



16 September 2024

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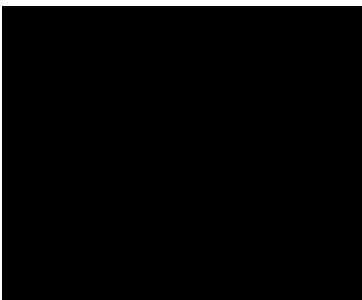
Tēnā koutou

Review of the Grocery Supply Code

Attached are the comments that the New Zealand Food and Grocery Council wishes to present on the ***“Review of the Grocery Supply Code Under Part 2 of the Grocery Industry Competition Act 2023 - Request for views on issues and opportunities to consider within the review”*** paper released on ***1 August 2024***.

We would welcome the further opportunity to comment.

Ngā mihi nui



Raewyn Bleakley
Chief Executive
NZ Food & Grocery Council



COMMERCE COMMISSION REVIEW OF THE GROCERY SUPPLY CODE

**Request for views on issues and opportunities to
consider within the review**

Submission by the New Zealand Food and Grocery Council

16 September 2024

NEW ZEALAND FOOD AND GROCERY COUNCIL

1. INTRODUCTION

- 1.1 The New Zealand Food and Grocery Council (**NZFGC**) welcomes the opportunity to comment on the Commerce Commission's (**Commission**) *Review of the Grocery Supply Code: Request for views on issues and opportunities to consider within the review (Request for Views paper)*.¹ NZFGC supports the Commission's proactive commencement of its first review of the Grocery Supply Code (**Code**) a year earlier than the statutory deadline and agrees with the Commission's statements that there are concerns that "systemic issues are not being addressed and suppliers may not be benefiting from the full protections of the Code".²
- 1.2 The Code's primary intention was to improve the dealings between the major grocery retailers and suppliers by addressing issues caused by the imbalance of negotiating power.³ This imbalance not only impacts suppliers' ability and incentives to invest and innovate, including developing new products, but also on conditions of entry and expansion of others into the retailer grocery market and the viability of suppliers given the regulated grocery retailers (**RGRs**) are the most significant route to market. This ultimately impacts the grocery offering to consumers.
- 1.3 NZFGC advocated for the introduction of a code and strongly supports the need for a mandatory Code. The current iteration was both well intentioned and has made some improvements to the relationships between suppliers and the RGRs. However, while the Code has been a step in the right direction, there has been mixed feedback from NZFGC members about its efficacy and operation to date. NZFGC endorses the Commission's finding that "power imbalances between the supermarkets and suppliers have not been reduced by the new Grocery Supply Code"⁴ and considers there is a pressing need to further refine and clarify the Code so that it is more effective at addressing these imbalances, and to achieve the objectives the Commission originally intended in its Final report on the Market Study into the Retail Grocery Sector.⁵ As the Grocery Commissioner has noted, this review process is an important checkpoint to ensure the 'right rules' are in place for New Zealand to move towards a "more competitive grocery sector with a trading environment that is fairer and more encouraging to confident and innovative suppliers".⁶
- 1.4 Further, there is an urgent need for clarification and guidance on the scope and application of the existing protections in the Code. Like any new regulation, there is uncertainty about how the new protections and obligations under the Code apply in practice, and guidance is needed to create a trading environment where businesses can participate confidently. Monitoring and enforcement of the Code is also required to ensure that the Code is meeting its objectives and provide greater certainty about what conduct is acceptable and not acceptable under the Code. NZFGC is concerned that, with the Commission's focus and resource being prioritised on early reporting and conducting further reviews and inquiries, the industry is not benefiting from the clarity that investigation of potential breaches of the Code would provide. This is undermining supplier confidence in the Code and contributing to confusion about its protections, and is a lost opportunity for improving the dynamic between RGRs and suppliers more quickly.
- 1.5 NZFGC represents the major manufacturers and suppliers of food, beverage and grocery products in New Zealand from the largest companies to emerging start-ups breaking into a highly competitive market and the companies that support them. Our members supply products that consumers purchase from the supermarket shelves every day, as well as being significant exporters. Previous

¹ Commerce Commission *Review of the Grocery Supply Code – Under Part 2 of the Grocery Industry Competition Act 2023 – Request for views on issues and opportunities to consider within the review* (1 August 2024) (**Request for Views paper**).

² Commission media release *ComCom testing if supply code 'rule book' is helping fix power imbalance in groceries* (1 August 2024) <<https://comcom.govt.nz/regulated-industries/grocery/review-of-the-grocery-supply-code/media-releases/comcom-testing-if-supply-code-rule-book-is-helping-fix-power-imbalance-in-groceries>>.

³ Ministry of Business, Innovation and Employment *Consultation paper – New Zealand Grocery Code of Conduct* (July 2022) at [15].

⁴ Commerce Commission *First Annual Grocery Report* (4 September 2024), pg. 5 (**Annual Grocery Report 2024**).

⁵ Commerce Commission *Market study into the retail grocery sector: Final report* (8 March 2022) at [9.13] (**Market Study Report**).

⁶ Foreword from Grocery Commissioner, Request for Views paper, pg. 4.

research shows the sector generates over \$40 billion in the New Zealand domestic retail food, beverage, and grocery products market, and over \$34 billion in export revenue from exports to 195 countries – representing 65% of total good and services exports.

- 1.6 This submission seeks to reflect the experiences of suppliers provided to NZFGC as they relate to this review. NZFGC members have had both positive experiences and engagement as well as confusing and concerning ones. In some instances, NZFGC has received feedback from members that the Code has already begun to enable more positive transactions and improved relationships with the RGRs. However, this is not yet the experience of all members and suppliers (some of whom have had confusing and concerning experiences). NZFGC wishes to emphasise that the issues raised in this submission should not detract from the ‘green shoots’ of change, and it is NZFGC’s hope that addressing the concerns outlined in this submission will improve the experiences for all suppliers. The views expressed in this submission are based on the current understanding and experiences of NZFGC and its members and may not encompass all perspectives or account for changes in the industry or issues with the Code that may emerge (given it has only been in force a short period of time).

