

Departmental Disclosure Statement

Grocery Industry Competition Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Business, Innovation and Employment.

The Ministry of Business, Innovation and Employment certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

3 November 2022

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Part One: General Policy Statement

This Bill is an omnibus Bill that amends more than one Act and is introduced under Standing Order 267(1)(a) because the amendments deal with an interrelated topic that can be regarded as implementing a single broad policy. That single broad policy is to improve competition and efficiency in the grocery industry for the long-term benefit of consumers, and to contribute to a trading environment in which businesses can participate confidently.

Background

On 8 March 2022, the Commerce Commission released its final report on its market study into the retail grocery sector in New Zealand. The report found that competition within the sector was not working well for consumers. The retail grocery market in New Zealand is dominated by three major grocery retailers (Foodstuffs North Island Limited, Foodstuffs South Island Limited, and Woolworths New Zealand Limited) that operate as a duopoly and competitors wanting to enter the retail grocery market face significant challenges, including access to groceries and the impacts of the imbalance in negotiating power between major grocery retailers and their suppliers.

Policy intent

The overall policy objective of this Bill is to improve competition and efficiency in the grocery industry for the long-term benefit of consumers, and to contribute to a trading environment in which businesses can participate confidently.

More competition should put stronger pressures on grocery retailers to deliver lower grocery prices, better quality, and a greater range of grocery products and services to satisfy the diverse preferences of New Zealand consumers.

A more competitive grocery industry is more conducive to productivity improvements over time and should result in a more level playing field for all businesses, as well as enabling clearer signals to suppliers and retailers that will guide investment and innovation to cater to consumer preferences.

Access to groceries is hindering entry and expansion in the retail grocery market

A competitor wanting to enter the market faces a challenge getting access to groceries for retail sale. Because of the barriers to entry, the major grocery retailers have substantial market power in the retail grocery market. In addition, they benefit from the efficiency of their vertically-integrated operations, their purchasing power to negotiate prices with suppliers, and the economies of scale they achieve by spreading fixed costs over a large number of retail stores. The combination of those factors means the major grocery retailers have significant advantages accessing groceries for retail sale relative to existing competitors and potential new entrants.

A new entrant to the retail grocery market or an existing grocery retailer looking to expand needs to overcome significant disadvantages to compete against the major grocery retailers. At the moment, there are few wholesale supply options for a new grocery competitor. With some exceptions in the supply of fresh produce, meat, and international products, a new competitor is unlikely to be able to secure products directly from large suppliers at a comparable cost to the major grocery retailers.

The Bill creates a two-part wholesale supply regulatory regime. Subpart 2 of Part 3 of the Bill imposes regulatory requirements on the major grocery retailers to facilitate

commercial supply of groceries. Subparts 4 to 8 of Part 3 of the Bill establish the wholesale regulatory backstop, which creates a range of additional wholesale supply obligations that may be imposed on the major grocery retailers if the major grocery retailers' commercial offerings are not what would be expected in a workably competitive market and additional regulation is likely to benefit consumers in the long term.

Commercially negotiated offerings in a competitive wholesale market, as facilitated by regulatory requirements, could be more efficient – and therefore more beneficial to consumers – than a regulated wholesale offering. However, the existence of the wholesale regulatory backstop further incentivises the major grocery retailers to seek commercial agreements with wholesale customers for wholesale offerings, and provides powers to require wholesale supply on regulated terms if necessary.

Imbalance in bargaining power between major grocery retailers and their suppliers

Another challenge is that the major grocery retailers are using their advantage in negotiating power to push costs and risks that they are better placed to address onto suppliers, and to reduce the transparency and certainty over terms and conditions of supply.

The imbalance of bargaining power has a flow-on impact of reducing incentives for suppliers to invest and innovate. Constraining the ability of the major grocery retailers to leverage their advantage in negotiating power should generate dynamic efficiency benefits as suppliers will be able to invest to enhance their productivity and to innovate and bring new products to consumers.

