

Will the Commerce Commission's supermarket study produce cheaper groceries?

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On 17 November 2020, [the Minister of Commerce and Consumer Affairs initiated a market study into the retail grocery market](#). The announcement came as no surprise – not only was it one of the Labour Party's election promises, but when the market studies provisions were added to the Commerce Act 1986 in 2018, it was generally understood that supermarkets would be the next in line after the fuel market.

The Commission expects to release a draft report [in July 2021](#). The Commission is required to deliver its final report by 23 November 2021.

It will be interesting to see how the study unfolds – but we do not expect to see any sweeping changes once the dust settles.

What are market studies?

A market study, referred to as a “competition study” in Part 3A of the Commerce Act, is a study of factors that may prevent competition from working well in a market.

Rather than considering whether there could be a specific breach of the Commerce Act or whether a merger creates a substantial lessening of competition, market studies look at whether markets are working well for consumers and how they could work better. The Commission does this by investigating whether there are features preventing the market from working well, and considering how those features can best be addressed.

What will the supermarket market study involve?

The terms of reference for the supermarket market study direct the Commission to carry out a market study into “any factors that may affect competition for the supply or acquisition of groceries by retailers in New Zealand”. Matters to be considered in the market study must include, but are not restricted to:

- The structure of the grocery industry at the wholesale and retail levels
- The nature of competition at the wholesale and retail levels of the grocery industry
- The pricing practices of the major grocery retailers
- The grocery procurement practices of the major grocery retailers
- The price, quality, product range and service offerings for retail customers.

In order to carry out the market study, the Commission will be seeking information from a range of stakeholders in the grocery supply chain, including retailers, wholesalers, distributors and suppliers. It can make compulsory information requests, and require individuals to attend interviews (potentially under oath). Businesses and individuals are required to provide information truthfully and accurately, or risk committing a criminal offence.

As outlined in our previous [update](#) on market studies, if you receive a request for information from the Commission, factors to consider include the validity and reasonableness of the request, and whether material collated to respond to a request raises competition/consumer law risk or confidentiality issues.

What can we expect the results to be?

Following a market study, the Commission can recommend changes including:

- Changes to legislation or other instruments
- Changes to the policies or practices of central or local government, or of a person or an organisation responsible for the oversight or regulation of a specified industry
- Changes to the amount or type of information made available by a person or an organisation in relation to a specified industry

- That a person or an organisation research or monitor a specified matter
- That persons within a specified industry change their behaviour.

Investigations into potential breaches of competition or consumer law could also result.

Following the Commission's first market study in 2019 into the retail market for the supply of petrol and diesel, the Government enacted the Fuel Industry Act 2020 in August this year. The Bill implements most of the Commission's recommendations, including increasing the transparency of wholesale fuel pricing and wholesale contracts. It remains to be seen whether these measures will result in any reduction in fuel prices for consumers.

Meanwhile, in Australia...

We can also look to Australia to anticipate what the Commission may recommend. The Australian Competition and Consumer Commission (ACCC) carried out an inquiry into the price of groceries in 2008. This led to the introduction of a new industry code requiring grocery retailers to display unit pricing in accordance with the code. While New Zealand's large supermarkets have voluntarily introduced unit pricing, there have been criticisms that without regulation the unit pricing is confusing and unclear – for example, not all products display unit pricing, and different units of measurement are sometimes used for the same product. It is possible that a regulated unit pricing regime may be recommended by the Commission following its supermarket market study.

In 2013, the ACCC turned its attention again to the retail grocery sector – in particular the relationship between supermarkets and suppliers. This investigation resulted in Coles – an Australian supermarket chain – being ordered to pay AUD\$10m in penalties for engaging in unconscionable conduct in its dealings with certain suppliers (note that New Zealand does not currently have an equivalent prohibition).

The ACCC's investigation, in addition to industry-led action, also resulted in the Food and Grocery Code of Conduct coming into force in 2015. This is a voluntary code for grocery retailers and wholesalers intended to improve standards of business conduct in the food and grocery sector to which all major Australian supermarkets have signed up.

Could the Commission recommend a similar code of conduct be implemented in New Zealand? Unlike in Australia, New Zealand's Commerce Act does not provide for industry codes to be introduced. If New Zealand was to so, legislative change would be needed.

Next steps

The next key step in the study will be the publication of a preliminary issues paper for consultation. This will provide an opportunity for interested parties to comment on the Commission's proposed approach and views on issues to be considered as part of the study.

Ultimately, it remains to be seen whether the supermarket market study will result in recommendations that will make a tangible difference for New Zealanders at the check-out, and whether the Government will take any of the Commission's recommendations on board.

If you have any questions about the Commission's market study powers or would like assistance in contributing to the study, please contact a member of our competition law team.

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