2. EXECUTIVE SUMMARY

- 2.1 NZFGC supports the Commission’s review of the Code as it considers the Code could be strengthened and clarified to better achieve its objectives. While well intentioned, the Code does not go far enough to achieve its key objective to address the imbalance in bargaining power between RGRs and suppliers. It is important that the Code adequately protects suppliers and takes into account the specific difficulties that are presented by the heavily concentrated environment in the New Zealand grocery sector.
- 2.2 The Code has only been in operation since 28 September 2023, and applied to existing grocery supply agreements since 28 March 2024. While not all issues with the Code will have materialised during its short period of operation, NZFGC is aware that there are several issues with the current Code which are diminishing its operation and effectiveness. NZFGC believes there are also areas where improvements to the Code could be made to better achieve its objectives. These issues and areas for improvement include:
- (a) The ability for RGRs’ to “contract out” of certain protections in the Code. The current ability for RGRs to contract out of key protections under the Code undermines the effectiveness of those protections and places the burden on suppliers to monitor whether RGRs’ have appropriately contracted out. This entrenches the imbalance of bargaining power between RGRs and suppliers which was the key objective the Code was intended to address.
 - (b) Uncertainties regarding the scope, interpretation and application of the Code’s protections and lack of clarity regarding the terms of the RGRs’ grocery supply agreements (GSAs). NZFGC understands there is confusion amongst its members as to the application of the Code’s protections where a supplier has not agreed to the RGRs’ GSAs, and how the Code’s protections apply to existing GSAs in practice. The scope of the Code’s obligation on RGRs to act in “good faith” is also uncertain, and some suppliers are unsure whether the Code applies to their dealings with RGRs given the definition of “groceries” under the Code. In addition, the RGRs’ approach of setting out GSA terms across various documents has created uncertainty for suppliers as to the exact terms of their trading relationships.
 - (c) Protection of confidential information and anti-retaliation measures. Suppliers are hesitant to raise issues with the Commission due to its obligations under the Official Information Act 1982 (OIA) and a fear of retaliation.
 - (d) Unfair conduct from RGRs and protections for suppliers that are not currently incorporated in the current version of the Code. The Code does not contain all protections that NZFGC advocated it should and does not adequately address some unfair conduct which has arisen since its commencement, such as the inclusion of imbalanced clauses in the template GSAs.
 - (e) Requiring suppliers to engage with both RGR head offices and individual stores. Suppliers have faced significant transaction costs in negotiating GSAs and dealing with both RGR head

offices and individual stores. In addition, the general lack of understanding of the Code and its obligations has resulted in an inconsistent approach to the application of the Code across RGRs and individual stores.

- (f) The implementation of the Code has imposed significant administrative burden and costs on suppliers and has left many suppliers disillusioned. Suppliers have expended (and continue to expend) considerable time and effort (at their own cost) in assessing RGRs' GSA offers for compliance with the Code. It is important that the cost of doing business in the newly regulated environment is significantly reduced for suppliers. NZFGC is also aware of the considerable administrative cost placed on the RGRs by the implementation of the Code. While compliance with new regulation is a cost of doing business, any wasted costs arising from a poorly functioning regulatory regime may ultimately be passed on to consumers.

2.3 NZFGC considers that these issues should be considered as part of the Commission's review, as these issues are undermining the effectiveness of the Code in meeting its objectives. In particular, it is NZFGC's view that each of these issues could be addressed and improved through amendments to the Code, monitoring and enforcement of breaches, and the publication of additional guidance on the Code's protections.

2.4 The issues identified in this submission are not exhaustive as not all issues will have materialised during the short time that the Code has been in operation, and NZFGC has not been able to fully consult with its members on all the issues they face under the Code in the limited time available to respond to the Commission's Request for Views paper. To the extent there are further issues with the Code which come to light in the course of the Commission's Code review process, these should be taken into account as part of the Code review. NZFGC welcomes further consultation with the Commission on any issues identified to date, before any proposed amendments to the Code are made.

3. THE EFFECTIVENESS OF THE CODE IN ACHIEVING ITS OBJECTIVES

3.1 The Code was well intentioned and addresses many issues that NZFGC sought to have included in a mandatory Code. However, not all of NZFGC's recommendations were adopted and the Code in its current form does not go far enough to achieve its key objective: addressing the imbalance in bargaining power between suppliers and RGRs. The Code has also created significant uncertainties as to its application, and NZFGC considers it is not meeting its purposes of promoting transparency and certainty, or creating an environment in which suppliers can participate confidently.⁷

3.2 These uncertainties have been exacerbated by the implementation of the Code. While the Code came into effect on 28 September 2023 it provided a grace period for RGRs to offer new Code-compliant GSAs by 28 March 2024. During this time, RGRs offered new GSAs to suppliers (December 2024), the Commission⁸ and NZFGC separately provided feedback to RGRs on their GSA terms (February 2024) and the RGRs then made updated GSA offers. Suppliers had to review multiple GSA offers, the first of which was received either before or at the same time that it was being reviewed by the Commission and before the Commission had published its checklist (which was not published until late February) or provided feedback on the RGRs' GSAs. This has led to significant administrative costs for suppliers and uncertainty for those suppliers that agreed to the first GSAs offered by the RGRs. More than 50% of suppliers have still not executed GSAs almost six months after expiry of the grace period.⁹

3.3 NZFGC therefore agrees with the Grocery Commissioner that this review is crucial as "*an ongoing power imbalance and lack of trust between suppliers and grocery retailers will ultimately undermine all of the other initiatives intended to deliver a well-functioning and competitive grocery market.*"¹⁰

⁷ Grocery Industry Competition Act 2023, s 16(b) and (c).

⁸ Commission letter to FSNI (9 February 2024); Commission letter to FSSI (28 February 2024) and Commission letter to WWNZ (28 February 2024).

⁹ During the Commission webinar for NZFGC members, 28 August 2024, the Commission advised that more than 50% of suppliers had still not executed GSAs.

¹⁰ Commission media release, above n 2.

Examples of some of the issues experienced with the Code to date, which undermine its effectiveness in achieving its objectives, are set out in section 4 of this submission.

- 3.4 Many of the provisions of the Code are modelled on provisions in the Australian and UK codes. However, New Zealand has one of the most concentrated supermarket sectors in the world, and is significantly more concentrated than either Australia or the UK. The imbalance in bargaining power that exists in New Zealand is more extreme than the imbalance that exists in Australia and the UK. NZFGC's view is therefore that, while the Australian and UK codes were a helpful starting point, the Code needs to better reflect the difficulties presented by the more constrained effective duopoly environment in New Zealand.¹¹
- 3.5 NZFGC made extensive submissions during the Ministry of Business, Innovation and Employment's (MBIE) Code consultation process and various recommendations regarding the content, drafting and implementation of the Code informed by its members' experiences in the New Zealand market.¹² While many of NZFGC's recommendations were ultimately adopted by MBIE in the final version of the Code, others were not. To the extent that NZFGC's recommendations were not adopted, NZFGC continues to hold the view that those recommendations would help to address many of the current issues with the operation and effectiveness of the Code outlined in this submission.

4. DETAILED COMMENTS ON THE ISSUES WITH THE CONTENT AND APPLICATION OF THE CODE AND OPPORTUNITIES FOR IMPROVEMENT

- 4.1 The Commission has sought views on whether there are "*any issues that are impacting the operation and effectiveness of the Code or opportunities to improve*".¹³
- 4.2 NZFGC considers that there are several issues with the current Code which are diminishing its operation and effectiveness, and therefore NZFGC members' faith in the Code. NZFGC believes there are also areas where improvements to the Code could be made to better achieve its objectives, including those outlined in NZFGC's submissions during MBIE's consultation process as noted above.
- 4.3 The issues with the current Code include (including those listed in the Commission's Request for Views paper):
- (a) the ability to contract out of certain of the protections in the Code;
 - (b) uncertainties regarding the application of many of the protections in the Code where a supplier has not agreed to a GSA;
 - (c) issues with understanding and interpreting the Code's protections and other terms of the Code;
 - (d) the Code does not include anti-retaliation protections;
 - (e) issues resulting from requiring individual store level agreements;
 - (f) there is a lack of clarity about the terms of GSAs;
 - (g) unfair conduct and issues not currently addressed by the Code; and
 - (h) the administrative cost and burden created by the implementation of the Code to date.

