

14 September 2023

Tēnā koutou,

## **Open letter to the grocery sector – Introduction of the Grocery Supply Code**

1. The Grocery Supply Code (the Code) comes into force on 28 September 2023.<sup>1</sup> It is secondary legislation made under the Grocery Industry Competition Act 2023 (the Act).
2. In my role as Grocery Commissioner, and as someone with experience in the grocery sector, I am committed to ensuring that we take this once-in-a-generation opportunity to make long-term, sustainable change for the benefit of Kiwi consumers.
3. The Code is one piece of a suite of reforms introduced by the Government as part of its response to the Commerce Commission's 2022 Market Study into the grocery sector.<sup>2</sup> These reforms work together to foster a more competitive grocery sector for the benefit of New Zealand consumers.
4. My vision for a more competitive grocery sector in the future is one that includes a trading environment that is fairer and more conducive to confident, innovative suppliers, but it is more broadly about Kiwis getting more choice and more competitive prices from increased competition between suppliers, wholesalers and retailers.
5. The Market Study found an imbalance in negotiating power between the big supermarkets and some of their suppliers. This power imbalance may impact the ability of some suppliers to innovate and invest in new grocery products, which may contribute to higher prices and more limited grocery offerings for consumers.
6. The Code seeks to increase transparency and certainty for suppliers by creating a set of rules that regulated grocery retailers (RGRs) need to follow when they are dealing with their suppliers.<sup>3</sup>

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<sup>1</sup> A copy of the Grocery Supply Code can be found at <https://www.legislation.govt.nz/regulation/public/2023/0220/latest/whole.html>

<sup>2</sup> A copy of the Market Study can be found at <https://comcom.govt.nz/about-us/our-role/competition-studies/market-study-into-retail-grocery-sector>

<sup>3</sup> Initially, these are Foodstuffs North Island, Foodstuffs South Island and Woolworths NZ and their associated persons (e.g., subsidiaries and franchisees).

7. As the grocery industry regulator, the Commission is responsible for overseeing the Act and the Code.

### **Purpose of the Grocery Supply Code**

8. The Code supports the main purpose of the Act, which is to promote competition and efficiency in the grocery industry for the long-term benefit of consumers in New Zealand. It does this by:
  - 8.1 Promoting fair conduct, and prohibiting unfair conduct, between RGRs and their suppliers;
  - 8.2 Promoting transparency and certainty about the terms of agreements between RGRs and suppliers;
  - 8.3 Contributing to a trading environment in the grocery sector that includes a diverse range of suppliers and in which businesses compete effectively; and
  - 8.4 Contributing to a grocery sector that consumers and businesses participate in confidently.

### **Consumers will ultimately benefit from the Code**

9. Our ambition for the Code is that New Zealand consumers benefit from the Code successfully achieving its purpose. In particular:
  - 9.1 A trading environment in which businesses compete effectively and participate confidently will enable suppliers to innovate and invest, leading to greater consumer choice.
  - 9.2 A trading environment that includes a diverse range of suppliers, competing effectively, should promote more vigorous competition between suppliers and better supply options for existing and emerging retailers. This supports retail competition, which is the key enabler for more competitive grocery prices.

### **What you can expect from us**

10. Our regulatory role is to steward the implementation and effectiveness of the Code so that it contributes to improved competition and efficiency in the grocery industry.
11. Under the Act, this role includes:
  - 11.1 Reviewing the Code within its first two years, and at least once every five years after that;
  - 11.2 Amending or revoking the Code and if necessary, making exemptions to specific provisions of it;

- 11.3 Recommending whether additional retailers should be regulated by the Code; and
  - 11.4 Our broader functions as the grocery regulator, applied in the context of the Code (for example, monitoring competition and efficiency, monitoring compliance, issuing warnings, reports or guidelines, and making comments).
12. We will:
- 12.1 Be transparent with the public about our expectations for RGRs and suppliers
  - 12.2 Independently monitor RGRs' progress, including with supplier feedback
  - 12.3 Be transparent with the public about how well we think the Code is operating and how well RGRs are sticking to it
  - 12.4 Enforce compliance
  - 12.5 Review the Code - earlier than the law requires if we believe it necessary - and amend the Code to set a higher bar if that is needed
  - 12.6 Identify negative impacts of the Code and act to minimise unintended consequences.

