MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HIKINA WHAKATUTUKI

Submission form

New Zealand Grocery Code of Conduct

July 202

newzealand.govt.nz

1 Submissions process

The Ministry of Business, Innovation and Employment (**MBIE**) seeks written submissions on the New Zealand Grocery Code of Conduct consultation paper by 5pm on **10 August 2022**.

Please send your submission form to:

- ***competition.policy@mbie.govt.nz*** with the subject line "Grocery Code of Conduct Consultation 2022"

- Competition Policy
  Building, Resources and Markets
  Ministry of Business, Innovation & Employment
  PO Box 1473
  Wellington 6140
  New Zealand

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Name (first and last name)
James Radcliffe, General Counsel

Email
Privacy of natural persons

Is this an individual submission, or is it on behalf of a group or organisation?
On behalf of an organisation

Business name or organisation
Woolworths New Zealand Limited

Is there any information you would like to be withheld? Please state which question/information you would like to be withheld? If applicable, please also provide a separate version of this form without the sensitive information.
No

2 The approach to developing a Code of Conduct

QUESTION 1: Do you have any comments in relation to **Chapter 1,** in particular any comments on:

- the objectives (**section 2.2**)?
- evaluation criteria for the Code (**section 2.3**)?

Please type your submission below.

Objectives

Woolworths New Zealand Limited (**WWNZ**) supports the proposed New Zealand Grocery Code of Conduct's (**Code**) objective of improving dealings between grocery retailers and suppliers and promoting competition in the market for acquisition of groceries. Good working relationships with suppliers are a critical part of our business and the Commerce Commission (**Commission**) found that "many suppliers have good relationships with the retailers they supply".[1] We are pleased that suppliers have rated Countdown as the number one grocery retailer to deal with in New Zealand in both of the most recent major grocery industry surveys.[2] We agree there is always room for improvement, and we believe introducing a mandatory code will benefit the industry and consumers.

Evaluation Criteria

WWNZ supports these criteria, and we agree that any mandatory Code will need to be efficient, effective in practice, and durable.

However, while WWNZ understands that it is useful to attempt to develop objective criteria to assess the pros and cons of the options considered, it is our view that these criteria should be used as an assessment tool rather than relied upon as a strict determining factor. For example, it may not be the case that the highest score is the most suitable option, but the scores can form part of the qualitative assessment of the various options.

[1] Commerce Commission *Market Study into the retail grocery sector – Final Report* (8 March 2022) ("**Final Report**") at paragraph 8.80.

[2] Nielsen Retail Barometer *Advantage Insights' Report* (2021). See also Figure 8.2 of the Final Report.

3 Which retailers should be bound by the Code?

QUESTION 2: In relation to **section 3.3**, which of the three **Designation Options** do you think is best, and why?

Please type your submission below.

A broader range of grocery suppliers should be designated

WWNZ supports a designation approach to the Code and agrees that all major grocery retailers should be designated now. However, we consider that the Code needs to apply to all key participants in the grocery industry, including:

- WWNZ, including its Countdown stores and its franchisees (the owners of FreshChoice and SuperValue stores), Foodstuffs North Island ("**FSNI**"), Foodstuffs South Island ("**FSSI**") and each of the New World, PAK'nSAVE, and Four Square franchisees / owners; and
- other grocery retailers, including online retailers, large meal-kit suppliers, and independent grocery wholesalers.

A principle of broad application would ensure that supplier treatment is consistent across the sector, all retailers compete on a level playing field, and the Code does not need to be revisited constantly.

Triggers for designation should be established

Future designation mechanisms are necessary to ensure that those retailers which meet the relevant minimum size / turnover threshold in the future or engage in unsatisfactory conduct in the context of supplier relationships, are captured by the requirements of the Code.

Revenue Trigger

Recognising that the Code could place a disproportionate compliance burden on very small operators (e.g. a standalone independent supermarket with no affiliation with a larger supermarket group), WWNZ suggests there be a minimum size / turnover threshold at which a grocery retailer is not subject to the Code.

While WWNZ supports an annual grocery revenue threshold trigger for designation, a retailer with $500 million annual revenue would exclude a number of key grocery retailers in New Zealand. WWNZ's view is that the revenue threshold trigger would better achieve the policy objectives of the Code by having a greater range of retailer-supplier relationships within scope. WWNZ would therefore support the threshold being materially lower to reflect this.

However, there must also be recognition that retailer revenue is not the only metric relevant to assessing bargaining power dynamics. There are a number of other factors (such as the local market size, the size of supplier, export opportunities available to the supplier, and a supplier's capability to supply multiple suppliers) that need to be considered. For example, massive global retailers such as Costco (which is due to open its first New Zealand store this year), and other potential entrants to the New Zealand market, such as Amazon, Walmart, and Aldi, have no or immaterial New Zealand revenue at present, but it would be an oversight if they were not required to comply with the Code. We therefore support an additional trigger based on a retailer's group / global revenue, which recognises that power imbalances do not stem solely from revenue in New Zealand, and would lead

to fairer and more competitive market conditions. WWNZ submits that this trigger must be clearly defined to avoid any ambiguity.