¹¹ NZFGC *New Zealand Grocery Code of Conduct: Consultation paper – Submission by the New Zealand Food & Grocery Council* (10 August 2022) at [5] (**NZFGC Submission on MBIE consultation paper**).

¹² NZFGC made two formal submissions: NZFGC Submission on MBIE consultation paper (10 August 2022) above n 11, and NZFGC *Consultation paper: Exposure Draft – New Zealand Grocery Supply Code of Conduct and the Grocery Industry Competition (Grocery Supply Code) Regulations 2023 – Consultation Draft – Submission by the New Zealand Food and Grocery Council* (7 July 2023) (**NZFGC Submission on Draft Code**).

¹³ Request for Views paper at [22].

- 4.4 The Code has only been in operation since 28 September 2023, and applied to existing GSAs since 28 March 2024. Given this Code review was announced just 126 days after the formal grace period for existing agreements ended on 28 March 2024, not all potential issues with the Code have had the opportunity to materialise, and NZFGC may not be aware of all the issues with the Code that its members are experiencing. Therefore, the issues identified by NZFGC in this submission should not be treated as exhaustive. As with any new regulation, it often takes time to uncover and address all possible challenges, and continuous monitoring and feedback are essential to identify and resolve latent issues to ensure that the Code is meeting its objectives effectively. NZFGC expects that the Commission will consider any additional issues that are brought to the Commission's attention as the Code review progresses.

The ability to contract out of certain of the protections in the Code

- 4.5 The Code contains a number of prohibitions on RGR conduct which can be 'contracted out' of if agreed to in the GSA and other specified criteria are met. For example, the Code allows RGRs to contract out of:
- (a) the prohibition on unilateral variations if (amongst other things) the GSA provides expressly for the retailer to make the variation and the variation is "reasonable" in the circumstances (cl 9);
 - (b) the prohibition on an RGR setting off any amount against a supplier's invoice or remittance if the GSA provides for the amount to be set-off and the set-off is "reasonable" in the circumstances (cl 12);
 - (c) the prohibition on payments for wastage if the GSA "expressly and unambiguously" sets out the circumstances in which a supplier would be required to make such a payment and the basis of the payment, and the claim for the payment is (amongst other things) "reasonable" in the circumstances (cl 14);
 - (d) the prohibition on requiring payments as a condition of stocking or listing grocery products if the payment is made in relation to a promotion, is required under the GSA and is (amongst other things) "reasonable" having regard to the costs/risks to the RGR in stocking, displaying or listing the products (cl 15);
 - (e) the prohibition on requiring a supplier to pay for an RGRs' business activities if the GSA provides for the payment and it is "reasonable" in the circumstances (cl 16); and
 - (f) the prohibition on requiring suppliers to fund promotions if the GSA provides for the funding and it is "reasonable" in the circumstances (cl 17).

(the **Contracting Out Provisions**).

- 4.6 There are several interrelated issues with the operation of the Contracting Out Provisions which are discussed in turn below.

The ability to contract out of the Code's protections does not address the imbalance of bargaining power between the RGRs and suppliers

- 4.7 NZFGC acknowledges that the current drafting of the Code was intended to provide flexibility for RGRs and suppliers to agree to contract out of certain of the protections in the Code from time to time by negotiation and where doing so was for the benefit of the supplier. However, in practice, the RGRs have sought in their template GSAs to 'contract out' of or provide for the ability to contract out of most of the protections under the Code which allow it;¹⁴ indeed, the initial template GSAs offered by the RGRs to suppliers removed these protections. NZFGC acknowledges that where uncertainty exists commercial entities are likely to test the interpretation of new regulation to their commercial benefit. As the Code does not expressly prohibit this conduct this has resulted in the RGRs

¹⁴ NZFGC acknowledges that in some cases, the RGR included provisions in its GSA which were in the nature of agreements to agree to contract out of certain of the Code's protections, signaling an intention to contract out of the protections at a future time.

contracting out of most of the protections which has created an unfortunate situation for many suppliers where, if they wish to have the protections intended by the Code, they need to negotiate with the RGRs to reinstate them.¹⁵

- 4.8 The current ability to contract out significantly undermines the effectiveness of those protections under the Code and does not address the imbalance of bargaining power between the RGRs and suppliers. NZFGC provided examples of issues regarding GSAs or conduct from RGRs in its submissions to MBIE during the initial Code consultation process as to why these protections were needed.¹⁶ These examples remain relevant to the Commission's Code review as the current format of the Contracting Out Provisions does not allow suppliers to rely on these protections with flexibility to determine when to contract out of these protections for their benefit, as instead they have to negotiate out of a default 'contracting out' position.
- 4.9 While it is NZFGC's view that the Code needs to have a degree of flexibility, the Commission's review should consider whether it is appropriate to allow the RGRs to contract out of the protections listed at [4.5] above in any circumstances (particularly cl 16).
- 4.10 It is NZFGC's view that, in any event, the RGRs should not be permitted to include broad and non-specific contracting out provisions in their GSAs, and suppliers should not be placed in a position where they need to negotiate with the RGRs in order to enjoy the default protections under the Code. The protections under the Code ought to be the default position in the RGRs' template GSAs and contracting out of the protections should not be permitted except where there is a clear benefit to a supplier, and only in very limited circumstances.
- 4.11 NZFGC considers it would also assist if the Commission prepared template options and/or case studies or examples as to how RGRs/suppliers could achieve this in a compliant way. While the Commission provided a checklist to suppliers to assist with their review of the RGRs' offered GSAs, this placed the duty/burden of assessing the newly offered GSAs' compliance with the Code onto suppliers. The Commission subsequently wrote open letters to the RGRs raising concerns with their template GSAs,¹⁷ but the Commission has not yet provided any guidance as to whether it considers the reissued GSAs comply with the Code (although the Commission's decision to commence this review of the Code well before it is required to under Grocery Industry Competition Act 2023 (**GICA**) and the Commission's media comments suggests that the Commission has concerns).

