SEAN CHAN

COMPETITION LAW OR COMPETITION BETWEEN SPECIAL INTEREST GROUPS? THE ACCOUNTABILITY DEFICIT IN THE COMMERCE COMMISSION'S MARKET STUDY POWER

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Abstract

The Commerce Commission's *Market Study into the Retail Grocery Sector* was widely criticised by the media for recanting on its bold draft report recommendations to stimulate competition in New Zealand's duopoly grocery marketplace. This paper demonstrates that the market study power represents a broad departure from the Commission's competition and fair trading functions and brings them into the policymaking arena, despite objections about their democratic legitimacy to assume these functions. Using the Retail Grocery Market Study as an example, this paper shows that the market study process favours organised industry groups at the expense of disparate consumer groups. This demonstrates that something is missing in how the Commission is held accountable for the exercise of the market study power. Applying Mark Bovens' accountability framework, this paper argues that the market study process is insufficient from the democratic perspective by failing to equally represent consumer groups affected by the exercise of this power.

Key words: 'Market Study into the Retail Grocery sector', 'Market studies', 'Commerce Commission', 'Market study accountability structures'.

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I Introduction

"ComCom report 'weak'" – National Business Review

"Commerce Commission's supermarkets softly-softly makes life harder for Government" – Stuff

"Final supermarket report a big backdown…" – New Zealand Herald

"Commerce Commission guttlessly capitulates to Supermarket Duopoly" – The Daily Blog

"New Zealand's supermarket duopoly lives to profit another day" – The Spinoff

"Supermarkets win in the end" – Democracy Project[2]

In recent years, concerns about the high cost of living have dominated the headlines. As a result of post-Covid inflation, grocery prices have soared. In response to the growing outcry, the Minister of Commerce and Consumer Affairs David Clark directed public attention towards the lack of competition in the supermarket industry. In November 2020, he formally initiated a market study to investigate whether competition in the retail grocery sector was promoting outcomes beneficial to consumers.[3] Two years later, the Commerce Commission (**the Commission**) released its *Final Report on the Market Study into the Retail Grocery Sector* to almost universal condemnation for falling short of its aspirational potential. These criticisms centred on the Commission recanting on their bold draft recommendations which, in the eyes of many observers, would have immediately transformed the state of competition in the supermarket industry. The "watered-down" final report was seen as letting the two dominant supermarket chains off the hook – seemingly inconsistent with the Commission's conclusion that they formed a formidable anti-competitive duopoly.

So, how did we get here? In July 2021, the Commission released its draft market study report suggesting that bold action be taken to support a third supermarket entrant into the market. They found that the retail grocery market was a "duopoly with a fringe of other competitors" dominated by Foodstuffs (New World, Pak'nSave and Four Square) and Woolworths

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2 See Bernard Hickey "New Zealand's supermarket duopoly lives to profit another day" (9 March 2022) The Spinoff <www.thespinoff.co.nz>; Will Mace and Dita De Boni "Grocery challengers say ComCom report 'weak'" (8 March 2022) National Business Review <www.nbr.co.nz>; Luke Malpass "Commerce Commission's supermarkets softly-softly makes life harder for Government" (8 March 2022) Stuff <www.stuff.co.nz>; Hamish Rutherford "Final supermarket report a big backdown on profitability and response" (8 March 2022) NZ Herald <www.nzherald.co.nz>; Martyn Bradbury "Commerce Commission guttlessly capitulates to Supermarket Duopoly – Labour won't do anything" (8 March 2022) The Daily Blog <www.thedailyblog.co.nz>; and Bryce Edwards "Political Roundup – Supermarkets win in the end" (9 March 2022) Democracy Project <www.democracyproject.nz>.

3 Commerce Commission *Market Study into the Retail Grocery Sector – Statement of Process* (19 November 2020) at 1.

(Countdown).[4] They also found that the duopoly market structure was harming consumers and New Zealand's grocery prices were both higher than they would be in a competitive market and by international standards.[5] In response, the Commission tabled several options to increase the level of competition. The most significant were suggestions to "directly stimulate retail competition". This was to be achieved either through the Government facilitating a new supermarket entrant via a competitive tender process or requiring the supermarkets to divest some of their existing stores to support a third supermarket banner.[6]

A third competitor entering a market to break up a duopoly is not unprecedented in New Zealand. For example, when 2Degrees formed to break up the Vodafone/Telecom duopoly in the telecommunications sector. However, while private sector action to enter a third competitor is not a new concept, government action to directly prop-up a new entrant to promote competition is unprecedented. Indeed, this proved to be a step too far for the Commerce Commission. In their final report, the Commission reneged on their recommendation to directly stimulate retail competition to the reproval of observers. Despite the final report still holding that the market was a duopoly, they found that "a new government-facilitated entrant would likely face the same issues relating to conditions of entry or expansion as any other potential entrant".[7]

Analysing the specific rationales underpinning the report's findings is outside the scope of this paper. Instead, I discuss how the market study procedure could be improved to give consumers a greater voice, allowing the Commission to give proper weight to the consumer perspective and potentially avoid this heavy public backlash in the future. In Part IV, I establish that the market study process gives greater access and voice to the regulated industry over consumers. As Part V discusses, strong accountability mechanisms are needed to monitor and prevent industry groups from dominating the market study process.

There is very little academic scholarship on the Commerce Commission's power to conduct market studies. Despite at least 45 countries having an equivalent market study power, former Commerce Commissioner Donal Curtin could only find one academic article about

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4 Commerce Commission *Market study into the retail grocery sector Draft report* (29 July 2021) at [9.10].

5 At [3.35] and [3.97].

6 At [9.98]–[9.106].

7 Commerce Commission *Market study into the retail grocery sector: Final report* (8 March 2022) at [9.257].

market studies – while I only found two.[8] Yet, market studies are highly worthy of analysis. It is unusual to ask a competition regulator to formulate policy to consider both competition and non-competition objectives. In this regard, the market study power deviates from the Commission's competition and fair trading functions. Applying a public law lens, it is worth asking whether the Commerce Commission has the democratic and constitutional mandate to undertake this bold new function. Throughout this paper, I argue that the market study power needs proper accountability mechanisms to have democratic legitimacy in the eyes of the public.

Exploring these ideas through the grocery market study, I find that (1) the market study process demands greater accountability than the Commission's other functions, (2) without substantive changes, the market study process continues to benefit powerful industry actors over vulnerable consumer groups, and (3) stronger accountability mechanisms would promote the democratic legitimacy of and reduce the risks of the regulated industry dominating the market study process. Part II discusses how the market study power differs from the Commission's other functions. Part III discusses why these differences demand that the market study power retains clear accountability mechanisms. Part IV applies the theory of interest-group pluralism to show that regulated industry actors have greater voice and access to the market study process than consumers. Finally, Part V applies Mark Bovens' accountability framework in recommending several changes to improve accountability in the market study process.

II The Market Study Power

Market studies are an increasingly common tool in the competition regulatory toolset. These studies allow competition authorities to investigate the structure of a market, the practices and behaviours of marketplace actors and, ultimately, what impediments exist to a competitive market.[9] By international standards, New Zealand was late in adopting the market study power. A 2015 study found that at least 45 competition agencies internationally had the

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[8] Donal Curtin "Submission to the Transport and Infrastructure Select Committee: Commerce Amendment Bill" at [28].

[9] See William E. Kovacic "Market structure and market studies" in Jay P. Choi, Wonhyuk Lim, and Sang Hyop Lee (eds) *Competition Law and Economic Developments, Policies and Enforcement Trends in the US and Korea* (Edward Elgar Publishing, Cheltenham, 2020) 30 at 31.

power to conduct market studies, with Japan having the function since the 1940s and the United Kingdom since 1973.[10]

The Commerce Amendment Act 2018 inserted Part 3A into the Commerce Act 1986 which grants the Commerce Commission the power to carry out competition studies (**market studies**). The Act defines a market study as a "study of any factors that may affect competition for the supply or acquisition of goods or services".[11] The overriding aim of market studies is the same as the purpose of the Act itself, which is to "promote competition in markets for the long-term benefit of consumers within New Zealand".[12] This part discusses how the market study power operates in New Zealand. Then, I discuss how the market study power deviates from the Commission's competition law functions, demanding stronger accountability mechanisms.

A New Zealand's market study model

Before 2018, the Commission conducted various ad hoc market studies without the explicit statutory power to do so, such as the 2011 milk price inquiry and the 2010 study into the commercial building industry.[13] These studies occurred despite the Court of Appeal's decision in *Commerce Commission v Telecom* [1994], which found that the Commission's incidental powers under the Commerce Act did not extend to "conducting an inquiry and publishing a report… otherwise than when determining an application before the Commission".[14] With the insertion of Part 3A into the Commerce Act, the market study model is now based on the express delegation of power, consistent with market study powers in comparable jurisdictions.[15] Having the express statutory mandate to carry out market studies shields the Commission from challenges by powerful commercial interests.[16]

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[10] Tamar Indig and Michal S. Gal "New Powers - New Vulnerabilities? A Critical Analysis of Market Inquiries Performed by Competition Authorities" in Josef Drexl and Fabiana Di Porto (eds) *Competition Law as Regulation* (Edward Elgar Publishing, Cheltenham, 2015) 89 at 89–90.

[11] Commerce Act 1986, s 48.

[12] Commerce Amendment Bill 2018 (45–2) (select committee report) at 1.

[13] Donal Curtin "Is the competition toolkit missing its torch? The case for market studies" (paper presented to New Zealand Association of Economists Annual Conference, Wellington, July 2015) at 12–15.

[14] *Commerce Commission v Telecom Corporation of New Zealand Ltd* [1994] 2 NZLR 421 (CA) at 429.

[15] Kovacic, above n 9, at 32.

[16] At 32.

Market studies can be initiated by either the Commerce Commission or the Minister of Commerce and Consumer Affairs if they consider it to be "in the public interest to do so".[17] The term "public interest" is not defined further in the Act, slightly concerning given it is the only formal legal constraint on the exercise of the market study power. Despite the lack of statutory guidance, the Commission's market study guidelines suggest they will consider the public interest with reference to their purpose of "promoting competition in markets for the long-term benefit of consumers".[18] According to the Commission, relevant factors to determine whether a market study is in the "public interest" includes whether:[19]

- there are indications that the market may not be working as competitively as it could be;
- the particular conduct of concern can be considered under another part of the Act or another statute; and
- if we are best placed to carry out the study.

The Act imposes few procedural requirements for market studies. Firstly, the party that initiated the market study (either the Commission or Minister) must prescribe the terms of reference and the date of publication for the final report by notice in the *Gazette*.[20] The terms of reference specify the goods or services to which the study relates and describe the scope of the study.[21] The terms may also prescribe the parties and organisations that the Commission must consult as part of the study.[22]

Secondly, the Commission must release a public draft report and allow a reasonable time for comments.[23] When preparing its final report, the Commission must "have regard" to any comments received on the draft report.[24] While the Act contemplates the draft report as the main point of formal engagement with industry stakeholders, in practice, the Commission engages the industry throughout the market study process. Especially when the study involves an industry or market where the Commission lacks prior knowledge, stakeholder involvement throughout the process helps input into the study's scope, analysis and

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17 Commerce Act 1986, s 50(1) and 51(1).

