



COVERSHEET

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| Minister | Hon Dr David Clark | Portfolio | Commerce and Consumer Affairs |
| Title of Cabinet paper | Grocery sector regulator, dispute resolution approach and monitoring and enforcement framework | Date to be published | 26 July 2022 |

List of documents that have been proactively released

| Date | Title | Author |
|-------------|--|---|
| July 2022 | Grocery sector regulator, dispute resolution approach and monitoring and enforcement framework | Office of the Minister of Commerce and Consumer Affairs |
| July 2022 | Regulatory Impact Statement Addendum: Grocery sector regulator and dispute resolution scheme | <i>MBIE</i> |
| 4 July 2022 | CAB-22-MIN-0259 Minute | Cabinet Office |

Information redacted

YES

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Some information has been withheld for the reasons of confidential advice to government.

Regulatory Impact Statement Addendum: Grocery sector regulator and dispute resolution scheme

Executive summary

1. In May 2022, the Ministry of Business, Innovation and Employment (MBIE) considered the recommendations of the Commerce Commission’s (the Commission’s) market study into the retail grocery sector. The Commission recommended the Government establish a grocery sector regulator and dispute resolution scheme in its final report.
2. Cabinet agreed to establish a grocery sector regulator and dispute resolution scheme on 23 May 2022 (CAB-22-MIN-0186 refers). Cabinet also agreed to appoint the Commerce Commission as an interim regulator. Final decisions were not made on the ongoing regulator or dispute resolution scheme at that time.
3. This Addendum considers options for which agency will undertake the regulator function on an ongoing basis and options for the form of the dispute resolution scheme(s). It should be read in conjunction with the substantive RIS for the grocery sector reforms (*Regulatory Impact Statement: Government response to the Commerce Commission Grocery Sector Market Study – Policy decisions.*)

| Responsible Manager(s) (completed by relevant manager) | |
|--|---|
| <p>Glen Hildreth Manager Competition and Consumer Policy Ministry of Business, Innovation and Employment 21 June 2022</p> | |
| Quality Assurance (completed by QA panel) | |
| Reviewing Agency: | Ministry of Business, Innovation and Employment (MBIE) |
| Panel Assessment & Comment: | <p>The Ministry of Business, Innovation and Employment’s Regulatory Impact Analysis Review Panel has reviewed the attached <i>Regulatory Impact Statement Addendum: Grocery sector regulator and dispute resolution scheme</i>, as an addendum to the Regulatory Impact Statement <i>Government Response to the Commerce Commission Grocery Sector Market Study – Policy decisions</i>, both prepared by MBIE.</p> <p>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.</p> |

Section 1: Background

4. On 23 May 2022, Cabinet agreed to:
 - a. implement a grocery sector regulator, with Commerce Commission (the **Commission**) acting as an interim regulator and for decisions on the ongoing regulator to be made subsequently.
 - b. establish dispute resolution scheme(s) to determine disputes relating to both the Code of Conduct and commercial wholesale supply arrangements.
5. The regulator would have responsibility for general oversight and monitoring of the grocery sector. The functions and powers of the grocery sector regulator, to be established in the Bill, are expected to include:
 - a. promote the confident and informed participation of suppliers, grocery retailers and consumers in grocery markets;
 - b. monitor compliance with and investigate conduct that constitutes or may constitute a contravention or involvement in a contravention of the obligations under the new regime, and enforce provisions as necessary;
 - c. monitor, conduct studies, other enquires or reviews into any matter relating to the operation of grocery markets and the performance of this regime;
 - d. inquire and make recommendations to the Minister as required on whether to designate any grocery retailer generally or specifically for regulated wholesale grocery access (including whether to deregulate any designated grocery retailer);
 - e. inquire, set and review requirements or determinations for:
 - i. how any designated grocery retailer should be regulated for wholesale grocery access;
 - ii. what recordkeeping and information disclosure requirements should apply to specified participants in the grocery sector;
 - f. prepare and publish reports, summaries and information from time to time on the performance of the grocery sector, including an annual report to government with annual 'state of competition' reports.
6. The dispute resolution scheme would hear disputes between the major grocery retailers and suppliers in relation to the Grocery Code of Conduct (being developed separately) and the wholesale grocery supply arrangements.

