

Submission

By

**THE
NEW ZEALAND
INITIATIVE**

to the Ministry of Business, Innovation and Employment

on its

**Consultation on New Zealand Grocery Supply
Code of Conduct**

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1 INTRODUCTION

- 1.1 This submission in response to the Ministry of Business, Innovation and Employment's Consultation on New Zealand Grocery Supply Code of Conduct is made by The New Zealand Initiative, a Wellington-based think tank supported primarily by major New Zealand businesses.
- 1.2 The Initiative was actively involved in the Commerce Commission's market study process investigating retail grocery competition. Our January 2023 submission on the Grocery Industry Competition Bill keenly supported measures that would facilitate greater competition in the sector by lifting barriers to entry.
- 1.3 Our submission feared that the Bill would actively discourage entry by international grocers while potentially running afoul of international trade agreements. We urged that it be withdrawn in favour of measures, recommended by the Commerce Commission, to mitigate real barriers to entry and enable greater competition.
- 1.4 In the time available for today's submission, the Initiative has not been able to examine the proposed Code in any detail. A search of the Ministry's regulatory impact statement shows that it did recommend "Option 2.3 – Introduce a mandatory code of conduct".¹ However, the impact statement provided no satisfactory basis for determining that the benefits to the public from implementing this option plausibly exceeded the costs.²

2 THE IMPORTANCE OF A PRESUMPTION IN FAVOUR OF FREEDOM OF CONTRACT

- 2.1 All MBIE's recommendations on page 65 of its regulatory impact statement can be expected to raise major retailers' costs and litigious uncertainties. There may be benefits for some suppliers and small retailers as a result, but this does not mean benefits for consumers at large.
- 2.2 Imbalance in market power is a feature of every market. Real estate agents commonly report at different times as to whether it is a sellers' or buyers' market. Large and small firms will never have equal market power, but each can fill niches in competitive markets. Competitive entry allows market power to be contested. It is part of a spontaneous process by which undue market power is discovered, and undermined.
- 2.3 We have not had time to explore the option of allowing suppliers and major retailers greater freedom to opt out of the proposed restrictions on voluntary contracting, by mutual agreement. But we suggest that MBIE should keep this option in mind. While large efficient suppliers of a product might have few alternative outlets, supermarkets might also have limited options for finding alternative build suppliers who meet quality standards and delivery requirements. To assert a market power imbalance is easy. It is a feature of dynamic market competition.

3 AN EXAMPLE OF WHAT LOOKS LIKE AN UNNECESSARY RESTRAINT

- 3.1 Clause 12 of the proposed code would impose a maximum of 20 days between when a retailer receives an invoice and when it is paid. It is not clear why the delivery date of the product and its speed of turnover (e.g., its perishability) would not be relevant

¹ <https://www.mbie.govt.nz/dmsdocument/22638-regulatory-impact-statement-government-response-to-the-commerce-commission-grocery-sector-market-study-policy-decisions-proactive-release-pdf>, 65.

² Op. cit., 68, provides qualitative assessments of MBIE's package of recommendations as a whole, but even there it provides no real net benefit assessment.

considerations. MBIE recognises the risk that allowing a maximum of 20 days should induce retailers to take more time to pay some invoices than currently. (A maximum road speed limit can become a target for some drivers.) We understand that neither the Australian nor the UK codes have such a restriction. Is there really a problem of a scale that warrants this provision? To what degree are disputes over delays are actually caused by disputes over compliance with delivery and quality requirements?

4 CONCLUSION

- 4.1 We stand by our January 2023 submission on the Bill. The policy focus should be on reducing entry barriers rather than raising costs for the industry and thereby, ultimately, for consumers. Competitive entry is the critical test for whether better value-for-money for consumers can be achieved on a sustained basis. To the degree that the government is determined nonetheless to increase transaction costs and liability risks, we suggest that MBIE should hesitate to recommend problematic options.