



17 January 2023

Committee Secretariat
Economic Development, Science and Innovation Committee
Parliament Buildings
Wellington
NEW ZEALAND

Email: eds@parliament.govt.nz

Dear Sir/Madam

Attached are the comments that the New Zealand Food & Grocery Council wishes to present on the *Grocery Industry Competition Bill 2022*.

This submission may be released in full. I would like to make an oral presentation to the Economic Development, Science and Innovation Committee should the opportunity be available.

Yours sincerely

A handwritten signature in blue ink, appearing to be "Raewyn Bleakley". The signature is stylized and fluid.

Raewyn Bleakley
Chief Executive



Grocery Industry Competition Bill 2022

**Submission by the New Zealand Food & Grocery
Council**

17 January 2023

NEW ZEALAND FOOD & GROCERY COUNCIL

1. The New Zealand Food & Grocery Council (“NZFGC”) welcomes the opportunity to comment on the *Grocery Industry Competition Bill 2022* (“the Bill”).
2. NZFGC represents the major manufacturers and suppliers of food, beverage and grocery products in New Zealand. This sector generates over \$40 billion in the New Zealand domestic retail food, beverage and grocery products market, and over \$34 billion in export revenue from exports to 195 countries – representing 65% of total good and services exports. Food and beverage manufacturing is the largest manufacturing sector in New Zealand, representing 45% of total manufacturing income. Our members directly or indirectly employ more than 493,000 people – one in five of the workforce.

OVERARCHING COMMENTS

3. NZFGC is broadly supportive of the provisions in the Bill including:
 - a) functions for the Commerce Commission (“the Commission”) especially investigation and enforcement to provide a strong signal of intent to act should expected competition not emerge
 - b) specification of the ‘regulated grocery retailers’ named in the Bill and others able to be ‘designated’ by Order in Council in the future
 - c) making of the grocery supply code (“the Code”) and its review within 2 years of operation
 - d) arrangements for a wholesale regime including reporting and examination/due process before further intervention is undertaken, a ‘wholesale code’ and the reserve powers that could split the major supermarket business units
 - e) strong enforcement powers and penalties
 - f) a dispute resolution scheme under the Bill
 - g) the establishment of a skilled and independent Grocery Commissioner
 - h) extensive investigation and information gathering powers and related offences
 - i) a facility for collective bargaining being available for grocery suppliers
 - j) disclosure statements to support the Commission monitoring competition and efficiency in the grocery industry
 - k) provision for the application of secondary legislation made under the Bill to apply to pre-existing agreements at the time secondary legislation commences.
4. We note that the Bill addresses the imbalance in negotiating power in three ways (creation of a grocery supply code, extension of protections in the *Fair Trading Act 1986* against the use of unfair contract terms and provision for collective bargaining). We consider these to be imperative for future fairness between suppliers and grocery retailers and strongly support their inclusion in the Bill.
5. In a very few areas we suggest change or caution:
 - a) in relation to review of the Code, we propose a review be required “within one month after the first year’s operation” (and not after two year’s operation). This will ensure that any unintended consequences can be addressed swiftly and not get ‘baked in’ to the system and it would identify major issues with set up and early operation
 - b) we believe it would be constructive to mandate a further review of the Code after 5 years and thereafter at the Minister’s discretion to report on the Code’s durability and effectiveness for the longer term
 - c) we are concerned that the wholesale system not create a wholesale duopoly that mirrors the retail duopoly. This would be of no benefit to suppliers or consumers. We are also concerned to ensure that suppliers maintain the ability to choose

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- whether to supply to retailers on a wholesale basis or on a retail basis only (we suggest two alternative amendments for this purpose)
- d) that accessibility to the dispute resolution processes for small to medium size suppliers is facilitated so that there is the ability for a full range of concerns to be able to be worked through at low cost
 - e) for the Commission's annual report on the grocery industry, we consider that this must report on the veracity of the retailer profitability analysis and suggested excess profits. Requiring the annual report to report on retailer profitability would be an ongoing mechanism to monitor any "super profit making" in the New Zealand market.

DETAILED COMMENTS

6. The Bill addresses the imbalance in negotiating power in three ways. We consider each of these important for redressing the imbalance and imperative for future fairness between suppliers and grocery retailers. We strongly support their inclusion in the Bill. The three ways are:
- a) Creation of a grocery supply code that the major grocery retailers will be required to comply with. Grocery retailers will be constrained from using their negotiating power advantage to force suppliers to accept unfavourable terms of supply that may involve suppliers taking on costs and risks that are better addressed by the major grocery retailers
 - b) Extension of protections in the *Fair Trading Act 1986* against the use of unfair contract terms in standard form small business contracts to a wider range of grocery contracts. Major grocery retailers will be constrained from pushing costs and risks onto suppliers
 - c) Establishment of the means to exempt certain suppliers from prohibitions in Part 2 of the *Commerce Act 1986* so that they can collectively negotiate terms and conditions of supply with the major grocery retailers within appropriate constraints.