The Bill addresses the imbalance in negotiating power in three ways. In particular, it –:

- creates a Grocery Supply Code that the major grocery retailers will be required to comply with to constrain their ability to use their negotiating power advantage to force suppliers to accept unfavourable terms of supply that may involve them taking on costs and risks that are better addressed by the major grocery retailers;
- extends 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 to constrain the ability of the major grocery retailers to push costs and risks onto suppliers;
- establishes 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.

A more even balance of negotiating power between suppliers and retailers should benefit consumers in the long term. It should enable suppliers to invest in productivity-enhancing capital and in innovation to bring new products to market that better meet the preferences of consumers.

The additional protections to suppliers should not reverse the current situation and give suppliers an advantage over retailers in negotiations, which could reduce the benefits to consumers in the long term.

However, the supplier protections will be most effective if there is an improvement in retail competition. This will apply competitive pressure on retailers to resist any upward pressure on prices from suppliers because they know they cannot simply pass on price increases to consumers without the risk of losing some competitive advantage.

Grocery regulator

A grocery regulator is needed to provide general oversight of the grocery industry, monitor and report on the industry's performance, and ensure compliance with the regulatory regime.

The Bill provides for the appointment of a Grocery Commissioner within the Commerce Commission and provides the regulatory powers and functions to the Grocery Commissioner and Commerce Commission.

The Commerce Commission may require information to be disclosed by the major grocery retailers, any wholesale customer, or any grocery supplier by regulation. Any information that is connected to the grocery industry, including both commercial information and some non-commercial information, may be required to be disclosed. The Privacy Act 2020 will apply to any information disclosure requirements, ensuring that adequate safeguards are in place.

The Commerce Commission has broad functions, duties, and powers to monitor compliance with the regulatory regime, to enforce compliance (including through taking court action), and to report regularly on the state of competition in the grocery industry.

The Commerce Commission may access a range of enforcement tools in the event of non-compliance, including the ability to issue corrective notices and require warnings to be disclosed. A range of remedies may be sought from the court for failures to comply with the Bill, such as pecuniary penalties (comprising four tiers of penalty levels, with higher-tier penalties applied to contraventions that may have potentially more serious impacts), orders to vary or cancel contracts, and injunctions to stop certain conduct or require certain conduct to continue.

Additionally, the Commerce Commission has functions to recommend additional regulation (for example, recommending an Order in Council to require major grocery retailers to sell groceries to wholesale customers) or to recommend that new parties be required to comply with the regime (for example the Grocery Supply Code). The Commerce Commission may also impose additional regulatory obligations on those major grocery retailers that are already regulated by the regime (information disclosure obligations and some components of the wholesale backstop).

Dispute resolution scheme

An alternative dispute resolution scheme is needed to provide independent, prompt, and cost-effective resolution of any dispute that a grocery supplier or a wholesale customer may have with a major grocery retailer. Any scheme must be accessible to grocery suppliers and wholesale customers, particularly smaller businesses.

The Bill provides for the Minister of Commerce and Consumer Affairs to appoint a dispute resolution scheme and approve that scheme's rules. The scheme will have jurisdiction to hear disputes between a grocery supplier or a wholesale customer and a major grocery retailer and may make binding determinations on disputes.

The Bill is intended to be divided at the committee of the whole House stage into separate Bills as follows:

- Parts 1 to 5 and Schedules 1 and 2 will become the Grocery Industry Competition Bill:
- Part 6 and Schedule 3 will become the Fair Trading Amendment Bill.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
Commerce Commission: Market study into the retail grocery sector – Final Report, 8 March 2022; Draft Report, July 2022. <i>See Commerce Commission - Market study into the grocery sector (comcom.govt.nz)</i> https://comcom.govt.nz/about-us/our-role/competition-studies/market-study-into-retail-grocery-sector?target=documents&root=228475	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO

2.2.1. If so, was a National Interest Analysis report prepared to inform a Parliamentary examination of the proposed New Zealand action in relation to the treaty?	NO