Lack of clarity as to the meaning of 'reasonable'

- 4.12 The Contracting Out Provisions attempt to limit the scope of the ability to contract out of the protections of the Code by only allowing the RGRs to engage in the prohibited conduct if it is "*reasonable*".
- 4.13 However, there is significant uncertainty as to what "*reasonable*" means in this context, leading to uncertainty as to the conduct which is and is not permitted under the Code. While the Code provides some limited guidance on the factors that may be taken into account when assessing reasonableness in some of the Contracting Out Provisions, other Contracting Out Provisions have no guidance at all. Further, there is no guidance provided as to how any factors that are to be taken into account in assessing reasonableness are to be weighed. For example, cl 17 provides that the prohibition on an RGR requiring a supplier to fund promotions does not apply if the relevant GSA provides for the funding and the funding of a promotion is *reasonable* in the circumstances. While cl

¹⁵ The Commission identified issues with all the RGRs' initial GSA offers in relation to provisions which sought to contract out of the Code's protections (see Commission letter to FSNI (9 February 2024); Commission letter to FSSI (28 February 2024) and Commission letter to WWNZ (28 February 2024). In the Commission's grocery newsletter (8 May 2024) it advised suppliers that they were not required to agree to contract out of any protections under the Code; however, the Commission's advice that suppliers should not contract out of Code protections unless doing so is of benefit to the supplier does not reflect commercial reality.

¹⁶ See, for example, NZFGC Submission on MBIE consultation paper at [145] – [148] (payments for promotions), [134] – [137] (wastage); NZFGC Submission on Draft Code at [87] (payments for business activities) and [91] (payments as a condition of being a supplier).

¹⁷ Commission letter to FSNI (9 February 2024); Commission letter to FSSI (28 February 2024) and Commission letter to WWNZ (28 February 2024).

17(3) specifies several factors to which regard must be had in determining whether the funding is reasonable, it does not specify how these factors are to be weighed or applied.

- 4.14 The uncertainty created by the lack of guidance of what is and is not permitted under the Code does not promote fair conduct or certainty of the terms of GSAs, or contribute to a trading environment where suppliers can participate confidently, all of which are purposes of the Code.¹⁸ NZFGC therefore considers the Code should include greater clarity or specificity on the meaning of “reasonable” conduct, and/or set limits on the outer bounds of what is “reasonable” in the context of any Contracting Out Provisions. In particular, there should be examples provided of what would not be considered reasonable in the context of each the Contracting Out Provisions listed at [4.5] to provide clarity to suppliers and RGRs.

The burden is on suppliers to monitor the RGRs’ compliance with the Contracting Out Provisions

- 4.15 The Contracting Out Provisions require the RGRs to give suppliers a notice explaining why their conduct is reasonable in the circumstances either as a matter of course (cl 9, cl 14, cl 15, cl 16) or upon request by a supplier (cl 12 and cl 17). However, this places a significant burden on suppliers to monitor the RGRs’ compliance with the requirements of the Contracting Out Provisions and raise any concerns with the RGR and/or the Commission. As the Commission is aware,¹⁹ suppliers have a genuine fear of potential retaliation if they raise concerns about an RGR’s conduct.
- 4.16 It is inconsistent with the objectives of the Code – and in particular its purposes of promoting fair conduct, transparency and contributing to an environment in which suppliers participate confidently – to place the burden for monitoring RGR conduct on suppliers, particularly given the difficulties in assessing what constitutes “reasonable” conduct under the Code discussed earlier.²⁰
- 4.17 NZFGC previously raised in a submission to MBIE that requiring suppliers to request a written explanation from the RGRs as to why an RGR’s actions are reasonable in the circumstances is inefficient and likely to lead to suppliers not questioning an RGR’s actions.²¹ NZFGC maintains its view that the RGRs should provide a written explanation as to why they believe the criteria set out in each of the Contracting Out Provisions is met on each occasion, without the suppliers having to request it. The Code should also make it clear that the requirement under the Code to provide reasons would not be met by issuing generic standard reasons to all suppliers; reasons should be tailored to the specific conduct, circumstances and supplier in question. For example, in relation to cl 17, the written explanation should explain why the funding to be provided by the supplier for a promotion is reasonable by reference to the benefits to that supplier from the specific promotion which that supplier is funding wholly or in part.
- 4.18 In addition, RGRs should not be permitted to automatically set-off any amount against a supplier’s invoice or remittance under the Contracting Out Provisions if there is a dispute regarding the reasonableness of that set-off. The RGRs’ template GSAs allow them to set-off charges or other amounts against any amounts they owe suppliers. This defeats the purpose of requiring RGRs to demonstrate the reasonableness of a set-off as it places the burden on suppliers to demonstrate why a set-off is unreasonable after it has already been applied. It is important that any dispute regarding the reasonableness of a set-off or other prohibited payment under the Code is resolved before that set-off or payment is applied. NZFGC considers that no deductions should be made from payments due to suppliers without explicit approval from suppliers in writing prior to a deduction being made.
- 4.19 NZFGC also recommended during the MBIE consultation process that the Code should be aligned with Australia and include a general provision that if a retailer seeks to rely on an exception to a

¹⁸ See s 16 GICA.

¹⁹ The Commission noted its Annual Grocery Report 2024 that it is aware that suppliers may be hesitant about getting in touch with the Commission for fear of retribution in the sector (pg. 111).

²⁰ NZFGC previously noted this inefficiency in the context of payments for retailer’s business activities in its first MBIE submission, where it submitted that it was ‘inefficient for suppliers to monitor retailers’ and ‘chase them to comply with the Code’ and that where retailers had taken payments for business activities, they should “communicate and show to suppliers that the activity has occurred”: NZFGC Submission on MBIE consultation paper at [142].

²¹ NZFGC Submission on Draft Code at [73] and [89].

prohibition under the Code, it has the burden of proving the exception applies;²² however, this recommendation was not ultimately adopted in the final version of the Code. NZFGC considers that, at a minimum, the RGRs should bear the burden of proving their conduct is reasonable in the event of any dispute. The burden of proof has significant practical implications and affects parties' incentives to proactively comply with the Code. It is consistent with the approach taken in other contexts, such as s 80A of the Commerce Act which was discussed in NZFGC's submission to MBIE²³ or s 46L(3) of the Fair Trading Act, which provides that, in the context of determining whether a term is an unfair contract term, a term is presumed not to be reasonably necessary in order to protect the legitimate interests of the party advantaged by the term unless that party proves otherwise. NZFGC believes that RGRs are more likely to take a conservative approach in seeking to rely on an exception if their conduct is deemed to be prohibited unless they prove otherwise.

