

Submission on the Grocery Industry Competition Bill

Submitted to:

Economic Development, Science and Innovation Committee

22 December 2022



Commerce Commission submission on the Grocery Industry Competition Bill

Introduction

1. The Commerce Commission (the Commission) appreciates the opportunity to make a submission to the Economic Development, Science and Innovation Committee (the Committee) on the Grocery Industry Competition Bill (the Bill).
2. The Commission is an independent Crown entity and is New Zealand's primary competition, fair trading, consumer credit, and economic regulatory agency. Our vision is to make New Zealanders better off. We work to ensure markets work well and that consumers and businesses are confident market participants.
3. The Commission is submitting on the Bill on the basis of:
 - 3.1 having been responsible for undertaking a market study into the retail grocery sector, of which the Bill forms part of the Government response; and
 - 3.2 the Commission being responsible for the majority of regulatory functions anticipated under the Bill.

Executive Summary

4. The Grocery Industry Competition Bill gives effect to several of the recommendations made as part of our retail grocery market study. We generally consider that the Bill is well-drafted and workable, and provides the Commission with a broad range of tools to improve competition in the grocery sector. Nevertheless, there are opportunities to improve the Bill which we set out in this submission. While Attachment 1 sets out a range of detailed feedback on the Bill, our key recommendations are as follows:
 - 4.1 Currently the Bill's purpose statement includes two limbs, relating first to promoting competition and efficiency, and second, to the extent that there is limited competition, promoting outcomes that are consistent with outcomes produced in competitive markets. We recommend removing the second limb, to avoid diluting what we consider should be the primary focus of the regime, which is to promote competition.
 - 4.2 The Bill's definition of groceries potentially has a significant effect on who the grocery supply code of conduct and wholesale supply regulation apply to, as well as having implications for our monitoring responsibilities. We recommend clarification in the Bill as to the implications of this definition, as well as consideration of changes to the definition of groceries.
 - 4.3 The Bill sets out a range of monitoring and reporting functions and requirements relating to different aspects of the regulatory regime. However, the purpose of some of these functions and requirements is not clear. To avoid a misalignment of expectations as to the Commission's role, we recommend that the Bill explicitly sets out the purpose of these monitoring functions, and of the Commission's annual review of competition. We also

recommend merging the competition review that would be triggered by a specified level of market concentration into the annual review of competition, and aligning the timelines and publishing obligations relating to the Bill's reporting requirements.

- 4.4 The Bill sets out a range of wholesale regulation tools, including four categories of backstop regulation. While we welcome a flexible and appropriately strong set of regulatory tools, the relationship and boundaries between the tools is not clear and the scope of some of the regulatory backstop instruments appears to go beyond what we understand to be the policy intent. We recommend better alignment of the terminology used in the forms of wholesale regulation tools, and clarification as to the boundaries of each tool.
- 4.5 Almost all provisions of the Bill come into force 14 days after receiving Royal assent. These timeframes provide little notice for grocery retailers or the Commission of the final details of the regulatory regime. There could therefore be benefit in pushing out the commencement date of the Bill's wholesale supply provisions. We believe this is likely to ultimately result in improved compliance, implementation, and quality of wholesale offerings, without delaying the point at which backstop forms of wholesale regulation could be imposed.
- 4.6 Many of the Bill's functions may be carried out alone by the Grocery Commissioner established under the Bill, or delegated at the Grocery Commissioner's discretion. However, for functions that must be performed by the Grocery Commissioner in conjunction with two other Commissioners, the Bill includes a restriction on delegation. This is likely to prevent the delegation of even non-substantive matters relating to these functions, which creates workload and governance challenges. We recommend removing this restriction on delegation.
- 4.7 We recommend that the Bill be amended so that if a court finds a contravention of the unfair contract terms provisions, it can immediately impose penalties or other remedies, rather than providing that it may do so only if the party continues to include or rely on such terms and a further order of the court is sought. This would provide greater incentives for unfair terms to be proactively removed from grocery supply contracts.
- 4.8 Finally, we recommend extending our ability to require regulated grocery retailers (RGRs) to provide compliance-related information such as written statements regarding compliance with an order or determination, or reports from auditors. Currently, this ability only applies in relation to RGRs' wholesale regulation obligations. However, we consider that there would be benefits if we were able to require RGRs to provide this information in respect of all of the obligations in the Bill.

5. More generally, we continue to support the adoption of the remaining recommendations from our market study. Most notably, although beyond the scope of the Bill, we consider that measures to free up land supply for retail grocery stores (and commercial development more generally) through the planning system will be critical to facilitating additional retail grocery store competition.

Background on our retail grocery market study

6. On 17 November 2020, the Hon Dr David Clark, Minister of Commerce and Consumer Affairs, published a notice under section 51(1) of the Commerce Act, requiring the Commission to undertake a study into any factors that may affect competition for the supply or acquisition of groceries by retailers in New Zealand.
7. On 8 March 2022, we published our final report on our market study into the retail grocery sector. It found that competition is not working well for consumers in the retail grocery sector. To improve competition, we made 14 recommendations:
 - 7.1 Recommendation 1: Improve the availability of sites for retail grocery stores under planning law
 - 7.2 Recommendation 2: Prohibit restrictive and exclusive covenants that inhibit retail grocery store development, and monitor land banking by the major grocery retailers
 - 7.3 Recommendation 3: Require the major grocery retailers to consider requests for wholesale supply in good faith, and meet associated disclosure obligations
 - 7.4 Recommendation 4: The next reviews of the Overseas Investment Act and Sale and Supply of Alcohol Act should consider whether they unduly impede entry or expansion by grocery retailers
 - 7.5 Recommendation 5: Monitor strategic conduct that affects the conditions of entry or expansion
 - 7.6 Recommendation 6: Introduce a mandatory grocery code of conduct to govern relationships between the major grocery retailers and their suppliers
 - 7.7 Recommendation 7: Consider a statutory authorisation or exception for collective bargaining by grocery suppliers
 - 7.8 Recommendation 8: Amend the Fair Trading Act to strengthen the business-to-business unfair contract terms regime
 - 7.9 Recommendation 9: The major grocery retailers should ensure their pricing and promotional practices are simple and easy to understand
 - 7.10 Recommendation 10: Mandate the consistent display of unit pricing

- 7.11 Recommendation 11: The major grocery retailers should ensure disclosure relating to loyalty programmes and data collection and use practices is clear and transparent
- 7.12 Recommendation 12: The major grocery retailers should cooperate with price comparison services
- 7.13 Recommendation 13: Establish a grocery regulator and dispute resolution scheme
- 7.14 Recommendation 14: Review the state of competition in the grocery sector three years after implementation of our recommendations, and collect information in the interim to support this review.

The Bill gives effect to a number of our retail grocery market study recommendations

- 8. This Bill gives effect (in some form) to Recommendations 3, 5, 6, 7, 8, 13, and 14 of our market study. It follows the passage of the Commerce (Grocery Sector Covenants) Amendment Act in June 2022, which largely gave effect to Recommendation 2. The Government has also recently announced its intention to mandate the consistent display of unit pricing via a consumer information standard under the Fair Trading Act, which relates to Recommendation 10.
- 9. In summary, the Bill:
 - 9.1 Establishes a Grocery Commissioner as a member of the Commission (clauses 160-166);
 - 9.2 Enables the establishment of a grocery supply code, to be enforced by the Commission (Part 2 of the Bill);
 - 9.3 Puts in place provisions to facilitate commercial agreements for wholesale supply of groceries, to be enforced by the Commission (subpart 2 of Part 3 of the Bill), and sets out a range of forms of ‘backstop’ wholesale regulation that may be imposed by the Commission or via an Order in Council (remainder of Part 3 of the Bill);
 - 9.4 Establishes a comprehensive monitoring and review regime to be undertaken by the Commission, including annual reports on the grocery industry (clause 168), reviews of the grocery supply code (clause 16), and reports relating to wholesale regulation (clauses 53, 68, 73, and 105);
 - 9.5 Provides a range of enforcement tools for the Commission and/or private parties, and provides for the establishment of a dispute resolution scheme in relation to the grocery supply code and wholesale supply regulation (Part 4 of the Bill);
 - 9.6 Provides for exemptions from certain provisions of the Commerce Act for agreements for collective negotiation by suppliers (clauses 176 to 181); and

- 9.7 Amends the Fair Trading Act to extend its unfair business-to-business contract terms provisions to a wider range of grocery supply contracts (clauses 191-204).
10. By giving effect to a number of the recommendations of our market study, we consider that the Bill should help to foster competition in the retail grocery sector.
11. However, while beyond the scope of this Bill, to provide the best possible chance of improvements to competition in the retail grocery sector, we continue to support the implementation of other recommendations made in our market study. This includes Recommendation 1, relating to planning law, and Recommendation 4, relating to the Overseas Investment Act and the Sale and Supply of Alcohol Act. From our perspective, Recommendation 1 is particularly important, with our market study identifying freeing up sites for retail grocery stores as a necessary measure to improve the conditions for entry and expansion, alongside improving availability of wholesale supply.