Part 1 Preliminary provisions

7. NZFGC is supportive of the functions set out in clause 4 of the Bill for the Commission. In particular, the monitoring, inquiries and reviews and the functions of being the regulator (investigation, enforcement and cooperation with other law enforcement agencies and overseas regulators operating in similar areas). The area requires this strong signal of intent to act should expected competition not emerge.
8. NZFGC notes that there are areas (such as in supermarket leases) that have definitions of "grocery" substantially wider than is included in this Bill and while we are not proposing any broadening at this time, we would not support any narrowing of the definition as drafted.

Part 2 Grocery supply code

9. NZFGC supports the specification of the 'regulated grocery retailers' named in the Bill (clause 8 – Woolworths, Foodstuffs North Island and Foodstuffs South Island) as having obligations under the Code and that this will cover existing retailer structures. We also support other retailers being able to be 'designated' by Order in Council in the future.
10. NZFGC is strongly supportive of the provisions relating to the making of the Code (clause 12) and its purpose, making, content and compliance of the Code (clauses 13 to 15). We support, in particular, linking penalties to the Code (clause 15).
11. In relation to review of the Code, we note a review is proposed within 2 years of operation (clause 16). We propose this be brought forward to "within one month after the first year's

operation". This will ensure that any unintended consequences [for either party] can be addressed swiftly and not get 'baked in' to the system. We also believe it would be constructive to mandate a further review after 5 years and thereafter at the Minister's discretion. A first review within one month of the first year would also be important to identify major issues with set up and early operation. A second review within 5 years would report on the Code's durability and effectiveness for the longer term.

Part 3 Wholesale supply of groceries

12. NZFGC notes that **Part 3** is the most extensive Part in the Bill (clauses 17 to 112) and is designed to facilitate better and expanded competition for grocery retailers not named as 'regulated grocery retailers' through requiring the named 'regulated grocery retailers' to make wholesale supply a tangible part of the New Zealand grocery market. The absence of a wholesale market was recognised by the Commission as a significant barrier to entry of competitors. NZFGC understands that **Part 3** creates a two-part wholesale grocery regime separated by steps to be taken if the second more interventionist part is to be triggered.
13. While NZFGC supports the arrangements for a wholesale regime, we are concerned that it not create a wholesale duopoly that mirrors the retail duopoly. This would be of no benefit to suppliers or consumers.
14. We are also concerned to ensure that suppliers maintain the ability to choose whether to supply to retailers on a wholesale basis or on a retail basis only. We understand this to be the case absent express wording in the Bill to the contrary. Managing supply channels is an important way for suppliers to determine the distribution of their product and there is currently a large degree of uncertainty about the terms of any wholesale regime and what it might require suppliers to commit to if they opt in. Wholesale arrangements need to be by way of a transparent cost and service model rather than as a quasi-distributor arrangement and it would be important for this to be explicit in the Bill.
15. We would be concerned if the Bill or any additional regulation under the Bill forces suppliers to opt in or if it is unclear whether the Bill or additional regulation has that effect.
16. Clause 20(f) recognises the desirability of independent suppliers retaining reasonable control over the channels for the retail sale of their own products and brands and clause 82 facilitates provision for suppliers opt out (with the regulatory impact statement making clear that independent suppliers may choose to opt out). We recommend this be made clearer by providing, on the face of the Bill, a clause that states independent suppliers must be permitted to opt out of the wholesale supply of groceries. This provides direct assurance of control by the supplier of their product. Suggested amended wording to clause 16(b) could be by way of amending clause 82 to directly provide independent suppliers *must* be allowed to opt out of the wholesale supply of groceries under an Order in Council under subpart 5 or a determination under subpart 6.
17. Alternatively, this could be done by way of a more detailed two-step process through:
 - a) adding a presumption along the lines of clause 20(f) that an independent supplier retains reasonable control over the channels for the retail sale of their own products and brands unless there is an objective justification to depart from this; and
 - b) amending clause 82 to provide an Order in Council under subpart 5 or a determination under subpart 6 that *must* allow independent suppliers to opt out of the wholesale supply of groceries under the Order or determination.