Uncertainties regarding the application of some of the protections in the Code where a supplier has not agreed to a GSA

- 4.20 The Commission has reported that many suppliers have not accepted the RGRs' offers to enter into a new GSA.²⁴ NZFGC is also aware that many of its members have not agreed new GSAs with the RGRs, including because the RGRs have sought to contract out of many of the protections under the Code (as explained earlier in this submission), the significant administrative burden of negotiating GSAs at individual store level (discussed further below at [4.45]) or because suppliers have not received an offer of a compliant GSA. This has created significant uncertainty amongst those members as to whether (and how) the Code's protections apply in those circumstances. Further there was a lack of clarity provided as to the status of the GSAs offered by the RGRs and their compliance with the Code, and NZFGC understands that this lack of clarity is still hindering supplier confidence.
- 4.21 Several of the Code's protections are expressed to apply only in circumstances where the RGR has a GSA with a supplier. For example:
- (a) clause 12 (Payments to suppliers) provides that an RGR must pay a supplier for all grocery products delivered and accepted "*in accordance with a grocery supply agreement*" within the time frame set out in the GSA and, in any case, within a reasonable time after receiving the supplier's invoice;
 - (b) clause 26 (Product ranging, shelf space allocation, and range reviews) provides that RGRs must publish or provide the RGR's product ranging and shelf space allocation principles "*to all suppliers with whom the [RGR] has grocery supply agreements*"; and
 - (c) clause 28 (Price increases) which provides restrictions on how RGRs must respond to proposed price increases from suppliers, only applies if "*the [RGR] has a grocery supply agreement with a supplier for the supply of groceries*".
- 4.22 A "*grocery supply agreement*" is broadly defined as an agreement between an RGR and a supplier.²⁵ Clause 7 of the Code requires RGRs to ensure that GSAs are written in plain language and a copy is provided to the supplier.
- 4.23 It is unclear therefore whether, in the absence of a signed written agreement with the RGRs, suppliers have a GSA in respect of which the protections in the Code apply. Further, there is a lack of clarity as to how the Code's protections apply to existing GSAs.
- 4.24 NZFGC's view is that suppliers should not be penalised for taking time to negotiate the terms of their GSAs or because they have not received a compliant GSA by not being able to rely on the protections under the Code during the negotiation process. Nor should suppliers be in a position

²² For example, see [11(f)] and [60] of NZFGC Submission on MBIE consultation paper.

²³ NZFGC Submission on MBIE consultation paper at [60].

²⁴ Annual Grocery Report 2024, at 110.

²⁵ The Code states a grocery supply agreement has the same meaning as 'supply agreement' under s 17 of GICA which is defined as "an agreement with a supplier".

where they do not benefit from the protections in the Code because of the terms of their existing GSAs.

- 4.25 NZFGC considers the Code should be clarified to ensure that suppliers are entitled to the Code's protections even if they have not yet agreed to a new GSA, and that the Code's protections apply regardless of the terms of any existing GSA that was in place between the RGRs and suppliers at the time that the Code came into effect. In particular, the Code should make it clear that:
- (a) the Code's protections automatically apply to suppliers with existing supply arrangements with RGRs even if a supplier has not yet signed a new GSA;
 - (b) to the extent that the RGRs and suppliers can agree to 'contract out' of certain protections under the Code, this will only apply if suppliers have given express consent *after* the Code has come into effect, so any terms in an existing GSA (executed prior to the enactment of the Code) cannot be taken as the supplier's consent to contract out of the Code's protections; and
 - (c) suppliers cannot be 'deemed' to have accepted a GSA which limits their protections under the Code simply by accepting a purchase order or otherwise complying with some of the terms of a new GSA which has been offered by an RGR but not yet signed by the supplier.
- 4.26 Finally, NZFGC understands that some suppliers did accept the initial GSAs offered by the RGRs. NZFGC shares the Commission's views that the initial GSAs offered by the RGRs were potentially not compliant with the Code.²⁶ The RGRs subsequently prepared updated versions of their template GSAs earlier this year to incorporate feedback provided by suppliers, the Commission and NZFGC. While NZFGC understands that the RGRs agreed to offer the updated GSAs to those suppliers that had already signed the earlier GSAs,²⁷ this has raised some concerns about whether and when the RGRs should be required to offer updated GSAs to suppliers. To ensure that RGRs are treating suppliers consistently and fairly, NZFGC considers the Code ought to include a process for ensuring that any updates to an RGR's standard GSA (including for compliance with the Code's requirements) should be offered to all suppliers. This will ensure that no suppliers are disadvantaged and improve certainty for suppliers.

Issues with understanding and interpreting the Code's protections and other terms of the Code

- 4.27 NZFGC is aware that there is confusion as to the scope of several of the protections under the Code including the obligation on the RGRs to act in good faith, the definition of groceries, and the meaning of a 'reasonable time'. NZFGC has not been able to prepare a complete summary of all of the issues relating to its members' understanding and interpretation of the Code in the very short timeframe provided for making submissions in response to the Commission's Request for Views paper. NZFGC can provide the Commission with further details of these issues as the Commission's review progresses.

Good faith

- 4.28 The Code currently imposes an obligation on RGRs to act in good faith in their dealings with suppliers; however, the scope of this obligation and how it applies is unclear and open to different (and conflicting) interpretations. While cl 6 of the Code provides some examples of factors to be taken into account in assessing whether an RGR has acted in good faith, there is no accompanying guidance explaining the types of RGR conduct which would/would not be likely to breach this obligation. As a result, suppliers and RGRs are likely to have conflicting views about when RGR conduct has breached this obligation. The difficulties in enforcing a good faith obligation against

²⁶ Commerce Commission letter to FSNI regarding its GSA (9 February 2024) at [2] noting that the content of FSNI's GSA "has raised potential compliance concerns"; Commerce Commission letter to FSSI regarding its GSA (28 February 2024) noting the content of FSSI's GSA "has raised potential minor compliance concerns"; and Commerce Commission letter to WWNZ regarding its GSA (28 February 2024) noting the content of WWNZ's GSA "has raised some potential minor compliance concerns".

²⁷ Commerce Commission *Open letter to the grocery sector – Focus of the grocery regulator 2024* (16 April 2024) at [18] "My understanding from the RGRs is that, if you have already signed a contract during the "grace period" a new amended agreement will be offered to you for consideration".

retailers was also identified in the Australian Code review process, where it was noted that “[s]uppliers raised concerns that good faith was too difficult to apply in practice, that there was significant uncertainty in the industry regarding the meaning of good faith, and that the term was open to broad interpretation leading to conflicting views”.²⁸

4.29 NZFGC is aware that its members have had inconsistent experiences in dealings with RGRs since the Code’s commencement. While some members have had positive dealings with RGRs and/or individual stores, NZFGC is also aware of RGR/individual store behaviour toward its members that it considers would be inconsistent with their obligation to act in good faith, including:

- (a) pressure placed on suppliers to sign GSAs;
- (b) an unwillingness from RGRs to negotiate terms of GSAs (for example, not responding to requests to negotiate or presenting GSAs on a ‘take it or leave it’ basis via Docusign);
- (c) representing to suppliers that the acceptance of a purchase order would amount to a deemed acceptance of the RGRs’ GSA; and
- (d) RGRs seeking to contract out of all or most of the protections listed at [4.5] as the default position in their template GSAs.

4.30 Where appropriate, NZFGC has raised these concerns with the RGRs and the Commission. NZFGC acknowledges there has been improvement in RGRs’ conduct but understands that there continue to be outstanding concerns from some suppliers.