Key recommendations on the Bill

12. Below, we set out our key comments and recommendations on the Bill. Further detailed comments are set out in Attachment 1.
13. Our submission does not focus on the substantive policy positions contained in the Bill, but rather the general workability of the provisions from our perspective as the proposed regulator.

We recommend streamlining the Bill's purpose to focus on promoting competition

14. Currently, the Bill's purpose statement includes two limbs, which relate to promoting:
- 14.1 competition and efficiency in the grocery industry; and
- 14.2 to the extent that there is limited competition in the grocery industry, outcomes that are consistent with outcomes produced in competitive markets.
15. The second limb of the purpose statement appears to be based on the purpose statement of Part 4 of the Commerce Act, which relates to monopoly infrastructure where there is little or no competition, and little or no likelihood of substantial increases in competition.
16. However, groceries markets are not natural monopolies, and there are no inherent structural barriers to the development of competition in these markets in the same way as there are for some forms of infrastructure. Given this, increases in competition in the grocery sector are both desirable and feasible. As such, we consider that the second limb is unnecessary in the main purpose statement, as it

dilutes what we consider should be the primary focus of the regime, which is to promote competition (and efficiency).¹

17. We also note that a purpose statement focussed on promoting competition would be consistent with the Fuel Industry Act. The Fuel Industry Act, which is also likely to have some form of (backstop) wholesale regulation once the Fuel Industry Amendment Bill is passed, has a sole focus on promoting competition.
18. We therefore recommend removing the second limb of the purpose statement.
19. To the extent that the Committee considers that the Act should still include a purpose of promoting outcomes that are consistent with outcomes produced in competitive markets, we recommend that this be shifted to Part 3 of the Bill and made specific to the wholesale supply of groceries. This purpose could act alongside the main purpose of the Bill, along the lines that “in addition to the main purpose of the Act as set out in section 3, to the extent that that purpose is unable to be achieved, the purpose of this part is to promote outcomes that are consistent with outcomes produced in competitive markets”.

We recommend further consideration of the definition of groceries, and clarification as to its implications

20. The definition of groceries, as set out in clause 5 of the Bill, is currently framed as an exhaustive list. That is, the Bill states that ‘groceries’ means goods in any of a specified list of product categories. Most notably, this list excludes alcoholic beverages, but is also likely to exclude other goods sold by supermarkets such as homeware and electronics.
21. The definition of groceries is a central concept in the Bill. Most explicitly, it affects whether a retailer can be designated as a Regulated Grocery Retailer (RGR) for the purposes of the grocery supply code and wholesale supply obligations. This is because, under clauses 11 and 25 of the Bill, the Commission must be satisfied that a person supplies all or a majority of the categories of groceries to consumers before recommending that it be designated as a RGR.
22. The definition of groceries may also have several other impacts.
23. For example, we understand that the definition of groceries is intended to limit which suppliers receive the benefits of the grocery supply code. This could be read into certain clauses in the Bill, such as clause 14, which states that “the grocery supply code may contain any provisions that are necessary or desirable to promote the purpose of the code in connection with the supply of groceries”. However, the exclusion of products that are outside of the Bill’s definition of groceries from the coverage of a grocery supply code is currently not explicit. If this is indeed the intent, this may create complexity in respect of suppliers where some of the groceries they produce are within the Bill’s definition of groceries and some are not. Our retail

¹ Even in the context of wholesale regulation, where we would be seeking to promote outcomes consistent with competitive markets, the ultimate objective is to promote competition in retail grocery markets.

grocery market study recommended that all suppliers of the major grocery retailers receive the benefits of a grocery supply code of conduct.

24. By a similar logic, the definition of groceries may also limit the goods which are subject to the Bill's wholesale supply provisions.
25. The definition of groceries could also have impacts for our monitoring responsibilities. Our monitoring is generally likely to focus on the grocery industry as a whole or on specific retailers, rather than on specific product lines. While an exhaustive definition of groceries provides helpful clarity on which groceries are within scope of the regime, it could create uncertainty about the proper scope and application of the Commission's monitoring functions.
26. The definition could also impact on when any market concentration threshold specified under clause 103 is reached, and therefore when a review of the state of competition is triggered under clause 104.
27. At a minimum, we recommend that limb (b) of the groceries definition in clause 5 and clause 188(1)(c) be amended to allow for regulations to be made to expand the definition of groceries over time, in addition to allowing it to be narrowed. This would make the regime more adaptable over time.
28. However, we also recommend that further consideration be given to other possible amendments relating to the definition of groceries and flow-on impacts that arise from this definition. This includes:
 - 28.1 being more explicit in the Bill as to whether regulation, including the grocery supply code and wholesale regulation, can only apply to goods that fall within the definition of groceries, in addition to only applying to RGRs;
 - 28.2 if the definition of groceries is *not* intended to limit which goods regulation can apply to, then considering amending the definition of groceries to state that the definition is inclusive rather than exhaustive; and/or
 - 28.3 stating for the avoidance of doubt, that in undertaking its monitoring functions under the Grocery Industry Competition Act, the Commission's monitoring activity may include monitoring grocery retailers generally, even if they sell products that do not fall within the definition of groceries (as well as products that *do* fall within the definition).

We recommend clarifying, streamlining, and aligning the Bill's monitoring and reporting provisions

29. The Bill requires the Commission to monitor and report on a range of matters. This includes:
 - 29.1 clause 16 (report on review of grocery supply code);
 - 29.2 clause 53 (report following inquiry into whether and what additional regulation should apply);

- 29.3 clause 68 (report on review of wholesale framework);
 - 29.4 clause 73 (report on review of wholesale code);
 - 29.5 subpart 7 of Part 3 (report on state of competition); and
 - 29.6 clause 168 (annual report on grocery industry).
30. Attachment 2 sets out these requirements in more detail.
31. In addition, clause 4 of the Bill provides that the Commission's functions of the Act include:
- 31.1 issuing warnings, reports, or guidelines, or making comments, about any matter relating to the grocery industry;
 - 31.2 monitoring competition and efficiency in the grocery industry, and to the extent that there is limited competition in the grocery industry, whether outcomes are consistent with outcomes produced in competitive markets;
 - 31.3 carrying out inquiries, reviews, and studies (including international benchmarking) in connection with the grocery industry;
 - 31.4 monitoring compliance with, investigating conduct that constitutes or may constitute a contravention, an attempted contravention, or an involvement in a contravention of, and enforcing this Act; and
 - 31.5 making available, or co-operating in making available, information in connection with the grocery industry.
32. Combined, these provisions mean that monitoring will be a central part of the regulatory regime. We support a strong monitoring regime, as we consider that 'shining a light' can play an important role in improving outcomes in markets for consumers.
33. However, we recommend additional clarity as to the purpose of our monitoring functions, to avoid a misalignment of expectations between different parties as to the Commission's role. Currently, some of the individual monitoring and reporting functions include their own purpose. However, there is no explicit purpose set out for:
- 33.1 the monitoring functions in clause 4 of the Bill;
 - 33.2 the annual report on the grocery industry (clause 168), which is arguably the Bill's 'flagship' reporting requirement; or
 - 33.3 the review of competition in the grocery industry (subpart 7 of Part 3).
34. We therefore recommend including an explicit purpose for the Commission's monitoring functions set out under clause 4 of the Bill. Based on the

recommendations of our market study, and our understanding of the policy intent behind the Bill, this could be along the lines of:

The purpose of the Commission's monitoring and reporting functions set out in section 4 of this Act, in addition to any of the purposes specified in relation to specific monitoring and reporting requirements set out elsewhere in this Act, is to:

- *Promote the purpose of the Act;*
- *Promote transparency, including by assisting the Commission and any other person to understand and assess:*
 - *the state of competition in the grocery industry;*
 - *whether the purpose of the Act is being met;*
 - *the practices and conduct of grocery industry participants, or classes of participant (whether specifically regulated under the Act or otherwise); and/or*
 - *the operation and effectiveness of this Act, any regulation or determinations made under this Act, and any other legislation relevant to the grocery industry;*
- *Support the Commission to make recommendations as to how competition or consumer outcomes could be improved, including whether this Act, any regulation or determinations made under this Act, and any other legislation relevant to the grocery industry should be amended, revoked, or replaced;*
- *Support an understanding of compliance with this Act, any regulation or determinations made under this Act, and any other legislation relevant to the grocery industry, by regulated participants; and/or*
- *Promote consumer confidence in the market, including by facilitating informed choice.*

35. We also recommend greater clarity as to the specific purpose of the annual report on the grocery industry (clause 168). At present, clause 168 does not specify what the purpose of an annual report is, nor what the annual report must contain. While both of these may be inferred from clause 168(2), this is framed in terms of the information the Commission may consider. We therefore recommend including a purpose of the annual report on the grocery industry in clause 168. This could draw on the proposed purpose of the Commission's monitoring functions outlined above, as well as clauses 168(2)(a) and (b).
36. Another key reporting provision is contained in subpart 7 of Part 3 of the Bill. In short, this requires the Commission to monitor the level of retail grocery market concentration and carry out a review of competition in the grocery industry if the retail grocery market concentration is below a prescribed threshold. As part of this review, the Commission must report on the state of competition, and set out our views on the operation and effectiveness of wholesale regulation (including any

backstop regulation), and whether any legislation or backstop regulation should be introduced, amended or revoked.