Section 2: What is the policy problem or opportunity?

What objectives are sought in relation to the policy problem?

7. In line with the substantive RIS, the objective underpinning the analysis in this addendum is to *promote competition in grocery markets for the long-term benefits of consumers*.
8. Establishing a grocery sector regulator will support this objective by providing an entity to oversee, monitor and enforce the competition-enhancing regulations and requirements being implemented for the grocery sector through the Grocery Industry Competition Bill. Taken together, these regulatory changes will address barriers to entry and expansion, make it easier for retailers to secure supply of groceries, and provide consumers with better information to make informed shopping choices.

9. The dispute resolution scheme provides an ability for disputes relating to grocery wholesale access and the Grocery Code of Conduct to be considered and settled and will help to address power imbalances between major grocery retailers and suppliers that inhibit competition.

Problem definition

10. The Commission found that competition is not working well in New Zealand's retail grocery sector for consumers. The Government is progressing reforms to the retail grocery sector with the aim of improving competition for the benefit of consumers. Without a dedicated agency to oversee, monitor and enforce the reforms, competition may not sufficiently improve in the retail grocery sector, because:
 - a. changes may not be implemented effectively and consistently;
 - b. a lack of central leadership and oversight of the regulatory regime for supermarket competition may result in the reforms not being effective;
 - c. monitoring the impact of reforms may not be undertaken – which may result in some recommendations not achieving the desired effects or their effects being unknown.
11. The dispute resolution scheme will enable disputes relating to the Grocery Code of Conduct and wholesale access to be resolved. Without a scheme in place, disputes between retailers and suppliers may be resolved unsatisfactorily and power imbalances between major grocery retailers and suppliers may result in the outcomes of disputes being heavily weighted towards retailers.

Section 3: Options identification and analysis

What criteria will be used to compare options to the status quo?

12. As the regulator and dispute resolution scheme will undertake different functions and roles, slightly different criteria are used in this document to compare options for each of these mechanisms.

Criteria – Regulator ¹

Independence in its ability to carry out functions impartially from direction that may impact public confidence that the functions and roles of the regulator (such as enforcement) are being undertaken at 'arm's length' from Ministerial decisions.

A dedicated focus on overseeing the retail grocery sector and administering the regulatory regime for the grocery sector contained in the Grocery Industry Competition Bill.

Alignment with wider competition system - sectoral regulation provides better outcomes and operates more efficiently when co-ordinated with competition/consumer enforcement.

Establishment pace – as the regulatory regime will come into force soon after the Bill receives Royal Assent, fast establishment will be critical to ensuring a regulator is in place and resourced and ready to oversee and administer the regulatory regime in the Bill.

Cost – establishment and implementation costs should be appropriate given the sector-specific focus of the regulator and the nature of its roles and functions explained above.

¹ These criteria have been developed with reference to machinery of government guidance from Te Kawa Mataaho Public Service Commission.

Avoids duplicating an existing function – Public Sector Commission guidance states that where an existing agency can carry out a function, this agency should be provided the function.

Criteria – Dispute Resolution Scheme

User focus – easy for potential users to find, enter and use regardless of their capabilities and resources. Dispute resolution caters to the needs of suppliers and access seekers.

Independence – needs to be independent, impartial and fair. Disputes must be confidential.

Efficiency – must be value for money (cost to users), proportionate, and timely (providing fast resolution where needed).

Effective – must deliver sustainable results and help minimise conflict. In addition, the dispute resolution scheme must provide an effective vehicle for resolving different disputes.