4.31 The above examples illustrate the difficulties in applying the concept of ‘good faith’ where the meaning is open to interpretation and there is no substantive guidance as to what an obvious breach of ‘good faith’ would involve. They also demonstrate how the burden is largely on suppliers to monitor RGR compliance with this obligation and to persuade an RGR they are acting in breach of this obligation in order to effect a change in their behaviour. As explained above, requiring suppliers to monitor RGR compliance with the Code is both inefficient and inconsistent with the Code’s key objective.

4.32 NZFGC is supportive of the good faith obligation in principle as it is important there is a strong overarching obligation on RGRs to act properly towards suppliers which can be interpreted in light of retailer practices as they appear or evolve over time, although it remains of the view that a principle of ‘fair dealing’ may be more appropriate in the context of the New Zealand grocery industry and the purposes of the Code.²⁹ In any event, NZFGC considers the Code could be improved by providing clearer guidance (with examples) of the type of conduct that would amount to a breach of the good faith obligation. NZFGC also invites the Commission to consider how this obligation could be better monitored and enforced (as a matter of priority) without placing the burden on suppliers to do so. The application of the good faith obligation in practice requires close monitoring to ensure that it is preventing unfair conduct, and is operating in a manner which meets the objectives of the Code.

The definition of ‘groceries’ is unclear

4.33 The Code applies to suppliers who carry on a business of supplying “groceries” for sale. Groceries are defined in the Code as having the same meaning as the definition in the GICA.

4.34 The GICA sets out an exhaustive definition of “groceries” as follows:

groceries—

(a) means goods in any of the following product categories:

²⁸ Australian Government Treasury *Independent Review of the Food and Grocery Code of Conduct: Final Report* (September 2018) at 27.

²⁹ NZFGC Submission on MBIE consultation paper at [51] – [58]; NZFGC Submission on Draft Code at [33] – [42].

- (i) *fresh produce (for example, fruit, vegetables, and mushrooms):*
- (ii) *meat, seafood, or meat substitutes:*
- (iii) *dairy products (for example, milk, cheese, and butter):*
- (iv) *bakery products:*
- (v) *chilled or frozen food:*
- (vi) *pantry goods or dry goods (for example, eggs):*
- (vii) *manufacturer-packaged food:*
- (viii) *non-alcoholic drinks:*
- (ix) *personal care products (for example, toiletries, first aid, and medicine other than prescription medicine):*
- (x) *household consumables (for example, cleaning products, laundry products, and stationery products):*
- (xi) *pet care products (for example, pet food); but*

(b) does not include, for the purposes of the Act as a whole or for a specified Part of the Act, any good or product category that is excluded from this definition by the regulations for the purposes of the Act or that Part.

- 4.35 NZFGC is aware that there is considerable confusion as to the precise nature of the products which are caught by the definition of 'groceries' which has led to uncertainty as to whether the Code's protections apply to some suppliers. For example, the Code does not define "household consumables" other than by reference to some inclusive examples. It is therefore unclear what other products will be included in this definition. For example, it is not immediately clear whether it would capture household products such as scrubbing brushes, magazines and newspapers, gift wrap, socks, underwear, and party decorations. There are a range of products which are sold through the supermarkets that NZFGC considers ought to be captured by the definition (if they are not already), including dust pans, buckets, cookware, toys, electronic goods, drink bottles, hot water bottles, electric blankets, and baby products.
- 4.36 It is not clear to NZFGC why the definition of 'groceries' was defined exhaustively in GICA and the Code, and specifically excluded some categories of product including alcohol. The Commission in its Market Study relied on an inclusive definition of the term "groceries" in conducting its study.³⁰ In addition, the Australian Code has an inclusive definition of groceries which is also broader than the New Zealand definition in the number of categories that it expressly applies to.³¹ NZFGC considers that, by defining 'groceries' exhaustively, GICA and the Code potentially create two classes of suppliers: those who are entitled to the Code's protections and those who are not. In addition, this exhaustive definition may not be sufficiently flexible to address products which are supplied by the RGRs in the future (but are not currently). While NZFGC is aware of at least one RGR that has advised it will take a consistent approach to all suppliers regardless of their status under the Code, it is NZFGC's view that a wider and more inclusive definition of 'groceries' which captures all products that RGRs supply would better reflect the intention of the Code.

³⁰ Market Study Report at [1.7] and definition of groceries on pg. 10.

³¹ The Australian Code defines 'groceries' as including the following: food, which includes fresh produce, meat and dairy items (excluding dairy items sold for in-store consumption), pet food, non-alcoholic drinks (excluding those sold for in-store consumption), cleaning products, toiletries, perfumes and cosmetics, household goods, electrical appliances and kitchenware, clothing, "do-it-yourself" products, pharmaceuticals, books, newspapers, magazines and greeting cards, CDs, DVDs, videos and audio tapes, toys, plants, flowers and gardening equipment, as well as tobacco and tobacco products.

There is a lack of certainty as to what is a “reasonable time”

- 4.37 Clause 12 of the Code requires the RGRs to pay a supplier within the time frame set out in a GSA and *“in any case, within a reasonable time after receiving the supplier’s invoice for the products.”*
- 4.38 NZFGC considers that the current timeframes under this clause lack clarity and that a maximum payment period should be set by the Code. NZFGC is aware that there have been inconsistent experiences amongst its members in terms of the payment of their invoices. Delayed payments put pressure on suppliers and NZFGC considers that setting a clear maximum payment term will increase certainty for all suppliers in their trading relationships, which will benefit the grocery market.

A lack of understanding has led to inconsistent outcomes

- 4.39 There has been an inconsistent approach to the application of the Code both across the RGRs and at individual store level. NZFGC believes that this is, in part, due to a lack of understanding of the Code and its obligations.
- 4.40 The Food and Grocery Code in Australia contains an explicit obligation on retailers and wholesalers to train their buying teams on the requirements of that code.³² NZFGC considers that similar obligations could be considered for New Zealand.

The Code does not include anti-retaliation protections

- 4.41 NZFGC advocated during the MBIE’s consultation process that the Code should include explicit anti-retaliation protections, including that for a period after a supplier raises a dispute or brings a complaint (for example, six months), or the Grocery Commissioner makes a determination in a supplier’s favour, the Grocery Commissioner may monitor whether a retailer retaliates against that supplier.³³ NZFGC’s recommendations were not ultimately adopted in the Code, although cl 6(3) of the Code states that in determining whether an RGR has acted in good faith, *“whether the retailer has not acted in a way that constitutes retaliation against the supplier for past complaints and disputes”* can be taken into account.³⁴
- 4.42 NZFGC considers the Code’s indirect protection against retaliation is insufficient. The Commission is aware that *“suppliers may be hesitant about getting in touch for fear of retribution in the sector”* and established its anonymous reporting tool to provide a *“secure channel”* for suppliers to raise concerns.³⁵ While NZFGC is encouraged by the establishment of the anonymous reporting tool, the tool raises challenges for the enforcement of the Code: NZFGC understands that there may be difficulties in intervening in relation to specific complaints regarding issues with RGRs raised through the tool unless the supplier has disclosed their identity or identifying features regarding the complaint.
- 4.43 NZFGC members’ fears about raising issues with the Commission, including through the anonymous reporting tool, are well founded. The Commission is subject to the OIA which requires that the Commission release information upon request unless there are *“good reasons”* to withhold it. This includes information provided to the Commission through the anonymous reporting tool. While NZFGC considers that there would be good reasons under the OIA to withhold information provided by suppliers about RGR conduct in many circumstances, the public interest may nevertheless require disclosure. Further, the Commission has a practice of reconciling its obligations under the OIA and need to protect commercially sensitive information by restricting provision of the information to the requester’s legal counsel subject to confidentiality undertakings. While the Commission does consult about the release of information, this is not possible in relation to information provided to the Commission through the anonymous reporting tool and NZFGC is also aware of examples where suppliers did not have an opportunity to comment on the proposed release of their information for various reasons. NZFGC is aware that, as a consequence, suppliers are hesitant to fully engage