37. This requirement in subpart 7 to review and report on the state of competition arguably substantially duplicates the requirement to report on the state of competition contained in clause 168. This can be distinguished from a more self-contained review such as the one provided for at clause 16 in respect of the grocery supply code.
38. We recommend reconsidering whether subpart 7 is required. One option would be to:
 - 38.1 repeal subpart 7 of Part 3;
 - 38.2 amend clause 168 to require the Commission to monitor and report on levels of market concentration as part of its annual review; and
 - 38.3 make it clearer that, as part of the section 168 report, the Commission may consider matters such as:
 - 38.3.1 whether any amendments to the Grocery Industry Competition Act, or any other legislation relevant to the grocery industry, are necessary or desirable;
 - 38.3.2 the operation and effectiveness of any additional regulation that is in place; and
 - 38.3.3 whether additional regulation is necessary or desirable or whether it is necessary or desirable to amend or revoke any additional regulation.
39. If subpart 7 of Part 3 of the Bill is retained, we recommend some minor amendments to clause 105. As we understand it, the intent of the Bill is that any of the separate reports provided for in the Bill may be provided as part of the Commission's annual report under clause 168, and that if so, a separate report is not provided. However, clause 105 and clause 53 are less clear as to this intent compared to clauses 16, 68 and 73, with the wording implying that, even if the content of the clause 105 or clause 53 report is included in an annual report, a separate report may still be required. We therefore recommend aligning the language used in clauses 105 and 53 with the language used in clauses 16, 68, and 73 to clarify that, if the content of a report is included in the Commission's annual report, then a separate report is not required.
40. Finally, as set out in Attachment 2, there are a range of inconsistent requirements across the Bill relating to publishing a report or review. For example:
 - 40.1 under clauses 16, 68, and 73, the Commission must provide a report to the Minister, but there is no obligation to publish the report;

- 40.2 under clauses 53 and 54, the Commission must give a report to the Minister, publish the final report at least 10 working days later, and the Minister must present the report to the House within 1 month;
 - 40.3 under clauses 105 and 106, the Commission must give a report to the Minister, and the Minister must present the report to the House within 1 month, but there is no requirement for the Commission to publish the report; and
 - 40.4 under clauses 169 and 170, the Commission must give a report to the Minister, publish the report at least 5 working days later, and the Minister must present the report to the House within 1 month of receiving final report.
41. We recommend standardising the provisions so that it is a requirement for the Commission to publish each report (although it is likely that we would do so even if it was not a statutory requirement), and aligning the timeframes between when the report must be provided to the Minister and when the Commission must publish the report.

We recommend better alignment of the terminology used in different wholesale regulation tools and clarification as to the boundaries of each tool

42. The Bill sets out a range of wholesale regulation tools, including default requirements for facilitating commercial agreements for the wholesale supply of groceries, and four categories of backstop regulation. These are:
- 42.1 wholesale frameworks;
 - 42.2 wholesale codes;
 - 42.3 non-discriminatory terms; and
 - 42.4 specified access terms.
43. Attachment 3 of this submission contains a stylised comparison of the purpose and scope of each of these tools, and the roles of RGRs, the Commission, and the Minister.
44. The Bill allows for different forms of wholesale regulation to be applied to different RGRs in parallel. We support provision for differentiated forms of regulation, as it allows the form of regulation imposed to reflect the particular circumstances and conduct of a RGR.
45. Overall, we consider that the Bill's wholesale provisions are generally workable. However, they are complex tools and the relationship and boundaries between the tools could be clarified.
46. For example, it appears likely that there would be a substantial overlap between the content of a wholesale framework and the default requirements for facilitating

commercial agreements. As set out in Table 1 below, in both cases, RGRs are responsible for putting in place their own rules relating to wholesale supply, and in both cases the Commission can play a role in influencing these.

Table 1: Comparison between default wholesale requirements and wholesale framework

| Regulatory tool | Default requirements for facilitating commercial agreements for wholesale supply of groceries | Wholesale framework |
|-------------------------------------|---|---|
| Requirements on RGRs | <ul style="list-style-type: none"> • Establish and implement effective rules, criteria, and procedures for considering wholesale supply requests (cl 31) • Establish and implement standard terms and conditions for the wholesale supply of groceries, and/or principles for determining the basis on which the regulated grocery retailer will make or respond to offers (cl 33) • Specify and use a method by which the prices of groceries supplied under the agreement are to be calculated (cl 38) | <ul style="list-style-type: none"> • Set out how a RGR will make decisions about pricing, range, and terms, including specifying the basis for all costs that it will use to arrive at wholesale prices for groceries (cl 64) • Specify all inputs, assumptions, and processes in connection with those decisions (cl 64) |
| Role of Commission in setting rules | <ul style="list-style-type: none"> • The Commission may make a determination prescribing the manner in which a person must comply with default requirements for facilitating commercial agreements, including (cl 43): <ul style="list-style-type: none"> ○ When, where, and how the duty must be complied with ○ What information must be provided in connection with the duty ○ Requirements with which information provided in connection with the duty must comply | <ul style="list-style-type: none"> • The Commission may require a RGR to establish, implement and maintain a wholesale framework (cl 57) • The Commission may, by written notice, direct a RGR to include, amend, or revoke any inputs, assumptions, processes, or requirements in its wholesale framework (cl 66) |

47. Despite the apparent overlap between the provisions, this is not made explicit in the Bill, and comparing the scope of the provisions is also made more difficult by the use of different terminology in relation to each tool. Similarly, while we consider it likely that the scope of our determination making power under clause 43 is narrower than our ability to direct inputs, assumptions, processes, and requirements in a wholesale framework under clause 66, this could be made clearer.
48. There also appears to be substantial overlap between wholesale codes on one hand, and non-discriminatory terms and specified access terms regulation on the other, as set out in Table 2 below.

Table 2: Comparison between wholesale codes, non-discriminatory terms, and specified access terms regulation

| Wholesale code | Non-discriminatory terms | Specified access terms |
|--|---|--|
| <p>Wholesale code may (cl 70):</p> <ul style="list-style-type: none"> • Regulate or prohibit any conduct in connection with: <ul style="list-style-type: none"> ○ A wholesale supply request ○ Entering into or arriving at a wholesale agreement ○ Rights or obligations under a wholesale agreement ○ A RGR otherwise dealing with a wholesale customer • Specify requirements about the content or form of a wholesale agreement, including required, or prohibited, terms or conditions • Regulate or prohibit any conduct in connection with supplying groceries under a wholesale agreement • Relate to any of the matters referred to in the default requirements for facilitating commercial agreements | <p>A determination relating to non-discriminatory terms may include (cl 84):</p> <ul style="list-style-type: none"> • Requiring the operational separation of a RGR • A RGR supplying groceries to wholesale customers on a non-discriminatory basis • A RGR's systems, procedures, and processes that relate to compliance, monitoring and reporting on compliance, performance measures, and audit of compliance with the determination and Order in Council | <p>A determination relating to specified access terms must (cl 91):</p> <ul style="list-style-type: none"> • Specify sufficient terms to allow the wholesale supply to be made available without the need for an agreement with the RGR • Identify the wholesale customers eligible for wholesale supply • State the timeframes within which a RGR must make available supply • Specify terms and conditions on which a RGR must make available supply <p>It may also deal with (cl 92):</p> <ul style="list-style-type: none"> • Maximum prices, margins, revenues, or pricing principles • Quality standards that a RGR must meet, including incentives to improve quality • Terms and conditions relating to access to wholesale supply • A RGR's systems, procedures, and processes that relate to compliance, monitoring and reporting on compliance, performance measures, and audit of compliance with the determination and Order in Council |

49. As set out above, a wholesale code may regulate or prohibit any conduct in connection with a wholesale supply request or agreement, and specify any requirements about the content or form of a wholesale agreement.
50. The Commission understands that wholesale codes are not *intended* to allow the Commission to compel wholesale supply, or provide for non-discrimination. However, this is not clear on a plain reading of clause 70.
51. On its face, there is relatively little distinction between the powers available to the Commission under a wholesale code, and the powers available if an Order in Council is made to provide for non-discriminatory terms or specified access terms. We recommend further consideration of any intended differences and similarities between these tools and making those explicit where possible.
52. At present, the Bill does include some provisions intended to guide the interaction between different wholesale tools. For example, it includes provisions for backstop regulation to override the default requirements for commercial wholesale supply (clauses 46 and 47). In addition, clause 58(5) states that, before implementing a wholesale framework or wholesale code, the Commission must have regard to

whether a matter would be more appropriately dealt with by way of non-discriminatory terms or specified access terms. However, there is no guidance provided as to what determines when this would be 'appropriate'. Further, provided that the Commission has had regard to this, to the extent that there is overlap between the tools, this provision does not prevent the Commission from making determinations on matters that could also be covered by non-discriminatory terms or specified access terms regulation.

