



Review of the Grocery Supply Code Woolworths New Zealand Limited Submission

16 September 2024

1. Introduction

- 1.1 This document outlines Woolworths New Zealand Limited's (**WWNZ**) feedback on the Commerce Commission's '*Request for views on issues and opportunities to consider within the review*', as part of its first review (**Review**) of the Grocery Supply Code 2023 (**Code**).

2. Executive summary

- 2.1 We support the Code, but it is too early to be able to properly evaluate the impact of the Code or to contemplate significant changes:
- (a) the introduction of the Code represented a significant development in terms of the regulatory environment that the New Zealand grocery sector operates in. It formed part of a broader suite of regulatory changes, which included the Commerce (Grocery Sector Covenants) Amendment Act 2022, Grocery Industry Competition Act 2023 (including the new wholesale regime) and the Consumer Information Standards (Unit Pricing for Grocery Products) Regulations 2023. These were all introduced in a short period of time, are still bedding in, and they all interact with one another in terms of their overall impact in the sector;
 - (b) the Commission announced the Review before some key aspects of the Code were even operational (and only five months after the rest came into full operation);
 - (c) in Australia the first review of the equivalent grocery code only occurred after it had been in force for several years;
 - (d) the Ministry of Business, Innovation and Employment (MBIE) and Parliament (in enacting the Grocery Industry Competition Act 2023 (**Grocery Act**)) expected a longer period before any review is conducted (noting anything sooner would require a review to begin "before the impacts of the Code are able to be evaluated");¹

¹ (February 2023). Grocery Industry Competition Bill: Officials' Report to the Economic Development, Science and Innovation Committee. Page 43. https://www.parliament.nz/resource/en-NZ/53SCED_ADV_129934_ED11982/4b7b0091994de94c6064db9df0ae615c35b2b8ac

- (e) the Commission has not raised any concerns with WWNZ about the existing Code as part of our regular dialogue (nor have suppliers);
- (f) significant investments in time, training, and drafting and agreeing new contracts (more than [] contracts to date) have been made in achieving compliance with the existing Code (regulatory certainty is necessary to support investment in New Zealand, and duplicative or disproportionate regulatory change adds cost to the system, which risks higher prices to consumers);
- (g) a Review after such a short period of time is inconsistent with one of the purposes of the Grocery Act, which is to promote certainty about the terms of agreements between RGRs and suppliers;
- (h) there are costs and risks from making changes, including the risks of unintended consequences for suppliers and consumers. Those risks are particularly acute given (i) the Commission has not articulated what specific concerns it is seeking to remedy from the early Review (so there is a lack of a problem definition), and (ii) the current Code is based on the Australian Food and Grocery Code (which has been in place since 2015), whereas any significant changes from that would inevitably represent untested regulatory interventions.

2.2 The Commission should, therefore, (and as contemplated by the Grocery Act) allow another year before evaluating the need for any changes to the Code.

2.3 In making this submission, WWNZ appreciates that there is a range of pre-existing perspectives on the Code,² which means great care needs to be taken to ensure those views are put to one side and the outcome of the Review is not predetermined. As an industry participant most acutely impacted by the Code (given the Code is currently, in effect, “one way” regulation), it is important that WWNZ’s submissions are given a fair and open minded hearing as part of the Review process. The Commission should avoid forming conclusions based on anecdote and speculation, and not be committed to a particular outcome until all submissions (and other relevant matters) have been considered in light of:

- (a) the overall purpose of the Grocery Act;
- (b) the Government Expectations for Good Regulatory Practice (which require robust analysis and implementation support for changes to regulatory