18 Commerce Commission *Market Studies Guidelines* (19 November 2020) at 8.

19 At 8.

20 Commerce Act 1986, s 50(2) and 51(2).

21 Section 51A(1).

22 Section 51A(2) and s 51A(3).

23 Section 51C.

24 Section 51C(2).

recommendations.[25] Regular stakeholder engagement helps the Commission identify pertinent questions and information sources, avoid errors or misinterpretations of evidence, understand the workability of potential recommendations and take a broader and sounder view of the sector.[26]

Stakeholder involvement in market studies tends to be less adversarial and legalistic than their enforcement activities in order to promote "buy-in" to the Commission's final recommendations.[27] While the Commission prefers to acquire information voluntarily from stakeholders, they reserve the power to compel confidential and commercially sensitive information from parties.[28] Section 98 grants the Commission the power to require a person to supply them with information, documents or evidence.[29] These s 98 powers are subject to few formal limitations, other than the Commission must consider that its exercise is "necessary or desirable for the purposes of carrying out its functions and exercising its powers under this Act".[30]

Once these two procedural requirements are met, that being the terms of reference and draft report, the Commission must publish a final report with its findings by the date indicated in the terms of reference.[31] Consistent with most international competition authorities, New Zealand uses the advisory model of market studies.[32] Under the advisory model, the Commission's recommendations are not binding until further action is taken by the government.[33] These recommendations are primarily aimed at improving competition and may include changes to legislation, central or local government policies or practices, regulatory policy or practices, the behaviour of market actors and/or further monitoring of a

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25 Organisation for Economic Co-operation and Development *Using market studies to tackle emerging competition issues* (2020) at 21.

26 At 21; and Organisation for Economic Co-operation and Development *Policy Roundtables: Market Studies* (2008) at 9.

27 At 21.

28 Commerce Commission, above n 18, at 12; and Commerce Commission *Competition and Consumer Investigation Guidelines* (July 2018) at 16.

29 Commerce Act 1986, s 98(1).

30 Section 98(1).

31 Section 51B and 51D.

32 Indig and Gal, above n 10, at 96.

33 Kovacic, above n 9, at 33.

specified matter.[34] However, the Commission is not required to make recommendations.[35] For example, the Commission could instigate a market study to "refute mistaken public assumptions that anti-competitive behaviour is taking place, most notably in cases of price increases".[36]

The Government must respond to any recommendations from the final report. Section 51E requires the Minister to respond "within a reasonable time after the report is made publicly available".[37] The requirement for government response places New Zealand's advisory model on the stronger end of the spectrum by international standards. According to the International Competition Network, only nine out of 36 jurisdictions (25 percent) require the government to respond to the competition agency's recommendations.[38] Indig and Gal support the obligation for the government to respond because, without this requirement, market studies with controversial conclusions would have a higher risk of being disregarded resulting in an erosion of the competition agency's legitimacy and stand.[39]

In sum, New Zealand's market study power has sparse procedural requirements and a mixed bag of formal accountability mechanisms. The most notable is the requirement to release a draft report and consider any comments, the use of the "advisory" model and the obligation on the government to respond within a "reasonable time". Areas of concern include the unclear definition of "public interest" for initiating a market study and the lack of constraints to exercise the s 98 information-gathering power. The next section discusses how the market study power differs from the Commission's competition and fair trading functions, underscoring the need for strong accountability mechanisms.

B Difference with the Commission's competition law functions

The Commerce Commission is an independent Crown entity tasked with enforcing laws relating to competition, fair trading and consumer credit contracts (the "**enforcement**

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34 Commerce Act 1986, s 51B(3).

35 Section 51B(2).

36 Organisation for Economic Co-operation and Development, above n 26, at 50.

37 Commerce Act 1986, s 51E.

38 International Competition Network "Market Studies Project Report" (paper presented to the 8th Annual Conference of the ICN, Zurich, June 2009) at 74.

39 At 96.

function")[40] Under this function, the Commission seeks to eliminate anti-competitive conduct across a marketplace by investigating and enforcing individual cases of anti-competitive conduct, primarily between private parties.[41] The enforcement function is *ex-post* or "backwards-looking" since there must be evidence of conduct that breaches competition law before the Commission can use its investigation and enforcement powers.[42] The focus is on what the involved firms did and what market scenarios characterised their acts.[43] The enforcement function is premised on the view that concentrated markets with firms behaving anti-competitively result in higher prices for consumers or reduced output by producers. High prices and reduced output are harmful to consumer and economic welfare and, therefore, a key purpose of competition regulation is to improve competition to maximise economic welfare.[44]

However, the market study power recognises that competition issues in a marketplace are not always the result of competition law infringements. Competition law enforcement is not well suited to address issues of persistent market dominance resulting from government policy failure or oligopolistic interdependence (the "**competition law gap**").[45] Persistent market dominance is not effectively resolved by prosecuting individual cases of anti-competitive conduct under the Commerce Act. Issues with the underlying market structure cannot be addressed through ad hoc enforcement action.

The focus of a market study is broader than in an ordinary enforcement action, allowing the Commission to investigate competition issues that fall within the competition law gap. Within a market study, the Commission are able to analyse the competitive characteristics of an entire market or industry rather than that of a single firm.[46] The Commission can evaluate *ex-ante* the market characteristics that are impeding competition.[47] This goes beyond simply eliminating anti-competitive conduct by individual firms and allows the Commission to

40 Commerce Commission "About us" (June 2022) <www.comcom.govt.nz>.

41 Kovacic, above n 9, at 38.

42 Mariateresa Maggiolino "The regulatory breakthrough of competition law: definitions and worries" in Josef Drexl and Fabiana Di Porto (ed) *Competition Law as Regulation* (Edward Elgar Publishing, Cheltenham, 2015) 3 at 15–16.

43 At 16.

44 At 15.

45 Jan Harper and others *Competition Policy Review: Final Report* (Australian Treasury, March 2015) at 448.

46 Indig and Gal, above n 10, at 92.

47 At 102.

consider how they can proactively increase competition across the whole market.[48] The Commission can consider a wider range of factors in a market study compared to an enforcement action. For example, the harmful effect of government policy, legislation, market conditions and consumer conduct on competitive conditions can all be considered.[49] Accordingly, the market study power expands the Commission's role to something more powerful and interventionary than their usual competition law function.[50] As this next part discusses, the Commission's expanded market study role demands strong accountability mechanisms.

III The Need for Clear Accountability in Market Studies

As I have demonstrated, the market study power represents a significant departure from the usual role of competition agencies. It reflects the "growing recognition that the historical concept of competition law is inadequate and that competition agencies should invest resources in pursuits beyond the prosecution of cases".[51] Within modern neoliberal economies, as Maggiolino observes, competition enforcers play a "more active role in promoting the maximization of economic welfare".[52] The market study power bolsters the Commission with a powerful tool to promote economic welfare and influence market structures, business conduct and economic incentives.[53] Furthermore, it has been suggested that competition agencies are pursuing a broader set of goals than their traditional focus on economic welfare. In a recent article, the Chairperson of the Australian Competition and Consumer Commission (ACCC) Rod Sims stated:[54]

> Antitrust law stands at its most fluid and negotiable moment in a generation. The bipartisan consensus that antitrust should solely focus on economic efficiency and consumer welfare has quite suddenly come under attack from prominent voices calling for a dramatically enhanced role for antitrust law in mediating a variety of social, economic, and political friction points, including employment, wealth inequality, data privacy and security, and democratic values.

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48 At 99.

49 At 102; and Richard Whish and David Bailey *Competition Law* (7th ed, Oxford University Press, Oxford, 2012) at 458–459.

50 Indig and Gal, above n 10, at 99.

51 Kovacic, above n 9, at 38.

52 Maggiolino, above n 42, at 16–17.

53 At 16.

54 Rod Sims and Graeme Woodbridge "Public Interest in Antitrust Enforcement: An Australian Perspective" (2020) 65 The Antitrust Bulletin 282 at 288–289.

A The policy function of market studies

In support of Sims' view, I argue that the market study power brings competition law further into the policy-making domain. The power demonstrates an increasing consensus that competition-policy goals are often better achieved through policy instruments rather than law enforcement mechanisms.[55] Kovacic argues that the "power to make recommendations, even without authority to impose them, can give the competition agency substantial influence in policy making".[56] Furthermore, Kovacic argues that there are "numerous instances in which the publication of a report based on a market study… has inspired legislative reforms or induced a government body (such as a sectoral-regulation body) to alter policy in the manner suggested by the competition agency".[57] Indeed, according to the International Competition Network, two of the three most common outcomes from market studies are "changes to government policy" or "changes in the law" (as shown in Figure 1).

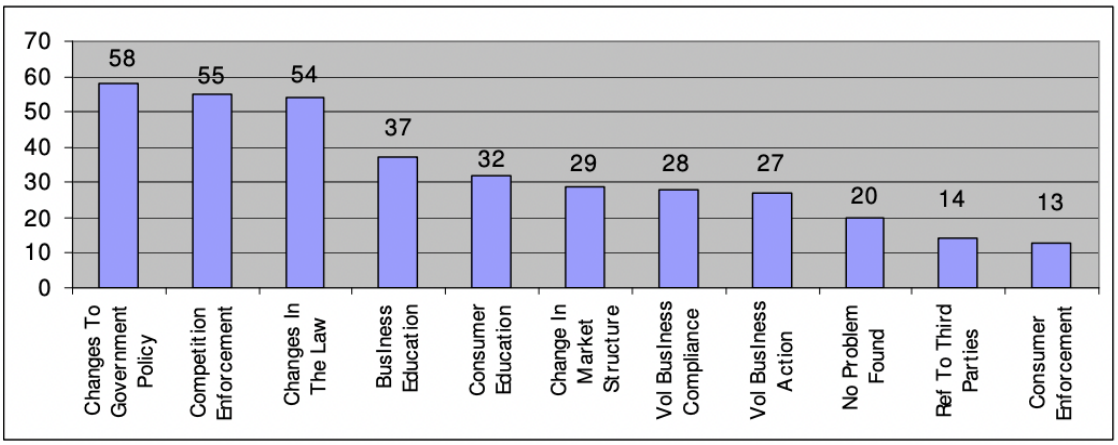

Figure 1: Most common outcomes of market studies from a review of 38 jurisdictions[58]

However, there are valid questions about whether competition agencies are best placed to engage in public policy reform decisions. The democratic mandate of competition agencies to engage in public policy decisions has been contested since they are a "professional agency not directly nominated by the public".[59] Lodge observes that democratic legitimacy issues may arise when significant policy issues "are seen to have been moved from majoritarian to

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55 See Indig and Gal, above n 10, at 103–105; Kovacic, above n 9, at 33; and Francesco Naismith and Baethan Mullen *Market Studies: Making All the Difference?* (Competition Policy International, March 2022) at 6.

56 Kovacic, above n 9, at 33.

57 At 33.

58 International Competition Network, above n 38, at 107.

59 Indig and Gal, above n 10, at 104–105.

non-majoritarian institutions".[60] In particular, issues could arise when the Commission's policy-making function conflicts with its implementation and enforcement functions. The Monash Business Policy Forum observes that "separation of policy design and implementation is key to effective regulatory agencies… Having these dual roles exacerbates information problems, confuses policy design with legal enforcement and undermines the independence and impartiality of the regulator".[61]

Under their market study function, the Commission is being asked to make recommendations that are not merely technocratic, but involve highly value-based choices.[62] For vexed social policy problems, the Commission might lack the capacity to evaluate all the costs, benefits and implications of their recommendations since they are primarily oriented towards eliminating anti-competitive behaviour. Is it appropriate to require the Commission to make trade-offs between economic efficiency and social, political and environmental objectives?[63]

As Indig and Gal observe, "where a balancing of competitive and non-competitive considerations is required, this should be performed at a higher level of government".[64] Accordingly, the Commission's policy-making function requires stronger accountability mechanisms to loop the democratic will into the process and strengthen the mandate for the Commission to assume an emboldened policy-making role. It would allow the government to monitor, feedback and constrain the Commission during the market study process – and ensure their policy-making is limited to competition issues.