18. Both alternatives are consistent with the regulatory impact statement which describes these regimes as imposing requirements on retailers “*unless an independent supplier has chosen to opt out of the regime*”,¹ and states that “[*t*]here are no restrictions stopping an independent supplier from opting out”.² This is an essential aspect of any such regime and currently it is not reflected in the Bill.

19. In all other areas we are broadly supportive of the provisions including reporting and examination/due process before further intervention is undertaken, a ‘wholesale code’ and the reserve powers that could split the major supermarket business units.

Part 4 Enforcement and dispute resolution

20. NZFGC supports strong enforcement powers and penalties (clauses 113-159). In our view these demonstrate the seriousness with which departures from requirements are to be taken.

21. We support the level of maximum penalties and not that, by comparison, the UK Groceries Code Adjudicator has the power to impose fines of up to 1% of annual turnover on the regulated retailers (those with turnovers <£1bn) in order to create an effective deterrent to retailers breaching the UK code.

22. NZFGC envisaged a dispute resolution scheme within the Code but a scheme under the Bill (Subpart 5, clauses 147-159) is supported so long as accessibility is addressed. NZFGC’s key concern with a dispute resolution facility in the primary legislation is accessibility to the dispute resolution processes for small to medium size suppliers and the ability for a full range of concerns to be able to be worked through at low cost.

Part 5 – Miscellaneous Grocery Commissioner

23. NZFGC strongly supports the provisions of the Bill concerning a Grocery Commissioner who is skilled and independent (clauses 160 to 166).

Annual report

24. The Commission is required to prepare an annual report on the grocery industry (clauses 168 to 171). Several aspects are listed that may be included. The state of competition as referred to in clause 105 is one of those aspects. Clause 105 is only triggered if the Commission considers market concentration is at or below a set threshold. We consider that the annual report must report on the veracity of the retailer profitability analysis and suggested excess profits. Requiring the annual report to report on retailer profitability would be an ongoing mechanism to monitor any “super profit making” in the New Zealand market.

Investigation and information gathering powers and

25. Provision is made in **Part 5, Subpart 2** for extensive investigation and information gathering powers and related offences (clauses 174 and 175). NZFGC strongly supports these provisions as set out in the Bill.

Collective bargaining

26. This subpart also provides for an exemption to be made for collective negotiations under regulations (clauses 176 and 177). NZFGC is supportive of the facility for collective bargaining being available for grocery suppliers.

¹ *Regulatory Impact Statement: grocery sector regulatory backstop to the quasi-regulated wholesale access regime* at paragraphs 37 & 41

² *Regulatory Impact Statement: grocery sector regulatory backstop to the quasi-regulated wholesale access regime* at paragraphs 39

Disclosure statements

27. NZFGC supports the provisions in **Part 5, Subpart 3** of the Bill relating to disclosure statements (clauses 182 to 187). This supports the Commission monitoring competition and efficiency in the grocery industry and ensures the Commission has sufficient information to assess whether the purpose of the Act is being met (competition and efficiency grocery industry and outcomes from the limited competition are consistent with competitive markets).

Part 6 – Amendments to other legislation

Amendments to *Fair Trading Act 1986*

28. NZFGC is strongly supportive of the provisions (clauses 192 to 199) which extend protections in the *Fair Trading Act 1986* against the use of unfair contract terms in grocery supply contracts as a specific group of small trade contracts. By setting the specified contract amount to \$1 million (instead of \$250,000, the protections extend to a wider range of grocery contracts albeit contracts that are still small to medium.

29. Provision is made in clause 200 for an application to be made by any person to the High Court or District Court for a term in a grocery supply contract to be declared an unfair contract term. NZFGC is very supportive of this provision to facilitate the triggering of protections for unfair contract terms.

Schedule 1

Transitional, savings, and related provisions

30. NZFGC is strongly supportive of the provisions in Schedule 1 in the Bill that provide for any secondary legislation made under the Bill (including the Code) to apply to pre-existing agreements at the time secondary legislation commences. We are aware of the resources this may require depending on the degree of tailoring of, for example, supply agreements undergo between different suppliers. However, if contracts/ agreements are otherwise locked up for years, the potential effectiveness of the Bill could be stifled.

Schedule 2

Dispute Resolution Scheme

31. This Schedule provides operational aspects of the dispute resolution scheme including approval of schemes, applicants and scheme rules, annual reporting and regulations that could set out rules. As this scheme develops, we will be focussed on the purpose set out for it to be user-focused, accessible, independent, fair, accountable, efficient, and effective. These are very important to ensure the workability of the scheme.

Schedule 3

Dispute Resolution Scheme

32. This Schedule provides the mechanism for amending the *Fair Trading Act 1986* to accommodate changes to unfair contract term provisions. NZFGC supports this facility.