53. Overall, we recommend:

- 53.1 Aligning the terminology used in each of the instruments to the extent that they relate to similar matters. For example, the terminology used in clause 64(1)(a) and (b) could be aligned with the terminology in clause 33 (and, to the extent considered relevant, clause 31).
- 53.2 Being clearer in the Bill as to when some of the tools may substitute for some of the others. For example, clause 62 could be amended to refer to the potential role of wholesale frameworks substituting for the default requirements for commercial wholesale supply.
- 53.3 Considering whether to clarify the boundaries of the Commission's ability to prescribe a manner of complying with the default legislative duties under clause 43 relative to its ability to direct inputs, assumptions, processes, and requirements under clause 66.
- 53.4 Considering amending the scope of the different wholesale regulatory tools to ensure they align with the policy intent. For example:
- 53.4.1 In respect of wholesale codes (assuming this is consistent with the policy intent) one option would be to amend clause 70 to state that a wholesale code:
- (a) may not be used to impose operational separation, or otherwise impose a non-discrimination obligation;
 - (b) may compel supply², but may not specify the pricing, margins, revenues or principles for determining prices, with these matters left to specified access terms regulation.
- 53.4.2 In respect of wholesale frameworks (again, assuming this is consistent with the policy intent), a similar option would be to limit the ability for the Commission to direct inputs, assumptions, processes, and requirements relating to pricing matters under a wholesale framework.

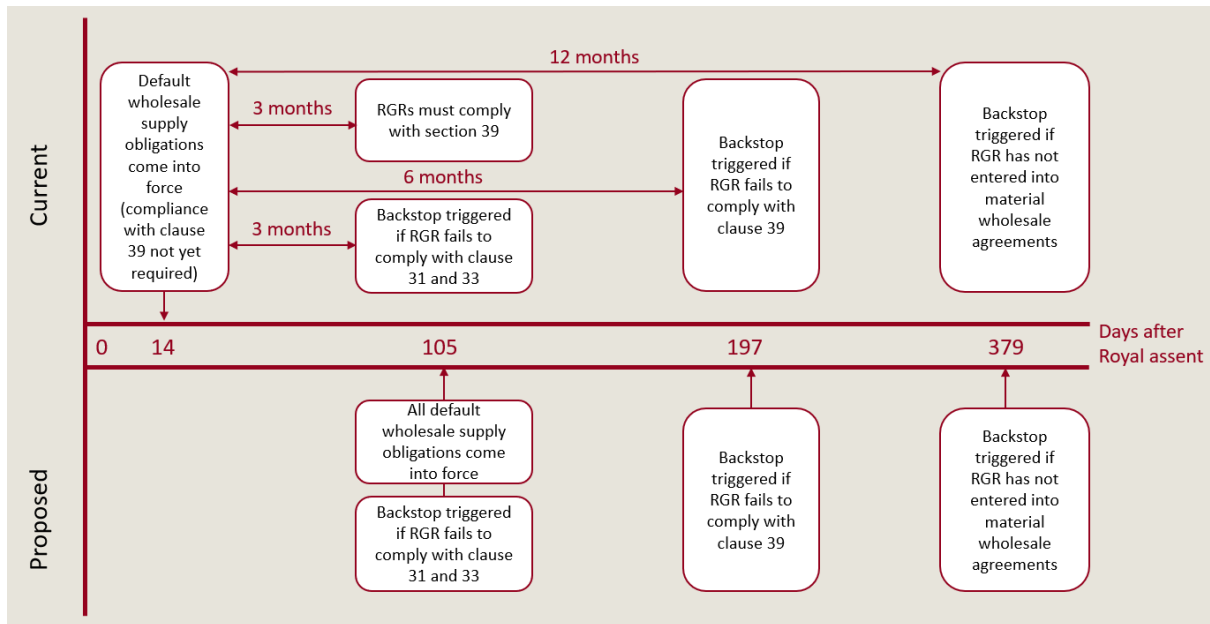
² While the policy intent may be that a wholesale code may not compel supply, we think that this may be difficult to effectively achieve in practice. Instead, restricting the ability of a code to determine pricing matters may be a more practical delineation between a code and specified access terms.

We recommend pushing out the commencement date of the Bill's wholesale supply provisions, without shifting when the wholesale backstop provisions could be activated

54. The Bill provides that the entire Act comes into force 14 days after Royal assent, with the exception of the obligation to comply with the grocery supply code.
55. This includes a number of significant obligations on RGRs in respect of wholesale arrangements, such as the requirement to have effective rules, criteria, and procedures for considering wholesale supply requests, as well as terms and conditions for the wholesale supply of groceries.³
56. The Bill's commencement date also 'starts the clock ticking' on when backstop wholesale regulation may be imposed by the Commission. Once the Bill's commercial wholesale provisions have come into force, backstop wholesale regulation may be imposed by the Commission after three, six, or twelve months (depending on what conditions are satisfied).
57. We consider that these timeframes provide little notice for grocery retailers and for the Commission of the final details of the regulatory regime which will not be settled until the Bill is passed into law. This could impact efficient and timely compliance and implementation respectively.
58. For example, we expect RGRs are likely to seek significant guidance from the Commission as to how we intend to interpret, monitor, and enforce subpart 2 of Part 3 of the Bill. However, our ability to provide timely guidance to RGRs will be dependent upon the timing for passage of the Bill into law. We are very unlikely to be in a position to make a determination under clause 43 at the time that the Bill comes into force given the timeframes currently proposed.
59. We therefore recommend consideration be given to extending the commencement date of key wholesale provisions such as clauses 31, 33, and 39. We consider that this is ultimately likely to result in improved compliance, implementation, and quality of wholesale offerings.
60. If the Committee is of a mind to ensure that there is still a strong, timely regulatory imperative for RGRs to provide commercial wholesale supply, then it could:
 - 60.1 shift the commencement date of these clauses to align with the time period at which backstop regulation can currently be triggered; and
 - 60.2 alter the reference point for backstop regulation from when subpart 2 of the Bill comes into force to when the Bill receives Royal assent.
61. This proposal is outlined in Figure 1 below.

³ Clause 39 of the Bill (regulated grocery retailer must put in place systems and processes for wholesale supply) also comes into force on this date, although a RGR is not actually required to comply with the clause until 3 months after the section comes into force.

Figure 1: Proposed change to commencement date



62. This would mean that there would be more time for both the Commission and RGRs to prepare for implementation of the Bill's wholesale supply provisions, without pushing back the point at which backstop regulation could be imposed.

We recommend removing the Bill's restriction on delegation

63. Many of the Bill's functions may be carried out alone by the Grocery Commissioner established under the Bill, or delegated at the Grocery Commissioner's discretion. However, clause 163 of the Bill also sets out a number of functions, duties and powers that must be performed by the Grocery Commissioner in conjunction with two other Commissioners.
64. Under clause 166, these functions, duties and powers may not be delegated. While we understand the intent that the most significant decisions should not be capable of delegation, we consider it likely that the restriction (as drafted) has the effect of limiting the ability of the Commission to delegate simple elements of decision-making that are unlikely to require or benefit from Commissioner attention, or from final decision-making at Commissioner level. It is common across all the work of the Commission for its functions, duties, and powers to be delegated when this is the case, and this provides significant efficiency benefits.
65. The Telecommunications Act contains similar (albeit less explicit) provisions, which we have also interpreted as prohibiting delegation of regulatory decisions that the Telecommunications Commissioner must perform with two or more other members of the Commission. In our experience, this has sometimes led to undesirable 'peaks' in workload and the inefficient use of Commissioners' time in relation to more minor matters.
66. Furthermore, this clause appears to differ from many modern Crown entity provisions where boards are granted broad powers to delegate. Ultimately, the

Commission's Board remains accountable for the exercise of all the Commission's functions, duties, and powers. Members hold collective and individual duties under the Crown Entities Act and they must properly discharge all functions, duties, and powers, including by satisfying themselves that proper frameworks are in place for the exercise of delegated decision-making. We consider that it is beneficial to allow the Board flexibility to determine whether delegation is appropriate on a case-by-case basis, having regard to the implications of that decision for the accountability of individual Members and the Commission as a whole.

67. As such, we recommend removing clause 166 and amending clause 163 to specify that the functions set out at clause 163(2) may be delegated with the consent of the Grocery Commissioner.
68. If the Committee is not minded to specifically state that functions may be delegated, then we recommend retaining clause 166 as it stands, as removing clause 166, without explicitly enabling delegation as part of clause 163, could create undesirable ambiguity.