B Democratic legitimacy of the market study

So far, I have made the case that the Commerce Commission lacks the democratic mandate to assume the policy-making function provided by the market study power. In support of my argument are several examples of the Commerce Commission's democratic legitimacy being placed into question by the media, businesses and public officials. As former Chair of the

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60 Martin Lodge "Accountability and Transparency in Regulation: Critiques, Doctrines and Instruments" in Jacint Jordana and David Levi-Faur (eds) *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar Publishing, Cheltenham, 2004) 124 at 125.

61 Monash Business Policy Forum *How should Australia's national economic regulators be reorganised?* (11 July 2014) at 13.

62 Lodge, above n 60, at 125.

63 At 125.

64 Indig and Gal, above n 10, at 100.

Commerce Commission Mark Berry remarked, "on one occasion an opposition Labour MP put to me a question along the following lines: "Surely you must be embarrassed that there is no proper accountability for your decisions…".[65] More recently, evidence has emerged which suggests that the public backlash to the retail grocery market study further eroded the Commission's democratic legitimacy and reputation. To give two examples, prominent media commentators Bryce Edwards and Bernard Hickey separately suggested they were "captured by vested interests" and "held hostage by… dominant market players".[66]

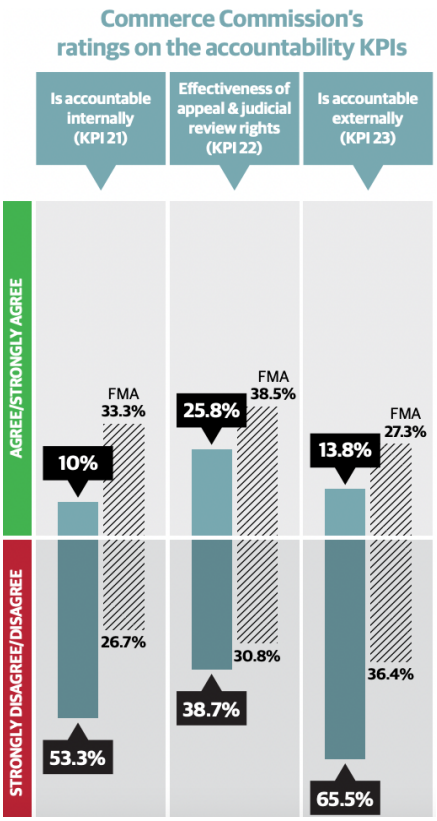

Figure 2: Commerce Commission's accountability ratings in the 2022 New Zealand Initiative survey of commercial regulators [67]

Furthermore, a 2022 New Zealand Initiative survey of the "200 largest businesses by revenue" found that the Commerce Commission were the least respected of New Zealand's six commercial regulators.[68] Only 10 per cent of respondents agreed that the Commission are

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[65] Mark Berry "Institutional Design Issues And Policy Challenges: Reflections From Former Chair Of The Commerce Commission, Dr Mark Berry" (2020) 51 VUWLR 231 at 232.

[66] See Bernard Hickey "New Zealand's supermarket duopoly lives to profit another day" (9 March 2022) The Spinoff <www.thespinoff.co.nz>; and Bryce Edwards "Political Roundup – Supermarkets win in the end" (9 March 2022) Democracy Project <www.democracyproject.nz>.

[67] Roger Partridge *Reassessing the Regulators: The good, the bad and the Commerce Commission* (The New Zealand Initiative, May 2022) at 24.

[68] At 7–8.

"accountable internally" and 13.8 per cent that they are "accountable externally".[69] By contrast, 53.3 and 65.5 per cent disagreed or strongly disagreed that they are internally and externally accountable.[70] Furthermore, only 6.3 per cent agreed that they "understand commercial realities" and 15.6 per cent agreed their "decision-making is predictable".[71] These results were reported by leading media outlets such as the New Zealand Herald, Stuff and Newsroom.[72]

While clearly, this is a damning evaluation of the Commission's business confidence, it should be taken with a grain of salt as a survey of big businesses whose commercial objectives are opposed to the Commission's functions. The Commission's outputs should not be primarily evaluated on its outcomes in terms of business confidence, but rather how effectively they meet their statutory purpose of "promoting competition in markets for the long-term benefit of consumers".[73] Questions should be asked about whether the Commission taking a business-friendly approach in the final market study report was subtly framed or influenced by the need to improve their business confidence, especially because the survey data was taken in the period between the draft and final report.[74]

Either way, the Commission evidently suffers from a democratic legitimacy problem. Democratic legitimacy depends on the regulator's capacity to engender and maintain the belief that they are the most appropriate body for the functions entrusted to them.[75] Black describes legitimacy as "social credibility and acceptability".[76] Therefore, a regulator is "legitimate" when it is perceived to have the "right to govern both by those it seeks to govern

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69 At 24.

70 At 24.

71 At 23.

72 See for example: Tom Pullar-Strecker "Commerce Commission reputation 'slides' in business poll" (24 May 2022) Stuff <www.stuff.co.nz>; Roger Patridge "Time is up for Commerce Commission" (24 May 2022) NZ Herald <www.nzherald.co.nz>; and Pattrick Smellie "NZ Initiative claims 'alarming' decline at ComCom" (24 May 2022) <www.businessdesk.co.nz>.

73 Commerce Act 1986, s 1A.

74 The survey data was taken between September and October 2021. The draft report was released in July 2021 and the final report in March 2022. See Partridge, above n 67, at 7.

75 Giandomenico Majone "The regulatory state and its legitimacy problems" (1999) 22 West European Politics 1 at 22–23.

76 Julia Black "Constructing and contesting legitimacy and accountability in polycentric regulatory regimes" (2008) 2 Regulation & Governance 137 at 144.

and those on behalf of whom it purports to govern".[77] In this regard, legitimacy depends on the acceptance of the regulatory body by others and, more importantly, the reasons for that acceptance.[78] Social acceptance requires the regulator's actions to be viewed as necessary, desirable or proper within a socially constructed system of values, beliefs and norms.[79] As the earlier discussion about the appropriateness of their policy-making role shows, there are serious questions about whether the Commission can maintain the belief that they are the most appropriate body for the market study function.

A lack of democratic legitimacy, or "democratic deficit" as Majone terms it, is identifiable by the perception of procedural and decision-making defects, such as a lack of transparency, insufficient public participation, unwillingness to give reasons, abuse of discretion and inadequate mechanisms of control and accountability.[80] As I have demonstrated, the Commission is perceived as expressing several of the "democratic deficit" criteria. In the New Zealand Institute survey, the Commission rated poorly for internal and external accountability, understanding of commercial realities and predictable decision-making. As Tyler argues, if regulators have "legitimacy they can function effectively; if they lack it it is difficult and perhaps impossible for them to regulate public behaviour".[81] Therefore, even though businesses and media are not their primary accountability stakeholder, the Commission still requires democratic legitimacy in the eyes of businesses and media to ensure obedience and compliance with its orders and effectively regulate public behaviour.

Fortunately for the Commission, the link between strong accountability mechanisms and democratic legitimacy is well-established in the literature. As Bovens observes, "democracy remains a paper procedure if those in power cannot be held accountable in public".[82] Where the perception of a democratic deficit exists, accountability mechanisms are crucial to provide market studies with normative legitimacy. Accountability mechanisms promote the acceptance of government authority, confidence in the government administration and ensure

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77 At 144.

78 At 144.

79 Mark C. Suchman "Managing Legitimacy: Strategic and Institutional Approaches" (1995) 20 Academy of Management Review 571 at 577.

80 Majone, above n 75, at 21.

81 Tom R. Tyler *Why People Obey the Law* (Princeton University Press, Princeton, 2006) at 57.

82 Mark Bovens "Public Accountability" in Ewan Ferlie, Laurence E. Lynn and Christopher Pollitt (eds) *The Oxford Handbook of Public Management* (1st ed, Oxford University Press, Oxford, 2007) 182 at 182.

the legitimacy of governance remains intact.[83] These mechanisms create a shortcut between the arms-length regulator and parliament, reducing the distance between regulation and electoral accountability.[84] Accordingly, effective accountability mechanisms would provide the Commission with the necessary mandate to make value-based choices and politically sensitive trade-offs as required under the market study function.

The requirements of democratic legitimacy include the theory of *ex-ante* accountability, or "input legitimacy" as termed by Scharpf, where decisions are legitimate if they are based on the agreement of those who are asked to comply.[85] Input legitimacy demands that stakeholders and the public are represented, consulted and able to participate in the decision-making system.[86] However, as Peters argues, if "one ideal of democracy is inclusiveness and equality then making public organisations responsive to only a limited number of individuals and interests appears to lessen that inclusiveness substantially".[87] According to this, the market study process not only needs to be inclusive, but also give equitable and fair weighting to the views of inputting parties. In contrast, this next part discusses how the market study process has a high risk of regulatory capture, providing the regulated industry with unfair access to and control over the market study process.

C The susceptibility to regulatory capture

The theory of regulatory capture is most famously associated with Nobel laureate George Stigler's *The Theory of Economic Regulation* (1971), in which he posits that "every industry or occupation that has enough political power to utilize the state will seek to control entry".[88] Regulatory capture occurs when the regulated industry directs the regulatory processes

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[83] Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 ELJ 447 at 464.

[84] Bovens, above n 82, at 198.

[85] Fritz Scharpf *Governing in Europe: Effective and Democratic?* (Oxford University Press, Oxford, 1999) at 7–8; and Fabrizio Gilardi "Evaluating Independent Regulators" (paper presented to the OECD Working Party on Regulatory Management and Reform, London, 10–11 January 2005) at 108.

[86] At 7–8; and Gül Sosay and E. Ünal Zenginobuz "Independence and Accountability of Regulatory Agencies in Turkey" (paper presented to the ECPR Conference on Regulatory Governance, University of Bath, Bath, UK, 7–8 September 2006) at 15–16.

[87] B. Guy Peters "Accountability in Public Administration" in Mark Bovens, Robert E. Goodin and Thomas Schillemans (eds) *The Oxford Handbook of Public Accountability* (Oxford University Press, Oxford, 2014) 211 at 215.

[88] George J. Stigler "The Theory of Economic Regulation" (1971) 2 The Bell Journal of Economics and Management Science 3 at 5.

intended to control them away from the public interest and towards the interests of the regulated industry.[89] When discussed in relation to competition law, regulatory capture occurs when regulated monopolies seek to influence and manipulate intervention by the competition regulator.[90] In regards to market studies, the process would be "captured" if the regulated industry influenced and gained control over the Commission's study to maintain its dominant market position.

Three conditions facilitate regulatory capture: (1) the pressure group has the motivation and ability to engage in it; (2) public officials are willing to cooperate with capture attempts; and (3) there are practical opportunities to successfully realise capture.[91] The market study process is vulnerable to two of these facilitating conditions. Firstly, it increases the motivation for the regulated industry to achieve capture by providing the competition regulator with a powerful policy-making function with substantial implications for the regulated industry. Secondly, it increases the practical opportunities to successfully realise capture by providing a forum for interested industry bodies to regularly engage with the competition regulator.