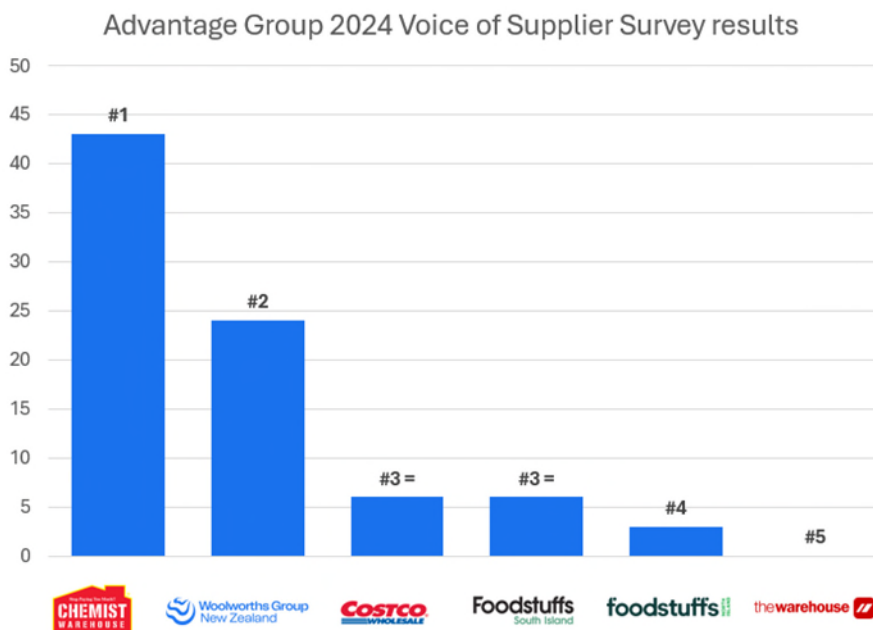
²Including the Grocery Commissioner stating that “if I drafted the first code, it would certainly be different to the way it is at the moment”. See: (2 September 2024). “We want to fix the cause of the issues” - Pierre van Heerden on acting early. Food Ticker. <https://www.foodticker.co.nz/we-want-to-fix-the-cause-of-the-issues-pierre-van-heerden-on-acting-early/>

systems, and that any regulatory intervention “achieve[s its] objectives in a least cost way” and “is proportionate, fair and equitable”);³ and

- (c) the Ministry of Regulation’s focus on ensuring any regulation “minimises unnecessary costs and unintended outcomes”.⁴

3. Our submissions

3.1 **WWNZ supports the Code:** We have long supported the introduction of a mandatory Code to enshrine a higher standard of practices across the sector and ensure small suppliers in particular get a fair go (including both during the Commission’s Market Study and during MBIE’s and Parliament’s consultation on the Code). Since it was introduced we have worked hard, and made significant investments (in both time and resource) to ensure our systems, processes, and contracts comply with the Code. Healthy supplier and retailer relationships are vital to the success of our business and for a sustainable and innovative retail sector. Our commitment to positive supplier relationships is demonstrated by WWNZ receiving the most positive sentiment from suppliers among regulated grocery retailers (**RGRs**) in the Advantage Group “Voice of Supplier Survey”, and being rated higher than other non-regulated grocery retailers (notably Costco and The Warehouse). See below.



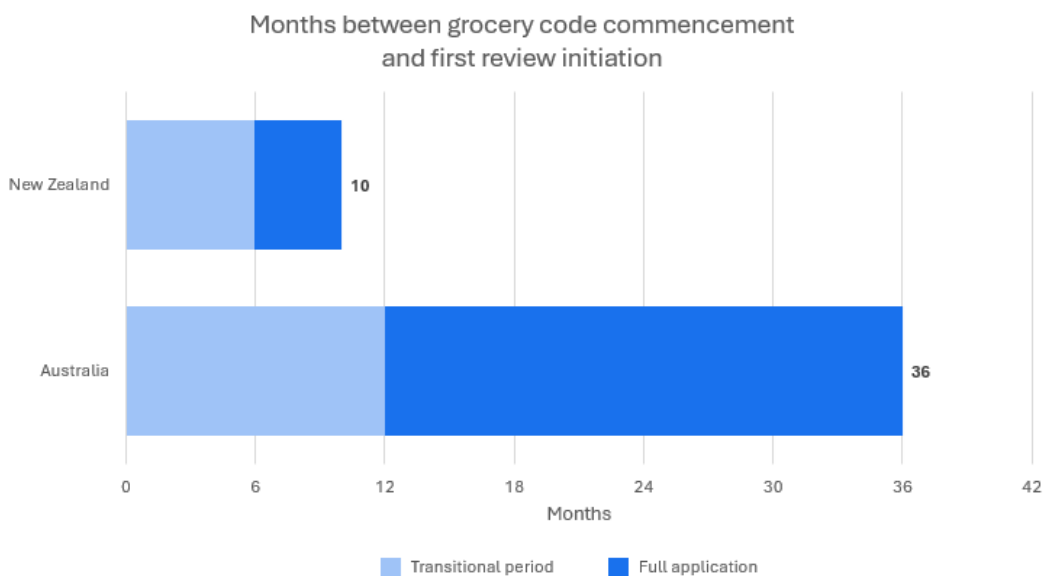
3.2 **It is too soon to assess the impact of the Code, or to contemplate significant changes:** The Code only took full effect on 28 March 2024, the dispute resolution scheme (which is a key part of the Code) only became operational on 5 September 2024 (after the Commission announced its Review), and suppliers are still signing up to the new Grocery Supply Agreements (**GSAs**) that WWNZ has developed to reflect the

