New Zealand Law Society
Te Kāhui Ture o Aotearoa

Grocery Industry Competition Bill

2/2/2023

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1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Grocery Industry Competition Bill (the **Bill**).

1.2 This is an omnibus Bill that seeks to implement a single broad policy of improving competition and efficiency in the grocery sector for the long-term benefit of consumers.

1.3 This submission has been prepared with input from the Law Society's Commercial and Business Law Committee.[1]

1.4 The Law Society wishes to be heard on the Bill.

2 Summary

2.1 We have been unable to undertake a clause-by-clause analysis of the Bill in the limited timeframe for making submissions. As a result, we have no specific comments on matters of detail relating to the wording of the Bill at this stage.

2.2 The telecommunications-industry-style regulation of access to the wholesale grocery market proposed in the Bill may be effective if the assortment of other barriers to market access highlighted by the Commerce Commission are also addressed in the manner recommended by the Commission. The Law Society emphasises that the regulation of incumbent market participants proposed in the Bill should form part of a comprehensive, sector-wide, series of reforms.

2.3 Without such a comprehensive approach, the type of regulation proposed by the Bill may discourage potential new entrants from risking the commitment of a massive amount of capital and effort to obtain a stake in the grocery sector. By way of example, it took 20 years for Australia's third significant supermarket operator, Aldi, to gain a significant market share of just under 11%[2] of the market (the two incumbents have a combined share of 65%) with most investment concentrated on the more populous and densely-packed New South Wales and Victorian markets.

2.4 A regulatory regime that will require market participants to supply competitors (at regulated prices) is likely to require a significant amount of supervision. This will come at significant cost and the associated compliance burden will almost inevitably impact on the prices paid by consumers.

2.5 Whilst orthodox economic thinking suggests that promoting greater competition in the sector will benefit consumers, the Commerce Commission's recent market study signals that there are a range of complex issues in play. The growth in the number of supermarkets broadly in line with the population growth coupled with only equivocal conclusions about whether the market is saturated may indicate that a new entrant, seeking to emulate the

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1 More information regarding this committee is available on the Law Society's website: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/.

2 Statistica – using 2021 market data

growth of Aldi in Australia, may struggle to justify a roll out, whether that be nationwide or focussed on the population-dense upper North Island.

2.6 Hastily developed legislation is unlikely to be the answer. We are not convinced that these concerns can be fixed in Select Committee alone. Amongst other things, more work will flow from the current review of the Commerce Act. The COVID-19 pandemic and associated public health measures demonstrated the importance of the supermarket sector. In short, the grocery industry is too important to get the regulatory policy settings wrong when a more comprehensive approach has a better chance of achieving lasting benefits for consumers. To proceed quickly risks unintended consequences.

3 Concerns with the Bill

3.1 The Law Society's key concerns about the Bill are summarised as follows:

3.2 *Uniqueness of regulatory framework*: The Law Society considers that there should be a period of consultation on the operation of the proposed regulatory regime. Elements of the new regulatory regime have not, so far as we are aware, been tried in any other OECD economy. There does not appear to have been an adequate opportunity for analysis, whether by the Commerce Commission or independent experts, of the economic impact of some of the measures proposed. We understand the drivers for decisive and speedy change. However, the consequences of getting things wrong will inevitably fall on consumers in the form of higher prices and/or product shortages. The grocery sector is too important for this to happen. This is a sector that is vital, not only to industry participants but also to consumers (New Zealand households). The time and effort should be taken to consult with industry participants and consumers (or consumer groups).

3.3 *Purpose statement*: It is unclear why the Bill's purpose statement contains two limbs. The second limb appears to be a restatement of the first and has the potential to be confusing. A simpler (singular) purpose of promoting, for the long-term benefit of consumers, competition and efficiency in the grocery industry would be clearer.

3.4 *Commencement*: All or substantially all of the regulatory regime under the Bill comes into force 14 days after receiving Royal assent. This is a very short timeline for implementing such significant, sector-wide-changes. There is also additional work to be done to put in place workable regulations to give effect to the new regime. As well as impacting the industry, there is a lot for the new regulator to do. We recommend that a staggered commencement timeline should be considered.

3.5 *Definition of groceries*: The definition of the term 'groceries' is pivotal to the functioning of the key elements of the Bill relating to the Grocery Supply Code as well as the regulatory framework affecting wholesale supply of groceries. As presently drafted, the definition of groceries is an exhaustive list of product categories. Of note, it does not include either alcoholic drinks, or the growing list of other goods regularly sold by supermarkets (ranging from pots and pans and a growing list of electronics items). In our view, the definition must include a (simple) mechanism to allow the definition to flex over time in line with market movements affecting the manner in which consumers live and shop. Because of the significance of this definition to the way in which the Bill works, some care needs to be taken

to examine how this definition applies to the various facets of the regulatory frameworks proposed by the Bill.