A few critical junctures might allow the regulated industry to influence the market study process. Firstly, after the process statement is released and the study formally begins, the Commission's market study guidelines state they will initially gather information about the sector from "businesses, consumers and organisations in a number of ways".[92] The guidelines set out that "the degree of our engagement with each stakeholder will vary… We may need more information and evidence from some parties than from others".[93] For an industry like the grocery market, where the Commission does not have much prior formal regulatory involvement, it might be expected that much of its information about the grocery market comes from industry actors. Sunstein, discussing regulatory processes in the United States, found that this stage usually involved informal communications with the industry because "they facilitate the process of obtaining information".[94] This is consistent with the

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89 Daniel Carpenter and David A. Moss *Preventing Regulatory Capture Special Interest Influence and How to Limit It* (Cambridge University Press, Cambridge, 2014) at 13.

90 Ernesto Dal Bó "Regulatory Capture: A Review" (2006) 22 Oxford Review of Economic Policy 203 at 203.

91 Indig and Gal, above n 10, at 103–105

92 Commerce Commission, above n 18, at 12.

93 At 13.

94 Cass R. Sunstein "Interest Groups in American Public Law" (1985) 38 Stan.L.Rev. 29 at 63.

Commission's preference to voluntarily acquire information from parties because it "seems less 'adversarial' than when we issue a formal notice" and it "can help our investigation proceed more quickly".[95]

However, the Commission's informal communications with industry stakeholders to acquire information and avoid "adversarial" relations could provide a practical opportunity to facilitate regulatory capture. As Crow, Albright and Koebele have observed, "the informal processes… that many agencies use to work with stakeholders and mitigate conflict prior to formal rulemaking may work to marginalize citizen influence".[96] Significant negotiation and deliberation occurs before the release of the draft report and the "input from citizens during later formal comment periods might prove less important to regulatory decision-makers who have already worked with organized stakeholders to reach consensus".[97] In this regard, the industry stakeholders initially selected to inform the scope and substance of the Commission's study critically shape the direction of the study. Stiglitz, aware of the risk posed by regulatory capture, warns regulators to ensure that "to ensure that the voice of those whose interests are likely to be hurt by [market] failure are well represented in the regulatory structures".[98]

The other critical opportunity for regulatory capture comes after the release of the draft report. Here, the Commission receives further submissions and may hold conferences and interviews with industry stakeholders to support or challenge the findings in the draft report.[99] At this later stage, the competition authority would likely have had several engagements with the parties, particularly those that were initially consulted for information scoping. Carpenter and Moss argue that repeated interaction with the regulated industry exposes the regulator to "cultural capture", subtly influencing the regulator to think like the regulated. They warn regulators about:[100]

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95 Commerce Commission, above n 18, at 12; and Commerce Commission, above n 28, at 16.

96 Deserai A. Crow, Elizabeth A. Albright and Elizabeth Koebele "Public Information and Regulatory Processes: What the Public Knows and Regulators Decide" (2016) 33 Review of Policy Research 90 at 103.

97 At 103.

98 Joseph Stiglitz "Regulation and Failure" in David Moss and John Cisternino (eds) *New Perspectives on Regulation* (The Tobin Project, Cambridge, MA, 2009) 11 at 18.

99 See Commerce Commission, above n 18, at 13–14; and Commerce Commission, above n 7, at 20–22.

100 Carpenter and Moss, above n 89, at 18.

> … the cultural or social influence of repeated interaction with the regulated industry… such that the regulator begins to think like the regulated and cannot easily conceive another way of approaching its problems. In the case of cultural or social capture, the legislator or agency may not be fully conscious or aware of the extent to which its behaviour has been captured.

While I am not suggesting that the Commission were necessarily "captured" in carrying out the retail grocery market study, the susceptibility of the process to regulatory capture in itself demands stronger accountability mechanisms. According to Stiglitz, regulatory capture can be monitored and prevented through "a broad system of checks and balances".[101] Furthermore, Stiglitz reminds regulators to ensure that the voices of the victims of regulatory failure are well-represented in these check and balance systems.[102] Accordingly, accountability mechanisms are not only required to prevent regulatory capture, but to loop in the perspective of under-represented interests. Following this, in Part IV, I evaluate how the market study loops in the perspectives of competing interest groups. After applying the theory of interest group pluralism, I argue that, as it stands, the process benefits organised industry groups at the expense of disparate consumer groups.

IV Interest Group Pluralism and the Retail Grocery Market Study

Thus far, I have suggested several reasons why the market study process demands stronger accountability mechanisms. Namely, to monitor and limit the Commission's exercise of its policy-making function, to improve its democratic legitimacy in assuming this function and to prevent regulatory capture. As this part explores, one further reason is to counter the effects of interest group pluralism.

I have discussed how interest groups can input at various points in the market study. Part II found that the Commission consults with stakeholders throughout the market study process. Part III established that these participation processes are vulnerable to regulatory capture from the regulated industry, in this case, the supermarkets. Following this, it might be asked *how* these participation processes are weighted towards the supermarkets' interests. Can consumer groups not also participate in these processes to counterbalance the supermarkets? To answer these questions, I apply the theory of interest group pluralism and argue that

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[101] Stiglitz, above n 98, at 18.

[102] At 18.

organised business interest groups are advantaged over disparate consumer groups in these forums.

A Defining interest group pluralism

The theory of interest group pluralism views politics as a deliberative concept which is shaped through the process of conflict and compromise between various special interest groups.[103] Under pluralist theory, political power is decentralised and, in order to gain power over policy-making, citizens must mobilise into interest groups.[104] According to this, citizens arrive at the political process with pre-selected interests and group themselves together to pursue particular economic interests.[105] Interest groups can gain political power by pursuing the "interests of citizens motivated to contribute political resources to the groups".[106] Therefore, according to pluralist theory, the main purpose of politics is to mediate the struggle between competing social groups seeking political power.[107]

Interest group theory has gone through several iterations and is closely associated with constitutional theory. At its earliest conception, James Madison in the Federalist Papers was concerned about citizens banding together to selfishly pursue special interests that were opposed to the "general good".[108] Madison saw the role of the constitution as countering the influence of powerful special interest groups, arguing that: "repressing the liberty to pursue selfish interests is authoritarian, but the constitutional order can be constructed to balance the adverse effects of selfishness".[109] More optimistically, John Hart Ely has described interest group pluralism as a vehicle to promote minority interests.[110] He describes majoritarian electoral mechanisms as insufficient to protect "against [the] unequal treatment of minorities".[111] According to Ely, interest group pluralism recognises that minority interest

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[103] Sunstein, above n 94, at 32.

[104] Andrew McFarland "Interest Group Theory" in L. Sandy Maisel, Jeffrey M. Berry and George C. Edwards (eds) *The Oxford Handbook of American Political Parties and Interest Groups* (Oxford University Press, Oxford, 2010) 37 at 39–40.

[105] At 32.

[106] At 40.

[107] At 32.

[108] At 37.

[109] At 37.

[110] John Hart Ely *Democracy and distrust: A theory of judicial review* (Harvard University Press, Cambridge (Mass), 1980) at 78 and 135.

[111] At 78.

groups, who are otherwise under-represented in electoral forums, can gain significant political power by circumventing the electoral process and directly protecting their interests "by entering into the give and take of the political marketplace".[112]

In contrast to Ely, Sunstein warns about the "problem of faction" that arises when one group dominates the legislative or executive process.[113] According to Sunstein, when a single interest group monopolises political power, they can subvert the bargaining and compromise on which interest group pluralism is based.[114] This monopoly over political power undermines the efforts of weak or diffuse interest groups such as consumers.[115]

The neopluralist school was developed out of the recognition that business and organised interests are in a superior position to, and have certain advantages over, consumer groups.[116] The theory is critical of the power imbalance faced by public interest and citizen groups when competing against business groups and professional organisations in the political marketplace.[117] Neopluralists do not view all interest groups as having equal access to the policy process, arguing that the "variation in resources often lead to one group having greater access than another".[118] Furthermore, the theory recognises the special difficulty faced by public interest and citizens' groups to organise and mobilise because of the "diffuse nature" of the interest.[119] The neopluralist school argues that having powerful special interest groups in politics does not necessarily lead to pluralism, but to "structures of privilege which exclude the public from the political process".[120] Against this theoretical background, the next part considers the role of interest group pluralism in competition regulation.

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[112] At 135.

[113] At 33.

[114] At 33.

[115] Sunstein, above n 94, at 33.

[116] Martin J. Smith "Pluralism, Reformed Pluralism and Neopluralism: the Role of Pressure Groups in Policy-Making" (1990) 38 Political Studies 302 at 315.

[117] McFarland, above n 104, at 42.

[118] Smith, above n 116, at 304.

[119] McFarland, above n 104, at 42.

[120] Theodore J. Lowi *The end of liberalism; ideology, policy, and the crisis of public authority* (Norton, New York, 1969) at 86–87; and Smith, above n 116, at 316.

B Interest group pluralism and competition law

According to pluralist theory, the role of economic regulation is to respond to constituent pressures and to ensure "agency outcomes reflect some form of deliberation".[121] Supporting this contention, several leading academics have observed that interest group pressures regularly influence and produce favourable regulatory outcomes. As Sunstein observes, "the existing work in economics and political science suggests that interest groups play an important but not decisive role in most modern regulation".[122] As Spiller observes, the "main thrust of the self-interest theory of regulation, as proposed by Stigler and Peltzman, is that regulations develop as the result of demands from different interest groups for governmental intervention".[123] As DeLorme observes, while competition law claims to "service the public interest, they are susceptible to the influence of special-interest groups as are any public policies".[124]

Special interest groups often have two objectives in applying pressure to regulatory processes. Firstly, to capture the benefit of the transfer of wealth.[125] Secondly, to obtain and defend favourable property rights.[126] While wealth distribution and property rights are usually within the remit of legislative policy, these functions can be delegated to regulatory authorities.[127] Competition regulators, therefore, have some delegated ability to permit the transfer of wealth and the capture of favourable property rights. Compared to legislative processes, however, regulatory processes are more insular, receive less media coverage and are generally not as transparent.[128] Regulators can "pursue interests not aligned with those of the politicians who appoint them", creating an additional incentive for regulated actors to place pressure on these processes.[129] Furthermore, in order to promote transparency and legitimacy, most regulators have "developed processes to incorporate input from regulated

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[121] Sunstein, above n 94, at 75.

[122] At 77–78.

[123] Pablo T. Spiller "Politicians, Interest Groups, and Regulators: A Multiple-Principals Agency Theory of Regulation, or "Let Them Be Bribed"" (1990) 33 The Journal of Law and Economics 65 at 65.

[124] Charles D. Delorme Jr., W. Scott Frame and David R. Kamerschen "Empirical Evidence on a Special-Interest-Group Perspective to Antitrust" (1997) 92 Public Choice 317 at 317.

[125] Bruce L Benson, M. L Greenhut and Randall G Holcombe "Interest Groups and the Antitrust Paradox" (1987) 6 The Cato Journal 801 at 802.

[126] At 802.

[127] Spiller, above n 123, at 66.

[128] Crow, Albright and Koebele, above n 96, at 90.

[129] Spiller, above n 123, at 66.

communities".[130] However, special interest groups have an incentive to place pressure on these regulatory input processes to capture wealth transfer and obtain favourable property rights.