³ (April 2017). The Treasury. Government Expectations for Good Regulatory Practice. <https://www.treasury.govt.nz/sites/default/files/2015-09/good-reg-practice.pdf>

⁴ Ministry for Regulation. Strategic Intentions. <https://www.regulation.govt.nz/mfr-what-we-do/corporate-publications>

requirements of the Code.⁵ It is, therefore, too soon to make any meaningful assessment of the impact of the Code. That, coupled with the significant investments that have been made in ensuring systems, contracts, and processes comply with the existing Code, mean that further time should be taken before contemplating any significant changes to it. In developing the Grocery Act, MBIE expressly rejected submissions calling for an earlier review of the Code, stating that a shorter time frame would require a review to begin “before the impacts of the Code are able to be evaluated”.⁶ In enacting the Grocery Act, Parliament plainly agreed with that position. Further:

- (a) in Australia, the first review of the equivalent grocery supply code occurred only after it had been in force for several years.⁷ See below.



- (b) the Review of the Code only five months after it became fully operational, and while suppliers are still signing up to new GSAs, is inconsistent with one of the purposes of the Grocery Act, which is to promote certainty about the terms of agreements between RGRs and suppliers.⁸

Duplicative or disproportionate regulatory costs or changes are not in the interests of New Zealand consumers, and regulatory certainty is important to enable both retailers and suppliers to invest in New Zealand.

⁵ Woolworths made offers to all of its existing suppliers to sign its new Code-compliant GSAs by the deadline of 28 March 2024 - however, approximately [] of suppliers are yet to sign the terms (as, despite written agreements being an obligation on RGRs under the Code, there is no obligation on suppliers to sign the terms).

⁶ (February 2023). Grocery Industry Competition Bill: Officials’ Report to the Economic Development, Science and Innovation Committee. Page 43. https://www.parliament.nz/resource/en-NZ/53SCED_ADV_129934_ED11982/4b7b0091994de94c6064db9df0ae615c35b2b8ac

⁷ In Australia, the first review of the Food and Grocery Code of Conduct was initiated in March 2018, three years after the commencement of the related Regulations in March 2015, and two years after it came into full force in March 2016. In contrast, the Review was launched on 1 August 2024, only 10 months after the initial commencement of the Code on 28 September 2023, and only four months after it came into full force at the end of March 2024.

⁸ Grocery Act, section 16(b).

- 3.3 **Neither the Commission nor suppliers have raised any substantive Code compliance concerns with WWNZ:** WWNZ was surprised by the public announcement of the Review as it has been in ongoing dialogue with the Commission regarding the new regulatory environment. If the Commission or suppliers have substantive Code compliance concerns that justify reviewing the Code earlier than required under the Grocery Act, WWNZ would expect those to have been raised with us - that has not been the case.
- 3.4 **Rather than amendments, there are better ways to support the objectives of the Code at this early stage:** To the extent the Commission has any concerns at this early stage about the objectives of the Code being met, there are better ways to achieve those objectives:
- (a) **The Commission communicating with RGRs and suppliers, or publishing guidance, on the areas where the objectives of the Code could be better achieved.** As noted, WWNZ has not had such communications from the Commission to date. The Government Expectations for Good Regulatory Practice state that regulators are expected to “provide accessible, timely information and support to help regulated parties understand and meet their regulatory obligations.”⁹
 - (b) **The Commission identifying areas for improvement in relation to specific RGRs, rather than more generalised commentary.** Perceptions of poor treatment of suppliers by an RGR are reputationally very damaging. While participants in the grocery sector are aware of where any problems may lie, as is the Commission, the general public may not be. If the Commission considers that some RGRs are not achieving the same Code standards as others, it would be helpful for the Commission’s communications and guidance to be specific about this to encourage compliance and avoid reputational damage to one entity based on the conduct of another. WWNZ should not be subject to further (or continually changing) regulation due to the conduct of the lowest common denominator in the sector, instead of the conduct of the entity in question being called out by the Commission.
- 3.5 **Contracting for flexibility, which the Code allows, is not “contracting out” of the Code:** There appears to be a misunderstanding among some industry stakeholders that RGRs have included provisions in their GSAs to “contract out” of the Code. That misunderstanding is reflected in the Commission’s Annual Report where it said that “areas that have been raised to date include clauses that allow parties to “contract out” of protections.”¹⁰ However, there is no ability to “contract out” of the Code. What WWNZ’s GSAs include are provisions that provide flexibility for certain matters to be subsequently agreed between an RGR and the relevant supplier (such as payments or contributions from a supplier to certain activities), as expressly contemplated by the Code.