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
The Ministry of Business, Innovation and Employment prepared three Regulatory Impact Statements to support the policy decisions that led to this Bill: <i>Government Response to the Commerce Commission Grocery Sector Market Study</i> to support Cabinet decisions in May [CAB-22-MIN-0186 refers]. Some information has been withheld under the grounds of confidential advice to Government and constitutional conventions. <i>available here:</i> https://www.mbie.govt.nz/dmsdocument/22638-regulatory-impact-statement-government-response-to-the-commerce-commission-grocery-sector-market-study-policy-decisions-proactiverelease-pdf <i>Regulatory Impact Statement Addendum: Grocery sector regulator and dispute resolution scheme</i> to support Cabinet decisions on the Groceries Commissioner, dispute resolution, and penalties in July [CAB-22-MIN-0259 refers]. Some information has been withheld for the reasons of confidential advice to government. <i>available here:</i> https://www.mbie.govt.nz/dmsdocument/22923-regulatory-impact-statement-addendum-grocery-sector-regulator-and-dispute-resolution-scheme-proactiverelease-pdf <i>Regulatory Impact Statement Addendum: Grocery sector regulatory backstop to the quasi-regulated wholesale access regime</i> to support Cabinet decisions on the wholesale regulatory regime in August [CAB-22-MIN-0303 refers]. Some information has been withheld for the reasons of confidential advice to government. <i>available here:</i> https://www.mbie.govt.nz/dmsdocument/25463-regulatory-impact-statement-addendum-grocery-sector-regulatory-backstop-to-the-quasi-regulated-wholesale-access-regime-proactiverelease-pdf	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
Based on an application of the Treasury's Regulatory Impact Analysis Quality Assurance criteria, it was determined that the quality assurance of the relevant regulatory impact assessments could be conducted internally by MBIE's Regulatory Impact Assessment Review Panel.	
The assessment of the MBIE panel is included in Appendix One.	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	NO

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	NO
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES

The potential costs or benefits are impacted by the level of effective compliance with obligations or standards.

The level of compliance is expected to determine the benefits that accrue to consumers over the long term from the improvement in competition resulting from the wholesale access regime, and the supplier protections.

To ensure high levels of compliance a range of tools have been employed, including:

- dispute resolution avenues available to a wholesale customer or a grocery supplier,
- monitoring, compliance and enforcement powers for the Commission
- the ability for the Commission or the Executive to impose additional regulation (the wholesale regulatory backstop).

The potential costs or benefits are impacted by the nature and level of regulator effort put into encouraging or securing compliance.

For this reason, the Government has committed \$4.790 million of funding to the Commission in the 2022/23 financial year to establish the necessary regulatory functions. Future funding decisions are yet to be made by the Government.

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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New Zealand is not bound by an international treaty in relation to the matters in this Bill. MBIE considers the Bill is consistent with New Zealand's international obligations.
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Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

The Commerce Commission convened a series of hui to obtain the insights of Māori on the retail grocery sector. In addition, the Commission received 18 submissions from Māori as part of the market study. Those insights and submissions were taken into account when preparing the final report.
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MBIE has since undertaken targeted engagement with some of the submitters to the Commission, and also with pan-Māori groups, as part of the policy development process.

MBIE's analysis of the policy indicates that the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi.
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Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	YES
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The Ministry of Justice has been consulted. Advice provided to the Attorney-General by the Ministry of Justice is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. Such advice, or reports, will be accessible here: https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/ .
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Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	YES
<p>The Bill creates a range of civil penalties and criminal offences as necessary for the operation of the new grocery regulatory regime. The penalties and offences are explained in Appendix Two.</p> <p>The Bill clarifies the jurisdiction of the court in relation to the penalties and offences created in the Bill.</p> <p>The Bill also provides for a new alternative dispute resolution scheme between the regulated grocery retailers and their suppliers and wholesale customers. The jurisdiction of this scheme extends to disputes up to \$5 million, and regulated grocery retailers must participate if a supplier or wholesale customer raises a dispute. Any concurrent proceedings raised in another jurisdiction are stayed until the dispute resolution is completed (except for proceedings initiated by the Commerce Commission). Appeal rights in relation to a binding determination of the dispute resolution scheme are limited to points of law. These matters are also explained in Appendix Two.</p>	

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
<p>MBIE consulted the Ministry of Justice as part of the policy development process on these provisions, and on the final Bill.</p>	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
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The following clauses in the Bill create provisions relating to the use of information that could be personal information:

Subpart 3 of Part 5 deals with disclosure standards. Clause 182 requires a participant in the grocery industry to comply with any disclosure standards that the Commission issues under clause 183. These disclosure standards are secondary legislation subject to disallowance.