In regards to wealth transfer, the literature suggests that industry interest groups can pressure competition regulators to permit the transfer of wealth from consumers to monopolists. As observed by DeLorme, in lieu of a direct transfer of wealth from the public treasury, special interest groups representing the industry are motivated to pressure competition regulators to establish regulations that promote market inefficiency.[131] Market inefficiencies, such as high barriers to entry, can protect the dominant market position of the incumbent firm. Therefore, the making of excess monopoly profits, as in the profits earned above what would be possible in a competitive market, can be seen as an indirect transfer of wealth or "consumer's surplus" from consumers to the monopolist.[132] According to DeLorme, this indirect transfer of wealth is the result of the competition regulator failing to prevent the monopoly conduct causing market inefficiency.[133]

As regards property rights, a short history of the United States Sherman Act of 1890 establishes that the original purpose of competition law was to redistribute and protect private property rights. The Sherman Act is widely considered to be the origin of modern competition law and the earliest predecessor of New Zealand's Commerce Act 1986. While contemporarily, the purpose of competition law is seen as promoting economic efficiency, historically, the balancing of interest group pressures was significant to competition law.[134]

As the name "antitrust" suggests, the Sherman Act was "intended as a transfer of property rights away from trusts".[135] In the 1870s and 1880s, American farmers complained that high prices for railway services and farm equipment were the result of monopoly power being exercised by the "trusts" – essentially an old colloquial term for big businesses.[136] During

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130 Crow, Albright and Koebele, above n 96, at 90.

131 Delorme Jr., Frame and Kamerschen, above n 124, at 317.

132 Robert H. Lande "Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged" (1982) 34 Hastings L.J. 64 at 74.

133 Delorme Jr., Frame and Kamerschen, above n 124, at 317.

134 Benson, Greenhut and Holcombe, above n 125, at 808.

135 At 808.

136 At 807.

this time, farmers possessed extensive political power and were able to pressure Congress into passing the Sherman Act, outlawing many common forms of monopoly conduct.[137] Once the Act passed, since the Act tends to protect small economic interests from being harmed by larger ones and because "the farmers were small entities and the railroads, banks, and manufacturers were large entities, the act appears to be a one-way transfer of property rights to the farmers".[138] Essentially, as pluralist theory suggests, the farmers, like any interest group, were motivated to obtain and protect property rights.

As the history of the Sherman Act shows, the balancing of interest group pressures is inherent in the history of competition law. Pluralist theory sees politics as mediating the rivalry between interest groups, and competition law provides a mechanism to distribute the benefits of regulation to rival interest groups. Since competition law can confer significant benefits onto interest groups, pluralism provides an appropriate normative lens to analyse the interest groups in a market study, as an example of a competition law forum. As this next section will show, the retail grocery market study was an example of a pluralist rivalry over the benefits of regulation between three competing interest groups.

C Framing the interest groups in the grocery market study

This paper focuses on the three main interest groups who submitted on the retail grocery market study: the supermarkets (e.g Countdown, Foodstuffs North Island, Foodstuffs South Island), suppliers (e.g NZ Food and Grocery Council, Nestlé, Federated Farmers) and consumers (e.g Consumer NZ, individual consumers). As can be observed through their submissions to the market study (their "**inputs**"), these three interest groups each had a distinct set of desired outcomes from the market study.

Firstly, the supermarkets were interested in keeping new regulations at a minimum since, no matter what shape this took, it would add costs to their business or reduce their profit margins. Their submissions, therefore, challenged the draft report's conclusion that competition was muted. If the supermarkets could demonstrate competition was functioning reasonably well, the Commission would have a reduced mandate to regulate and intervene in the market on the basis of correcting competition. Woolworths and Foodstuffs both presented

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[137] At 807.

[138] At 808.

information that grocery prices were not high by international standards and that the Commission overestimated their profitability, arguing that, if the draft report had correctly considered this, it would have concluded there was no issue with competition.[139] While they supported some regulation, such as the grocery code of conduct, freeing up restrictive land covenants and the grocery ombudsman, both supermarkets strongly refuted the suggestion of supporting a third supermarket entrant to the market, calling it "unprecedented" and "not warranted".[140]

Secondly, the suppliers were mainly interested in supporting changes that improved their bargaining power in relation to supermarkets. Because of the duopoly market structure, suppliers face the monopsony problem – where there is only one buyer in town for the products produced by suppliers.[141] Grocery suppliers reported a range of unfair conduct by the supermarkets, including refusing to pay agreed costs to suppliers, unilaterally imposing additional costs without warning or prior agreement, and a general culture of bullying and intimidation.[142] Due to the monopsony problem, suppliers were often forced to comply with the supermarkets' demands, no matter how unreasonable or unfair, since they risked foreclosing half of their buyers by losing one of Foodstuffs or Countdowns' business. The eight submissions by supplier representative groups mostly discussed the issues of the grocery code of conduct, which would govern the relationship between retailers and suppliers, and the supplier collective bargaining provisions, authorising small-scale suppliers to collectively bargain with the supermarkets.[143] The majority of supplier submissions ignored the recommendations from the draft report about supporting a third supermarket

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139 See Foodstuffs North Island *Foodstuffs North Island's Submission on Grocery Market Study Draft Report* (15 September 2021) at 8–33; and Woolworths New Zealand *Woolworths New Zealand Limited's submission on the New Zealand Commerce Commission's draft report regarding the market study into the retail grocery sector* (10 September 2021) at 57–108.

140 See Foodstuffs North Island, above n 139, at [421]; and Woolworths New Zealand, above n 139, at [4.1].

141 Maurice E. Stucke "Looking at the Monopsony in the Mirror" (2013) 62 Emory L.J. 1509 at 1510.

142 New Zealand Food and Grocery Council *Market study into the retail grocery sector: Draft report* (26 August 2021) at 33–38.

143 See Nestle New Zealand Limited *Submission by Nestlé New Zealand Limited ("Nestlé") in respect of the Draft Report of the New Zealand Commerce Commission ("NZCC") on the Market study into the retail grocery sector dated 29 July 2021 ("Draft Report")* (26 August 2021); Vegetables NZ and Horticulture NZ *Draft Report Market Study Into the Retail Grocery Sector* (26 August 2021); Federated Farmers of New Zealand *Draft Report for Market Study into the Retail Grocery Sector* (26 August 2021); Waterloo Farm *Feedback On Commerce Commission's Draft Report On Supermarkets Waterloo Farm Vegetable Grower* (26 August 2021); Rural Women New Zealand *Market Study into the Grocery Sector* (26 August 2021); and Pernod Ricard Winemakers *Pernod Ricard Winemakers NZ Limited's Response To The Market Study Into The Grocery Sector* (25 August 2021).

entrant to the market.[144] Only two submissions from suppliers supported the third supermarket entrant recommendation, suggesting that most suppliers were not overly concerned about consumer-facing issues such as high retail prices.[145]

Lastly, consumers were represented by a disparate group of representative bodies. Consumer NZ constituted the only recognisable consumer advocacy group, but charities like FinCap, Christians Against Poverty and The Salvation Army, as representatives of people affected by food insecurity, served as a reasonable proxy for consumers. Consumer NZ supported changes that reduced the adverse outcomes for consumers resulting from the duopoly market structure.[146] By comparison, some of the charity submissions were distrustful of competition law and market mechanisms, with the Salvation Army expressly stating that "[a]ccess to basic food needs to be seen as a human right and not simply a market commodity to be supplied based on theories of market behaviour".[147] Irrespective of any scepticism, every consumer representative group expressly supported taking action to create space for a third major supermarket entrant.[148]

In sum, the supermarkets demanded minimal regulatory intervention, suppliers sought regulation that improved their bargaining power *vis-a-vis* the supermarkets and consumer groups supported most of the report's recommendations, but were particularly interested in mechanisms to introduce more competition into the retail market. While all of the recommendations were intended to improve consumer welfare, the introduction of a third supermarket entrant was viewed by consumer groups as the most direct way of stimulating price and non-price competition in the grocery sector.

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[144] See Nestle New Zealand Limited, above n 143; Vegetables NZ and Horticulture NZ above n 143; Federated Farmers of New Zealand, above n 143; Waterloo Farm, above n 143; Rural Women New Zealand, above n 143; and Pernod Ricard Winemakers, above n 143.

[145] Two supplier representative groups supported the third supermarket entrant recommendations: New Zealand Food and Grocery Council *Market study into the retail grocery sector: Draft report* (26 August 2021); and NZPork *NZPork feedback on Market Study into the grocery sector Draft report* (26 August 2021).

[146] Consumer NZ *Submission on "Market study into the retail grocery sector: Draft report"* (26 August 2021) at 1.

[147] The Salvation Army *Market Study into the grocery sector – draft report Consultation comments to the Commerce Commission* (26 August 2021) at 3.

[148] See The Salvation Army, above n 147; FinCap *Letter of support for Consumer NZ submission responding to the Market study into the retail grocery sector Draft report* (25 August 2021); Consumer NZ, above n 147; and Christians Against Poverty *Market Study into the Grocery Sector* (26 August 2021).

As discussed earlier, the final report reneged on the suggestion of introducing a third supermarket entrant. The recommendations from the draft report to directly stimulate retail competition, by requiring the divestment of assets to stimulate a third supermarket entrant or supporting a state-sponsored third supermarket entrant, were removed from the final report. The other notable omission was the recommendation to separate the major supermarkets' wholesale and retail arms, enabling new entrants to access the wholesale supply chain at competitive prices without needing to establish their own infrastructure. This sort of divestment is not unprecedented in New Zealand. A similar split occurred in 2011 when the former state-backed monopoly Telecom retained its retail operation but divested its fixed-line operation to Chorus.[149]

The position after the final report was that the supermarkets received everything that they bargained for in their submissions. The final report's recommendations to amend the Overseas Investment Act to assist entry of a third supermarket, banning "no supermarket" provisions in land covenants, and voluntarily giving wholesale access to independent retailers, among other things, were expressly supported by Woolworths and Foodstuffs submissions.[150] Similarly, the suppliers received the code of conduct and collective bargaining authorisation that they sought in their submissions.[151] The most notable omission was, therefore, consumer groups' interest in directly stimulating a third supermarket entrant. While I am not suggesting that the Commission intentionally chose consumers as "losers" and the supermarkets and suppliers as "winners" as suggested by some media reports, it does raise questions about how effectively each interest group can protect their interests in the market study forum.[152]

D The interest group problem in the market study

As discussed earlier, the market study process allows interest groups to input into the final report to promote democratic legitimacy. However, I argue that this seemingly egalitarian pluralistic feature of the market study is premised on an outdated model of interest group

[149] Reuters "Separated Telecom and Chorus debut in New Zealand" (23 November 2011) <www.reuters.com>.

[150] See Foodstuffs North Island, above n 139, at 89; and Woolworths New Zealand, above n 139, at [6.2].

[151] See Nestle New Zealand Limited, above n 143; Vegetables NZ and Horticulture NZ above n 143; Federated Farmers of New Zealand, above n 143; Waterloo Farm, above n 143; Rural Women New Zealand, above n 143; and Pernod Ricard Winemakers, above n 143.

[152] See Bryce Edwards "Political Roundup – Supermarkets win in the end" (9 March 2022) Democracy Project <www.democracyproject.nz>.

pluralism. John Hart Ely's view that any minority interest can mobilise into an interest group to effectively protect themselves in the political marketplace (see discussion above in section A) is no longer the mainstream theoretical position. Despite this, Ely's pluralist theory is effectively the basis of how the market study process treats its input and participation mechanisms by providing an unregulated political marketplace for interest groups to deliberate.