⁹ (April 2017). The Treasury. Government Expectations for Good Regulatory Practice.

<https://www.treasury.govt.nz/sites/default/files/2015-09/good-reg-practice.pdf>

¹⁰ (4 September 2024). First Annual Grocery Report. Commerce Commission. Page 111.

https://comcom.govt.nz/data/assets/pdf_file/0019/362305/Annual-Grocery-Report-2024.pdf

- (a) These flexibility provisions only provide a framework for subsequent agreements, and any subsequent agreements themselves:
- (i) still require the mutual agreement of both the supplier and the RGR; and
 - (ii) must be reasonable in the circumstances and RGRs must act in good faith - as required by the Code.
- (b) These flexibility provisions are necessary in the context of the commercial reality of dealings between RGRs and suppliers. WWNZ deals with more than 1,500 suppliers. WWNZ's upfront GSAs need to provide for flexibility to reflect the specific requirements of the relationship with a given supplier. It would not be commercially practical to only allow such agreements where they were expressly agreed in the upfront GSAs (as opposed to WWNZ's approach of providing for flexibility in the upfront GSAs to agree such matters as / when reasonable).
- (c) These flexibility provisions have been recognised as being beneficial to suppliers. In the recent review of the Australian Food and Grocery Code of Conduct (**Australian Review**), it was noted that it would not be in suppliers' interests for payments / contributions from suppliers to be prohibited outright, and that there needs to be flexibility to reflect the specific requirements of the supplier / retailer relationship. Examples cited were that:¹¹
- (i) a supplier might want to agree to contribute to in-store promotions to enhance the success of their product.
 - (ii) a supplier might want to agree to share the costs of market research where mutual benefits can be expected from this being undertaken jointly by the supplier and the retailer.

The Australian Review, therefore, recommended that these types of payments be allowed but subject to a reasonableness test and a requirement to agree to them in writing.¹² These are the same safeguards that already exist in the Code in New Zealand, and provide an appropriate balance of retailer and supplier interests. Further, the Australian Review noted (and this is equally applicable in New Zealand) that any flexibility provisions would also be subject to the general consumer law "protections against unconscionable conduct and unfair contract terms [that] would further protect against supermarkets coercing suppliers into agreeing to exceptions that are not in their interests."¹³

- (d) These flexibility provisions were included in WWNZ's GSAs that WWNZ consulted on widely prior to implementation, including with the Commission. The Commission did not raise concerns and while some suppliers asked

¹¹ (June 2024). Independent Review of the Food and Grocery Code of Conduct: Final Report. Australian Treasury. Pages 60 - 61. <https://oia.pmc.gov.au/sites/default/files/posts/2024/06/Final%20Report%20-%20Food%20and%20Grocery%20Review%202024.pdf>

¹² Page 58.

¹³ Page 9.

questions about how the provisions were intended to work, once WWNZ provided further explanation (making it clear that they provided for flexibility only, and that any subsequent agreements would require mutual agreement), suppliers generally appeared satisfied with these flexibility mechanisms. Based on that consultation, WWNZ had legitimate expectations that the Commission did not have any issues with its GSAs, and on that basis WWNZ has incurred significant time and resources since then implementing those GSAs.

