate;
- this would (not just may) produce more consistent and predictable codes over time in different sectors with similar needs; and

- *authorisation of collective bargaining (not just for supermarket suppliers but also for other businesses in “B to b” trading arrangements) is appropriate (again across a range of sectors with similar needs).*

### The issues as they impact on motor trade sectors:

MTA’s members operate in a range of sectors in which there are significant market power imbalances, including retail fuel (where SME retailers and distributors deal with multinational fuel majors), motor vehicle sales (where SME or small-medium business car dealers deal with international/national motor vehicle manufacturer/importer suppliers), collision repairs (where SME repairers substantially deal with large international/national insurers) and convenience stores (within retail fuel outlets). In some cases, MTA’s members are effectively also suppliers (like the small producers as in the Grocery Market Study), but in other cases they are downstream in the distribution chain as buyers/sellers/retailers.

***The vast majority of MTA members are SMEs or small-medium businesses contracting with much larger businesses with substantial market power, on “B to b” contract terms that are often imposed by big businesses (basically on a “take it or leave it” basis).***

Other jurisdictions, including (for example) Australia, more actively regulate trading relationships to maintain (more of a semblance of) a level playing field, in the interests of trade, business, competition and ultimately consumers. But in New Zealand ***many of these SME businesses and business sectors generally fall between the cracks in terms of legislated/regulatory or other legal trade practices protection.*** In brief overview:

- Consumer protection legislation (such as the Consumer Guarantees Act 1993) now extends consumer protections beyond common law notions such as “unconscionable bargain”, and that includes some protection for businesses buying and consuming consumer goods. However, *that offers SMEs little help in business-to-business trading transactions (regarding goods/services that are being on-sold etc) because: very little protection is available in the “B to b” context; and big businesses generally impose terms contracting out of any applicable statutory/regulatory or other legal protection.*
- The prospect of extension of the “unfair contract terms” regime under the Fair Trading Act 1986 into some “B to b” trading offered a glimmer of hope. *But with a \$250,000 per annum cap on that initiative, and with even small businesses generally needing to turn over much more than that to be sustainable, this is unlikely to have significant impact on most of these “B to b” relationships.* Fuel retailers turning over substantial volumes of fuel for modest margins are an obvious example of a small “b” business with contracting far exceeding that cap. Franchisee car dealers turning over anything more than a handful of new vehicles (for modest margins) are another example obviously outside of unfair contract terms protection.
- The recent fuel market study firmly grasped the essence of the underlying issues in terms of “B to b” contract terms in that market, and the nature of the sorts of one-sided contracts that small independent traders/fuel retailers face. *But although the outcomes of that study include restrictions on contracting that protect small-medium distributors dealing with big fuel multinationals, those protections do not apply to protect small independent traders/fuel retailers (pump operators) contracting with the multinationals or intermediary distributors<sup>1</sup>.*

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<sup>1</sup> The issue, here, is that the contractual protections included in sections 16/17 in the Fuel Industry Act 2020 refer to “distributors” not “resellers”, which excludes “dealers” (i.e. independent retailers operating under the usual fuel brands from owner-operated retail fuel sites).

- The Commerce Act 1986 at least theoretically offers some protection. But it should already be clear to the Commission, not least from the fuel market study and progress so far in Grocery Sector Study to date, that *it is unrealistic (commercially and in terms of the likelihood of being outgunned) to expect SMEs to take effective action under the Commerce Act to seek to reign in market dominating big business suppliers and/or buyers (upon whom the SMEs are broadly dependent)*. Even where competition law principles might suggest big businesses are crossing the line, it is not realistic to expect much smaller businesses to grasp these difficult legal issues and blow the whistle, or to instigate some sort of dispute or long-shot regulatory complaint (which amounts to biting the hand that feeds them), when they are so clearly outmuscled and outgunned.

MTA's SME members across a range of sectors are frustrated that they operate in markets in which the large dominant market participants can (and do) dictate "take it or leave it" one-sided contract terms and arrangements, without the many SME suppliers or buyer/sellers having any effective mechanism to properly negotiate terms so they can compete on a level playing field. That will include SME members in the retail fuel market who will also have Convenience Store elements to their business that will have (to a greater or lesser extent) an interest in the Grocery Market Study and its recommendations too – although it would be fair to say that this has not been as much of a focus for MTA and its members as the fuel market study that will have impacted on many of those same SMEs.

Against that background MTA has for some time been involved as an industry voice lobbying for legislative/regulatory changes in various motor trade sectors, to seek to establish or restore more of an equilibrium to these various big-business dominated markets, in the interests of MTA's SME members, competition in those markets, and ultimately consumers.

In that context ***MTA's submission in respect of the Draft Grocery Study Report focusses on the broader recommendations identified above, which MTA perceives could have a positive impact across a broader range of sectors impacting on motor trade participants.***

***The broader reforms suggested in the Draft Grocery Market Report offer a strong first step to seek to plug a substantial legislative/regulatory gap. A statutory Code of Conduct making power, appropriate mandatory sector codes and some sort of lawful collective bargaining regime would assist greatly.*** That would not be a *complete* solution across all markets. But ***this would be a long-overdue step in the right direction, which would be highly beneficial in a broad range of sectors where B to b trading raises issues for markets and consumers.***

On that basis, ***MTA applauds and strongly endorses this aspect of the Draft Grocery Market Report and urges the Commission to maintain and/or (if anything) fortify and/or flesh out those broader recommendations.***



## NATIONAL CONTACT DETAILS

### Physical address

Level 12,  
Nokia House  
13-27 Manners  
Street Te Aro,  
Wellington 6011

### Postal address

PO Box 9244  
Marion Square  
Wellington 6141

### Phone

04 385 8859

### Members toll free phone

0800 001 144

### Mediation Line

0508 682 633

### Fax

0800 000 695

### Email

[mta@mta.org.nz](mailto:mta@mta.org.nz)

### Website

[mta.org.nz](http://mta.org.nz)