I argue that the political marketplace at issue, that being the market studies input processes, needs to be regulated appropriately. Viewed through a neopluralist lens, the idea that these participation and input processes are neutral and impartial does not hold up to scrutiny. From the neopluralist perspective, it is problematic that the market study formally treats all inputting parties agnostically and does not contain any mechanisms for recognising or tempering the disadvantages that certain groups face when inputting into the market study. This has the paradoxical effect of giving the report democratic legitimacy by outwardly appearing as if the "public are represented, consulted and able to participate in the decision-making system".[153] However, simultaneously, it makes the output less democratic because it provides organised and well-resourced interests with unfettered access to the Commerce Commission which consumer groups cannot easily countervail. Using Lowi's neopluralism definition, this makes the market study process a "structure of privilege which excludes the public from the political process".[154]

Despite consumers being the largest interest group by headcount, they are the least active and worst-represented group in the market study forum. Group theory demonstrates how consumer groups face challenges in defending their collective interests. Mancur Olson's seminal text *The Logic of Collective Action* (1965) argues that "consumers are at least as numerous as any other group in the society, but they have no organisation to countervail the power of organised or monopolistic producers".[155] According to Olson's theory, "in the world of interest group politics… the few defeat the many".[156] The logic of collective action asserts that groups with a hundred or more potential beneficiaries, such as consumers, will

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[153] Scharpf, above n 85, at 7–8

[154] Lowi, above n 120, at 86–87; and Smith, above n 116, at 316.

[155] Mancur Olson *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press, Cambridge (Mass), 1965) at 166.

[156] See McFarland, above n 104, at 41; and Olson, above n 155, at 167.

not organise because "individuals will not get a positive payoff if they contribute, since either they will get the public good anyway, or else the benefit is smaller than the contribution".[157] Following this logic, only groups with a small number of beneficiaries will organise, because the individuals will receive a positive payoff for their contribution.[158] Because of this paradox, McFarland hypothesises that smaller groups such as businesses and corporates will form organised interests, while large diffuse groups such as consumers will not organise.[159]

Consumers are vulnerable to the "rational apathy" problem when they are the victim of a competition law infringement.[160] Under the "rational apathy" model, it is irrational for individual consumers to defend their interests in the market study forum. As observed by Van den Bergh, private parties will only submit to forums to defend their interests if the private benefits of doing so (the expected outcome of the proceedings) outweigh the private costs.[161] Supermarkets and suppliers have a strong incentive to incur the cost of submitting to the market study since a favourable outcome yields significant benefits to their revenue and financial performance. They have a strong financial stake in the outcome of the market study.

Conversely, individual consumers are faced with limited incentives to personally incur the high cost of inputting into the market study. The costs to consumers to opt-in usually exceed their individual private losses and low-value damage suffered from high grocery prices.[162] The time and labour costs for an individual consumer to submit to the study will often outweigh their minor stake in the outcome of the study. Furthermore, individual consumers are not paid to submit to market studies, unlike those employed or contracted by the supermarkets. They simply do not have the same vested financial interest in the outcome of the market study.

The "rational apathy" problem is compounded by the free rider problem. As observed by Olson, public policy produces "public goods", whereby "if one person in an area receives the

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[157] McFarland, above n 104, at 41

[158] At 40–41.

[159] At 41.

[160] Roger Van den Bergh "Private Enforcement of European Competition Law and the Persisting Collective Action Problem" (2013) 20 MJ 12 at 14.

[161] At 14.

[162] At 22.

benefit, then, by its very nature, all persons in that area receive the benefit".[163] The market study is an example of a public policy resulting in a "public good". In this case, if the market study results in a more competitive marketplace, the benefits from increased competition, such as lower prices and better service, are received by all consumers, not just those who inputted into the market study process. Because the benefits from increased competition flow to all consumers, individual consumers have an interest to leave enforcement to other individuals so they can reap the benefits of lower grocery prices, without having to spend their own resources.[164] In other words, consumers are incentivised to "free ride" by passively reaping the benefits from the market study, while placing the financial risk and advocacy burden on other groups such as Consumer NZ.

The pluralist literature sees countervailing consumer interest groups as the main external constraint on powerful industry interest groups.[165] Notably, Consumer NZ was the only true "consumer advocacy" group involved in the market study. However, they are not an equally-powered counter-group to the supermarkets and suppliers. Unlike the supermarkets and suppliers, they do not have a direct interest, financial or otherwise, in the grocery industry. Consumer NZ is a generalist consumer group and has a limited ability to effectively "compete with industry or advocacy professionals when it comes to policy or technical capacity".[166]

Therefore, the Commission likely did not fully understand or give proper weight to the consumer perspective because of the underrepresentation of consumers in the market study. Interestingly, the Government's reaction to the market study supports this argument. The Minister of Consumer Affairs David Clark announced several actions that went above and beyond the Commission's recommendations in the government's official response to the market study.[167] However, this is not surprising according to pluralist theory. Pluralist theory accepts that, unlike regulators who assume that interest groups are a proxy for citizen

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[163] Olson, above n 155, at 14–15.

[164] Van den Bergh, above n 160, at 24.

[165] Smith, above n 116, at 305.

[166] Crow, Albright and Koebele, above n 96, at 103.

[167] The Government rejected the voluntary wholesale access recommendation, but strengthened it by making wholesale access mandatory. They also rejected the three year review recommendation, but went further by establishing an annual review of competition in the grocery sector.

interests, the government will take into account unorganised interests.[168] According to Smith, the "reality of achieving re-election is a major motivation for governments to take account of unorganized groups".[169]

In sum, the market study process reflects an outdated conception of pluralist theory. It bases its democratic legitimacy on the mere ability to input and participate in the process. However, it fails to take into account the neopluralist concern about the superior position of businesses against consumer groups. Consumer groups suffer from the logic of collective action which compromises their ability to effectively defend their interests in the market study forum. By contrast, the Government's response went beyond the market study recommendations, because their electoral accountability mechanism provides a greater incentive to consider "unorganised interests" such as consumers. This raises the question: if the logic of collective action posits that "the few defeat the many", but the government's majoritarian electoral mechanism results in "the many defeating the few", is requiring the government to respond to the market study a sufficient accountability mechanism to ensure democratic concerns are heard? The following section evaluates whether the accountability mechanisms in the market study process are a sufficient safeguard against the effects of interest group pluralism in sidelining unorganised voices such as consumers.

V The Accountability Deficit in the Market Study Power

Thus far, this paper has tabled several key reasons why the market study power demands greater accountability mechanisms. This includes the sparse statutory procedural requirements, the *ex-ante* nature of the power in contrast with the Commission's other functions, the policy-making function which requires the Commission to balance competitive and non-competitive objectives, the susceptibility of the process to regulatory capture and the contentious democratic legitimacy supporting the Commission to assume an emboldened policy-making role. Furthermore, applying an interest-group pluralist lens to the retail grocery study has revealed that powerful corporate interests are advantaged over vulnerable consumer groups in the market study forum. This more active policymaking role coupled with participation mechanisms which fail to equally represent groups affected by the exercise of power raise serious questions about the democratic legitimacy of the market study power.

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168 Smith, above n 116, at 305.

169 At 305.

Something is lacking in how the Commission is held accountable for its exercise of this power. This part applies Mark Bovens' accountability framework to assess where the market study's accountability mechanisms fall short of expectations.

Mark Bovens defines accountability in its widest sense as "the obligation to explain and justify conduct".[170] It is about providing answers to those with a legitimate claim to demand an account.[171] In a narrower sense, according to Bovens, accountability is:[172]

> a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences.

Accountability structures are particularly important within the regulatory state. Under the traditional "democratic chain of delegation" model, accountability relationships flow from citizens delegating their power to popular representatives who, in turn, have delegated to the government the power of enforcing laws and policy.[173] Within the "chain of delegation" model, Minister's delegate policy implementation to ministries, but retain close control and oversight through the doctrine of ministerial responsibility.[174] It is the formal duty of "public bodies to account for their actions to ministers".[175]

However, with the rise of independent regulatory agencies, although Ministers remain formally answerable to Parliament for the performance of their agencies, in practice, they have limited control and oversight.[176] Regulators are intended to remain at "arms-length" from the Government and, therefore, operational responsibilities are entrusted to the heads of the agency.[177] As Bovens observes, "agencies are effectively shielded from parliamentary scrutiny because the minister is structurally uninformed about their daily operations".[178] This is known as the "political accountability" gap.

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[170] Bovens, above n 82, at 184.

[171] Mark Bovens, Thomas Schillemans, Robert Goodin *The Oxford Handbook of Public Accountability* (Oxford University Press, Oxford, 2014) at 6.

[172] Bovens, above n 83, at 450.

[173] Bovens, Schillemans, Goodin, above n 171, at 14–15.

[174] Bovens, above n 82, at 184.

[175] Colin Scott "Accountability in the Regulatory State" (2000) 27 Journal Of Law And Society 38 at 40.

[176] Bovens, above n 82, at 184.

[177] At 197–198.

[178] At 198.

According to Bovens, accountability mechanisms are deployed to create a shortcut between the regulator and Parliament.[179] This section discusses how accountability mechanisms are used to make regulators responsive to the democratic will and ensure the public interest is upheld. Amidst this background, this part first analyses the accountability mechanisms in the market study power using Bovens' accountability framework. Following this, I evaluate what changes could be made to the market study power to enhance the democratic and learning perspectives on accountability.

A Bovens' accountability analysis

1 To whom is account rendered?

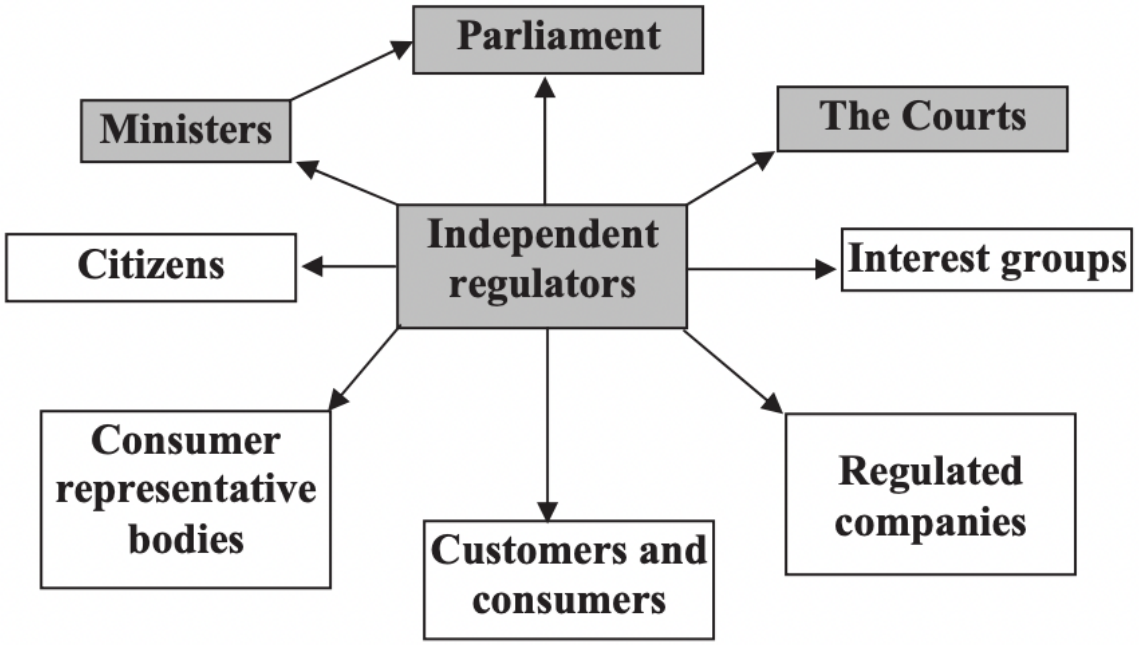

Figure 3: A 360-degree view of regulatory accountability[180]

With independent regulators like the Commission, the vertical, linear model of accountability does not sufficiently explain the accountability relationships between principals and actors. These accountability networks do not fit neatly into Bovens' "democratic chain of delegation" model since the Minister does not have direct control or day-to-day oversight of the regulator. Instead, the House of Lords uses a 360-degree model to describe the accountability of independent regulators (Figure 3). They view accountability as a network

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179 At 198.