- (e) Removal of the ability to provide for subsequent flexibility and mutual agreement on these matters would have significant detrimental operational and commercial impacts on WWNZ and our suppliers, and risk unintended consequences for both suppliers and consumers. This was noted in the recent Australian Review: “Highly prescriptive legislation that inserts Government in every part of the relationship between supermarkets and their smaller suppliers would likely have unintended and undesirable consequences for suppliers and consumers.”¹⁴ If all costs and risks in a retailer / supplier relationship are required to be borne by retailers (as opposed to being able to be allocated through ordinary course and bespoke commercial agreements), over time those increased costs to retailers will as a matter of economics likely need to flow through to either lower purchase prices to suppliers or higher retail prices to consumers, in particular given suppliers’ margins / returns are often many times the size of WWNZ’s. The risks of unintended consequences from the Commission making substantive changes to the Code are particularly acute given:
- (i) the Commission has not articulated what specific concerns it is seeking to remedy from the early Review (so there is a lack of a problem definition); and
 - (ii) the current Code is based on the Australian Food and Grocery Code (which has been in place since 2015), whereas any significant changes from that would inevitably represent untested regulatory interventions.

3.6 **The Commission’s consideration of supplier promotional funding:** The Commission’s First Annual Grocery Report advises that the Commission is considering the practice of supplier promotional funding.¹⁵ This indicates that supplier promotional funding may also be considered as part of this Review. The practice of supplier promotional funding involves suppliers charging higher upfront invoice prices to retailers, with discounts to achieve an overall lower “net price” provided to retailers through promotional funding on a periodic basis. It is not a matter of WWNZ requiring suppliers to provide promotional funding, but rather it is a practice that benefits and is primarily driven by suppliers (not by WWNZ), and is common across the world (it is not unique to New Zealand). This is because it is a practice that allows suppliers to control the timing of a retailer’s promotional programme in relation to the supplier’s products. WWNZ’s role as a retailer (and NZGW’s role as a wholesaler) would be

¹⁴ Page 10.

¹⁵ (4 September 2024). First Annual Grocery Report. Commerce Commission. Page 97.
https://comcom.govt.nz/data/assets/pdf_file/0019/362305/Annual-Grocery-Report-2024.pdf

significantly simplified if suppliers were instead willing to agree to lower upfront (everyday) cost prices to WWNZ (as it would simplify WWNZ's ability to offer everyday low prices to consumers, simplify ensuring pricing integrity and clarity to consumers, and smooth demand profiles, which would provide supply chain efficiencies), as well as enhancing NZGW's ability to offer competitive everyday wholesale prices to other retailers). However, given the majority of large suppliers currently negotiate higher upfront prices and then offer periodic promotional funding, if the Commission were to make any recommendations that restricted the continuation of supplier promotional funding, the Commission would need to implement appropriate transitional requirements to ensure those changes were reflected in lower competitive everyday prices to retailers (to ensure consumers did not face higher overall grocery prices as a result).

4. Concluding comments

- 4.1 We hope that this information assists the Commission. As a business that is most impacted by the Code, we are available to meet with the Commission to discuss this submission. It is important that WWNZ's submissions are given a fair and open minded hearing as part of the Review process and that the Commission not be committed to a particular outcome until all submissions (and other relevant matters) have been considered.
- 4.2 In particular, for the reasons outlined above, we are firmly of the view that it is too soon to be able to evaluate the impact of the Code, or to contemplate significant changes to it. However, if the Commission disagrees and does contemplate making changes to the Code in the context of its current Review, **Appendix One** sets out WWNZ's views on potential improvements to the Code that the Commission should include in any consideration of changes.

Appendix One

- 4.3 As outlined in our submission, we are firmly of the view it is too soon to be able to evaluate the impact of the Code, or to contemplate significant changes.
- 4.4 However, if the Commission disagrees and does contemplate changes to the Code in the context of its current Review, the following sets out WWNZ's views on potential improvements that the Commission should consider:
- (a) **The good faith obligations should be reciprocal**, i.e. both RGRs and suppliers (at the least, large suppliers) should be required to act in good faith. New Zealand law requires reciprocal good faith obligations in other areas (the Courts have said that good faith obligations must necessarily “flow both ways. To suggest otherwise would make no sense”).¹⁶ The good faith obligations included in the new Canadian grocery supply code are reciprocal.¹⁷ Reciprocal good faith obligations are particularly important given that:
- (i) Suppliers' commercial incentives in dealing with retailers are to increase cost prices, and it is retailers' role to negotiate on behalf of New Zealand consumers for fair prices, while always acting in good faith.
 - (ii) WWNZ is already seeing some large multinational suppliers seeking to rely on the Code¹⁸ to refuse to provide justification for the extent of cost price increases being sought.
 - (iii) One sided obligations risk “chilling” the behaviour of WWNZ's employees in fulfilling their commercial role to challenge the basis for unreasonable cost price increases from suppliers (which risks higher prices to New Zealand consumers).
 - (iv) It is not correct to assume that bargaining power sits with WWNZ compared to many of its suppliers:
 - (aa) Large multinational suppliers are often larger than WWNZ , and their returns much higher than WWNZ's and Woolworths'. See the diagram below.¹⁹