We recommend simplifying the mechanism for penalties and other remedies to be imposed in relation to the use of unfair terms in grocery supply contracts

69. Clauses 192 to 204 of the Bill give effect (in respect of the grocery industry) to recommendations 8A and 8C of our market study report, which were to allow for private action in respect of unfair contract terms, and to consider raising the transaction value cap for unfair contract terms. We support these provisions of the Bill.
70. However, the Bill does not give effect to recommendation 8B, which was to simplify the mechanism for imposing penalties and other remedies in relation to the use of unfair contract terms.
71. As we noted in our market study final report, unlike other provisions of the Fair Trading Act and the Commerce Act, the Fair Trading Act's existing unfair contract terms provisions are subject to a 'two-step' enforcement process, under which it is not an offence to include a term in a contract unless that term has previously been declared by a Court to be unfair. This differs from most other prohibitions in the Fair Trading Act and Commerce Act, which relate to conduct generally, not solely conduct that has previously been subject to a court declaration.
72. To provide greater incentives for unfair terms to be proactively removed from grocery supply contracts, we recommend that the Bill be amended so that the prohibition on the inclusion of unfair contract terms relates to the inclusion of terms that meet the definition of being unfair, rather than only terms that have previously been *declared* to be unfair. This would mean that if a court found that there was a contravention of the unfair contract terms provisions, it could immediately impose penalties or other remedies, rather than only if the party continued to include or rely on such terms and further application was brought before the court for an order imposing a remedy. This recommendation is in line with the recommendation in our

market study, and submissions we have previously made in relation to enforcement of prohibitions against unfair contract terms generally under the Fair Trading Act.

We recommend extending the powers of the Commission to monitor compliance with additional regulation

73. Finally, clause 108 provides us with compliance monitoring powers in relation to compliance with an Order in Council or determination made under Part 3. Such powers include the ability to require RGRs to provide information such as written statements about whether the RGR has complied with an order or determination, or reports from auditors.
74. We consider that there would be benefits if we were able to require RGRs to provide similar information in respect of all of their obligations under the Bill, as we will need to monitor compliance with other aspects of the Bill including the grocery supply code of conduct and the obligations in subpart 2 of Part 3 (Requirements for facilitating commercial agreements for wholesale supply of groceries). In our experience, the clause 108 power (which is similar to section 53N of the Commerce Act) is a highly useful tool to incentivise compliance.
75. We recommend amending and reframing clause 108 to relate to the Act as a whole, rather than just Orders in Council or determinations that relate to wholesale regulation.

Conclusion

76. We thank the Committee for this opportunity to make a submission and would be pleased to provide any further assistance that the Committee may require. If the Committee has any specific questions on this submission please contact Cam Vannisselroy, Principal Policy Analyst, at [REDACTED]

Attachment 1: List of specific drafting comments and suggestions

| Clause number | Clause title / subject of issue | Issue | Recommendation |
|--|--------------------------------------|--|---|
| Part 1 – Preliminary provisions | | | |
| 4 | Commission’s function under this Act | Clause 4(a)(c)(iii) lists the Commission’s functions in relation to compliance and enforcement as “monitoring compliance with, investigating conduct that constitutes or may constitute a contravention, an attempted contravention, or an involvement in a contravention of, and enforcing this Act”. This level of prescription may unnecessarily restrict the Commission’s activity. | We recommend amending this provision so that the list of actions that may be taken are inclusive examples of how monitoring compliance and enforcement might be delivered in practice. For example: "Monitoring compliance with and enforcing this Act, including by investigating conduct that constitutes or may constitute a contravention, an attempted contravention, or involvement in a contravention". |
| 4 | Commission’s function under this Act | <p>Clause 4(f) states that the Commission’s functions, in addition to the other functions conferred on the Commission by this Act (including the annual report provided for in clause 168), are “to keep under review the law, policies, and practices that are relevant to its other functions under this section (including overseas law, policies, and practices)”.</p> <p>We appreciate and support the intent of the regime to allow the Commission to comment on policy and legislation that may impact on competition in the grocery industry. However, we have concerns that this provision implies an overlap with MBIE's policy responsibilities as the administering department that goes beyond our understanding of the intended role for the Commission.</p> | <p>We recommend amending the wording in this function to make it clear that the Commission:</p> <ul style="list-style-type: none"> • may, both within and beyond the context of its formalised reporting functions, comment on the operation and effectiveness of any legislation relevant to the grocery industry, such as when engaging with other government departments, but • does not have primary policy responsibility for grocery sector regulation. |

| Clause number | Clause title / subject of issue | Issue | Recommendation |
|---|---|---|---|
| 5 | Interpretation – regulated grocery retailer | Regulated grocery retailer has two separate definitions under Part 2 of the Bill (grocery supply code) and Part 3 (wholesale supply of groceries). This may cause confusion. | We recommend using two separate terms to reflect the different definitions. For example: “regulated grocery retailer” for Part 2 and “regulated grocery wholesaler” for Part 3. |
| Part 2 – Grocery supply code | | | |
| 13 | Purpose of grocery supply code | The purpose of the grocery supply code is currently framed as “to promote fair conduct, and prohibit unfair conduct, between regulated grocery retailers and their suppliers”. However, under clause 15 the obligation to comply with the code only applies to retailers. | We recommend amending clause 13 to state “to promote fair conduct, and prohibit unfair conduct, by regulated grocery retailers towards their suppliers”, to reflect the reality of the code’s reach. |
| Part 3 – Wholesale supply of groceries | | | |
| 20, 58, 62, 64, 65, 77 | Other principles of this Part | Clause 19 states that the main principle of Part 3 of the Bill is the importance of wholesale offerings being consistent with outcomes produced in a competitive wholesale market. Clause 20 then sets out further principles that may be relevant to the main principle. This includes principles relating to pricing, range, clear market signals, and commercial relationships. This list does not include other principles that may also be relevant to whether outcomes are consistent with a competitive wholesale market, including the quality of wholesale supply (which may be of particular relevance to perishable goods), and the service provided. The absence of these principles may lead to an overly narrow consideration of factors when the Commission and Minister are considering exercising functions, duties, and powers under the Bill. Flowing on from this, clauses 58(1)(b)(ii), 62(a), | We recommend consideration of whether other principles such as quality and service should be added to clause 20, and subsequently reflected in clauses 58(1)(b)(ii), 62(a), 64(1)(a), 65, and 77(1)(b). |

| Clause number | Clause title / subject of issue | Issue | Recommendation |
|------------------|---|---|---|
| | | 64(1)(a), 65, and 77(1)(b) are also framed more narrowly than may be desirable. | |
| 21, 83, 84(3)(b) | Interpretation in this Part – non-discrimination | <p>The definition of non-discrimination refers to a RGR not treating any wholesale customer differently from how it treats itself or any other wholesale customer, except to the extent that a particular difference in treatment is objectively justifiable and does not lessen, and is unlikely to lessen, <u>competition in a grocery wholesale supply market</u>. Discrimination can harm competition in downstream retail markets, as well as in upstream wholesale markets. The existing definition, which is limited to the harm to competition in upstream wholesale markets, is therefore too narrow.</p> <p>It is also not entirely clear whether the reference to “does not lessen, and is unlikely to lessen, competition” is relative to a situation in which wholesale supply is provided on the same terms as the RGR self-supplies (or supplies other access seekers), or whether it is relative to the status quo (in which there is often no wholesale supply at all). If it was the latter, then this would potentially impose a very low barrier to discrimination being allowed.</p> | <p>We recommend amending the underlined text to "competition in any grocery market", as well as making corresponding amendments to clause 83 and 84(3)(b). We also recommend clarifying that the reference to “does not lessen, and is unlikely to lessen, competition” is relative to a situation in which wholesale supply is provided on the same terms as the RGR self-supplies (or supplies other access seekers).</p> |
| 30 | Regulated grocery retailer must consider wholesale supply request in good faith | There is no definition of good faith in the Bill. However, we understand that there is likely to be a definition of good faith in the grocery supply code, which will go beyond what is typically considered to constitute good faith. While outside of the scope of the Bill, we encourage careful consideration of the terminology used as part of the grocery supply code to avoid | N/A |

| Clause number | Clause title / subject of issue | Issue | Recommendation |
|---------------|---|---|---|
| | | unintentional impacts on the concept of good faith that is intended to relate to wholesale supply in the Bill. | |
| 33 | Regulated grocery retailer must establish and implement standard terms and conditions | <p>Clause 33 provides that a RGR must:</p> <p>(a) establish and implement standard terms and conditions for the wholesale supply of groceries; and</p> <p>(b) to the extent that particular terms and conditions for the wholesale supply of groceries are not standardised (for example, price), establish principles for determining the basis on which the RGR will make offers, or respond to offers, in relation to those terms and conditions.</p> <p>As currently drafted, there may not be sufficient guidance or incentive about when RGRs are to establish and implement standard terms and conditions under (a), and when they will put in place principles under (b). We think that it may often be more desirable, including for transparency reasons, for terms and conditions to be standardised rather than being left to principles.</p> | <p>We recommend amending clause 33 to add the following underlined words:</p> <p>“(a) <u>to the extent reasonably practicable</u>, establish and implement standard terms and conditions for the wholesale supply of groceries”</p> <p>We think this will provide a signal that terms and conditions should be put in place in the first instance, except where this is not reasonably practicable.</p> |
| 34 | Regulated grocery retailer must comply with ongoing duties relating to standard terms and conditions and principles | <p>Clauses 32 and 34 are equivalent provisions. However, the language of clause 34(b) differs from clause 32(b).</p> <p>Clause 32(b) states that a RGR must regularly review and, if necessary, amend rules, criteria, and procedures to ensure that they continue to comply with this Act.</p> <p>Clause 34(b) states that a RGR must regularly review standard terms and conditions and those principles to ensure that they continue to comply with this Act, and promptly make any amendments that are necessary or desirable to remedy any defects.</p> | <p>We recommend amending clause 34(b) to state “regularly review and, if necessary, amend those standard terms and conditions and those principles to ensure that they continue to comply with this Act (including the requirements of any determination made under this subpart)”.</p> |