Clause 186 provides for the information that disclosure standard may require a participant to disclose, which includes any agreement entered by a participant, a participant's financial statements, costs, revenues, and margins.

While this disclosure power is not primarily concerned with requiring the disclosure of personal information, personal information could be caught by disclosure standards made by the Commission under clause 183.

Clause 173(a) also applies s 98 of the Commerce Act to the Bill, which enables the Commission to require the disclosure of information where the Commission considers it necessary or desirable to carry out its functions and exercising its powers under the Act. It is possible that the Commission may use this power to require the disclosure of personal information.

Any personal information disclosed to the Commission under the Bill must be kept in accordance with the Privacy Act 2020. The Bill does not empower the Commission to publish any personal information disclosed to it under any of its information disclosure powers under the Bill.

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
<p>The Bill includes a provision in clause [183] that may override to the principles of the Privacy Act 2020 in that it enables the Commission to set information disclosure standards which may include requiring personal information. The Privacy Commissioner considers that this is a justified override to the Privacy Act 2020 based on information provided.</p> <p>It was noted that the Commission should take care to ensure that it has good processes and practices to comply with the Privacy Act 2020 and keep info secure given it may be collecting personal information as a result of the disclosure standards (noting of course that they are already subject to the Privacy Act 2020 and already hold and collect personal information).</p>	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>The policy to be given effect by this Bill was the subject of consultations by the Commerce Commission as part of its market study into the grocery sector during 2021. In addition, MBIE has undertaken some targeted consultation on the policy.</p> <p>Officials engaged with the major grocery retailers, other grocery retailers, supplier groups, suppliers, consumer groups and Māori organisations as part of developing the policy to be given effect by this Bill. The targeted engagement took the form of meetings (often virtual) with officials and the external parties, and was over the period of March – August 2022.</p> <p>Consumer-focused groups raised concerns that addressing the imbalance in negotiating power between suppliers and retailers may put upward pressure on prices.</p> <p>The major grocery retailers raised concerns about the workability and effectiveness of the entire regime, particularly the mandatory wholesale access regulation. Officials had a number of targeted engagements with major grocery retailers as part of the development of the wholesale access regulation in June-July 2022 and have considered these concerns in the policy design.</p> <p>Other grocery retailers had concerns about the likelihood that commercially negotiated wholesale would enable them to compete in the retail market.</p> <p>Māori groups focused on the perspective of Māori suppliers and provided similar views to supplier groups and suppliers, that there were a range of areas in which costs and risks are being pushed onto suppliers.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
<p>The Bill was developed in consultation with the Commerce Commission (the proposed regulator under the Bill) with the aim of ensuring they are workable.</p> <p>The Bill was informed by the targeted engagement (explained above), but there has been no engagement beyond Government on the Bill itself during the drafting process.</p>	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	YES
<p>The implementation of the Grocery Supply Code (as secondary legislation), Part 2 of the Bill, and the application of the Wholesale Supply regime in Part 3 of the Bill, both have some retrospective effects on existing contractual arrangements.</p> <p>The transitional provisions in clause 1 of Schedule 1 stipulate that any secondary legislation made under this Part 2 and Part 3 may regulate existing agreements as if it is made after the commencement of the secondary legislation.</p> <p>And the transitional provisions in clause 2 of Schedule 1 stipulate that Subpart 2 of Part 3 applies to existing wholesale agreements if it is made after the commencement of the Act.</p> <p>The effect of these provisions is to allow the Grocery Supply Code and the Wholesale Supply regime to apply to arrangements negotiated by the major grocery retailers and suppliers or wholesale customers prior to the enactment of the Bill (or any secondary legislation made under the Bill).</p> <p>These provisions are necessary to ensure that any grocery supply agreements come into line with the requirements of the Grocery Supply Code in a reasonable time, and any wholesale agreements come into line with the Wholesale Supply obligations too.</p> <p>This is particularly relevant for the Grocery Supply Code where there are already concerns from the supplier community that the major grocery retailers are adjusting existing supply agreements with terms and conditions that seek to give them an advantage in anticipation of the Grocery Supply Code coming into force. It is important for the effectiveness of the Grocery Supply Code that, in due time, all grocery supply agreements comply with the regulatory requirements.</p>	