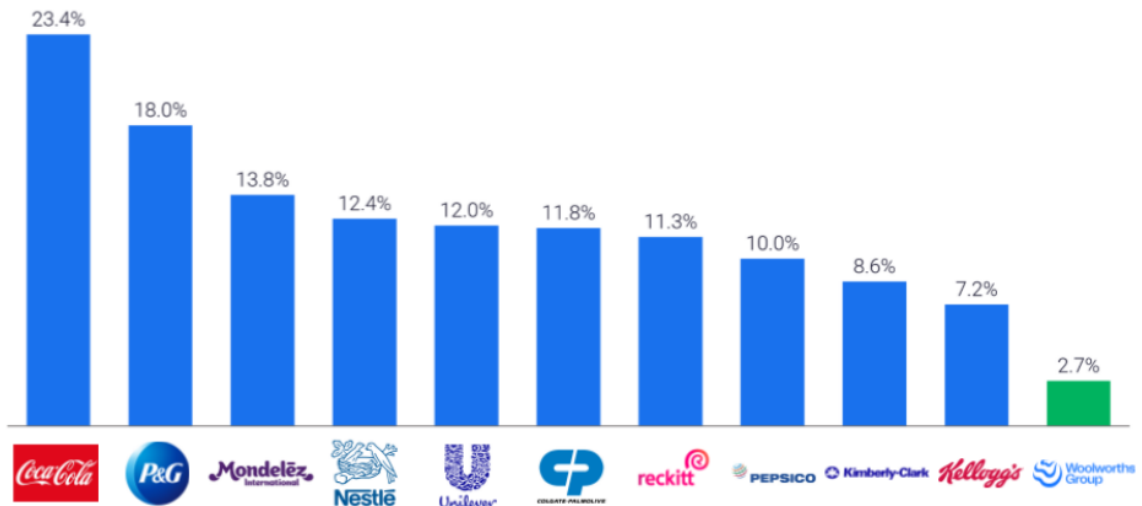
¹⁶ *Young v Tower Insurance Limited* [2016] NZHC 2956 [7 December 2016] at paragraph 163.

¹⁷ In Canada, the new code will impose good faith obligations on all parties in the sector: “*in general it is expected that all supply chain players – Retailers, Suppliers, wholesalers, larger and smaller entities are expected to act in Good Faith and live up to the spirit of fair and ethical dealing, including concepts around Reasonable Notice and communicating with one another in sufficient detail and in an effective format.*” See: (26 June 2024) Canadian Industry Grocery Code of Conduct Provisions. Pages 1 - 2. <https://canadacode.org/wp-content/uploads/2024/07/Final-Grocery-Code-Provisions-June-26-2024.pdf>

¹⁸ []

¹⁹ Source: Company Annual Reports; S&P Capital IQ. All figures represent F23, except for Reckitt (F22 due to availability of data); currency conversions as at the last date of the financial year. Net Profit After Tax (NPAT) figures are not net of profits not attributable to shareholders, and exclude non-recurring costs.

Global CPG profitability, FY23, NPAT margin (%)



- (bb) In many categories a small number of multinational suppliers account for 70% to 90%+ of products sold. 64% of all of WWNZ sales come from products sold to us by the largest 5% of our suppliers.
- (cc) Suppliers' costs to us have a much bigger impact on the retail prices paid by New Zealand consumers than any other cost or our margin. See below.



