

3 November 2022

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Grocery Industry Competition Bill**

### **Purpose**

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1. We have considered whether the Grocery Industry Competition Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 24452/4.18). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with section 14 (freedom of expression), section 17 (freedom of association) and section 25(c) (right to be presumed innocent until proven guilty). Our analysis is set out below.

### **The Bill**

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4. In March 2022, the Commerce Commission released its final report on competition in the retail grocery sector in New Zealand. The report found that market competition was not working well for consumers due to three major grocery retailers dominating the market and operating as a duopoly, resulting in significant barriers to entry for new competitors.
5. This Bill aims to address the Commission's findings by putting in place a range of actions to improve competition and efficiency in the grocery industry for the long-term benefit of consumers. Specifically, the Bill amends several Acts to –
  - a. create a two-part wholesale supply regulatory regime that:
    - i. imposes requirements on regulated grocery retailers (RGRs) to facilitate commercial supply of groceries to wholesale customers; and
    - ii. establishes a wholesale regulatory backstop so that additional wholesale obligations can be imposed on RGRs if their commercial

offerings fall short of what is reasonably expected in a workably competitive market;

- b. create a grocery supply code that RGRs must comply with to constrain their negotiating power advantage;
- c. extend protections in the Fair Trading Act 1986 against unfair contract terms to a wider range of grocery contracts;
- d. establish the means to exempt certain grocery suppliers from Commerce Act 1986 provisions that prohibit them from collectively negotiating terms of supply with RGRs;
- e. provide for the appointment of a Grocery Commissioner within the Commerce Commission with sector-specific regulatory powers and functions. These include the power to require industry participants to disclose certain information, and other broad powers, functions, and tools to monitor and enforce compliance with the regulatory regime; and
- f. provide for the Minister of Commerce and Consumer Affairs to approve a dispute resolution scheme for disputes arising between RGRs and grocery suppliers or wholesale customers.

## **Consistency of the Bill with the Bill of Rights Act**

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### **Section 14 – Freedom of expression**

6. Section 14 of the Bill of Rights Act affirms the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right to freedom of expression has also been interpreted as including the right not to be compelled to say certain things or to provide certain information.<sup>1</sup>
7. The Bill includes provisions that require RGRs, wholesale customers, and grocery suppliers to supply certain information and documentation to the Commerce Commission or, in some instances, to any person who requests it. This can include both commercial and non-commercial information. These requirements can be imposed to promote a range of regulatory purposes such as regulatory transparency, compliance, monitoring and enforcement of the Bill's new regime.
8. There are also various provisions requiring the Commission and RGRs to consult relevant people.<sup>2</sup>
9. These requirements prima facie limit the right to freedom of expression affirmed by section 14.

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<sup>1</sup> See, for example, *Slight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

<sup>2</sup> E.g. clauses 11(2) and 63(b).

10. Where a provision is found to limit any particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is demonstrably justifiable in terms of section 5 of that Act. The section 5 inquiry is approached as follows:<sup>3</sup>
  - a. Does the provision serve an objective sufficiently important to justify some limitation on the right or freedom?
  - b. If so, then:
    - i. is the limit rationally connected to the objective?
    - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
    - iii. is the limit in due proportion to the importance of the objective?
11. We have concluded that the limits on the right to freedom of expression in the Bill appear to be justified under section 5 of the Bill of Rights Act because:
  - a. the Bill's objective of promoting competition and efficiency in the grocery industry, which aims to benefit all New Zealand consumers in the long term, is sufficiently important to justify limiting the right;
  - b. the requirements are rationally connected to the Bill's objective. The disclosure powers promote industry transparency and accountability essential to the new regime and build on or extend several of the Commission's existing regulatory powers; and
  - c. the limits on freedom of expression appear reasonable and proportionate to the objective. RGRs, wholesale customers, and grocery suppliers are in the best position to supply relevant information to support compliance monitoring and enforcement.