Part A: Grocery Sector Regulator

Options being considered

Option One – A dedicated unit within MBIE

13. A business unit would be established within MBIE to undertake the regulator functions. This model is like the United Kingdom Groceries Code Adjudicator, which is a unit located in the Department for Business, Energy & Industrial Strategy.
14. The operational support needs of the regulator would be provided by the wider MBIE operational infrastructure. The form of the entity would likely constitute a 'branded business unit' within MBIE, similar to the New Zealand Companies Office or Intellectual Property Office of New Zealand (IPONZ).

Option Two – A role within the Commerce Commission

15. The Commission would undertake most regulator functions, with dispute resolution functions carried out by one or more dispute resolution service providers engaged by the Ministry of Business, Innovation and Employment (as such functions are not currently provided by the Commission) with close information sharing between dispute resolution services and the Commission.
16. As the agency responsible for New Zealand's competition regime, the grocery sector regulator function would sit alongside the Commission's existing competition and fair trading functions.

Option Three – Establish a new Crown Entity

17. This option involves establishing and operating a new Crown Entity to undertake the grocery sector regulator's roles and functions. This agency would be established outside of MBIE or the Commission as an entirely new entity.
18. In terms of form, the agency would likely be an Independent Crown Entity (ICE) under the Crown Entities Act 2004 given the need for such an agency (with investigation, monitoring and enforcement functions) to remain independent from direct Ministerial direction to support public confidence.

How do the options compare to the status quo/counterfactual?

| | Status quo – No regulator currently exists (though approval to develop one has been secured) | Option One – A dedicated unit within MBIE | Option Two – A role within the Commerce Commission | Option Three – Establish a new Crown Entity |
|---|---|---|--|---|
| Independence | 0 There is currently no independent grocery sector regulator. | + | ++ | ++ Would provide an appropriate degree of independence from Ministerial direction in line with its proposed enforcement functions. |
| Dedicated focus on grocery sector | 0 Under the status quo there is no agency with a specific and dedicated focus on the grocery sector | + | + | ++ A new agency would establish a primary and dedicated focus on the grocery sector that does not currently exist in one agency. This entity could be established to only focus on this sector. |
| Alignment with wider competition system | 0 Under the status quo, oversight of New Zealand's competition regime currently rests with the Commerce Commission. | 0 | ++ | 0 Compartmentalising grocery sector competition in a new agency may result in a 'silo' effect but this could be overcome through close working relationships with the Commission. |
| Establishment pace | 0 No agency currently exists. | ++ | ++ | - Establishing a new agency will be time intensive due to the need to design, fund, implement and establish the new operations and functions of the agency. |
| Avoids duplicating an existing agency function | 0 Under the status quo, oversight of New Zealand's competition regime would not be duplicated. | - | ++ | -- Would result in functions being established in a new agency that could likely be housed in an existing entity (the Commission). |
| Cost | 0 No cost under the status quo | \$5 million per annum | \$4.79 million in 2022/23, Confidential advice to Government | Approximately \$15 million per annum (MBIE costing estimates) |
| Overall assessment | Under the status quo there is no existing agency with a specific focus on New Zealand's retail grocery sector. Under the status quo, problems arising from the lack of a grocery sector regulator would continue. | Situating the role within MBIE would enable the fast establishment of the regulator and leverage MBIE's existing structure and operational support. However, it may result in the grocery sector regulator role being 'siloed' away from the broader competition focus of the Commission, and may result in some duplication. | Situating the role within the Commission would build on its role as interim grocery sector regulator and aligns with its wider competition and sector regulation functions. As an independent Crown Entity the Commission holds an appropriate degree of independence from Ministerial direction. Recommended option | This option can enable a dedicated and sole focus on grocery sector regulation. However, it comes at a higher cost and with a longer establishment timeline. This option does not align with Public Sector Commission guidance that roles should be established within existing agencies where there are opportunities for alignment. |

Example key for qualitative judgements:

- ++ much better than doing nothing/the status quo/counterfactual
- + better than doing nothing/the status quo/counterfactual
- 0 about the same as doing nothing/the status quo/counterfactual
- worse than doing nothing/the status quo/counterfactual
- much worse than doing nothing/the status quo/counterfactual

Which option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

19. **Option 2 (appointing the Commerce Commission as grocery sector regulator)** best aligns with the criteria set out in this document. This option:

- a. leverages the Commission's capability and capacity in competition issues and knowledge of the grocery sector from the market study
- b. enables a focused objective on competition and efficiency in the interests of consumers
- c. ensures enforcement decisions can be undertaken impartially in line with its status as an independent Crown entity
- d. enables faster establishment
- e. builds on an existing agency with similar roles and functions.

What are the marginal costs and benefits of option 2?

| Affected groups | Comment | Impact | Evidence Certainty |
|---|--|-----------------------------------|--------------------|
| Additional costs of the preferred option compared to taking no action | | | |
| Regulated groups (grocery retailers and suppliers) | Regulated groups will not incur any direct costs from the operation of the regulator, unless cost recovery is explored | Low | Medium |
| Consumers | No direct costs to consumers are expected. | None | Medium |
| Government | Government will meet the cost of implementing and operator the regulator. | Confidential advice to Government | Medium |
| Total monetised costs | The only quantifiable cost is the cost to implement the regulator. | | Medium |
| Non-monetised costs | We anticipate regulated groups will incur some costs in relation to the regulated regime. | Medium | Medium |
| Additional benefits of the preferred option compared to taking no action | | | |
| Regulated groups (grocery retailers and suppliers) | Retailers and suppliers benefit from increased accountability and oversight of the grocery sector. | Medium | Medium |
| Consumers | No direct benefits to consumers from the regulator's activities. However, consumers can benefit from the regulatory regime the regulator will oversee in terms of price, quality, range and service. | Low | Medium |
| Government | The regulator's monitoring and annual review and reporting requirements will provide government with an in-depth view of the dynamics | Medium | Medium |

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| | of the retail grocery sector. This will help inform subsequent interventions. | | |
| Total monetised benefits | No monetised benefits identified. | Unclear | Unclear |
| Non-monetised benefits | We anticipate a range of non-monetised benefits from the regulator's oversight and stewardship role of the sector. These will fall to retailers, suppliers, consumers, and government in different ways, including in better quality, range and service for consumers. | Medium | Medium |

Part B: Dispute resolution scheme

Options being considered

20. The options under consideration for the dispute resolution scheme involve different ways of providing pathways for dispute resolution for disputes under either (or both) the Grocery Code of Conduct and / or grocery wholesale access regime.
21. Some matters are common to all three options, for example:
- a. the Government will be responsible for ensuring the dispute resolution schemes are operating and will be able to either deliver them in-house or contract out²
 - b. the costs of dispute resolution could be met by the major grocery retailers, except in certain circumstances (this is the case in Australia and the United Kingdom in relation to their Grocery Codes of Conduct), and is also the case in the New Zealand Construction Contracts Adjudication regime, refer to section 56 of the [Construction Contracts Act](#).
 - c. the regulator will be able to receive confidential complaints (separate to disputes) and will be aware (via information sharing) of the nature of disputes.
22. There are a number of dispute resolution processes that could be used in the grocery dispute resolution scheme, including:
- a. **Mediation:** typically a consensual process where parties seek to address the dispute with the assistance of a third party.
 - b. **Arbitration:** a determinative process where parties present arguments and evidence to a dispute resolution practitioner (arbitrator) who decides the matter in dispute and issues an award, is governed by the Arbitration Act 1996. Is appropriate to make a binding decision away from the courts.
 - c. **Adjudication:** a determinative process where parties present arguments and evidence to a dispute resolution practitioner (adjudicator) who makes a determination. Is common within the judicial system, and can be used outside