Reciprocal good faith obligations on suppliers would also benefit other retailers - for example, such obligations may have benefited The Warehouse in relation

to the recent concerns it had about obtaining the supply of Weet-Bix from Sanitarium.²⁰

- (b) **There should be obligations or incentives for suppliers to agree to written supply terms:** The Code imposes an obligation on RGRs to have a written supply agreement that complies with, and contains all of the supplier protections provided for under the Code. However, it imposes no obligation or incentives on existing suppliers to agree to that written supply agreement. This means that, despite WWNZ offering GSAs to all its suppliers that are fair and balanced (and following consultation with the Commission and the supplier community), WWNZ's ability to comply with this aspect of the Code is outside of its control. A party should not be subject to (and certainly not liable for) requirements that are outside its control.²¹ It is also problematic from a commercial perspective to not have written supply terms in place. A Code requirement similar to that included in the new Canadian grocery supply code would be helpful: *"No Party who conducts or intends to conduct business with another Party shall purposely avoid or refuse entering into an Agreement (particularly a written Agreement) with that other Party."*²² At the very least reciprocal good faith obligations on suppliers to agree to reasonable GSAs should be considered.
- (c) **The Code protections should distinguish between large and small suppliers:** Reflecting the above, we consider that small to medium suppliers, who may find larger retailers complex to deal with, should be the primary beneficiaries of the Code (not large multinationals). One option would be to use the same definition of "large" applied in s 45 of the Financial Reporting Act 2013 (either assets in excess of \$66 million or revenue in excess of \$33 million).²³ At the very least, it needs to be recognised that if the Code tips the ledger too far in favour of suppliers (in particular large multinationals), or places unnecessarily onerous obligations on RGRs, that risks leading to higher prices to New Zealand consumers - for example, by enabling large multinational suppliers to use the Code to refuse to provide explanation for the extent of cost price increases being sought (whereas in other countries, they would be expected to justify the reasons for their cost price increases to retailers). This makes it difficult for WWNZ to engage in reasonable negotiations with suppliers, and fulfil its role of negotiating on behalf of New Zealand consumers for fair prices, as without that information WWNZ cannot test the basis for proposed supplier cost price increases. It would be an adverse outcome for New Zealand consumers if the Code enabled large multinational suppliers to push through higher cost prices in New Zealand compared to other countries.

²⁰ (20 March 2024). Commerce Commission rejects Warehouse complaint against Weet-Bix. NewstalkZB. https://www.newstalkzb.co.nz/news/business/warehouse-disappointed-commerce-commission-rejects-weet-bix-complaint/?utm_source=zb&utm_campaign=article_link&utm_content=related

²¹ What is the Rule of Law. American Bar Association. <https://www.americanbar.org/advocacy/global-programs/who-we-are/rule-law-initiative/what-is-rule-of-law/>

²² (26 June 2024). Canadian Industry Grocery Code of Conduct Provisions. Page 3. <https://canadacode.org/wp-content/uploads/2024/07/Final-Grocery-Code-Provisions-June-26-2024.pdf>

²³ Section 12(1)(b)(ii) of the Grocery Industry Competition Act 2023 allows the Commission to provide for the disapplication of the Code in accordance with section 15, including by providing that the trading relationships of a specified supplier or class of suppliers are not covered by any provision or provisions of the Code.

(d) **The Code should apply to all grocery retailers of substantial size in New Zealand** (including global retail giants such as Costco, and other large retailers selling groceries in New Zealand such as The Warehouse and Chemist Warehouse).: This is necessary to ensure that:

- (i) grocery retailers are competing on a level playing field;
- (ii) smaller suppliers receive the benefit of the Code across the entire sector; and
- (iii) suppliers have the same incentives to supply not only RGRs but also other grocery retailers, including large, newer entrant retailers.

It does not make sense, from a policy perspective, for suppliers that are some of the world's largest multinational corporations to have benefit of the Code in dealing with WWNZ, but for a small New Zealand-owned supplier to not have the benefit of the Code in dealing with Costco ("the world's third-biggest retailer, after Amazon and Walmart").²⁴ It is also notable that Costco is subject to the new grocery supply code in Canada and that in New Zealand the Advantage Group "Voice of Supplier Survey" (as above) demonstrates significantly higher positive sentiment from suppliers in dealing with WWNZ than Costco.

²⁴ (16 May 2024). Why America loves Costco. The Economist.
<https://www.economist.com/podcasts/2024/05/16/why-america-loves-costco>