

16 April 2024

Tēnā koutou,

## **Open letter to the grocery sector – Focus of the grocery regulator 2024**

1. New Zealand’s \$25 billion grocery sector touches every consumer in New Zealand and needs to have more competition in order to be effective and provide a benefit to New Zealand consumers. A more competitive market will deliver better prices, quality, innovation and choice to satisfy diverse consumer preferences and needs.
2. As Grocery Commissioner, my focus is on levelling the playing field to create more opportunities for suppliers and new entrants in the sector, and to realise the benefits of the new regime for consumers in New Zealand.
3. The Grocery Industry Competition Act 2023 (the Act) has been in place since July 2023 and gives the Commerce Commission (Commission) responsibilities for monitoring and regulating the grocery sector. This is in addition to existing work we carry out under the Commerce Act 1986 and the Fair Trading Act 1986. Some aspects of the regime have been under a “grace period” until 28 March 2024, during which time we have made comments, but not taken any enforcement actions.
4. The purpose of the Act is to promote competition and efficiency in the grocery industry for the long-term benefit of consumers in New Zealand.
5. Since it came into effect, I have been working with the grocery team at the Commission, implementing the functions outlined in the Act and establishing our role as regulator of the grocery sector.
6. This letter builds upon my previous communications with the sector,<sup>1</sup> and provides an update on key aspects of our work to date, including:
  - 6.1 the Grocery Supply Code;
  - 6.2 the first annual report into the state of competition in the grocery sector;
  - 6.3 assessing the effectiveness of the wholesale regime; and
  - 6.4 implementing Unit Pricing Regulations.

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<sup>1</sup> Commerce Commission “Open Letter to the grocery sector - Commencement of the Grocery Industry Competition Act 2023” (13 July 2023); Commerce Commission “Open letter to the grocery sector - Introduction of the Grocery Supply Code (14 September 2023); Commerce Commission “Grocery newsletter - February 2024” (15 February 2024) all available at <https://comcom.govt.nz/regulated-industries/grocery/grocery-updates>.

7. Transparency is integral to the work that we do. I hope by publishing this update, alongside the Commission's correspondence with the regulated grocery retailers (**RGRs**),<sup>2</sup> I can provide increased clarity and certainty to the grocery sector about our priorities and expectations and the work currently underway.

### **Grocery Supply Code**

8. The purpose of the Grocery Supply Code (**Code**) is to promote the purpose of the Act by:
- 8.1 promoting fair conduct, and prohibiting unfair conduct, between RGRs and suppliers;
  - 8.2 promoting transparency and certainty about the terms of agreements between RGRs and suppliers; and
  - 8.3 contributing to a trading environment in the grocery industry:
    - 8.3.1 in which businesses compete effectively and consumers and businesses participate confidently; and
    - 8.3.2 that includes a diverse range of suppliers.
9. Prior to the Code coming into force on 28 September last year I signalled my expectation that the RGRs take their obligations under the Code seriously and prioritise their compliance with the Code's rules for dealing with suppliers.

### *Grocery supply agreements*

10. A key element of the Code is ensuring all grocery supply agreements (**agreements**) are made in writing and comply with the provisions of the Code. This helps to promote transparency and certainty about the terms of agreements.
11. The Code's associated regulation included a grace period of six months, to allow RGRs time to review and make offers to update any existing agreements with suppliers. This grace period ended on 28 March 2024. There was no requirement on suppliers to have accepted these offers by the end of the grace period and suppliers can still negotiate on these contracts with RGRs.
12. Each RGR confirmed to us that they would be offering new agreements to all existing suppliers during the grace period.
13. During the grace period, our focus was on receiving and understanding the agreements that each of the RGRs had developed and/or used to make the offers to new and existing suppliers. I understand that in some cases agreements were offered to suppliers either before, or at the same time, that we were reviewing them. I will address this further at the end of this section to clarify to suppliers what they can expect from RGRs.

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<sup>2</sup> These are Foodstuffs North Island, Foodstuffs South Island and Woolworths New Zealand and their associated persons (e.g., subsidiaries and franchisees).