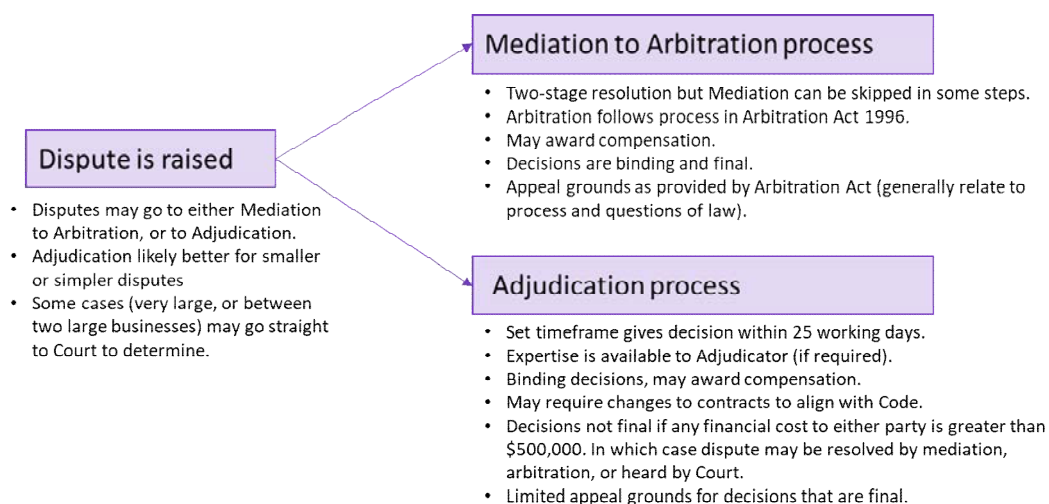
² Options to make the dispute resolution scheme industry-led, or to make the regulator responsible for ensuring the dispute resolution scheme is in place have been considered and not advanced because they would either not be clearly considered independent and impartial or would risk disincentivising parties from engaging in dispute resolution due to a risk of admitting non-compliance to the regulator.

the judicial system where empowered by statute or contract. Is appropriate where a legal precedent or a rights-based determination is required.

Option One – A two-pathway mediate-arbitrate and adjudication process

23. This option involves two pathways for dispute resolution, which would apply to the Code of Conduct, quasi-regulatory wholesale access and regulated wholesale access:

Figure 1: Diagram representing Option One - two pathway dispute resolution process



24. Mediation and arbitration are well known forms of dispute resolution. Arbitration follows clear processes set out in the Arbitration Act 1996 and is able to deal with relatively large and complex issues as an alternative to seeking a Court determination. Adjudication is a highly flexible method of dispute resolution that can be designed to cater to the circumstances of the expected disputes.

Option Two – Require negotiation prior to either arbitration or adjudication

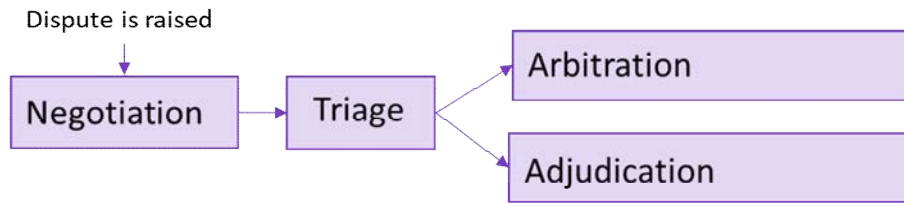
25. Under this option, all disputes would be required to engage in a process of negotiation prior to seeking a determinative resolution (via either arbitration or adjudication, subject to the triage).

26. The benefit of this option is requiring parties to the dispute to proactively seek a solution themselves – a reasonable expectation as all parties to disputes will be businesses that should have the ability to engage in negotiations.

27. The risk of this approach is that the requirement to negotiate may deter some suppliers or access seekers from raising a dispute due to concerns around potential repercussions, or that they will be pressured in any negotiations.

