



**Review of the Grocery Supply Code
Woolworths New Zealand Limited Cross Submission**

11 October 2024

1. Introduction

1.1 This document provides Woolworths New Zealand Limited's (**WWNZ**) cross submission in relation to the Commerce Commission's (**Commission**) "Request for Views" paper for its first review (**Review**) of the Grocery Supply Code 2023 (**Code**).

2. Executive summary

2.1 As outlined in our 16 September 2024 submission (**Submission**), we support the Code, but we consider it is too early to be able to properly evaluate its impact or to contemplate significant changes to it. A number of other submissions reinforce that view, and that at this stage (rather than contemplating any substantive changes to the Code) there is a need for clear guidelines from the Commission on its approach to the Code. Clear guidance would assist stakeholders to:

- (a) understand the Commission's substantive views on the Code, including in relation to the practices of specific RGRs (rather than making statements at a generic or anecdotal level), and to assist suppliers to better understand matters such as "flexibility provisions" which allow for future agreement; and
- (b) understand how to engage with the Commission in relation to the Code, for example, by providing stakeholders with reassurance of how the Commission will protect confidential information.

2.2 The following factors reinforce our view that publication of guidance is the appropriate and proportionate next step for the Commission:

- (a) Doing so would be consistent with the Commission's usual practice when a new regulatory regime is introduced (and best practice from a regulatory / public law perspective).
- (b) The Commission has not defined the policy or operational problem it is seeking to address by way of its early review of the Code, and has not raised

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any issues or concerns with WWNZ about the existing Code as part of our regular dialogue.

2.3 Beyond these core submissions, in this cross submission WWNZ outlines that:

- (a) A number of other submissions emphasise the need to ensure that the Code does not introduce unnecessary regulatory costs into the grocery supply chain, which risks higher prices to consumers.
- (b) A number of other submissions reinforce that good faith obligations should be mutual.
- (c) The Code already protects against “retaliation”, and so does not require any further specific provisions to do so.
- (d) Payment within a “reasonable time” is the appropriate standard for supplier payment terms.
- (e) WWNZ does not oppose broadening the definition of “groceries” to other genuine grocery products (such as beer and wine), and WWNZ notes that it already treats such products as if they were covered by the Code.
- (f) Private label products are an important part of a competitive grocery market, and any changes to the Code that make it more difficult for RGRs to range private label products risk decreasing product innovation and choice for consumers, increasing consumer pricing and undermining competition.
- (g) It would be inappropriate, and undermine contractual and regulatory certainty, for the Grocery Commissioner to be given powers to arbitrate on what is “fair” or to unwind contractual agreements. The existing Code, which sets out the rules in advance based on known concepts of “good faith” and “reasonableness”, backed by specific obligations, is sufficient to protect supplier interests and is necessary to enable sufficient legal and contractual certainty in dealings between RGRs and suppliers.

2.4 WWNZ trusts that this cross submission will be useful for the Commission’s Review. 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.

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3. Our cross submissions

The submissions reinforce that it is too soon to assess the impact of the Code or to contemplate significant changes

- 3.1 A number of other submissions reinforce WWNZ's core submission that it is too soon to make any meaningful assessment of the impact of the Code or to contemplate any significant changes. In particular, the New Zealand Food and Grocery Council (**NZFGC**) noted that not all potential issues with the Code will have had the opportunity to materialise yet,¹ and the NZFGC's² and other submissions have noted some "green shoots" of positive change arising from the Code at this early stage (for example, of the two references to WWNZ that the Commission has received via its Anonymous Reporting Tool, one noted that "it has become easier to do business with" WWNZ since the Code was implemented).³
- 3.2 These submissions reinforce the view that it is necessary to allow more time for the impacts of the existing Code (good, bad, or otherwise) to be meaningfully assessed, and that it is inappropriate for any preconceived views that the Code will not be effective in achieving its policy objectives, or that it should be drafted differently,⁴ to be taken into account in the Review.⁵
- 3.3 Further, the number of submissions calling for Commission guidance on the Code (as discussed at [3.4] below) underscores that there is a widely held view that so far the Commission has not focussed enough on this, and at this stage this should be addressed and the Commission's priority should be providing guidance on the existing Code (to assist stakeholders to understand it and the Commission's approach to it), rather than contemplating material changes to it. This is consistent with the Ministry for Regulation's recent guidance that "[r]egulators think about who they are educating, what they want them to know and do, and the best way to reach them and encourage them to do the right thing."⁶

¹ (16 September 2024). New Zealand Food and Grocery Council. Review of the Grocery Supply Code (**NZFGC Submission**) at [4.4].