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
<p>The Bill includes provisions for the Minister to appoint a dispute resolution scheme, which provides for both consensual dispute resolution process that result in settlement agreement and determinative processes that result in a binding determinations which may not exceed \$5 million in value. The details of this regime will be set out in secondary legislation, but under clause 154 it will enable an adjudicator or other decision maker to determine claims before it on the basis of the information available to the adjudicator or other decision-maker.</p> <p>The Bill also provides a range of broad determination powers to the Commerce Commission under Part 3 of the Bill that may impact the rights, obligations or interests of regulated grocery retailers. These determination powers are all powers to make delegated legislation and are set out in full in 4.8 and Appendix 4.</p>	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	YES
<p>The collective negotiation exemption, in Subpart 2 of Part 5 of the Bill, creates a power to make delegated legislation that grants an exemption from sections 27 and 30 of the Commerce Act 1986.</p> <p>Regulations may be made (refer to clause 176) exempting to a specified person or class of persons from ss 27 and 30 of the Commerce Act for the purposes of enabling the collective negotiation of 1 or more supply agreements with regulated grocery retailer. The regulations may also prescribe any terms and conditions of the exemption.</p> <p>Provided the terms and conditions of the exemption are met, ss 27 and 30 of the Commerce Act will not apply to any contract, arrangement, and understanding entered pursuant to the exemption.</p>	

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>A summary of the powers to make secondary legislation is provided here. Further details on the nature and extent of the power, why the power is necessary, and the safeguards that apply, is provided in Appendix Three.</p> <p>The Bill creates powers for the Executive to make secondary legislation by Order in Council, for the following matters:</p> <ul style="list-style-type: none"> - clause 9, power to designate a grocery retailer as having Grocery Supply Code obligations; - clause 12, power to make a Grocery Supply Code; - clause 23, power to designate a grocery retailer as having wholesale supply obligations; - clause 76, power to require grocery retailers to sell groceries to wholesale customers on terms that will be set by the Commission (refer to sections 84 and 90); - clause 103, In relation to the wholesale supply regime, setting a market concentration threshold that will be monitored by the Commission; - clause 150, power to prescribe classes of eligible disputes; - clause 176, power to exempt from sections 27 and 30 of the Commerce Act 1986 and prescribe terms and conditions (if any) for the exemption; - schedule 2, clause 18, setting the rules of a regulated dispute resolution scheme (the backstop option to appointing a dispute resolution scheme); - clause 189, any other matter that the Bill says may or must be provided for by regulations; - clause 190, miscellaneous provisions relating to fees. <p>The Bill creates powers for the Commission to make secondary legislation by determination in the following instances:</p> <ul style="list-style-type: none"> - clause 43, prescribing how a grocery retailer must comply with their wholesale supply obligations; - clause 57, imposing additional wholesale backstop regulation in the form of the Wholesale Code or Framework; - clause 84, imposing non-discriminatory terms as part of the wholesale backstop regime; - clause 90, imposing specified access terms as part of the wholesale backstop regime; - clause 183, issuing disclosure standards that must be complied with by any of suppliers, the major grocery retailers, and/or other grocery retailers. 	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO
<p>The entire Bill, with the exception of clause 15, commences 14 days after Royal assent. The proposed 14 days is a tight timeframe for regulated parties to be compliance-ready.</p> <p>For the regulated grocery retailers to be in a position to comply with the Bill when it commences, they may need to make preparations to comply with the law before it commences.</p>	