28. The option still allows for multiple determinative approaches (arbitration and adjudication) which could be similarly designed to option one.

Figure 2: Diagram representing Option Two – negotiated-determinate two pathway dispute resolution process



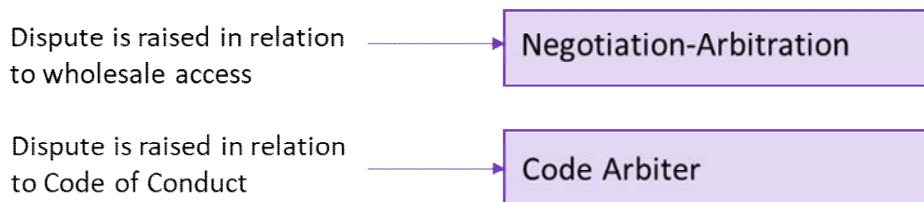
Option Three – Separate regimes for the Grocery Code of Conduct and wholesale access regime

29. The key differences between this option and the other two are:

- a. Removal of the triage function meaning the dispute resolution mechanism is matched to where the dispute arose (wholesale access or Code of Conduct), rather than the attributes of the dispute.
- b. Modification of the Code of Conduct pathway to use a 'Code Arbiter' (akin to the Australian model), which would be an independent party to investigate disputes raised by suppliers and provide binding determinations within about 20 working days.

30. Refer to figure 3, below, for a simple diagram of this approach.

Figure 3: Diagram representing Option Three separate dispute resolution processes







What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

32. Based on our analysis, **we recommend Option 1**, where the dispute resolution scheme:

- a. has two pathways, with an initial triage stage, to cater to the Code of Conduct, quasi-regulatory wholesale access, and wholesale access
- b. is overseen by government (with information sharing provisions) but is provided by a contracted independent service provider
- c. includes an adjudication process to provide fast resolution of disputes using a set process (with third-party chosen by government)
- d. uses Mediation-Arbitration for larger or complex disputes, and allows for some disputes to go directly to Court (e.g. large access issues).

What are the marginal costs and benefits of the option?

| Affected groups | Comment | Impact | Evidence Certainty |
|---|---|--|--------------------|
| Additional costs of the preferred option compared to taking no action | | | |
| Regulated groups (e.g. grocery retailers and suppliers) | Regulated groups – particularly the major grocery retailers – will likely bear some costs of disputes. Any costs vary depending on the number and scale of disputes. For example, in relation to the Code of Conduct Australia had 4 disputes raised in the 2020-21 financial year. The UK had 9 arbitrations over 7 years. Volumes of disputes in relation to wholesale are unknown. | Low | Medium |
| Consumers | No direct costs to consumers are expected. | Low | Medium |
| Government | Some costs to government as it must ensure regulatory functions are established. Some costs may be cost recovered. | Low | Medium |
| Total monetised costs | Direct monetised costs apply to (a) Government in relation to any non-cost recovered costs with the setup and maintenance of the dispute resolution function. This could be met within the government costs (above). (b) the parties to the dispute through the costs to engage in dispute resolution which includes both their own costs and the costs of any third-party arbitration or adjudication. | Low-high (Depending on number of disputes) | Low |
| Non-monetised costs | We anticipate regulated groups will incur some costs in relation to the dispute resolution scheme | Low | Medium |
| Additional benefits of the preferred option compared to taking no action | | | |
| Regulated groups (e.g. grocery retailers and suppliers) | Benefit from provision of a clear scheme to raise disputes and seek resolution. This should | Medium-High | Medium |

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| | provide improved clarity about conduct in the industry. Suppliers and access seekers benefit from major grocery retailers having incentives to avoid dispute resolution, and methods designed to suit their needs if a dispute arises. | | |
| Consumers | Increased competition enabled by the dispute resolution providing incentives for parties to comply with reforms, overseen by government. | Medium-Low | Medium |
| Government | Improved awareness of the nature of disputes in the industry to target regulatory activity. | Medium | Medium |
| Total monetised benefits | The direct benefits to suppliers and access seekers have not been monetised. | | |
| Non-monetised benefits | Overall, the non-monetised benefits accrue to suppliers and access seekers (a distributional benefit) in the form of improved trading with the major grocery retailers. Dynamic benefits (from improved productivity, investment, and innovation) accrue to all regulated groups and also to the long-term benefit of consumers. | Medium | Medium |

Section 4: Implementation and evaluation

How will the new arrangements be implemented?