| Clause number | Clause title / subject of issue | Issue | Recommendation |
|---------------|---|---|--|
| | | We consider that the provisions should be aligned, and that the wording of clause 32(b) is preferable. | |
| 34 | Regulated grocery retailer must comply with ongoing duties relating to standard terms and conditions and principles | <p>Clause 34(a) states that a RGR must take all reasonable steps to use:</p> <p>“(i) the standard terms and conditions referred to in section 33; or</p> <p>(ii) terms and conditions that are customised in a particular case (where those customised terms and conditions are consistent with the principles referred to in that section)”.</p> <p>The wording of limb is (ii) confusing and could be clarified.</p> | We recommend amending clause 34(a)(ii) to use wording such as “to the extent that particular terms and conditions are not standardised, terms and conditions that are consistent with the principles referred to in section 33”. |
| 38 | Regulated grocery retailer must ensure transparent pricing under wholesale agreement | <p>Clause 38(2) provides that a RGR must not vary or agree to vary a pricing or charging method specified in a wholesale agreement, except in accordance with a determination issued under this subpart.</p> <p>This applies even if a pricing change is advantageous to the access seeker. It is possible that, due to other priorities, the Commission will not issue a determination on this matter in the early phases of the regime. This means that, until a determination is issued, there may be undue restrictions on the flexibility of wholesale supply arrangements that may ultimately be detrimental to access seekers.</p> | <p>We recommend amending clause 38(2) along the following lines:</p> <p>"(2) A regulated grocery retailer must not vary or agree to vary a pricing or charging method specified in a wholesale agreement, except:</p> <p>(a) in a manner that is beneficial to the wholesale customer; or</p> <p>(b) if a determination has been made under this subpart, in accordance with a determination issued under this subpart."</p> <p>We accept that there is a risk that the ability to vary a pricing or charging method in a manner that is favourable to</p> |

| Clause number | Clause title / subject of issue | Issue | Recommendation |
|-------------------------------|--|---|--|
| | | | <p>a wholesale customer may result in initial wholesale offers that are on terms that are undesirable to the access seeker. However, we also think this is a risk under the current drafting, except that under the status quo there is no ability for these offers to be improved if a determination is not in place.</p> |
| 43 | Commission may prescribe manner of complying with duty | It is not clear that the scope of the Commission's ability to make a determination under clause 43 extends to what is anticipated by clause 38(2) (see above). | We recommend expanding the scope of clause 43 to clarify that, in addition to prescribing the manner of complying with a duty, it can also include providing the ability to vary a pricing or charging method under clause 38. |
| Subpart 2 of Part 3 generally | Ability of the Commission to grant an exemption | Currently, while the Commission may prescribe a manner of complying with subpart 2 of Part 3 (clause 43), there is no ability for the Commission to grant an exemption to a person or a class of persons from some or all of the duties set out in subpart 2 of Part 3. There may be a situation in the future where it is undesirable for one or more duties in subpart 2 to apply to a RGR. At present, it is likely that the only way the Commission could potentially disapply duties (without backstop regulation being in effect) would be to make a determination under clause 43 in a way that reduces or narrows the requirements. However, this may stretch or be outside the intent of this provision. Alternatively, we would need to apply our enforcement | We recommend providing the ability for the Commission to make a determination exempting a person or class of persons from some or all of the duties set out in subpart 2 of Part 3 of the Bill, provided that the Commission considers that it is necessary or desirable to do so, and that doing so would not be contrary to the purpose of the Bill. |

| Clause number | Clause title / subject of issue | Issue | Recommendation |
|---------------|---|---|---|
| | | discretion, although this would not protect RGRs from civil action by third-parties. | |
| 84 | Commission must make determination relating to non-discriminatory terms | Clause 84(3)(c) states that “a determination may regulate, deal with, or otherwise relate to [...] A’s systems, procedures, and processes that require 1 or more of the following:” [list omitted]. This language is currently unclear. | We recommend clarifying the language of clause 84(3)(c) by, for example, adopting the following wording: “A’s systems, procedures, and processes in connection with 1 or more of the following”. This reflects wording used in clause 92(1)(d). |
| 91 | Content of determination for specified access terms regulation | <p>Clause 91(1) provides that a determination under section 90 must—</p> <p>(a) specify sufficient terms to allow the wholesale supply of groceries to be made available by a regulated grocery retailer within the time frames specified under paragraph (c), without the need for a wholesale customer to enter into an agreement with the regulated grocery retailer; and</p> <p>[b and c omitted]</p> <p>(d) specify the terms and conditions on which a regulated grocery retailer must make available the wholesale supply of groceries under the determination.</p> <p>It is unclear how (a) and (d) differ from each other.</p> | We recommend either condensing clause 91(1)(a) and (d) or clarifying how they differ. |
| 98 | Failure to submit specified access terms proposal | Clause 98 provides several options for the Commission if a RGR fails to submit a specified access terms proposal that complies with section 96 by the date specified under section 95. Under clause 98(a), one of these options is to give written notice to 1 or more other regulated grocery retailers under section 95. This appears to be circular, and does not in itself appear to provide a | We recommend reconsideration of the consequences for failing to submit a specified access terms proposal. This could include making contravention of clause 95 subject to a civil liability remedy |

| Clause number | Clause title / subject of issue | Issue | Recommendation |
|--|---|--|--|
| | | consequence for a RGR failing to submit a specified access terms proposal. | (including an order to pay a pecuniary penalty or compensation). |
| 98 | Failure to submit specified access terms proposal | <p>Clause 98(c) currently states that if a RGR fails to submit a specified access terms proposal that complies with section 96 by the date specified under section 95, the Commission may publish and consult on a draft determination under section 99 even though it has not received a specified access terms proposal from A.</p> <p>This does not provide for the possibility that the Commission has received a specified access terms proposal, but that it is not compliant.</p> | We recommend amending clause 98(c) to include the underlined word: “publish and consult on a draft determination under section 99 even though it has not received a <u>compliant</u> specified access terms proposal from A”. |
| 110 | Regulated grocery retailer may stop supply if wholesale customer’s failure is serious or persistent | Clause 110 states that a RGR must only stop supply if the Commission has given its prior approval to the RGR acting in a given manner, and the RGR complies with the terms and conditions of the Commission’s approval. We consider that an upfront determination (made under clause 57 or 76) about when RGRs may stop supply is likely to be more efficient and promote more certainty than a case-by-case approval function. | We recommend amending clause 110 so that the Commission is not required to give its approval for a RGR to stop supply if the manner and situations in which supply may be stopped is covered in a determination made under clause 57 or 76. |
| Part 4 – Enforcement and dispute resolution | | | |
| 115 | Procedural matters relating to corrective notice | Clause 115 sets out several procedural matters relating to corrective notices that are not a feature of other legislation we enforce that provides for corrective action notices (Fuel Industry Act and Retail Payment System Act). | For consistency, we recommend aligning the Grocery Industry Competition Bill’s provision relating to corrective notices with those set out in the Fuel Industry Act and Retail Payment System Act. In practice, this would likely involve removing clause 115. |

| Clause number | Clause title / subject of issue | Issue | Recommendation |
|-------------------------------|---|---|---|
| 122 and 123 | Maximum penalty (Tier 1) | At present, it is not clear that the language in clause 122(4)(a) and (b) and clause 123(4)(a) and (b) extends beyond contravention to an attempted contravention and involvement in a contravention. | We recommend clarifying that reference to a contravention in clause 122(4)(a) and (b), and clause 123(4)(a) and (b), includes attempted contravention and involvement in a contravention. |
| Part 5 – Miscellaneous | | | |
| 161 | Minister's recommendation | Currently, the responsible Minister may recommend that a person be appointed as the Grocery Commissioner only if the person is a member of the Commission appointed under section 9(2) of the Commerce Act. While we appreciate that, in practice, the appointment to the Commission may be able to take place in near parallel to the appointment as Grocery Commissioner, the provision as drafted may nevertheless create confusion. | We recommend removing the requirement for a person to be a member of the Commission for them to be appointed as Grocery Commissioner, while still providing that the Grocery Commissioner is a member of the Commission under the Commerce Act. |
| 163 | Who performs or exercises functions, duties, and powers of Commission | <p>Clause 163 states that the functions, duties and powers of the Commission must be performed by:</p> <p>(a) the Grocery Commissioner alone; or</p> <p>(b) if the chairperson of the Commission agrees, the Grocery Commissioner with 2 or more other members of the Commission.</p> <p>This lacks clarity that it is the Grocery Commissioner who would request that the Chair of the Commission allocate 2 or more members for the purposes of performing functions, duties and powers. In contrast, Section 10(1)(c)(ii) of the Telecommunications Act provides that every function not otherwise specified must be performed, if the Telecommunications Commissioner requests the chairperson of</p> | We recommend that this clause be amended to be more specific that it is the Grocery Commissioner who would request that the Chair of the Commission allocate 2 or more members for the purposes of performing functions, duties and powers (without necessarily adopting the drafting of the Telecommunications Act). |