Appendix One: Further Information Relating to Part Two

Regulatory impact analysis – question 2.3.1

The Ministry of Business, Innovation and Employment's internal Regulatory Impact Assessment Review Panel reviewed each of the three Regulatory Impact Statements. They were assessed as follows:

Government Response to the Commerce Commission Grocery Sector Market Study, on 6 May 2022, available here: <https://www.mbie.govt.nz/dmsdocument/22638-regulatory-impact-statement-government-response-to-the-commerce-commission-grocery-sector-market-study-policy-decisions-proactiverelease-pdf>

The Ministry of Business, Innovation and Employment's Regulatory Impact Analysis Review Panel has reviewed the attached Regulatory Impact Statement Government Response to the Commerce Commission Grocery Sector Market Study – Policy decisions, prepared by MBIE.

The Panel notes that an advance decision taken by Cabinet on one recommendation from the Grocery Sector Market Study was made without a Regulatory Impact Statement [recommendation 2], and will be subject to a Supplementary Analysis Report. This decision is therefore not analysed in this Impact Statement and does not impact upon the analysis summarised in this Impact Statement.

The Panel considers that the information and analysis summarised in the Impact Statement meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

Regulatory Impact Statement Addendum: Grocery sector regulator and dispute resolution scheme, on 21 June 2022, available here: <https://www.mbie.govt.nz/dmsdocument/22923-regulatory-impact-statement-addendum-grocery-sector-regulator-and-dispute-resolution-scheme-proactiverelease-pdf>

The Ministry of Business, Innovation and Employment's Regulatory Impact Analysis Review Panel has reviewed the attached Regulatory Impact Statement Addendum: Grocery sector regulator and dispute resolution scheme, as an addendum to the Regulatory Impact Statement Government Response to the Commerce Commission Grocery Sector Market Study – Policy decisions, both prepared by MBIE.

The Panel considers that the information and analysis summarised in the Regulatory Impact Statement Addendum meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

Regulatory Impact Statement Addendum: Grocery sector regulatory backstop to the quasi-regulated wholesale access regime, on 28 July 2022, available here: <https://www.mbie.govt.nz/dmsdocument/25463-regulatory-impact-statement-addendum-grocery-sector-regulatory-backstop-to-the-quasi-regulated-wholesale-access-regime-proactiverelease-pdf>

MBIE's Regulatory Impact Analysis Review Panel has reviewed this Regulatory Impact Statement: grocery sector regulatory backstop to the quasi-regulated wholesale access regime, as supplementary to the Regulatory Impact Statement: Government Response to the Commerce Commission Grocery Sector Market Study – Policy decisions (the original RIS), both prepared by MBIE.

The Panel considers that, given the combination of content in the original RIS and the supplementary RIS, and the enabling nature of the regulatory options, the information and analysis summarised in this supplementary Regulatory Impact Statement meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

Appendix Two: Further Information Relating to Part Three

Offences, penalties and court jurisdictions – question 3.4

The following clauses in the Bill create or amend offences or civil pecuniary penalty regimes:

- Clause 120 provides for pecuniary penalty orders as a civil liability remedy in relation to a contravention of the matters listed in clause 120(2), which are: the Grocery Supply Code (clause 15), obligations under the quasi-regulatory wholesale supply regime (clauses 30-41), obligations under the wholesale supply regime (the framework in clause 63, 65 and 66(3), the wholesale code in clause 71, non-discriminatory terms or specified access terms regulation under clause 81), corrective notices (clause 114), disclosure of warning (clause 117), conditions of exemption for collective negotiation (clause 180), and disclosure standards (clause 182).
- Clauses 122-125 outline the four tiers of penalty that may be applied to particular contraventions, these vary from:
 - o Tier 1 (clause 122), with a maximum amount of \$500,000 for an individual and a maximum for any other party (eg a corporate) that is the greatest of \$10 million, or three times the commercial gain from the contravention (if it can be easily proven) or ten percent of the turnover.
 - o Tier 2 (clause 123), with a maximum amount of \$200,000 for an individual and a maximum for any other party (eg a corporate) that is the greatest of \$3 million, or the commercial gain from the contravention (if it can be easily proven) or three percent of the turnover.
 - o Tier 3 (clause 124), with a maximum amount of \$250,000 for an individual and a maximum for any other party (eg a corporate) of \$5 million.
 - o Tier 4 (clause 125), with a maximum amount of \$30,000 for an individual and a maximum for any other party (eg a corporate) of \$300,000.
- Clause 175 creates offenses, based on the powers in the Commerce Act 1986, for a failure to comply with a notice under clause 174. These notices relate to the Commission's monitoring and investigation powers. A person who commits an offence is liable on conviction to a fine not exceeding \$100,000 (for an individual) or a fine not exceeding \$300,000 (for any other party eg a corporate).