3.6 *Definition of participant*: The key definition 'participant' is unclear and not sufficiently targeted to avoid the risk of unintended capture of small and inconsequential elements of the grocery supply chain. The inclusion of individuals and companies that are "involved, directly or indirectly, in the grocery supply chain" is likely to have wide reach and adds both an unnecessary element of uncertainty and a risk of spill over capture of a much broader range of businesses than is necessary to achieve the purpose of the new regime to be implemented under the Bill. As an alternative, we suggest that a targeted, functional, definition should be considered. One example of this drafting approach is that contained in the Electricity Industry Act 2010, which lists industry participants by function and includes both:

(a) certain, identified, categorises of service provider; and

(b) scope for other (presumably) functional types or categorises of person to be added by regulations made under the Act.

3.7 *Complexity*: The Bill contains:

(a) A complex matrix of regulatory tools for reporting and monitoring, seemingly with different criteria depending on the function that the relevant tool is to discharge. The goals and the functionality of the regulatory framework needs to be clearer for such a significant new regulatory regime.

(b) A number of different types of backstop regulation to buttress the regulatory tools. We have not had the time to analyse these in order to determine whether they are sufficiently clear and workable. Some of these appear to have 'boundary issues', where it is not immediately clear which item of backstop is applicable to the relevant tool.

3.8 *Application of regulatory regime to suppliers*: Despite the very large size and obvious market power of the two incumbent supermarket chains, there must be some care taken to ensure that the introduction of the new regulatory regime does not trigger a pendulum swing that simply hands more power to a handful of multinational suppliers (including some suppliers that are amongst New Zealand's biggest businesses). On an initial reading of the Bill, it appears that the wholesale supply regime does not contain any countervailing obligations on suppliers. Instead, there are provisions designed to allow suppliers to opt out of the protections provided by the regime. This is an issue that needs to be considered further including, for example, whether countervailing obligations should be imposed on large suppliers capable of looking after themselves, with exceptions or opt outs being confined to small suppliers – for whom the Commerce Commission has advocated the need for protection. In chapter 6 of its market study, the Commission provides examples of regulatory arbitrage. Law Society members are also aware of examples where the Commerce Act has been used as a weapon by large suppliers seemingly in an effort to insulate themselves from efforts, by their competitors, to build market share. These types of power struggles typically lead to smaller players being caught in the crossfire. Again, the

risks of getting this "wrong" and handing large suppliers greater market power will negatively impact consumers.

3.9 *Ministerial powers*: On an initial reading, we consider the powers designated to the Minister require further consideration. For example, the power to designate additional (to the two incumbent supermarket chains) persons as a regulated grocery retailer should require an economic and/or competition law basis for a decision made as a result of a recommendation by the Commerce Commission. In this way, the decision-making process is clearly insulated from allegations of politicisation and lobbying.

3.10 *Operational separation*: The Bill contains provisions that contemplate the idea of 'operational separation'. This is despite the Commerce Commission specifically stating that it does not recommend operational or structural separation of the major grocery retailers' wholesale and retail businesses.[3] The inclusion of these provisions is unhelpful in circumstances where the relevant concepts were canvased by the market study and dismissed. On the basis that the Commerce Commission is best placed to make that assessment, it is not clear why the concept has been included in the Bill.

3.11 *Price setting*: In the short time available, we have not been able to analyse those aspects of the proposed new regulatory framework that could, ultimately, be applied directly or indirectly for price setting (at a wholesale level). As a bare minimum, we would wish to see clear evidence that such a mechanism works. We are not aware of suitable overseas examples/benchmarks and note that the grocery sector differs significantly from those sectors (electricity and telecommunications) which deal with essentially fungible/substitutable products and services.

3.12 *Dispute resolution*: We note the measures in the Bill that are designed to implement the Commerce Commission's recommendations for an alternative dispute resolution scheme, to provide a prompt and cost-effective resolution of any dispute that a grocery supplier or a wholesale customer may have with a major grocery retailer. However, the Bill merely provides the framework by which a third-party provider will contract to provide a dispute resolution scheme (including the approval of the rules). At a high level, we note:

(a) The Bill (see clause 147) contemplates the Ministry as a sort of 'default provider' of an approved dispute resolution scheme. Without delving into the rationale for such a default provider, industry participants may consider it preferable for a known, reputable and independent provider of dispute resolution services to operate the dispute resolution scheme.

(b) Further work appears to be required on the issue of concurrent proceedings (see clause 151). Clause 151(3) is unhelpful – by providing scope for a court or tribunal dealing with concurrent proceedings the latitude, on its own initiative or on application of the Commerce Commission, to allow or stay concurrent proceedings but no guidance about when a court or tribunal could (or should) exercise that power. This opens the door for costly and delaying applications to stay proceedings as participants undertake a version of forum shopping.

[3] Market study into the retail grocery sector Final report, 9.120-124

(c) The role of clause 153 (District Court may order compliance with rules of dispute resolution scheme) is unclear. It is not clear why a dispute resolution scheme provider would seek an order requiring a regulated grocery retailer to comply with the rules of a binding scheme. The purpose of this power requires clarification.

(d) Further work appears to be required on the enforcement provisions in clauses 155 to 157 of the Bill, including clarification of the basis on which the court should have a power under clause 155(4) to open up a freely negotiated settlement and the basis on which the court decides what the modified negotiated settlement looks like.

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