³² Clause 40 of the Australian Code (Competition and Consumer (Industry Codes-Food and Grocery) Regulation 2015).

³³ NZFGC Submission on MBIE consultation paper at [108].

³⁴ Clause 6(3)(d).

³⁵ Annual Grocery Report 2024, at pg. 111.

with and provide the Commission with evidence of unfair RGR conduct due to a perceived risk that RGRs would become aware that the supplier has raised issues.

- 4.44 NZFGC considers the Code could be improved by introducing express anti-retaliation protections, including appropriate protections for any confidential information provided to the Commission regarding RGR conduct. Suppliers need assurance that the information they provide to the Commission will not automatically be provided to RGRs and/or their legal counsel. This assurance and protection would also improve the Commission's ability to investigate and take enforcement action in relation to breaches of the Code. Suppliers should be able to ultimately control when their identity in relation to a complaint will be disclosed and the Commission should be able to act on and investigate complaints without disclosing this information to RGRs.

Issues resulting from requiring individual store level agreements

- 4.45 The Code applies to the RGRs and their interconnected body corporates, franchisees and transacting shareholders³⁶ but does not expressly address how suppliers should navigate product supply negotiations with RGRs' 'head offices' and individual stores. NZFGC raised this issue in its submission on the MBIE consultation paper, noting (in relation to "Foodstuffs" entities) that a key issue facing suppliers was the need to conduct negotiations with each of the Foodstuffs head offices, and then often renegotiate with individual retail outlets. NZFGC explained that "[t]his adds to transaction costs, increases uncertainty, and significantly leverages their buyer power (all of which is inconsistent with [GICA])".³⁷ NZFGC recommended that head office negotiated and agreed terms "should prevail across individual stores" while still maintaining the "ability of suppliers to choose to deal directly with local retailers, and for suppliers to decide to make local variations",³⁸ however this was not clarified in the final version of the Code.
- 4.46 NZFGC is aware from its members that since the Code's commencement this issue has continued to cause confusion amongst suppliers in their dealings with Foodstuffs North Island's (**FSNI**) and Foodstuffs South Island's (**FSSI**) head office and its individual stores. In particular, NZFGC is aware that blank template store agreements were being provided to its members by individual stores and that there is confusion regarding the status and hierarchy of store agreements against the FSNI/FSSI GSAs.
- 4.47 NZFGC considers the Code could be improved to address this issue. Requiring suppliers to negotiate GSAs with individual stores is impractical and unnecessarily increases the cost of compliance. NZFGC also understands that there is widespread non-compliance with the Code at the individual store level (where individual stores vary the terms of the template GSAs) which increases uncertainty for suppliers and is inconsistent with the purpose of the Code.
- 4.48 NZFGC also considers that, to the extent they are separate legal entities, RGR head offices should be made jointly/severally liable with individual stores for breaches of the Code. This would assist in addressing the issue NZFGC previously identified in the MBIE consultation process that RGR "head offices have been unable or unwilling to rein in the behaviour of individual stores, however egregious".³⁹

There is a lack of clarity about the terms of grocery supply agreements

- 4.49 There is also a lack of clarity regarding the precise terms of GSAs given RGRs commonly have a suite of documents which comprise their contractual relationship with suppliers. While the RGRs prepared template GSAs, these written agreements incorporated multiple other documents by reference, the majority of which were available online and took precedence over the terms of the written document and were not initially provided in writing to suppliers as required under cl 7 of the Code.

³⁶ GICA, s 8.

³⁷ NZFGC Submission on MBIE consultation paper at [177].

³⁸ NZFGC Submission on MBIE consultation paper at [177].

³⁹ NZFGC Submission on MBIE consultation paper at [29] – [35].

- 4.50 NZFGC initially raised this issue in its submission to MBIE on the Draft Code, noting that the ‘cloud’ of supply agreement documents provided on an ad-hoc basis created difficulties for suppliers to understand the payments required and negatively impacts their decision-making.⁴⁰ In particular, NZFGC noted that *“a common and significant issue is the various different charges a supplier may have with a retailer that makes the cost to serve retailers uncertain or even unknown”* and recommended that steps are taken towards simplifying grocery arrangements to promote transparency and efficiency.⁴¹
- 4.51 Despite the commencement of the Code, the RGRs have continued their approach to setting out the terms of their GSAs across various documents. This creates significant uncertainty for suppliers as to the exact terms of their trading relationship with RGRs (and therefore the terms are not transparent) and requires them to monitor these additional documents for changes and ongoing compliance with the Code. NZFGC considers that GSAs should prevail over any other terms or policies that may be incorporated by reference, and the Code could be improved by mandating further minimum content that must be included in the RGRs’ template GSAs. The RGRs and suppliers would also benefit from the Commission issuing guidance about how transparency and certainty can be achieved in the template GSAs.

Unfair conduct and issues not currently addressed by the Code

- 4.52 The template GSAs that were originally offered to suppliers contained a number of imbalanced clauses which favoured RGRs. Some of these clauses were not expressly prohibited or regulated under the Code but were nonetheless inconsistent with its key objective. Some examples of imbalanced terms that NZFGC is aware of from reviewing both the initial and revised GSA offers include:
- (a) Confidentiality: Excessive confidentiality protections for RGR confidential information.
 - (b) Assignment: Prohibitions on suppliers from assigning their obligations under the GSAs without any corresponding prohibition on RGRs’ assignment.
 - (c) Termination rights: Allowing RGRs to terminate the GSAs in a wider range of circumstances than suppliers.
 - (d) Indemnities: Requiring suppliers to give broad indemnities in favour of the RGRs which cover a range of contingencies.
 - (e) Intellectual property: Permitting RGRs to use supplier intellectual property with limited or no restriction.
- 4.53 These types of clauses risk entrenching the imbalance of bargaining power between RGRs and suppliers as they tip the balance of the contractual bargain in the RGRs’ favour from the outset. In addition, it is difficult for suppliers to negotiate a more favourable position on these terms given the imbalance of bargaining power between suppliers and the RGRs. It is NZFGC’s view that the existing prohibition on unfair contract terms under the Fair Trading Act does adequately address this issue. While the unfair contract terms regime was expanded under GICA to apply to GSAs with an annual value of less than \$1m,⁴² suppliers are required to file proceedings to declare the terms of any GSAs are unfair before there would be any consequences for an RGR including an unfair term in its GSA.
- 4.54 There is currently no incentive for RGRs to provide more balanced terms in their template GSAs when these matters are not expressly regulated under the Code. NZFGC considers the Commission should, as part of its Code review, consider whether the Code’s protections should extend to these types of terms and any other imbalanced terms that were included in the RGRs’ template GSAs.