² At [1.6] the NZFGC Submission notes: "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."

³ (16 September 2024). Anonymous Reporting Tool Submission, Submitter Two.

⁴ For example, 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-heerdenon-acting-early/>

⁵ (September 2024). Ministry of Regulation. Professional Conduct - Quick Guide, Regulatory Practice at page 4. <https://www.regulation.govt.nz/regulatory-system-capability/regulatory-practice-essentials>.

⁶ (September 2024). Ministry of Regulation. Regulatory Compliance Activities - Quick Guide, Regulatory Practice Essentials at page 4. <https://www.regulation.govt.nz/regulatory-system-capability/regulatory-practice-essentials>.

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The submissions emphasise the need for further communication and guidance from the Commission on the existing Code

- 3.4 The submissions raise a clear theme of industry stakeholders wanting guidelines from the Commission on the Code. That view is shared across RGRs and suppliers.⁷ In the current circumstances, where there are insufficient grounds to justify changes to the Code, where regulatory changes will inevitably result in further uncertainty and costs in the grocery supply chain, and stakeholders are actively seeking guidance from the Commission, WWNZ considers that the appropriate next step is for the Commission to provide that guidance.
- 3.5 In particular, the provision of Commission guidance at this stage would align with:
- (a) the fundamental and basic principles of regulatory and public law best practice. Namely, imposing further or different regulation on a sector will inevitably impose costs. Accordingly, it is accepted that further regulations and interventions should only be imposed in light of an evidence-based identification of a problem and a clear analytical and evidence-based assessment that existing regulations are not effective to address that problem. Given the Commission has not yet provided substantive guidance on the existing regulations, nor an articulation of any “problem definition”, it is not apparent that evidence would exist that the existing regime is not effective. Furthermore, making changes to a regulatory regime, without giving it an opportunity to be effective, undermines the need for regulatory certainty. RGRs need to know that further regulation will not be imposed arbitrarily, as it is inefficient for RGRs and other industry participants to have to operate in an environment where there is a constant state of uncertainty about when the regulatory landscape could shift. RGRs should be able to have confidence that further regulation will only be considered if they fail to fulfil their obligations or that the existing regime is proven (on evidence-based grounds) to not be effective. All relevant costs would need to be considered and weighed against any identified benefits before recommendations to change the Code could reasonably be made by the Commission;
 - (b) the Government Expectations for Good Regulatory Practice, which state that regulators are expected to “provide accessible, timely information and support to help regulated parties understand and meet their regulatory obligations;”⁸ and

⁷ See, for example, the NZFGC Submission at [1.4], [2.2(b)], [3.1], [4.13], [4.14], [4.20], [4.23], [4.25], [4.32], [4.35], [4.60]; (16 September 2024) Foodstuffs North Island and Foodstuffs South Island. Review of the Grocery Supply Code - Foodstuffs' Submission in Response to Request for View (**Foodstuffs Submission**) at [43].

⁸ (April 2017). The Treasury. Government Expectations for Good Regulatory Practice. <https://www.treasury.govt.nz/sites/default/files/2015-09/good-reg-practice.pdf>

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- (c) the Ministry for Regulation’s focus on ensuring any regulation “minimises unnecessary costs and unintended outcomes”,⁹ given it would be far less costly (and with a much lower risk of unintended consequences) for the Commission to provide clarity on the existing Code, rather than to make changes at this early stage. We note that the Commission’s public statements that it would prefer to change the Code rather than “make comments and send letters to try and change things”¹⁰ under the existing Code appears inconsistent with this guidance from the Ministry for Regulation.