The following clauses in the Bill create or amend jurisdiction of a court or tribunal:

- Clauses 142-143 clarify the jurisdiction of the High Court and District Court to hear and determine matters arising under Subpart 3 of Part 4 of the Act (sections 120-141).
- Clauses 147-159 provides for an alternative dispute resolution scheme to resolve disputes that may arise between a supplier and a regulated grocery retailer or a wholesale customer and a regulated grocery retailer. Under clause 149 the dispute resolution scheme may consider a dispute provided the amount claimed does not exceed \$5 million. The regulated grocery retailers are required to comply with the dispute resolution scheme.
- Clause 157 limits the appeal rights of a regulated grocery retailer in relation to a binding decision of the dispute resolution scheme. It restricts the appeal rights of all parties to points of law.

Appendix Three: Further Information Relating to Part Four

Powers to make delegated legislation- question 4.8

The Bill creates powers for the Executive to make secondary legislation by Order in Council, for the following matters.

Clause in the Bill	Power to make delegated legislation	Safeguards that apply to the exercise of the power
Clause 9	Power to designate a grocery retailer as having Grocery Supply Code obligations	<p>Minister's designation recommendation may only be made after the Commission has made recommendation. In doing so the Commission must consult the affected person, and must publish the reasons for its recommendation.</p> <p>Designation OIC must be published, presented to the House, and is subject to disallowance.</p>
Clause 12	Power to make a Grocery Supply Code	<p>Minister must consult with affected persons and the Commission before recommending Code.</p> <p>Code OIC must be published, presented to the House, and is subject to disallowance.</p> <p>Code will be subject to review by the Commission after one year, and thereafter as directed by the Minister or determined by the Commission.</p>
Clause 23	Power to designate a grocery retailer as having wholesale supply obligations	<p>Minister's designation recommendation may only be made after the Commission has made recommendation. In doing so the Commission must consult the affected person, and must publish the reasons for its recommendation.</p> <p>Designation OIC must be published, presented to the House, and is subject to disallowance.</p>
Clause 76	Power to require grocery retailers to sell groceries to wholesale customers on terms that will be set by the Commission	<p>OIC may only apply to retailers that are designated as having wholesale supply obligations under section 23.</p> <p>OIC may only be made after the Commission undertaken an inquiry under sub-part 3 of Part 3. In doing so the Commission must consult affected persons, prepare and publish a draft report for comment, and must publish its final inquiry.</p> <p>The Minister must table the intended response to the Commission's inquiry in the House, and if the Minister intends to regulate against the recommendation of the Commission, the Minister must set out the reasons for the Minister's decision in that response.</p> <p>OIC may only be made if the Minister is satisfied of the matters in clause 73(1) or 73(2).</p>