180 House of Lords *Select Committee on the Constitution 6th Report of Session 2003-04 The Regulatory State: Ensuring its Accountability* (6 May 2004) at 20.

of relationships, with regulators' having different accountability duties depending on the nature of the account-holder.[181]

Colin Scott describes three forms of accountability "to whom" in the regulatory state: upwards, horizontal and downwards.[182] The first is regulators' upwards accountability to a higher authority.[183] The Commerce Commission is "upwards" accountable to the Courts, Parliament and the Minister of Consumer Affairs (the shaded boxes in Figure 3). These relationships reflect the traditional vertical model of accountability between principals and agents with delegated powers.[184] This upwards form of accountability exposes the market study to the democratic will and checks and balances within the representative democracy.[185]

The second is horizontal accountability: accountability rendered to a broadly parallel institution.[186] The Commission's market study power does not contain mechanisms of horizontal accountability. However, as will be discussed later, this paper's recommendation of establishing independent consumer bodies would introduce a form of horizontal accountability.

The third is downwards accountability: accountability to lower-level institutions and groups. Downwards accountability includes the Commission's accountability to interest groups, regulated industries, consumers and citizens (the white boxes in Figure 3). Through these relationships, the Commission is made directly accountable to the general public. This complements their indirect accountability to the electorate through elected representatives. According to Sosay, these direct accountability relationships to regulatory stakeholders were designed to mitigate concerns about the "democratic accountability and legitimacy of independent non-majoritarian institutions".[187]

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181 At 19–21.

182 Scott, above n 175, at 42.

183 At 42.

184 Gül Sosay "Delegation and Accountability: Independent Regulatory Agencies in Turkey" (2009) 10 Turkish Studies 341 at 345.

185 At 344.

186 Scott, above n 175, at 42.

187 Sosay, above n 184, at 345.

2 Who is the actor?

The Commission comfortably fit within Bovens' definition of "corporate accountability" and should be held accountable as a unitary actor.[188] Most independent regulators, the Commission included, are delegated their powers as an institution rather than as individuals.[189] Until a discrete market study branch within the Commission is established, the market study process and final output reflect the collective work of several branches within the Commission. For this reason, hierarchical accountability remedies targeted at one of the Commission's eight branch managers would be an ineffective solution. Therefore, corporate accountability is both consistent with how economic regulators are treated internationally and is sensible in light of the Commission's structure.

The market study power is vulnerable to the "problem of many hands" because it can be difficult to assess who is responsible for the study's outcomes. As Bovens observes, since "many officials contribute in many ways to the decisions and policies of government, it is difficult to identify who is morally responsible for political outcomes".[190] The problem arises because the Government both front-ends and back-ends the market study process, with the Commission doing the operational work in the middle. They "front-end" the process by initiating the market study, setting the terms of reference and delegating their policy-making power to the Commission. The Government, by sending the policy issue to a market study rather than taking the lead itself, temporarily insulates the issue from political scrutiny for the study's duration. They then "back-end" the process because they are required to review the study's findings and explain the reasons for acceptance or rejection of each recommendation.[191]

However, this process blurs accountability for who is responsible for the ultimate outcome. Instead of front-footing issues, the Government can defer their accountability by claiming they were just following the recommendations of an independent regulator over which a Minister does not have control or oversight. Equally, the Commission can defer its accountability by saying it did not make the ultimate policy decision, its role is simply to investigate and make independent recommendations.

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188 Bovens, above n 83, at 458.

189 Sosay, above n 184, at 345.

190 Bovens, above n 82, at 189.

191 Commerce Act 1986, s 51E; and Indig and Gal, above n 10, at 96.

Having said that, the "problem of many hands" should not be overstated. With the retail grocery market study, due to the way the Government individually accepted and rejected the report's recommendations, it was reasonably clear to the discerning onlooker who was responsible for what. For example, when the Government went beyond the Commission's recommendations by making it mandatory (rather than voluntary) for wholesalers to consider requests for wholesale access, it was clear they were taking responsibility for this policy outcome. Conversely, the refusal to directly stimulate a third supermarket entrant was the Commission's responsibility since they omitted it from the final report. In reality, journalists had no issue holding the Commission (rather than Government) accountable for the failure to directly stimulate a third supermarket entrant. It was relatively clear that the changes between the draft and final report were not influenced by the Minister, since the Commission was "insulated" from political scrutiny until the release of the final report.

3 Which aspect of the conduct is account to be rendered?

Bovens distinguishes between accountability for the procedure or process (**procedural accountability**) and accountability for the product or outcome (**product accountability**).[192] The market study renders the Commission accountable for both the process and substance. Across the literature, much emphasis has been placed on product accountability for regulatory outcomes or performance.[193] This conforms with the rise of the regulatory state, which has promoted a "performance-oriented culture that is characterized by a closer focus on results".[194] To hold the regulator substantively accountable, regulatory outcomes should be assessed in terms of the goals they have been assigned.[195] According to Stiglitz, to measure the product accountability of regulators, there must be (1) clearly defined objectives, (2) a reliable way of assessing whether they have met those objectives, and (3) consequences exist when they have not complied with those objectives.[196]

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[192] Bovens, above n 83, at 459–461.

[193] Sosay, above n 184, at 345.

[194] Robert D. Behn *Rethinking democratic accountability* (Brookings Institution Press, Washington D.C, 2001) at 25-26.

[195] Stéphane Jacobzone "Independent Regulatory Authorities in OECD countries: an overview" (paper presented to the OECD Working Party on Regulatory Management and Reform, London, 10–11 January 2005) at 75.

[196] Joseph E. Stiglitz "Democratizing the International Monetary Fund and the World Bank: Governance and Accountability" (2003) 16 Governance 111 at 111.

In the market study process, product accountability is rendered to the Minister and Parliament. The requirement to respond and accept, reject or modify each individual recommendation renders the Minister accountable for the product or outcome of the study. Having said that, there is a problem with the market study process failing to reflect upon its regulatory objectives *ex-post*. As it stands, there are no mechanisms to evaluate the outcome of the study against the objectives set by the Minister in the terms of reference.[197] This will be discussed further in Part B.

Regulatory outcomes are only one aspect of accountability. Procedural accountability recognises that output-oriented legitimacy alone does not guarantee democratic legitimacy and good governance.[198] It requires that the Commission are held accountable for their activities during the decision-making process by ensuring that the process is open and transparent to stakeholders.[199] As discussed earlier, procedural accountability provides input legitimacy, where decisions are legitimate if they are based on the agreement of those who are asked to comply.[200]

Unlike product accountability which is primarily rendered to the Minister, the Commission are procedurally accountable to a wider set of stakeholders. The Commission's engagement with stakeholders during the information gathering stage, the statutory requirement to release and seek submissions on the draft report and initial working papers, and the ability to hold workshops, conferences and interviews with industry stakeholders foster procedural accountability. However, as I have emphasised, while these mechanisms theoretically hold the Commission accountable to downwards stakeholders, in practice, these mechanisms benefit well-resourced, organised industry actors over diffuse interest groups. The next section discusses how the nature of the Commission's accountability obligations facilitates the unequal rendering of accountability.

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[197] See ASB "Submission to the Transport and Infrastructure Committee on the Commerce Amendment Bill" at 7.

[198] Sosay, above n 184, at 345.

[199] Scharpf, above n 85, at 7–8; and Sosay and Zenginobuz, above n 86, at 15–16.

[200] Scharpf, above n 85, at 7–8; and Gilardi, above n 85, at 108.

4 The nature of the obligation?

Bovens describes the nature of the accountability obligation as two-fold: either the actor is forced to give account (**vertical accountability**) or they voluntarily choose to do so.[201] Within the market study process, there is a distinction between the accountability obligation owed to upwards and downwards account-holders. Upwards account-holders exercise power in relation to the Commission.[202] Therefore, the Commission owe a vertical obligation to upwards account-holders. In the market study context, vertical accountability requires them to justify their market study recommendations to the Minister and Parliament since acceptance depends on these account-holders. This is confirmed by the statutory requirement for the Minister to respond to the final report "within a reasonable time after it is made publicly available".[203]

By contrast, the duties owed to downwards account-holders are a mix of vertical and voluntary. The Commission owe the lesser duty of transparency and representation to downwards account-holders.[204] These are primarily procedural duties and downwards account-holders are limited in their ability to scrutinise the study's outcome. Firstly, in regard to transparency, regulatory information must be "accessible and assessable" to all account-holders.[205] The requirement to release a draft report is a key vertical accountability mechanism, allowing the public to test and evaluate the Commission's preliminary findings. The requirement to release a draft report explaining their reasoning also fosters "accessibility and assessability".

Secondly, the representation duty requires that downward account-holders are "not only provided information, but also represented in the process, allowed to participate, and consulted before a decision is made".[206] The representation duty, by incorporating the input of downwards actors into the final report, is a form of *ex-ante* accountability. However, the only vertical representation obligation imposed on the Commission is in relation to the draft report. Section 51C (Consultation on draft competition report) states that the Commission

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201 Bovens, above n 83, at 460.

202 House of Lords, above n 180, at 21.

203 Commerce Act 1986, s 51E.

204 Lodge, above n 60, at 132.

205 At 127.

206 Sosay, above n 184, at 347.

"must have regard to any comments received on the draft report".[207] The other mechanisms for public representation are voluntarily assumed by the Commission. This includes conferences, interviews, workshops, consumer surveys, information-gathering engagements and working papers for consultation – all of which are not prescribed by the Commerce Act, but were used in the retail grocery market study.[208]

As I have emphasised, these informal input mechanisms are vulnerable to regulatory capture. Given the risk that powerful special interest groups have the upper hand in these input forums, there need to be tighter controls over how the Commission runs its downwards accountability mechanisms. I argue that the nature of the Commission's representation duty owed to downwards account-holders extends beyond just providing a raw input forum for deliberation. Their duty extends to ensuring that all downwards account-holders are equally able to represent their interests and participate in the decision-making process. Using the words of Bovens, this needs to be transformed into a vertical accountability obligation where the Commission is accountable to their upwards actors for ensuring that downwards actors are fairly represented. This next part discusses how improving the representation of marginalised actors in the market study would enhance the democratic and learning perspectives of accountability.

B Normative analysis

Bovens describes three perspectives underpinning accountability mechanisms: democratic, constitutional and learning. Firstly, from the democratic perspective, accountability mechanisms provide a democratic means for citizens to monitor and control government conduct. As accountability mechanisms promote public input and information transparency, they allow citizens to judge the effectiveness, fairness and efficiency of governance.[209]

Secondly, the learning perspective views accountability mechanisms as a tool to enhance the learning capacity and effectiveness of public administration.[210] To give effect to the learning perspective, accountability structures should be designed to keep governments effective in

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[207] Commerce Act 1986, s 51C.