3.6 Reinforcing the above, as we set out in our Submission, the Commission has not raised with us any areas where it believes the objectives of the Code could be better achieved, nor any substantive guidelines on the Commission’s views of the Code. Further, we would have expected that given the high level of constructive engagement WWNZ has had with the Commission on matters relating to the Code, if the Commission did have such concerns, it would have raised them and given WWNZ an opportunity to address them quickly. In our experience, it is unusual for the Commission to not publish guidelines when a new regulatory regime / law is introduced. For example, the Commission has published:

- (a) “Misuse of Market Power Guidelines”, in response to the change to the market power laws;¹¹
- (b) “Competitor Collaboration Guidelines”, in response to the change to the cartel laws;¹² and
- (c) “Unfair Contract Terms Guidelines”, in response to the introduction of the unfair contract terms regime.¹³

3.7 While the Commission has published a fact sheet and a checklist with the intention of assisting suppliers’ understanding of the Code, these documents do not reflect the level of detail that the Commission usually provides in its guidelines (such as the examples noted above). The checklist is merely an expansion of the Code provisions

⁹ (September 2024). Ministry for Regulation. Strategic Intentions. <https://www.regulation.govt.nz/mfr-what-we-do/corporate-publications>

¹⁰ (2 September 2024). FoodTicker. “We want to fix the cause of the issues” - Pierre van Heerden on acting early. <https://www.foodticker.co.nz/we-want-to-fix-the-cause-of-the-issues-pierre-van-heerden-on-acting-early/>

¹¹ (March 2023). Commerce Commission. Misuse of Market Power Guidelines. https://comcom.govt.nz/_data/assets/pdf_file/0014/311360/Misuse-of-Market-Power-Guidelines-March-2023.pdf.

¹² (January 2018). Commerce Commission. Competitor Collaboration Guidelines. https://comcom.govt.nz/_data/assets/pdf_file/0036/89856/Competitor-Collaboration-guidelines.pdf

¹³ (August 2022). Commerce Commission. Unfair Contract Terms Guidelines. https://comcom.govt.nz/_data/assets/pdf_file/0021/290190/Unfair-contract-terms-guidelines-August-2022.pdf

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with question prompts for suppliers, but does not provide any practical worked examples or case studies. The submissions from suppliers seeking guidelines from the Commission demonstrate that these resources provided by the Commission so far are not considered to be sufficient. The publication of guidelines would be more useful to industry stakeholders, consistent with the Commission's ordinary practice, and would be much less risky and costly to all participants than making premature or unnecessary changes to the Code.¹⁴

The submission in relation to confidentiality further emphasises the need for Commission guidance

- 3.8 One submission called for the Code to contain additional confidentiality provisions to enable suppliers to engage with the Commission without fear of information being disclosed to the RGRs under the Official Information Act 1982 (**OIA**).¹⁵ From WWNZ's perspective, this submission reinforces the need for further Commission guidance, rather than requiring any change to the Code. In particular, the OIA already contains statutory exceptions that enable the Commission to withhold such information - for example, if disclosure would prejudice the commercial position of the provider or prejudice the supply of similar information in the future. Accordingly, rather than requiring any changes to the Code, this concern could (and should) be addressed by the Commission providing guidance to suppliers on how it would apply those exceptions to supplier complaints.

The submissions reinforce WWNZ's view that guidance should be provided in relation to specific RGRs, rather than generalised commentary or making changes that are intended to address the conduct of specific RGRs

- 3.9 To the extent supplier submissions have raised concerns about RGR conduct, those concerns do not appear to relate to WWNZ. Demonstrating this:
- (a) Investment buying: The NZFGC submission raised concerns about investment buying practices.¹⁶ As raised in WWNZ's submissions to the Ministry of Business, Innovation and Employment (**MBIE**) during the development of the Code, WWNZ does not engage in or support the practice of investment buying.¹⁷ Furthermore, to the extent investment buying practices are of concern to the Commission, WWNZ submits that those concerns could be dealt with under the existing Code, including through the "good faith" obligations (cl 6), the "funding promotions" obligations (cl 17), and the "funded promotions" obligations (cl 20(2)). If the Commission believes this needs to be

¹⁴ WWNZ also reiterates that the Commission has not raised any concerns regarding the existing Code as part of our regular dialogue (nor have suppliers). []

¹⁵ NZFGC Submission at [4.43].

¹⁶ NZFGC Submission at [4.55].