		OIC must be published, presented to the House, and is subject to disallowance.
Clause 103	In relation to the wholesale supply regime, setting a market concentration threshold that will be monitored by the Commission	Market concentration threshold triggers review, but does not otherwise affect rights of any person. OIC must be published, presented to the House, and is subject to disallowance.
Clause 150	Power to prescribe classes of eligible disputes	Minister must consult with affected persons and the Commission before recommending regulations to set jurisdiction of dispute resolution scheme. OIC must be published, presented to the House, and is subject to disallowance.
Clause 176	Power to exempt from sections 27 and 30 of the Commerce Act 1986 and prescribe terms and conditions (if any) for the exemption	Minister's regulation recommendation may only be made after the Commission has made recommendation. In doing so the Commission must consult the affected person, and must publish the reasons for its recommendation The Minister may only recommend that regulations are made for the purpose of enabling specified persons to enter into supply agreements with regulated grocery retailers, and the Minister must have regard to any efficiencies that are likely to result from creating the exemption and any lessening of competition that may result from gaming of the exemption. Regulations must be published, presented to the House, and is subject to disallowance.
Schedule 2, clause 18	Setting the rules of a regulated dispute resolution scheme (the backstop option to appointing a dispute resolution scheme)	Minister must consult with affected persons and the Commission before recommending regulations to provide for a regulated dispute resolution scheme. Any rules set out in the regulation must comply with Clause 13 of the Schedule. OIC must be published, presented to the House, and is subject to disallowance.
Clause 189	Any other matter that the Bill says may or must be provided for by regulations.	Regulations must be published, presented to the House, and is subject to disallowance

The Bill creates powers for the Commission to make secondary legislation by determination in the following instances.

Clause in the Bill	Power to make delegated legislation	Safeguards that apply to the exercise of the power
Clause 43	Prescribing how a grocery retailer must comply with their wholesale supply obligations.	<p>This power will be exercised by the Grocery Commissioner and two other Commissioners.</p> <p>The Commission must consult prior to exercising this power, including by publishing a draft determination and reasons for it, and consulting affected persons.</p> <p>The determination must be published, presented to the House, and is subject to disallowance</p>
Clause 57	Impose additional wholesale backstop regulation in the form of the Wholesale Code or Framework	<p>This power will be exercised by the Grocery Commissioner and two other Commissioners.</p> <p>This power may only be exercised if the Commission is satisfied one of the statutory tests under clause 55 is met (in addition to the consultation requirements).</p> <p>The Commission must consult prior to exercising this power, including by publishing a draft determination and reasons for it, and consulting affected persons.</p> <p>The determination must be published, presented to the House, and is subject to disallowance</p> <p>The Wholesale Code will be subject to review by the Commission after one year, and thereafter as directed by the Minister or determined by the Commission.</p>
Clause 84	Impose non-discriminatory terms as part of the wholesale backstop regime.	<p>This power will be exercised by the Grocery Commissioner and two other Commissioners.</p> <p>A determination may only be made under this power if the major grocery retailers have been required to sell groceries to wholesale customers by Order in Council (in addition to consultation and other process requirements).</p> <p>In developing the determination, the Commission must publish a draft determination, publish a statement of its reasons for proposing to make the determination, and consult on the draft determination with any persons, or representatives of person that the Commission considers will be substantially affected by the determination.</p> <p>This determination must be publish, presented to the House, and is subject to disallowance.</p>

<p>Clause 90</p>	<p>Impose specified access terms as part of the wholesale backstop regime.</p>	<p>This power will be exercised by the Grocery Commissioner and two other Commissioners.</p> <p>A determination may only be made under this power if the major grocery retailers have been required to sell groceries to wholesale customers by Order in Council (in addition to consultation and other process requirements).</p> <p>The determination must address the matters in clauses 91 and 92.</p> <p>In developing the determination, the Commission must publish a draft determination, publish a statement of its reasons for proposing to make the determination, and consult on the draft determination with any persons, or representatives of person that the Commission considers will be substantially affected by the determination.</p> <p>This determination must be published, presented to the House, and is subject to disallowance.</p>
<p>Clause 183</p>	<p>Issue disclosure standards that must be complied with by any of suppliers, the major grocery retailers, and/or other grocery retailers. Disclosure standards may cover a broad range of information including prices, financial statements, revenues, and costs.</p>	<p>This power will be exercised by the Grocery Commissioner and two other Commissioners.</p> <p>This power can only be exercised if the Commission is satisfied that the criteria in clause 187 are met.</p> <p>The Commission must consult prior to exercising this power, including by publishing a draft standard and reasons for it, and consulting affected persons.</p> <p>The determination must be published, presented to the House, and is subject to disallowance.</p>