| Clause number | Clause title / subject of issue | Issue | Recommendation |
|---------------|--|--|--|
| | | <p>the Commission to make 2 or more other members of the Commission available for the performance of a particular function and the chairperson agrees to that request, by the Telecommunications Commissioner and those other members of the Commission.</p> <p>We think more specificity may be preferable.</p> | |
| 164 | Further provisions relating to when Grocery Commissioner acts with 2 or more other members | <p>Clause 164(3) states that, when the Grocery Commissioner acts with 2 or more other members, the chairperson is the Grocery Commissioner. This may unduly restrict the Commission's governance arrangements, such as where decision-making in relation to groceries is being combined with decision-making in respect of another regulatory function.</p> | <p>We recommend amending clause 164 so that the chair of the Commission is responsible for determining who is the chair of the groceries decision-making body.</p> |
| 176 | Exemption for agreements for collective negotiation | <p>We support the inclusion of provisions in the Bill relating to exemption from certain provisions of the Commerce Act for agreements for collective negotiation. We are comfortable with the scope and drafting of these provisions, noting that the substance of any exemption will be determined through regulations.</p> <p>However, for future reference, when the Minister is considering recommending an exemption, we consider it important that the following factors and limitations on the exemption are considered:</p> | N/A |

| Clause number | Clause title / subject of issue | Issue | Recommendation |
|---------------|---|--|---|
| | | <ol style="list-style-type: none"> 1. The exemption should be limited to non-price terms and conditions, not terms and conditions relating directly to the main contract price. 2. The exemption should just relate to 'price fixing' under section 30 of the Commerce Act, not 'market allocation' or 'output restriction'. This is to mitigate the risk of inappropriate cartel conduct which is outside the policy intent. 3. The exemption should only be provided if it is reasonably necessary and not for the dominant purpose of lessening competition. This is so it aligns with the collaborative activity test under the Commerce Act and the scope is not wider than the policy intent. 4. The exemption should be clear that commercially sensitive information that is not necessary for the purpose of the collective negotiation is excluded from the exemption. | |
| 181 | Register of agreements for collective negotiation | Clause 181 requires the Commission to maintain and publish a register that lists all current agreements for collective negotiation that are notified to the Commission. However, there does not appear to be any requirement for any agreements to be notified to the Commission. | <p>We recommend either:</p> <ul style="list-style-type: none"> • including a requirement for agreements to be notified to the Commission (and providing that the benefits of any exemption do not apply until the Commission has been notified); or • removing the requirement for the Commission to maintain a register. |

| Clause number | Clause title / subject of issue | Issue | Recommendation |
|-----------------------|---|---|---|
| Other comments | | | |
| N/A | Use of information | Currently, there is no express power for the Commission to use information obtained for one purpose for the performance of any of our functions, including where the information is provided under compulsion. This creates doubt as to whether information gathered under (for example) the Commerce Act or Fair Trading Act may be used in relation to the Commission's functions under the Grocery Industry Competition Bill, and vice-versa. | We recommend introducing a provision along the lines of section 17M of the Tax Administration Act 1994. While this issue relates to all of the Commission's functions, and not just our proposed grocery responsibilities, we consider that an explicit provision to this effect in the Grocery Industry Competition Bill is nonetheless beneficial, and is unlikely to prejudice our existing functions. |
| N/A | Use of powers for monitoring compliance | The Bill sets out a range of monitoring, compliance, and enforcement powers for the Commission. One of the Commission's functions under the Act is to monitor compliance with the Act. However, the Bill is not explicit that the Commission may use of all of its monitoring powers for the purpose of monitoring, investigating, and enforcing compliance. This may lead to parties suggesting that certain monitoring tools were not intended to be used for the purpose of assessing compliance. In contrast, section 52F(3) of the Commerce Act and section 167(4) of the Telecommunications Act are explicit that the Commission is entitled to exercise any of its powers under the relevant Act for the purpose of monitoring compliance by regulated suppliers with regulations made under that Act. | We recommend including a provision that makes it explicit that any of the Commission's monitoring and enforcement tools under the Bill (including powers carried over from the Commerce Act under subpart 2 of Part 5 of the Bill, such as section 98 of the Commerce Act) may be used for the purpose of monitoring, investigating, and enforcing compliance with the Grocery Industry Competition Act, or any regulations or determinations made under the Act. |

Attachment 2: Comparison of monitoring and reporting requirements

77. The below table is provided for the purposes of comparing the different monitoring and reporting requirements in the Grocery Industry Competition Bill as introduced. This description is summarised and stylised.

| Clause | Report | Purpose | Monitoring and reporting requirements | Publishing requirements | Obligation on Minister | Content | Relationship to clause 168 report |
|--------|-----------------------------------|---|--|---|--|--|--|
| 168 | Annual Report on Grocery Industry | N/A | <ul style="list-style-type: none"> As soon as practicable after end of each financial year (cl 169) Only required to give the first report after the end of the first financial year that begins after this section comes into force (cl 171) | At least 5 working days after providing the report to the Minister, publish the report (cl 169) | Within 1 month after receiving the final report, present the annual report on the grocery industry to the House (cl 170) | <p>May consider any information the Commission considers relevant, including (cl 168):</p> <ul style="list-style-type: none"> the state of competition in the grocery industry, including the conditions of entry and expansion for grocery retailers the operation and effectiveness of this Act and any other legislation relevant to the grocery industry any information that may or must be included in the reports listed below any information the Commission has obtained under any legislation <p>First report must include the Commission's assessment of whether there has been a material improvement in the state of competition (cl 171)</p> | N/A |
| 16 | Review of Grocery Supply Code | Assess the operation and effectiveness of the grocery supply code; and assess whether the grocery supply code should be amended, revoked, or replaced (cl 16) | <ul style="list-style-type: none"> First review: undertake within 2 years after the code comes into force, give to Minister as soon as practicable after completing it (cl 16). After first review (cl 16): <ul style="list-style-type: none"> Must review and give the Minister a report at any time required by the Minister | Not specified | Not specified | No elaboration on scope of the report beyond the purpose statement | Give the Minister a report on that review (whether as a separate report or as part of its annual report) |

| Clause | Report | Purpose | Monitoring and reporting requirements | Publishing requirements | Obligation on Minister | Content | Relationship to clause 168 report |
|--------|-------------------------------|---|---|---|--|---|--|
| | | | <ul style="list-style-type: none"> ○ May review and give the Minister a report at any other time | | | | under section 168) (cl 16) |
| 53 | Report following inquiry | <p>To consider (cl 49):</p> <ul style="list-style-type: none"> • Whether wholesale supply should be subject to additional regulation and, if so, what • If additional regulation already applies, whether the additional regulation should be amended, revoked, or replaced and, if so, how • Whether any other regulation or action may be necessary or desirable to promote the purpose of this Part | <ul style="list-style-type: none"> • At any time on the Commission's own initiative (cl 48) • If required by the Minister, give a report to the Minister at the due date specified by Minister (cl 48) • Must publish draft report & allow reasonable time for comments (cl 52) | At least 10 days after providing the report to the Minister, publish final report (cl 53) | Within 1 month after receiving the final report, present the report to the House (cl 54) | <ul style="list-style-type: none"> • Record inquiry findings, including whether tests for regulation are satisfied, whether the form of regulation should change (and how), benefits and cost-effectiveness of regulation (cl 50 and 51) • Set out whether the Commission intends to impose, amend, revoke or replace any additional regulation or determination (cl 51) • Set out any recommendation in relation to an Order in Council (cl 51) • Include other recommendations it thinks fit, including changes to legislation, policies or practices of Government, changes to amount or type of information made available, research or monitoring, or changes in behaviour (cl 51) | The Commission may include the final report in its report under section 168 (cl 53) |
| 68 | Review of Wholesale Framework | Assess the operation and effectiveness of a wholesale framework; and assess whether a determination or direction should be made or amended, revoked, or replaced (cl 68) | <ul style="list-style-type: none"> • First review: undertake within 2 years after any wholesale framework comes into effect, give to Minister as soon as practicable after completing it (cl 68) • After first review (cl 68): <ul style="list-style-type: none"> ○ Must review and give the Minister a report at any time required by the Minister | Not specified | Not specified | No elaboration on scope of the report beyond the purpose statement | Give the Minister a report on that review (whether as a separate report or as part of its annual report under section 168) (cl 68) |