¹⁷ (16 June 2023). WWNZ. Submission Form New Zealand Grocery Code of Conduct at page 31.

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explicit, this could be addressed by the provision of guidance as discussed above. WWNZ should not be subject to further regulation due to the conduct of another industry participant, in particular when that conduct could be addressed through existing provisions.

- (b) Foodstuffs¹⁸ ranging, financial requirements, and store hierarchy: A submitter raised concerns about the ability to “sell our goods in Foodstuffs stores” or to meet “Foodstuffs financial demands”,¹⁹ and the NZFGC said that there is confusion among suppliers regarding the status and hierarchy of individual Foodstuffs store agreements vis-a-vis the Foodstuffs cooperatives’ Grocery Supply Agreements (**GSAs**). Clearly these concerns do not relate to WWNZ.
- (c) Access to all documents forming part of GSAs: An anonymous submitter expressed concerns over their ability to access all documents forming part of GSAs.²⁰ However, we have ensured that all documents comprising part of our GSAs are available online via a single link provided in its Vendor Trading Terms (the primary document within its GSA).

3.10 WWNZ reiterates that it should not be subject to further regulation based on concerns about the conduct of others in the sector. Instead, the Commission should provide further guidance and commentary under the existing Code in relation to specific worked examples or case studies to assist stakeholders to understand their rights and obligations, and the Commission’s expectations, under the existing Code. If the Commission is concerned that the conduct of a particular RGR is in breach of the current Code, it has wide-ranging investigative powers available to it by which that party’s compliance can be assessed.

The submissions reinforce that some stakeholders have misunderstood flexibility provisions in GSAs - this again reinforces the need for Commission guidance

3.11 The submissions have made it clear that certain stakeholders have misunderstood the inclusion of flexibility provisions in GSAs. In particular, while WWNZ does not have visibility of other RGRs’ GSAs, WWNZ’s GSAs do not include any provisions that “contract out” of the Code.²¹ Rather, WWNZ’s GSAs include provisions that provide flexibility for certain matters to be subsequently agreed between an RGR and the relevant supplier (as expressly contemplated by the Code). Those matters still require mutual agreement between the supplier and the RGR and need to be reasonable and agreed in good faith. No supplier is required to agree to them. As WWNZ outlined in

¹⁸ Foodstuffs North Island and Foodstuffs South Island made a joint submission and are referred to as Foodstuffs in this submission.

¹⁹ (16 August). Anonymous Submitter C. Review of the Grocery Supply Code at [5].

²⁰ (16 September 2024). Anonymous Reporting Tool Submission, Submitter Two.

²¹ See for example: (16 September). New Zealand Specialist Cheesemakers Association. Review of the Grocery Supply Code at [2], and NZFGC Submission at [4.5].

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its Submission, such flexibility provisions are essential in the commercial context of WWNZ dealing with more than 1,500 different suppliers. The removal of the ability to provide for such flexibility on the basis of mutual agreement would have significant detrimental operational and commercial impacts on WWNZ and our suppliers, and risk unintended consequences for both suppliers and consumers.

- 3.12 To the extent that there remain any concerns from some suppliers on this point:
- (a) that could potentially reflect an approach taken by other RGRs. As noted in our Submission, when WWNZ explained its flexibility provisions to suppliers (i.e., making clear that they provide for flexibility only and that any subsequent agreements to implement such flexibility would require mutual agreement), WWNZ's suppliers generally appeared satisfied with these flexibility mechanisms;
 - (b) given there is no legal ability to "contract out" of the Code, if some suppliers think certain RGRs have sought to do so, that reflects a need for the Commission to provide guidance to RGRs and suppliers on what it considers is acceptable under the Code (rather than evidencing any need to change the Code); and
 - (c) WWNZ would, consistent with the Australian Code Review's recommendation²² and the suggestion in Foodstuffs' Submission,²³ be willing to proactively provide further clear and simple guidance on any flexibility provisions at the time of negotiating a new GSA - for example a one-page information sheet that outlines the flexibility provisions and that makes clear that any subsequent agreements to implement such flexibility would require mutual agreement.

