

Competition Policy  
Building, Resources and Markets  
Ministry of Business, Innovation & Employment  
PO Box 1473  
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10 August 2022

## **Grocery Code of Conduct Consultation 2022**

Thank you for the opportunity to comment on the Grocery Code of Conduct Consultation Paper (the **Code**).

We support the Government introducing a Code of Conduct for the major grocers. We believe the Code will result in a better balance in the bargaining power between the major grocers and suppliers.

Consistent with The Warehouse Group's purpose to help kiwis live better every day, we believe that consumers should be at the heart of all steps the Government takes in response to the Commerce Commission's market study findings. Therefore, our view is that the Code should be drafted with the long-term interests of consumers as its overriding focus and goal.<sup>1</sup>

However, it is important to recognise that the Code treats only one symptom of a lack of competition, i.e., the impact of that lack of competition on upstream suppliers.

We are concerned that some of what is suggested in the Consultation Paper will not be in the best interests of consumers and would see consumers paying higher prices or having less choice in the future. We do not believe that is in the spirit of what is intended, so we offer the following observations that we believe will better serve the long-term interests of consumers by delivering fairer prices and better availability.

### **Future application of the Code**

The Code does not deal directly with the lack of competition in the market or the impact of that lack of competition on consumers, both of which are at the core of the Commerce Commission's recommendations.

New entry and expansion are the only things that will make a meaningful difference to the grocery prices consumers pay and the choices consumers have.

Considerable care is needed to ensure that the Code (or any other policies) does not make entry and expansion more difficult unless there is a very clear policy rationale for doing so. Putting in place policies that make entry and expansion more difficult without a clear policy rationale, will undermine the interests of consumers.

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<sup>1</sup> Consultation Paper, Question 5.



The costs of complying with the Code are likely to be significant. The Consultation Paper refers to estimates from the UK that even in 2008, the compliance cost for a grocery retailer was £290,000. The equivalent figure converted to NZD and adjusted for inflation to 2022 prices implies compliance costs exceeding \$1 million. Compliance costs at this level are likely to materially impact the profitability of a new or expanding grocery retailer and therefore reduce the incentive to enter or expand.<sup>2</sup>

For these reasons, we disagree with the designation options for extending the Code's application to new or expanding retailers.<sup>3</sup> The proposed revenue thresholds included in the Consultation Paper are very low and are not an appropriate proxy for indicating when the type of mismatch in bargaining power the Code is intended to address will arise.

Indeed, the highest threshold outlined in the Consultation Paper implies the Code would apply to a retailer when it obtains approximately 7% of the New Zealand grocery market.

There is no reason to think that the same imbalance of bargaining power that exists between the major grocers and suppliers would exist between a new entrant and suppliers at that level of market share. Indeed, there is nothing unique about the grocery sector to suggest that an entrant with this level of market share would be in any different a situation to any other retailer engaging with suppliers across the economy with a 7% market share. Such retailers are subject to New Zealand's existing laws, which appropriately manage supplier/retailer relationships across the economy. There is no reason to believe the additional protection of the Code would be needed simply because a retailer gains a certain level of grocery sales and certainly not a level as low as 7%.

Rather than applying a revenue threshold, new and expanding retailers should only become subject to the Code after a Commerce (or Grocery) Commission investigation that concludes that there is a policy reason for extending the Code's application. That investigation can appropriately consider and balance supplier and consumer interests. Such a process would ensure that there is a robust policy reason for extending the application of the Code and that the interests of consumers are fully considered.

In any event, however designation of new retailers occurs, such retailers should be given a transition period of at least a year before the Code applies to them.<sup>4</sup>

### **TWG supports a principle-based approach in the Code**

Consistent with our focus on consumers, we believe that a principles-based approach to the Code should be preferred.<sup>5</sup>

The retail landscape is continuing to change at a rapid pace and a principles-based approach is more likely to enable innovation and be adaptable to changing circumstances, while minimising compliance costs and facilitating good consumer outcomes. The ability for retailers to make "unilateral" changes is a good example. Retailers manage a very large supplier base and in many cases it is simply not practical to negotiate changes with each individual supplier. Prohibiting unilateral changes as a default is likely to add significant transaction costs for retailers, and may stymie efficiency enhancing changes, both of which would be to the detriment of consumers.

<sup>2</sup> Consultation paper, Question 33.

<sup>3</sup> Consultation Paper, Question 2.

<sup>4</sup> Consultation Paper, Question 34.

<sup>5</sup> Consultation Paper, Questions 7, 11, 12, 14, 15, 16, 20, 21, 22, 23, and 24.



Our view is that the Consultation Paper has undervalued these benefits of a principles-based approach when assessing the various options outlined.<sup>6</sup>

That said, we appreciate that there are some areas where more detail might be desirable in the Code. For example, we support specific provisions that protect supplier IP, and protect whistle blowers.<sup>7</sup>

### **Concluding comments**

We remain very supportive of the Government's actions to increase competition in the grocery sector as we believe that new entry and expansion will deliver significant and enduring benefits for consumers.

Delivering those consumer benefits by facilitating new entry and expansion should be the touchstone for any proposed policies, including the Code. Our comments in this submission are directed to that end.

Yours sincerely

**The Warehouse Group Limited**

Privacy of natural persons



Nick Grayston  
**Chief Executive Officer**

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<sup>6</sup> Consultation Paper, Questions 10, 13, 19, and 27.

<sup>7</sup> Consultation Paper, Question 17.