## **Section 17 – Freedom of association**

12. Section 17 of the Bill of Rights Act affirms that everyone has the right to freedom of association. The right to freely associate is directed towards the right to form or participate in an organisation and to act collectively, rather than simply to associate as individuals. The right recognises that everyone should be free to enter consensual arrangements with others and promote common interests of the group. By protecting the right of individuals to decide freely whether they wish to associate with others, it also includes the right not to associate.
13. The Bill includes provisions that engage the right to freedom of association because they regulate the ability of RGRs to contract freely with suppliers and wholesale customers. For example, the Bill provides that the Governor-General may make

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<sup>3</sup> *Hansen v R* [2007] NZSC 7.

regulations setting out a grocery supply code that may, inter alia, regulate how RGRs enter into agreements with suppliers and the terms of such agreements.<sup>4</sup>

14. To the extent that these provisions engage the right of freedom of association, we consider that the Bill's objective is sufficiently important to justify limiting the right, the limits are rationally connected to the Bill's objective, and impair the right no more than reasonably necessary to achieve the objective. In particular, the most significant powers – those within the 'wholesale regulatory backstop' enabling the Commission to impose additional wholesale supply obligations on RGRs<sup>5</sup> – can only be invoked in circumstances where commercial arrangements fall short of what is reasonably expected in a workably competitive market.

### **Section 25(c) – Right to be presumed innocent until proven guilty**

15. Section 25(c) of the Bill of Rights Act affirms that anyone charged with an offence has the right to be presumed innocent until proven guilty according to the law. The right to be presumed innocent requires that an individual must be proven guilty beyond reasonable doubt, and that the State must bear the burden of proof.<sup>6</sup>
16. The Bill creates new strict liability offences where:
  - a. a regulated grocery retailer fails to comply with a Commission-issued notice requiring them to provide information and documentation by a certain date (clause 108(2) and (3));
  - b. a person fails, without reasonable excuse, to comply with requirements issued by the Commission using its specific regulatory powers (clause 175(1)(a) and (4));
  - c. a person resists, obstructs, or delays an employee of the Commission acting under a warrant (clause 175(1)(c) and (4));
  - d. a person who has been required to appear before the Commission (clause 175(3) and (4)):
    - i. refuses or fails, without reasonable excuse, to appear before the Commission to give evidence;
    - ii. refuses to take an oath or make an affirmation as a witness;
    - iii. refuses to answer any question; or
    - iv. refuses to produce any document that that person is required to produce.

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<sup>4</sup> Clauses 12 and 14.

<sup>5</sup> Subparts 4 to 8 of Part 3.

<sup>6</sup> *R v Wholesale Travel Group* (1992) 84 DLR (4th) 161, 188 citing *R v Oakes* [1986] 1 SCR 103.

17. Each of these offences carries a maximum penalty of a fine not exceeding \$100,000 in the case of an individual, and \$300,000 in any other case.
18. Strict liability offences prima facie limit section 25(c) of the Bill of Rights Act. This is because they create a 'reverse onus'; instead of the State having to prove guilt, the accused must prove a defence (or disprove a presumption) in order to avoid liability.
19. Strict liability offences have been found more likely to be justifiable under section 5 of the Bill of Rights Act where:
  - a. the offences are regulatory in nature and apply to persons participating in a highly regulated industry;
  - b. the defendant will be in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite; and
  - c. the penalty for the offence is at the lowest end of the scale and proportionate to the importance of the Bill's objective.
20. On balance, we consider that the limits on section 25(c) of the Bill of Rights Act in the Bill appear justified, as:
  - a. the offences are regulatory in nature and the intention of the Bill is to increase regulation of the retail grocery industry;
  - b. the offences rationally support the important objective of increasing transparency and regulatory compliance of the retail grocery industry;
  - c. RGRs and others involved in the retail grocery sector are best placed to advise on any reason to justify their non-compliance; and
  - d. in the context of New Zealand's highly profitable retail grocery industry, the penalties are reasonable and proportionate.

## **Conclusion**

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21. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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