| Clause | Report | Purpose | Monitoring and reporting requirements | Publishing requirements | Obligation on Minister | Content | Relationship to clause 168 report |
|--------|--------------------------------|---|---|-------------------------|---|---|--|
| | | | <ul style="list-style-type: none"> ○ May review and give the Minister a report at any other time | | | | |
| 73 | Review of Wholesale Code | Assess the operation and effectiveness of a wholesale code; and assess whether the wholesale code should be amended, revoked, or replaced (cl 73) | <ul style="list-style-type: none"> ● First review: undertake within 2 years after any wholesale code comes into effect, give to Minister as soon as practicable after completing it (cl 73). ● After first review (cl 73): <ul style="list-style-type: none"> ○ Must review and give the Minister a report at any time required by the Minister ○ May review and give the Minister a report at any other time | Not specified | Not specified | No elaboration on scope of the report beyond the purpose statement | Give the Minister a report on that review (whether as a separate report or as part of its annual report under section 168) (cl 73) |
| 105 | Report on State of Competition | Not specified | <p>The Commission must (cl 104, 105):</p> <ul style="list-style-type: none"> ● Monitor the level of retail grocery market concentration ● Promptly notify the Minister if the retail grocery market concentration is at or below the threshold prescribed for 2 consecutive years ● After it notifies the Minister, carry out a review of competition in the grocery industry ● Within 1 year after starting a review under this subpart, give to the Minister a report on the review | Not specified | Within 1 month after receiving the final report, present the report to the House (cl 106) | <ul style="list-style-type: none"> ● Describe the state of competition in the grocery industry, including retail and wholesale parts (cl 105) ● Set out the Commission's views on (cl 105): <ul style="list-style-type: none"> ○ The operation and effectiveness of this Part ○ Whether any amendments to this Part are necessary or desirable ○ The operation and effectiveness of any additional regulation ○ Whether additional regulation is necessary or desirable or whether it should be amended or revoked | The Commission may include a report under this section in its report under section 168 (cl 105) |

Attachment 3: Grocery wholesale regulation tools – comparison of purpose, scope, and respective roles

78. The table below is provided for the purposes of comparing the scope of different wholesale regulation tools as contained in the Grocery Industry Competition Bill as introduced. This description is highly summarised and stylised, and does not contain requirements relating to process or triggers for regulation.

| | Default requirements for facilitating commercial agreements for wholesale supply of groceries | Wholesale framework | Wholesale code | Non-discriminatory terms | Specified access terms regulation |
|--------------------------------|--|---|---|--|--|
| Purpose | <p>No specific purpose.</p> <p>Purpose of Part is to promote the purpose of this Act by enabling wholesale customers to (cl 17):</p> <ul style="list-style-type: none"> • Have reliable and cost-effective wholesale supplies of groceries • Have reasonable access to the benefits of RGRs' scale and efficiency | <p>Promote the purpose of the Part by (cl 62):</p> <ul style="list-style-type: none"> • Providing transparency about how RGRs will make decisions about pricing, range, or terms for wholesale supply • Providing an incentive to the RGR to make decisions that are consistent with outcomes in a competitive wholesale market | <p>Promote the purpose of this Part by providing rules in connection with the wholesale supply of groceries provided by RGRs (cl 69)</p> | <p>Promote the purpose of this Part by ensuring that a RGR does not treat wholesale customers differently from how it treats itself or any other wholesale customer, except where objectively justifiable (cl 83)</p> | <p>Promote the purpose of this Part by providing for the wholesale supply of groceries on regulated terms and conditions (cl 88)</p> |
| Scope of wholesale tool | <p>By default, RGRs must:</p> <ul style="list-style-type: none"> • Consider a wholesale supply request in good faith (cl 30) • Establish and implement effective rules, criteria, and procedures for considering wholesale supply requests (cl 31) • Establish and implement standard terms and conditions for the wholesale supply of groceries, | <p>Wholesale framework must (cl 64):</p> <ul style="list-style-type: none"> • Set out how a RGR will make decisions about pricing, range, and terms, including specifying the basis for all costs that it will use to arrive at wholesale | <p>Wholesale code may (cl 70):</p> <ul style="list-style-type: none"> • Regulate or prohibit any conduct in connection with: <ul style="list-style-type: none"> ○ A wholesale supply request ○ Entering into or arriving at a wholesale agreement | <p>A determination relating to non-discriminatory terms may include (cl 84):</p> <ul style="list-style-type: none"> • Requiring the operational separation of a RGR • A RGR supplying groceries to wholesale | <p>A determination relating to specified access terms must (cl 91):</p> <ul style="list-style-type: none"> • Specify sufficient terms to allow the wholesale supply to be made available without the need for an agreement with the RGR |

| | | | | | |
|------------------------------------|--|--|---|--|--|
| | <p>and/or principles for determining the basis on which the regulated grocery retailer will make or respond to offers (cl 33)</p> <ul style="list-style-type: none"> • Ensure that each wholesale agreement is in writing and in plain language (cl 37) • Specify and use a method by which the prices of groceries supplied under the agreement are to be calculated (cl 38) • Put in place systems and processes for wholesale supply (cl 39) | <p>prices for groceries; and</p> <ul style="list-style-type: none"> • Specify all inputs, assumptions, and processes in connection with those decisions | <ul style="list-style-type: none"> ○ Rights or obligations under a wholesale agreement ○ A RGR otherwise dealing with a wholesale customer • Specify requirements about the content or form of a wholesale agreement, including required or prohibited terms or conditions • Regulate or prohibit any conduct in connection with supplying groceries under a wholesale agreement • Relate to any of the matters referred to in the default requirements for facilitating commercial agreements | <p>customers on a non-discriminatory basis</p> <ul style="list-style-type: none"> • A RGR’s systems, procedures, and processes that relate to compliance, monitoring and reporting on compliance, performance measures, and audit of compliance with the determination and Order in Council | <ul style="list-style-type: none"> • Identify the wholesale customers eligible for wholesale supply • State the timeframes within which a RGR must make available supply • Specify terms and conditions on which a RGR must make available supply <p>It may also deal with (cl 92):</p> <ul style="list-style-type: none"> • Maximum prices, margins, revenues, or principles • Quality standards that a RGR must meet, including incentives to improve quality • Terms and conditions relating to access to wholesale supply • A RGR’s systems, procedures, and processes that relate to compliance, monitoring and reporting on compliance, performance measures, and audit of compliance with the determination and Order in Council |
| <p>Requirements on RGRs</p> | <ul style="list-style-type: none"> • Comply with default rules set out in legislation (various clauses) • Make and comply with own rules, criteria, and procedures for considering wholesale supply requests (cl 31 and 32) • Make and comply with standard terms and conditions for the wholesale supply of groceries, | <ul style="list-style-type: none"> • Prepare wholesale framework (cl 63) • Comply with framework, including any direction from the Commission (cl 64-65) | <ul style="list-style-type: none"> • Comply with wholesale code made by the Commission (cl 71) | <ul style="list-style-type: none"> • Comply with the requirements imposed on it under a determination (cl 81) | <ul style="list-style-type: none"> • Provide a specified access terms proposal (cl 95-98) • Comply with the requirements imposed on it under a determination (cl 81) |

| | | | | | |
|--|---|--|---|---|--|
| | <p>and/or principles for determining the basis on which the regulated grocery retailer will make or respond to offers (cl 33 and 34)</p> <ul style="list-style-type: none"> • Comply with determination made by the Commission (cl 41) | | | | |
| Role of Minister | N/A | N/A | N/A | <ul style="list-style-type: none"> • The Minister may recommend the making of an Order in Council that requires 1 or more RGRs to supply groceries on non-discriminatory terms (cl 76) | <ul style="list-style-type: none"> • The Minister may recommend the making of an Order in Council that requires 1 or more RGRs to supply groceries in accordance with specified access terms regulation (cl 76) |
| Role of Commission in setting rules | <ul style="list-style-type: none"> • The Commission may make a determination prescribing the manner in which a person must comply with default requirements for facilitating commercial agreements, including (cl 43): <ul style="list-style-type: none"> ○ When, where, and how the duty must be complied with ○ What information must be provided in connection with the duty ○ Requirements with which information provided in connection with the duty must comply | <ul style="list-style-type: none"> • The Commission may require a RGR to establish, implement and maintain a wholesale framework (cl 57) • The Commission may, by written notice, direct a RGR to include, amend, or revoke any inputs, assumptions, processes, or requirements in its wholesale framework (cl 66) | <ul style="list-style-type: none"> • The Commission may make a grocery wholesale industry participation code (cl 57) | <ul style="list-style-type: none"> • If an Order in Council relating to non-discriminatory terms is made, the Commission must make a determination specifying how that requirement applies to those RGRs (cl 84) | <ul style="list-style-type: none"> • If an Order in Council relating to specified access terms is made, the Commission must make a determination specifying how that requirement applies to those RGRs (cl 90) |