The submissions emphasise the need to ensure that the Code does not introduce unnecessary regulatory costs into the grocery supply chain

- 3.13 A number of submitters, including both RGRs and suppliers, noted the administrative burden that the Code has imposed for all affected parties.²⁴ In contemplating any changes to the Code, it is important that the Commission does not introduce unnecessary regulatory costs into the grocery supply chain, which risk the unintended consequence of higher grocery prices to consumers. WWNZ agrees with NZFGC's submission that "any wasted costs arising from a poorly functioning regulatory regime may ultimately be passed on to consumers."²⁵ Accordingly, WWNZ:

²² (June 2024). Australian Treasury. Independent Review of the Food and Grocery Code of Conduct – Final Report at pages 63-64.

²³ Foodstuffs Submission at [40].

²⁴ See, for example, NZFGC Submission at [4.59] and Foodstuffs Submission at [22] - [24].

²⁵ NZFGC Submission at [2.2(f)].

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- (a) submits that any further regulation should be kept to the minimum necessary to achieve the policy objectives of the Code in order to mitigate the risks of unintended consequences, such as higher grocery prices;
- (b) disagrees with the NZFGC's suggestion that RGRs be required to offer updated GSAs to all suppliers whenever they update their standard form GSAs.²⁶ It would be costly, impractical, and unreasonable for RGRs to have to agree new GSAs with all suppliers, including suppliers that already have an agreed Code-compliant GSA in place, just because a RGR intended to make changes to its standard form GSA for future agreements (in effect, that would require WWNZ to replicate the process it conducted in agreeing new GSAs with all its suppliers as a result of the Code coming into force); and
- (c) disagrees with the NZFGC's submission that any written explanations provided to suppliers should be written afresh in a bespoke manner each and every time they are required.²⁷ Given WWNZ deals with over 1,500 suppliers, it would be impractical and unreasonable to require a bespoke explanation, rather than an explanation that applies at a general level to such situations. A requirement to draft bespoke explanations would also, therefore, result in higher compliance costs for RGRs (which the NZFGC itself recognised risks higher grocery prices for consumers).

The submissions reinforce that good faith obligations should be mutual

- 3.14 Consistent with WWNZ's Submission, Foodstuffs' Submission also indicated that the good faith obligations should be reciprocal, in particular with respect to large multinational suppliers.²⁸ Several submitters also recognised that placing obligations only on RGRs and not suppliers may ultimately not be in the best interests of consumers.²⁹ WWNZ agrees with those submissions, and reiterates that a one-sided good faith obligation risks undermining the purpose of the Code. It also risks higher grocery prices for consumers by limiting WWNZ's ability to engage in more robust cost price negotiations, particularly with multinational suppliers who are in some cases many times larger than WWNZ.

²⁶ NZFGC Submission at [4.26].

²⁷ WWNZ also notes that the NZFGC raised concerns about suppliers having to request written explanations from RGRs as to why certain agreements are reasonable and allowed under the Code (at [4.17]). For the most part the requirements on RGRs to provide written explanations are automatic (i.e. they do not require the request of a supplier). There are only a few provisions in the Code in which the supplier needs to request a written explanation (namely, clause 12(4) regarding set offs, 17(5) regarding funding promotions, and clause 19(3) regarding delisting) – and in those circumstances, it is relatively straightforward for a supplier to request an explanation.

²⁸ Foodstuffs Submission at [14].

²⁹ (16 September 2024). Retail NZ. Review of the Grocery Supply Code (**Retail NZ submission**); (16 September). Anonymous Submitter D. Review of the Grocery Supply Code Request for Views paper.

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3.15 Further, while many of the concerns about the purported “imbalance of bargaining power” between RGRs and suppliers have been raised by the NZFGC,³⁰ it is important that the Commission’s assessment reflects that:

- (a) a number of the NZFGC’s members are some of the world’s largest multinational FMCG companies that will have their own interests to protect in this Review process (namely, enhancement of their bargaining power with New Zealand retailers); and
- (b) WWNZ needs to be able to negotiate robustly to keep input costs as low as possible in order to obtain competitive prices for New Zealanders, especially given that:
 - (i) for every \$1 spent by a customer in a Woolworths supermarket in New Zealand, we pay 62 cents directly to our suppliers (with WWNZ currently making a 0.5 cent loss); and
 - (ii) as the Commission was advised during the Grocery Market Study,³¹ WWNZ already at that time had to pay suppliers on average 10% more than Woolworths Australia for identical products.