### **Our message and expectations for RGRs**

- 13. It is very early days for this regulatory regime. However, the evidence, rationale and need for the Code have been well established. We also have the benefit of being able to draw on the experience of overseas grocery regulators that have implemented similar codes.
- 14. We expect RGRs to be actively working to comply with both the spirit and the letter of the Code. It is up to you to demonstrate that you are making good progress. Initially, we think this includes:
  - 14.1 Publicly committing to the Code and its objectives;
  - 14.2 Ensuring that all relevant staff and associated parties are aware of the Code and are properly trained on it;
  - 14.3 Communicating the Code to your suppliers, including what changes they can expect and how to raise issues;
  - 14.4 Setting up systems and processes to capture supplier feedback, including potential breaches of the Code;
  - 14.5 Ensuring that you have appropriate accountability and resourcing within your business to implement the Code successfully;

- 14.6 Publicly report on your compliance with the Code on a regular basis; and
  - 14.7 Engaging constructively with the disputes resolution service once it is established.
15. I know from my experience that negotiations between retailers and their suppliers can be tough. However, in a workably competitive market, I would expect RGRs to be able to engage in tough negotiations with suppliers to get the best deals they can, passing these benefits on to consumers, while still complying with the Code. We will continue to engage directly and constructively with you to implement the Code successfully.
16. We will also monitor the Code's progress closely and adjust our approach as we learn more about it. This includes looking out for negative unintended consequences.

### **Our message and expectation for suppliers**

17. A good trading environment is good for everyone. Suppliers have a role in making the most out of the Code and helping it achieve its objectives. We strongly encourage you to:
- 17.1 Know your rights and use them
  - 17.2 Tell us about your experiences
  - 17.3 Understand the conduct that is no longer allowed, or is regulated, by the Code
  - 17.4 Report conduct by RGRs or other suppliers that is inconsistent with the Code
  - 17.5 Not agree to 'contract out' of protections offered by the Code, unless this benefits you.
18. We understand that there is a diverse range of suppliers and that not all suppliers are facing the same power imbalance. Some suppliers may have significant bargaining power over the RGRs.
19. While the Code is primarily directed at RGRs, we will be using all our powers under the Act to identify and act against any conduct by any participant that may hinder or obstruct the purpose of the Act (promoting competition and efficiency in the grocery sector for the long-term benefit of New Zealand consumers) being achieved. For example:
- 19.1 More powerful suppliers encouraging problematic or prohibited behaviour by RGRs towards their rivals;
  - 19.2 Unfair trading practices, such as retail price maintenance; and

- 19.3 Behaviour that may be contrary to the spirit and purpose of the Act, such as unreasonably limiting supply to retailers in a way that is ultimately detrimental to New Zealand consumers.
20. We will be publishing information about the Code on our website and updating this as the Code is implemented.
21. Importantly, we are here to help and to listen, confidentially if necessary.

### **The transition period**

22. The Code applies to all new agreements made on or after 28 September 2023. For existing agreements, the retailer has a grace period until 28 March 2024 to offer the supplier amendments to the agreement so it complies with the Code.

### **Dispute resolution scheme**

23. The Ministry of Business, Innovation and Employment (MBIE) is in the process of appointing a dispute resolution provider. MBIE will retain oversight of the dispute resolution scheme.
24. While the scheme is being established, suppliers and retailers should alert the Commerce Commission to any behaviour that may be inconsistent with the Code.

### **How to get in touch with us**

25. Anyone can make a complaint to the Commission about a party in the grocery sector at any time. This could be about a breach of the new rules introduced by the Act or the Fair Trading or Commerce Acts.
26. You can make a complaint through our website at <https://comcom.govt.nz/make-a-complaint>. Alternatively, you can call us on 0800 943 600 or email [contact@comcom.govt.nz](mailto:contact@comcom.govt.nz).
27. We understand that you might be concerned about what we do with information you give us, or you may be concerned that informing us about possible wrongdoing might put your position at risk. We take steps to protect your information. We value information from confidential informants and have a policy of protecting people's identity when requested.
28. If you are concerned about the need to protect your identity, please raise it with us when you make a report.

### *Staying up to date and contacting the Grocery team*

29. More information will be available on our work on the grocery sector at <https://comcom.govt.nz/regulated-industries/grocery> and updates will be published through our social channels. Links to our social channels can be found on the website.

30. You can also email us. If you would like to make a general enquiry or get in touch with the Grocery team at the Commission, email [market.regulation@comcom.govt.nz](mailto:market.regulation@comcom.govt.nz).
31. If you would like to receive emails from us when we update our website or have other grocery regulation news to share, email us with the subject line 'Subscribe Grocery' to join our distribution list.

Ngā mihi nui

**Pierre van Heerden**  
Grocery Commissioner