⁴⁰ NZFGC Submission on Draft Code at [48].

⁴¹ NZFGC Submission on Draft Code at [172].

⁴² GICA, ss 203 – 215.

- 4.55 Further, during the MBIE consultation process, NZFGC identified a number of additional issues that it submitted should be addressed by the Code but which were ultimately addressed (or not in the manner NZFGC recommended). These include issues relating to investment buying⁴³, range reviews (and specifically the lack of transparency as to the reasons for RGR decision making particularly relating to deletions and supplier access to data)⁴⁴, the transparency of costs (which NZFGC acknowledges have improved somewhat since the Code was implemented, but further improvement is still needed)⁴⁵, shelf space allocations⁴⁶, supply chain procedures,⁴⁷ intellectual property protections (including for private label),⁴⁸ and transport requirements⁴⁹. NZFGC invites the Commission to consider these issues as part of its review.
- 4.56 NZFGC also invites the Commission to reconsider the notice periods under the Code. NZFGC considers that many of the notice periods under the Code are too long.⁵⁰ For example, as the average inventory holding of fresh product is 8 – 15 days, the 30-day notice period for a retailer to make a claim for damaged grocery products or shortfall under cl 21(8) is of no value.⁵¹
- 4.57 The above list are examples of only some of the issues previously raised by NZFGC during the MBIE consultations. NZFGC understands that the Commission is already familiar with NZFGC's submissions and has not repeated all of the issues identified in those submissions.

Administrative costs and burden created by the implementation of the Code

- 4.58 The implementation of the Code has imposed a significant administrative burden and costs on suppliers. It was difficult and time-consuming for suppliers to review the initial GSAs offered by the RGRs as they did not follow the same standard format, the RGRs had sought to contract out of most (if not all) the Contracting Out Provisions in the Code and there was considerable uncertainty regarding the terms of the GSAs and the application of the Code more generally. Ultimately, as the Commission identified in its open letters to the RGRs in late February, the initial GSAs were not Code-compliant, and the RGRs then offered new GSAs. As explained earlier, there remains uncertainty as to the status of those GSAs in the absence of guidance from the Commission and the commencement of the Code review.
- 4.59 While implementing a new regulatory regime often presents significant challenges and adjusting to a new regime often requires a period of learning and adaptation, the experience with the implementation of the Code (including the offer of multiple GSAs, delays in providing Code-compliant GSAs and the uncertainties created by a lack of guidance) has been unfortunate and NZFGC is concerned that suppliers are becoming disillusioned with the Code given the administrative effort and cost required to rely on it. NZFGC's members have spent considerable time and effort (at their own cost) to understand the Code's protections and attempt to ensure the multiple GSAs offered by RGRs are compliant with them. For some suppliers, despite this significant effort, they have been unable to resolve compliance concerns and have still not (almost six months after the end of the Code's grace period) been provided with Code-compliant GSAs.
- 4.60 The cost of doing business to operate in the now regulated grocery industry and ensure compliance with the Code's requirements needs to be much lower than it has been to date. NZFGC considers that suppliers and the RGRs would be greatly assisted if the Commission provided guidance on its expectations for GSAs and published detailed guidance on how the Code's protections should be interpreted/applied, including examples of conduct that the Commission considers is (and is not)

⁴³ NZFGC Submission on MBIE consultation paper at [124]; NZFGC Submission on Draft Code at [107] – [113].

⁴⁴ NZFGC Submission on MBIE consultation paper at [156] – [161].

⁴⁵ NZFGC Submission on Draft Code at [172]; NZFGC Submission on MBIE consultation paper at [66] – [67].

⁴⁶ NZFGC Submission on Draft Code at [162].

⁴⁷ NZFGC Submission on Draft Code at [164].

⁴⁸ NZFGC Submission on Draft Code at [125] – [130].

⁴⁹ NZFGC Submission on Draft Code at [65] – [68].

⁵⁰ For example, see NZFGC Submission on Draft Code at [116], proposed mark-ups to cl 27 (price increases),

⁵¹ NZFGC Submission on Draft Code at [116].

acceptable under the Code. NZFGC acknowledges that while the Commission published open letters to the RGRs raising concerns with their initial GSAs and issued a checklist to assist suppliers with their review of the GSAs, the checklist does not explain what types of conduct would breach the Code. It was also unfortunate that the checklist was published well after the RGRs issued their initial GSAs and only a few weeks before the end of the grace period, which limited its effectiveness as some suppliers had already agreed to the terms offered by RGRs. NZFGC – please review and confirm this is correct. No further guidance has been provided on the compliance or otherwise of the RGRs' reissued GSAs.

- 4.61 NZFGC also considers (as explained earlier) that monitoring and enforcement of the Code is also required to ensure that the Code is meeting its objectives, and provide greater certainty about what conduct is acceptable and not acceptable. Whilst the Grocery Commissioner has published some helpful updates on the Commission's website (including the letters to the RGRs regarding their GSA template terms), it is unclear whether the Commission has any active investigations into compliance with the Code. NZFGC considers it would promote fair conduct and supplier confidence if there were greater visibility of the Commission's monitoring and enforcement activities, for example by establishing a grocery case register which records the Commission's current investigations under GICA and the Code.
- 4.62 NZFGC encourages the Commission to consider as part of its review what steps it can take to address this administrative burden and ensure that any amendments to the Code that arise from this review process provide greater clarity and certainty for suppliers, and help to reduce the administrative burden on suppliers.

5. PROCESS

- 5.1 NZFGC understands that the purpose of the Commission's Request for Views paper is to "*provide an opportunity for interested parties to provide views ... about the issues to consider within a review*" of the Code. Accordingly, NZFGC has identified in this submission some of the key issues that it considers the Commission ought to consider as part of its review of the Code.
- 5.2 As explained earlier, given the short period of time that the Code has been in operation, there are likely other issues with the Code which have not yet materialised. The limited time to make submissions on the Request for Views paper also means that NZFGC has not had the opportunity to identify all of the issues that its members may be experiencing with the Code, or the potential solutions to the issues experienced to date.
- 5.3 NZFGC understands that there will be further opportunities to engage with the Commission on its review, once it has fully scoped and planned its review process. NZFGC welcomes this and expects that any further consultation will take place before the Commission issues any proposed amendments to the Code.