3.16 In this context, further strengthening the negotiating power of the world’s largest suppliers is unlikely to result in lower grocery prices for New Zealand consumers and, in fact, could have the opposite effect. The Commission should, therefore, give consideration to Retail NZ’s submissions that:

- (a) large and multinational suppliers are “unlikely to need the protection of the Code”; and
- (b) the Commission should consider whether the Code should be disapplied to a particular class of suppliers.³²

The Code already protects against “retaliation”

3.17 WWNZ acknowledges that some submissions have advocated for the inclusion of explicit “anti-retaliation” provisions.³³ WWNZ does not engage in retaliation, and notes that the Code already provides protection against retaliation given that it is provided as

³⁰ NZFGC Submission at [2.1]

³¹ (September 2021). WWNZ. Woolworths New Zealand Limited’s submission on the New Zealand Commerce Commission’s draft report regarding the market study into the retail grocery sector at [26.3.2].

³² Retail NZ Submission.

³³ See for example NZFGC Submission at [4.41] - [4.44].

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a specific example of conduct that would breach the “good faith” requirements (cl 6(3)(d)).

Payment within a “reasonable time” is the appropriate standard for payment terms

3.18 Despite the Code already requiring that RGRs pay suppliers “within a reasonable time” (cl 12(1)(b)), the NZFGC has submitted that the Code should specify a maximum payment period for the RGRs to pay suppliers.³⁴ WWNZ considers that the “reasonable time” threshold in cl 12(1)(b) is a sufficiently flexible and objective standard that can be applied across multiple different trading relationships to achieve fair and efficient outcomes as between suppliers and retailers, and enables suppliers to choose and negotiate payment terms that best suit their business requirements. WWNZ is strongly opposed to the introduction of a prescribed maximum payment period, and considers that any such requirement is unnecessary and risks significant adverse consequences, including for suppliers and consumers, for the following reasons:³⁵

- (a) A prescribed maximum payment period is unnecessary: WWNZ adopts a tailored approach to its relationships with its suppliers. Suppliers are able to negotiate payment terms that reflect their requirements. For example, [] of WWNZ’s suppliers are already on payment terms that are 20 days or shorter (with [] of WWNZ’s suppliers on payment terms of 14 days or shorter).³⁶ The way WWNZ partners with its suppliers reflects their diversity, ranging as they do between large multinational corporations to small New Zealand family-owned businesses (including 120 produce growers). WWNZ has implemented a shorter payment term for smaller suppliers, offering them the option of 14-day payment on standard settlement terms (this applies to New Zealand suppliers from whom WWNZ buys less than \$250,000 of goods each year and whose total annual turnover is less than \$1 million per annum). WWNZ offers even shorter payment terms to fresh produce suppliers, allowing those suppliers to choose a 7-day payment term.
- (b) A prescribed maximum payment period is unnecessarily inflexible and risks unintended consequences (including reduced range for consumers): The inflexibility of a prescribed maximum payment period applied to a diverse range of commercial relationships risks significant unintended consequences and adverse outcomes for both suppliers and consumers. WWNZ negotiates payment terms with its suppliers based on the nature of a particular product and the circumstances of each supplier relationship. A prescribed maximum payment period would not reflect the commercial dynamics of the grocery

³⁴ See NZFGC submission at [4.37] - [4.38].

³⁵ For more detailed analysis of this, see [June 2023]. WWNZ. Submission form: Consultation on New Zealand Grocery Supply Code of Conduct at page 8.

³⁶ As at the time of WWNZ’s submission to MBIE on its Consultation on New Zealand Grocery Supply Code of Conduct in June 2023.

sector, nor the vast array and variety of the products sold in supermarkets, which require a need for flexibility. Retailers and suppliers need to retain the ability to tailor payment terms to the shelf-life, shelf-cycle, and lead times of particular products - it would not make sense to require the same payment terms for products which have a shelf life of a few days, products which have a shelf-cycle of a month, and products which can take more than 20 days to be delivered from the supplier to the retail store. An inflexible prescribed maximum payment period would be very different to the approach taken elsewhere in the Code, which generally allows for commercial negotiation to take place within principle-based restrictions. That inflexibility would also risk reduced range for consumers, because sales cycles of products will not necessarily align with the payment cycles; retailers would have a reduced incentive to stock products that have a shelf-cycle or lead time that is longer than the prescribed payment terms.