33. The implementation of the grocery sector regulator will be given effect through the Grocery Industry Competition Bill, where the formal roles, functions and powers of the regulator will be set out and conferred on the agency. Decisions will also be sought on the funding requirements and appropriations for the regulator.
34. The Bill will also set out the legislative framework for the dispute resolution scheme. It is proposed that MBIE will be responsible for:
 - a. administering a regime to authorise dispute resolution providers to carry out the grocery disputes – similar to the Financial Service Providers (Registration and Dispute Resolution) Act – this will allow existing dispute resolution service providers to operate the grocery disputes on a commercial basis, using existing industry capability; and/or
 - b. appointing a dispute resolution service provider if required. This allows MBIE to ensure provision of the service when the reforms come into force in case it takes time for the dispute resolution service providers to adjust their offerings.
35. Close information sharing mechanisms will be set up to ensure that information from dispute resolution informs the enforcement functions of the Commission as grocery sector regulator.

Consultation on these proposals

36. The Commission has consulted on the proposals to develop and implement a grocery sector regulator and dispute resolution schemes as part of the market study process. Following release of the final report, MBIE officials have also consulted on the options in this paper with other agencies and certain stakeholders (including grocery retailers and supplier groups) to test these proposals.

37. The dispute resolution scheme for the Code of Conduct is being consulted on through July 2022, with final decisions to be made on the detailed content of the Code in October. As such, policy decisions on the form of the dispute resolution scheme for the Grocery Code of Conduct will be subject to further testing and feedback. Cabinet decisions being sought on the dispute resolution scheme will be flexible enough to cater to the dispute resolution approaches that are being considered in the options for the Code of Conduct consultation.

How will the new arrangements be monitored, evaluated, and reviewed?

38. If the regulator was to be established within the Commerce Commission or a new independent Crown Entity, MBIE will monitor the performance of the Grocery Sector Regulator. MBIE already monitors the performance of the Commerce Commission under the Crown Entities Act and could also monitor the performance of a grocery sector Crown entity if needed.

39. The performance of the regulator in undertaking the role will be regularly monitored and reviewed as part of the Crown Entity accountability regime.

Potential implementation risks

40. As part of this analysis, officials have considered the following potential implementation risks with the preferred options above:

| Risk description | Mitigation |
|---|---|
| <i>Grocery Sector Regulator</i> | |
| <p>Ability to secure the people needed: Establishment of the function in the Commission could be inhibited if securing the right capacity and capability is difficult (given the currently tight market for professionals of this nature)</p> | <p>Resourcing the Commission to plan for, and engage, resources at appropriate market rates.</p> <p>Providing the Commission with funding certainty early so they can plan for, identify, and engage, the people they need.</p> |
| <i>Dispute resolution scheme</i> | |
| <p>Capacity of the market: As set out above, the preferred option may involve MBIE administering a regime to authorise providers. Research by officials indicates that there are a range of dispute resolution providers, and adjudicators, in the market.</p> <p>However, further investigation is needed to understand the capacity of the market to provide resolution services relating to the grocery sector.</p> | <p>MBIE will undertake targeted engagement with peak dispute resolution bodies (including the Arbitrators and Mediators Institute of New Zealand (AMINZ)), as part of consultation on the Grocery Code of Conduct, to confirm the capacity in the market.</p> <p>As a 'backstop option', MBIE could establish or contract a dispute resolution scheme itself.</p> |