14. After completing a preliminary assessment, we provided feedback to each RGR suggesting the need for various changes to aspects of their agreements to better align with the purpose of the new regulatory regime.
15. This feedback varied between each RGR. One example is where we viewed the agreement as complex and difficult to understand, with multiple underlying agreements making it potentially problematic for suppliers to navigate and understand.
16. Our feedback letters to the RGRs on their agreements, as well as their responses, are available to view on the Commerce Commission website.<sup>3</sup> Suppliers can use this information to compare our comments to the contracts that they have been offered by the RGRs.
17. I have been encouraged that the RGRs have considered our feedback and in response, have recently made amendments to their proposed agreements. However, I understand this may have created some uncertainty for suppliers who received and may have already signed a contract before the RGRs' latest amendments.
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.
19. I acknowledge that this has been a particularly busy time for both RGRs and grocery suppliers and I recognise the significant administrative effort required on both parties. It is, however, in the long-term interest of the industry that this is done right.
20. In some circumstances this may be the first time suppliers have had such an agreement in writing, in addition to also requiring written agreements to be in place at an individual store level.
21. I continue to encourage suppliers to seek legal advice in relation to agreements that are offered to them. If you are concerned or confused about the status of what has been offered to you, you should contact the RGR for clarification.
22. I want to reiterate there was no requirement on suppliers to have accepted these offers by the end of the grace period on 28 March 2024. There is opportunity to negotiate some of the terms outlined in the agreements in addition to ensuring these agreements align with the conditions of the Code. The Code is not intended to prevent or hinder such negotiations.
23. The Act allows for exemption from Commerce Act prohibitions on collective negotiation on agreements, in specific circumstances. We are interested to hear from suppliers if there are topics that would benefit from collective negotiation and if an exemption may be needed. This would allow suppliers to talk to each other on an approach to specific terms/topics, excluding pricing.

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<sup>3</sup> Correspondence between the Commission and the RGRs in relation to grocery supply agreements can be accessed at <https://comcom.govt.nz/regulated-industries/grocery/grocery-updates>.

24. In accordance with the Commission’s Enforcement Response Guidelines,<sup>4</sup> we will now be seeking further information about the agreements from RGRs, and the processes and communications that have been followed during any offer and acceptance of these agreements, in order to complete our compliance assessment and inform our decisions on any next steps.

*Broader compliance with the Code*

25. The Code covers not only what should be included in agreements, but how the RGRs continue to deal with suppliers on an ongoing basis.
26. We encourage suppliers to familiarise yourselves with the protections of the Code and continue to come forward to the Commission with any feedback or concerns related to the conduct of RGRs. Any intelligence we receive is critical in helping us better understand what is currently occurring in the sector and helps to inform our future priorities.
27. To support supplier understanding of the Code we published a Code factsheet and checklist. The factsheet provides an overview of the Code, as well as information on its background, key features and where to get more information. The checklist is for suppliers of RGRs to guide review of any agreements against the provisions of the Code and assess retailers’ ongoing conduct against the provisions of the Code. Both of these are available for download on our website.<sup>5,6</sup>
28. If you are seeking to resolve a dispute with an RGR, for example you have a disagreement over a payment, you will also soon have the option of using the independent dispute resolution scheme that the Minister of Commerce and Consumer Affairs has approved for the New Zealand Dispute Resolution Centre to provide. Consultation on the rules of this scheme closed in February 2024 and we are expecting the outcomes to be announced soon.
29. We will be providing further information regarding the complaints and dispute resolution pathways as soon as these are available.

*Grocery Supply Code Review*

30. Under Schedule 2 of the Act, the Commission is also required to review the operation and effectiveness of the Code within two years after the Code came into force (by 28 September 2025). We could do this earlier if there is a need to modify certain aspects of the Code that are not working as intended. Please provide us with feedback if you believe there are unintended consequences occurring.

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<sup>4</sup> <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines>

<sup>5</sup> [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0022/329710/Commerce-Commission-Grocery-supply-code-factsheet-28-September-2023.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0022/329710/Commerce-Commission-Grocery-supply-code-factsheet-28-September-2023.pdf)

<sup>6</sup> [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0025/344950/Grocery-Supply-Code-Checklist-for-Suppliers-29-Feb-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0025/344950/Grocery-Supply-Code-Checklist-for-Suppliers-29-Feb-2024.pdf)

31. We are currently in the planning phase for this review and welcome feedback relevant to this topic. For example, types of conduct that are of concern when dealing with RGRs but not covered by the Code, or any issues with the provisions currently in the Code.

### **Reporting on the state of competition**

32. The Act empowers the Commission to regularly monitor and report on competition and efficiency in the grocery sector, including producing an annual report on the state of competition in the grocery sector. Our monitoring and regular reports are a powerful regulatory tool to improve transparency, influence the behaviour of market participants, and promote better outcomes in the grocery sector over time.
33. We have been actively collating detailed data and information from across the sector to assess how competition in the sector is evolving and which can then be compared over time.
34. Given the current high public interest in the grocery sector, we intend to publish our first report in July 2024, a year earlier than was allowed for under the Act to take the opportunity to comment on what we are observing in the sector in the early stages of the new regime.
35. The first report will include analysis of key sector developments since the Market Study in 2022, and metrics we will monitor over time such as market share, margin analysis and outcomes for consumers.
36. Over time our reports will track how competition and efficiency in the grocery sector is evolving and evaluate the effectiveness of regulatory interventions and inform the use of further regulatory tools.