- (c) There are acknowledged challenges with prescribed maximum payment periods: Evidence from overseas (considered by the previous Government when considering maximum payment periods to improve business payment practices) has shown that often the introduction of a maximum payment term actually increases payment terms across many sectors.³⁷ It was also identified that small businesses may be most negatively impacted by a maximum payment period.³⁸ The current Government has abandoned the previous Government's Business Payments Practices Act 2023 (which implemented a payment practices disclosure regime), in part on the basis of evidence as to the likely negative impact of maximum payment terms on the economy.³⁹
- (d) A prescribed payment term that did not reflect commercial requirements would risk higher grocery prices to consumers: WWNZ's initial high-level estimates are that the financial impact of any prescribed maximum payment period that did not reflect commercial requirements would impose a significant additional cost to WWNZ and, therefore, risk higher grocery prices for consumers and a lower level or deferral of capital investment into WWNZ's supermarket business.

3.19 Accordingly, WWNZ submits that clause 12 as it stands is the correct regulatory tool to deliver benefits in the grocery sector.

³⁷ (February 2020). MBIE. Discussion Paper: Improving Business-to-Business Payment Practices in New Zealand at page 10.

³⁸ (8 November 2022). MBIE. Cabinet Paper Better Business Payment Practices Disclosure and Publication regime at [19].

³⁹ See (22 February 2024). New Zealand Government. Government to Address Business Payment Practices <https://www.beehive.govt.nz/release/government-address-business-payment-practices>; (June 2023). Australian Government. Statutory Review of the Payment Times Reporting Act 2020 <https://treasury.gov.au/sites/default/files/2023-08/p2023-428993.pdf>.

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WWNZ does not oppose broadening the definition of “groceries” to other genuine grocery products

- 3.20 Certain submissions call for the expansion of the definition of “groceries” under the Code to include alcohol products such as beer and wine.⁴⁰ Since the inception of the Code, WWNZ has taken the approach of treating such products as if they were covered by the Code (as recognised by the NZFGC),⁴¹ and WWNZ would have no concerns at such products being formally included within the scope of the Code.
- 3.21 Beyond such products (that WWNZ considers are genuine grocery products), the NZFGC went further and submitted that the Code should apply to all products that RGRs sell at retail.⁴² However we do not consider it appropriate that the coverage of the Code be expanded to all products sold at retail, as:
- (a) the requirements of the Code do not work well for other products that have their own unique and bespoke requirements - for example, flowers and newspapers that worldwide are commonly sold on a “sale or return” basis;
 - (b) in relation to general merchandise products such as manchester and small appliances, RGRs’ sales of those items are likely very small compared to other much larger retailers of those products (such as Briscoes, The Warehouse, Mitre 10, and Wesfarmers (Kmart and Bunnings)). Given that disparity:
 - (i) there is no policy justification for regulating RGRs in relation to such products; and
 - (ii) regulation of RGRs in relation to such products would result in RGRs needing to compete on an uneven playing field with other much larger retailers of such products.

Private label products are an important part of a competitive grocery market

- 3.22 WWNZ notes that some submitters expressed concerns about RGRs’ retailing of private label products. It is important to put those submissions in context:
- (a) As the Commission noted during its Grocery Market Study the “penetration of private label products by sales revenue is relatively low in New Zealand

⁴⁰ See for example (16 September 2024) New Zealand Winegrowers. New Zealand Winegrowers Submission on Review of the Grocery Supply Code; and (16 September 2024) Brewers Association of New Zealand. Submission on Review of the Grocery Supply Code Request for Views Paper.

⁴¹ NZFGC Submission at [4.36]

⁴² NZFGC Submission at [4.36].