[208] Commerce Commission, above n 18, at 12–15.

[209] Bovens, above n 82, at 192.

[210] Bovens, above n 83, at 463.

delivering on their promises.[211] It tests whether the correct incentives are in place for officials to reflect on their policies.[212] This includes the existence of sufficient sanctions to motivate actors to learn from mistakes.[213]

Lastly, the constitutional perspective views the purpose of accountability as preventing the concentration and abuse of government power.[214] Accountability mechanisms achieve this by providing countervailing checks and balances against the exercise of state power.[215] In regards to the market study power, while there are some concerns from the learning perspective, the main focus of this paper is on the democratic perspective. Therefore, this part briefly assesses the compliance of the market study process with the learning perspective, before demonstrating that the main shortfall of the process is its failure to comply with the democratic perspective.

1 Learning perspective

From the learning perspective, the market study process needs to provide sufficient incentives for officials to reflect on and improve their policies and procedures. For regulators, this often takes the form of *ex-post* performance assessments. As Jacobzone observes, regular performance assessments are "crucial to ensure accountability and to establish the legitimacy of the regulatory authority".[216] In these performance assessments, according to Gilardi, regulatory performance should be assessed in terms of the objectives that they have been assigned.[217] This requires objectives to be clearly defined and identified, measurable targets to be set and the risk of sanctions if these targets are not met.[218]

However, a study of market study practices across 36 countries found that both setting objectives for market studies and *ex-post* performance assessments are uncommon. According to the International Competition Network, 70 per cent of jurisdictions do not

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211 At 462.

212 At 463.

213 At 466.

214 At 463.

215 At 463.

216 Jacobzone, above n 195, at 74–75.

217 Gilardi, above n 85, at 108.

218 Sosay and Zenginobuz, above n 86, at 12–13.

measure the changes in market outcomes following a market study and 85 per cent do not publish criteria for measuring impacts.[219] The report concludes that "[t]his indicates that for many, at present, measuring the costs and benefits of their market studies work… is relatively new, not fully developed, or non-existent".[220] Similarly, in New Zealand, there is no requirement for the Commission to indicate whether the study met its terms of reference.

To promote the learning perspective, this paper recommends that the Commission be required to reflect on whether the market study achieved its initial objectives. There should be a stronger requirement to evaluate the proportionality, costs, benefits and impacts before initiating a market study and after the study has concluded. For example, before starting a market study, there should be a requirement to consider whether the expected social benefits from the study outweigh the potential harm from intervening in the market and whether the market failure could be addressed through less onerous means, such as enforcement action.[221] This would promote accountability by providing further visibility of outcomes and encourage the Minister to only initiate studies that are reasonably necessary or justifiable.[222]

After the study has concluded, the Commission should be required to assess whether the terms of reference, objectives of the study and statutory purpose of "promoting competition in markets for the long-term benefit of consumers" were achieved by the study's outcome. Requiring the Commission to explicitly consider the outcomes of the market study against its statutory purpose would recalibrate the process around consumers as the primary stakeholder rather than the regulated industry. Furthermore, it would allow them to learn from mistakes made during the process and apply the lessons learned to improve their future performance.[223]

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219 International Competition Network, above n 38, at 81.

220 At 82.

221 See Indig and Gal, above n 10, at 105.

222 See ASB, above n 197, at 7.

223 William E. Kovacic and Marc Winerman "The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness" (2015) 100 Iowa L Rev 2085 at 2111.

2 Democratic perspective

From the democratic perspective, accountability mechanisms legitimise government action by allowing affected citizens to participate in the decision-making process.[224] In the market study process, the main mechanisms to loop in the democratic interest are the various participation and input processes. However, the democratic perspective is not only about shortening the distance between regulators and regulated. Inclusiveness is another key aspect of democracy. As Peters observes, if "one ideal of democracy is inclusiveness and equality then making public organisations responsive to only a limited number of individuals and interests appears to lessen that inclusiveness substantially".[225] If inclusiveness is an "ideal of democracy", does the Commission's failure to remedy the disadvantages faced by consumer groups weaken their compliance with the democratic perspective?

The answer is not a simple one. Firstly, the government bookend the process and are responsible for both requesting and scrutinising the market study output. At the latter stage, the opposition and media can scrutinise the report which might indirectly loop in the underrepresented perspectives from the market study. However, while the Commission prefers dealing with interest groups as opposed to individuals, the government must take into account unorganised interests since these actors hold the crucial electoral accountability mechanism. If a critical juncture of consumers are dissatisfied with the market study outcome (and process), in theory, the legislature and media can represent these voters by holding the market study accountable. Therefore, the market study is still connected to the democratic will because its findings must go through parliamentary scrutiny.

However, if the government wanted to distance itself from the grocery market study's recommendations, they face a Catch-22 scenario. On one hand, following the Commission's recommendations would require the government to adopt the findings of a politically unpopular report. On the other hand, if they went too far beyond the Commission's recommendations, it would be perceived as the government being undemocratic by bypassing the Commission's findings developed in conjunction with interest groups and simply doing what they pleased. As Malpass observes, "without the political cover provided by the

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[224] Ludvig Beckman "Deciding the demos: three conceptions of democratic legitimacy" (2019) 22 Critical Review of International Social and Political Philosophy 412 at 415.

[225] Peters, above n 87, at 215.

Commerce Commission it becomes much more Labour versus the supermarkets".[226] In the end, the government's solution was to tip-toe slightly beyond the Commission's recommendations (by making some voluntary recommendations mandatory and reviewing the supermarket industry more regularly than recommended), but not straying too far off the beaten path and reintroducing the rejected third supermarket recommendation.

So, while the democratic will is looped in by the government's requirement to respond, in practice, the government is unlikely to deviate too far from the market study's findings and lose the "political cover" provided by the Commission. Therefore, it is insufficient that the market study process relies solely on the government's response to connect the market study recommendations to the democratic will and hold the study democratically accountable. For this reason, the democratic perspective must be promoted within the market study process itself. As I have emphasised throughout this paper, consumers were underrepresented in practice and disadvantaged in theory throughout the grocery market study. If the market study's main democratic weakness is that industry interest groups are advantaged over consumer groups, accountability mechanisms must amplify the consumer perspective.

Following this, I recommend that the government investigate whether establishing independent consumer bodies (**ICBs**) would strengthen the consumer's voice in the market study process. In the United Kingdom, these are bodies established by statute to safeguard consumer interests rather than the broader public interest.[227] Examples of ICBs include EnergyWatch, which represented consumers in the Office of Gas and Electricity Markets, and Postwatch, which monitored the Royal Mail.[228] ICBs were established in recognition that economic regulators could not always easily and consistently establish the consumer interest.[229] According to the House of Lords, they were founded out of a concern that "regulators, in balancing the interests of the regulated companies… with the consumers, might hear more of the company voice and have too great a regard for their interests".[230] Furthermore, as a parallel statutory body, they serve as a counterweight to challenge the

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[226] Luke Malpass "Commerce Commission's supermarkets softly-softly makes life harder for Government" (8 March 2022) Stuff <www.stuff.co.nz>.

[227] David Stubbs *Regulatory Models for Consumer Bodies: A Report for the Consumer Council for Northern Ireland* (Consumer Council for Northern Ireland, December 2013) at 6.

[228] These bodies are now defunct and have been merged into Citizens Advice. House of Lords, above n 180, at 22.

[229] At 22.

[230] At 22.

economic regulator, providing a form of horizontal accountability that the market study process currently lacks.[231]

As I have emphasised, the consumer voice is not only theoretically vulnerable because of the "logic of collective action", but consumers were *substantially* underrepresented in the grocery market study. The only inputting consumer groups were Consumer NZ and a peripheral fringe of charities. The low consumer engagement likely reflects that, in its current form, the market study process places the onus on consumers to engage with the process. The pluralist analysis in Part IV showed that consumers face high costs and adverse incentives to participate in the market study process. Consumers do not have a vested financial interest in the outcome of the market study, unlike the regulated industry.

In contrast, ICBs actively seek out the consumer perspective, for example, by conducting surveys and interviews.[232] After completing this fieldwork, they are tasked with collating their findings and discerning the consumer interest, before representing this interest in the market study process. It should be observed that the House of Lords has raised valid questions about what is the common framework to discern the consumer interest and to what extent are ICBs representative of the consumer interest. A comprehensive study on the effectiveness of ICBs in the United Kingdom is worthy of a paper in itself. My research has found limited scholarship on this topic. For now, ICBs are not a silver bullet to the market study's accountability problem, but a sensible launching point for further discussion and investigation.

VI Conclusion

The unanticipated public backlash against the retail grocery market study has revealed several regulatory design and procedural issues plaguing the market study process. As I have argued, the market study process diverges significantly from the Commission's other functions. It moves their function into the field of increasing competition rather than prosecuting anti-competitive conduct. It requires them to make policy decisions which balance both competitive and non-competitive objectives. It leaves them vulnerable to regulatory capture by requiring significant engagement with the regulated industry. And it is being exercised

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[231] At 22.

[232] At 25.

within a context of contentious democratic legitimacy, where the Commission faces challenges regarding its appropriateness to wield a policy-making power.

Applying the theory of interest-group pluralism has revealed that the market study process provides greater access and voice to industry actors over consumer groups. This can be shown both empirically and according to pluralist theory. On an empirical basis, Consumer NZ was the only consumer representative group that engaged with the study. On a theoretical basis, according to the neopluralist school, not all interest groups have equal access to the political marketplace. Rather, organised business interests occupy a superior position to consumer groups. The ability of consumer groups to effectively defend their interests is undermined by the logic of collective action, rational apathy problem and free-rider problem. As a result, the Commission likely did not give enough weight to consumer interest groups in the retail grocery market study.

Accordingly, the final market study report's recommendations closely matched the supermarket and supplier interest groups' submissions. By contrast, the recommendation to directly stimulate a third supermarket, which was supported by the consumer and charity group submissions but rejected by the supermarkets and suppliers, was omitted from the final report. By itself, this does not prove anything. But, according to pluralist theory, this outcome was to be expected.

These factors, in combination, demand that future market studies have stronger accountability mechanisms. This paper has established several accountability deficits in the current market study process. Firstly, because the study is conducted at arms-length from the Minister, it is susceptible to the "problem of many hands" where it is unclear whether the Minister or Commission are responsible for the study's outcome. Secondly, the market study process relies heavily on downwards accountability mechanisms to consumers and industry groups. These downwards mechanisms are often voluntarily adopted by the Commission and not regulated by the statute. This represents a problem when these downwards mechanisms grant greater access and voice to industry groups.

I am not suggesting any revolutionary remedies. Instead, these suggestions are intended to be a starting point for further discussion and investigation. From the learning perspective, a requirement to reflect on the objectives of the study would allow the Commission to learn

from mistakes made during the process and improve its future performance. From the democratic perspective, the introduction of independent consumer bodies would remedy the biggest issue I have observed with the market study process: the systemic underrepresentation of consumer voices. As I have emphasised throughout this paper, the Commerce Commission's sole statutory purpose is to "promote competition in markets for the long-term benefit of consumers".[233] The Commission can only achieve this aspirational purpose if consumers are empowered to defend their interests in the market study process.

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 12,903 words.

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