### **Wholesale supply**

37. The Act established a new wholesale supply regime, creating obligations on the RGRs to set up systems to facilitate wholesale supply to other grocery retailers. This is intended to make it easier for businesses to enter the grocery retail market and to support the growth of existing grocery retailers.
38. The legislation requires that the RGR's wholesale offerings are consistent with what would be expected in a competitive market, and that their wholesale supply makes a material contribution to improving competition in the sector. If these thresholds are not met, we can consider regulatory "back stop" provisions that have been built into the Act to further regulate the RGR's wholesale offers. This could include a wholesale code, regulation of mark ups by the Minister, etc.
39. The Commission has been monitoring the RGRs on a monthly basis to understand the progress they are making toward providing a reliable, cost-effective wholesale offering. We encourage both retailers and suppliers to participate in the wholesale regime in terms of the spirit of the Act.

40. If retailers have any concerns about RGRs' wholesale supply obligations under the Act, please raise these with the Commission.

### **Unit pricing**

41. The Unit Pricing Regulations require certain grocery retailers in addition to the RGRs, to display the unit price for goods clearly and legibly, at no less than 25% the size of the marked price.<sup>7</sup> This applies to in store, online, and advertised prices (except audio and visual advertisements).
42. Unit pricing is the price per unit of measure for a product, such as the cost per kilogram or per litre. Unit pricing aims to help consumers make better informed purchasing decisions by making it easier to compare the prices of all types of different grocery products, especially where products are sold in different sized packaging, unpackaged and by different brands.
43. We have developed guidelines which are available on the Commission's website.<sup>8</sup> We encourage grocery retailers to carefully consider the guidelines and their obligations and seek legal advice if it is required.
44. There is a transition period for complying with the Regulations. Physical stores must comply by 31 August 2024 and online stores must comply by 31 August 2025 at the latest. I want to encourage all RGRs to adopt these online measures earlier.

### **Commission's compliance and enforcement powers**

45. The Commission has compliance and enforcement powers under the Grocery Industry Competition Act 2023, the Commerce Act 1986, and the Fair Trading Act 1986 in relation to the conduct of the RGRs.
46. When determining the most appropriate compliance or enforcement response to a particular situation, we do not apply a rigid formula. Rather, we weigh all competing considerations and exercise our judgement. Much will depend on the circumstances of the case and the attitude and responsiveness of the parties involved. Not every breach requires litigation; nor can we accept every offer of settlement.
47. As indicated above, over the coming months we will be seeking further information from the RGRs so we can make a compliance assessment and decide on any next steps. These next steps may include opening an investigation, making further information requests, and/or requesting that relevant persons employed by the RGRs attend an interview with the Commission. We may also compel suppliers to attend an interview or provide us with information where we deem this to be appropriate in assisting our investigation.
48. If we make a decision to pursue our enforcement options, these options include, but are not limited to, seeking a declaration of a contravention, a compensatory order, an order to vary or cancel a contract, an injunction or a pecuniary penalty order.

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<sup>7</sup> <https://www.legislation.govt.nz/regulation/public/2023/0185/latest/LMS824115.html>

<sup>8</sup> [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/347154/Unit-pricing-regulations-a-guide-for-grocery-retailers-Guideline-March-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/347154/Unit-pricing-regulations-a-guide-for-grocery-retailers-Guideline-March-2024.pdf)

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

49. 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.
50. 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 at [grocery.regulation@comcom.govt.nz](mailto:grocery.regulation@comcom.govt.nz).
51. You can make an enquiry or complaint on our website or contact us directly at [grocery.regulation@comcom.govt.nz](mailto:grocery.regulation@comcom.govt.nz).
52. We understand you may be concerned about what we do with the information you provide. We take steps to protect your information and we will not contact the RGR involved while we assess your complaint.
53. If we do decide to investigate your complaint, we will contact you and ask if you are happy for us to disclose your identity, and/or details about your complaint to the RGR.
54. If you are concerned about revealing your identity at all, our Anonymous Reporting Tool provides a secure channel for people to remain anonymous when coming forward to the Commission. Find out more about our anonymous reporting tool on our website <https://comcom.govt.nz/make-a-complaint>.
55. Finally, I encourage you to continue to get in touch with us. The information we receive through all channels helps us understand both the current dynamics of the industry and issues being faced by individual grocery industry participants.

Ngā mihi nui,

**Pierre van Heerden**  
Grocery Commissioner