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compared to other jurisdictions.”⁴³

- (b) Private label products are used by a range of grocery retailers, including the group of grocery retailers that it is understood the Commission would like to see enter / expand in New Zealand,⁴⁴ for example:
- (i) In Australia, more than three-quarters of Aldi’s sales come from private label products⁴⁵ (with the Commission’s Annual Report putting this at “roughly 90%”).⁴⁶
 - (ii) Costco’s private label brand, “Kirkland Signature”, makes up approximately a quarter of Costco’s annual revenue.⁴⁷
 - (iii) The Warehouse has launched and expanded its “Market Kitchen” private label range, noting “[w]e’re working with local Kiwi suppliers to grow our Market Kitchen range, and establish it as a high quality, great value offering for our customers for all the basics they need.”⁴⁸
- (c) Private label products can deliver a number of benefits to consumers, including:
- (i) providing great value and increased choice for New Zealand consumers;
 - (ii) providing a value benchmark that suppliers need to be cognisant of when pricing their own products and, therefore, enhancing price competition;
 - (iii) enhancing competition on innovation, quality, and variety between suppliers; and
 - (iv) creating growth opportunities for suppliers to enter or expand by producing private label products on retailers’ behalf.

⁴³ (March 2022). Market study into the retail grocery sector. Final report. Commerce Commission at [8.160].

⁴⁴ (4 September 2024). Commerce Commission. First Annual Grocery Report (**Grocery Report**) at page 57.

⁴⁵ (17 August 2021). IRI. Private label growth outpaces national brands

<https://www.iriworldwide.com/en-au/insights/news/private-label-growth-outpaces-national-brands>

⁴⁶ (4 September 2024). Commerce Commission. First Annual Grocery Report at page 116 (footnote 401).

⁴⁷ (5 June 2024). Fortune. How Costco built its \$56 billion Kirkland store brand that’s bigger than Nike and Coca-Cola <https://fortune.com/2024/06/04/costco-kirkland-store-brand-nike-coca-cola/>

⁴⁸ (24 May 2023). FoodTicker. The Warehouse launches private label butter <https://www.foodticker.co.nz/warehouse-launches-private-label-butter/>

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- 3.23 Given the above, WWNZ considers that any changes to the Code that make it more difficult for RGRs to range private label products risk undermining competition (in particular, competition with larger branded FMCG multinationals), less choice for consumers, and ultimately higher prices for consumers. Accordingly, any such changes to the Code would need to have a clear “problem definition”, and be subject to a rigorous cost benefit analysis to ensure they did not result in adverse consumer outcomes.

RGRs and suppliers need regulatory and contractual certainty

- 3.24 WWNZ notes that one submitter recommended that the Grocery Commissioner be empowered to act as an arbiter on specific issues, for example, to be empowered to rule on whether an RGR’s course of action or strategy is “fair” or “unfair”, and be empowered to unwind contractual terms that are considered “unfair”.⁴⁹ Such a subjective approach would remove the certainty which underpins ordinary efficiency-enhancing commercial dealings between RGRs and suppliers, and would undermine contractual certainty. As the Australian Full Federal Court has said:⁵⁰

“a rationally based system of law needs to set out the limits of acceptable commercial behaviour in order that persons can order their commercial affairs in advance. Such a system cannot depend on the personal approach of a judge, based upon his or her view of commercial morality. Worse still, if there is the perception that the judge makes the law in any individual case and then applies it retrospectively.”

- 3.25 WWNZ considers that the existing Code, which sets out the rules in advance based on known concepts of “good faith” and “reasonableness”, backed by specific obligations, is not only sufficient to protect supplier interests, but is also necessary to enable sufficient legal and contractual certainty in dealings between RGRs and suppliers. That is particularly important given 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 to achieve fair retail prices. Any change to the Code that prevents RGRs from engaging in robust, but good faith, negotiations with suppliers risks higher grocery prices for consumers.

4. Concluding comments

- 4.1 We hope that this cross submission assists the Commission. As outlined to the Commission previously, as a business that is most impacted by the Code, 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.

⁴⁹ (5 August). Anonymous Submitter A. Review of the Grocery Supply Code at [14].

⁵⁰ *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 [402].

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- 4.2 In particular, for the reasons outlined in our Submission and detailed further 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, it is important that WWNZ be provided sufficient and reasonable opportunity to provide its views on any proposed changes.