Investigation Trigger

WWNZ supports an investigation-based trigger, whereby a designation investigation into a grocery retailer that falls below the revenue threshold may be initiated by the Commission[3] at its discretion (e.g. as a result of a complaint) or if directed by the Minister. If the Commission's investigation confirms that the grocery retailer's dealings with suppliers have resulted, or are likely to result, in an imbalance of negotiating power, and being required to comply with the Code is likely to assist in the Code's objective being met, then the Commission may make a recommendation to the Minister for that grocery retailer to be designated.

Additional Designation Powers

In addition, the Commission should be empowered to recommend to the Minister that a retailer be designated where a retailer requests to be designated.

Code should apply to suppliers as well as retailers

Under the current proposal, it is not envisaged that suppliers will be subject to obligations under the Code, but it is recognised that the Code "could incentivise suppliers to conduct themselves in good faith in their dealings with retailers".[4]

WWNZ considers that this does not go far enough and any good faith obligation in the Code should equally apply to suppliers as well as retailers, especially large multinational suppliers. Reciprocal good faith obligations on both retailers and suppliers would help to:

- Ensure that rights and obligations apply in a consistent way.
- Ensure that the compliance burden does not fall only on retailers.
- Foster and encourage relationships that are conducted in good faith by making the obligations mutual (it would be difficult for one party to be engaging in good faith, if the other was not). For example:
    - In New Zealand employment law good faith obligations are mutual, and the courts regularly refer to the importance of this mutuality in achieving good faith dealings.
    - In relation to insurance contracts, the High Court has said that the obligation of good faith necessarily "flows both ways. To suggest otherwise would make no sense."[5]
- Recognise that many of New Zealand's suppliers are large multinational corporations, many times bigger than WWNZ, FSNI, and FSSI and other grocery retailers.[6]

In addition, as WWNZ has outlined to MBIE in relation to the proposed quasi-regulatory wholesale regime, because supplier consent to wholesale sales and promotional funding is so critical to WWNZ (or any wholesaler in New Zealand, as is the case overseas) being able to offer a competitive wholesale product offering to other retailers, the success of any quasi-regulatory wholesale scheme will ultimately be determined by supplier participation and support. This is another reason that suppliers should also be obliged to deal with grocery retailers / wholesalers in good faith, including to consider, in good faith, any requests from a grocery wholesaler for "wholesale" terms that would enable a grocery wholesaler to supply products competitively (and to pass through promotional funding) to other retailers.

QUESTION 3: In relation to **section 3.4**, which of the three **Options** do you think is best, and why?

Please type your submission below.

WWNZ supports a compliance approach which recognises that, in some cases, certain obligations under the Code may sit better with a retailer's head office, and in other cases, certain obligations may sit better with an individual store. For this reason, WWNZ considers that Option A would be the most effective approach. This approach would also accommodate different ownership structures across the grocery sector in New Zealand, in particular, the franchise model whereby stores are individually owned but are operated subject to the terms of a franchise agreement. For example, it would be a perverse outcome if Code obligations applied only to head office / franchisor in relation to conduct carried out at store / franchisee level, particularly where the head office / franchisor had no meaningful ability to ensure that the Code is complied with.

There are other logical reasons why certain Code obligations should be imposed on individual stores, or on both individual stores / franchisees and head office / franchisor:

- A number of processes and decisions that impact suppliers (e.g supplier negotiations and ranging decisions) occur at store level, and it would undermine the purpose of the Code to allow stores to avoid the obligations imposed by the Code without consequence. As a matter of principle, where an individual store is involved in bargaining or dealing with a supplier, it would be appropriate for the store to be subject to the relevant obligations under the Code, and therefore subject to the consequences under the Code. In other words, liability should attach to the specific entity involved in the offending conduct. For example, for some grocery retailers:
    - Product ranging decisions will be made solely at head office. However, for others, some or all of those decisions could be made at an individual store level.[7] Accordingly, if the Code is to introduce measures to ensure non-discrimination on product ranging and shelf space allocation, and that activity occurs both at head office and at store level across different grocery retailers, then the Code must be flexible enough to apply those compliance obligations on those individual stores and head office, as the case may be.
    - Supplier negotiations will take place solely at head office. However, for others some or all of those negotiations could take place at an individual store level. Therefore, the Code must place the obligations, in relation to supplier negotiations and supply agreements, on the responsible entity. The effectiveness of the Code is diluted if the obligations (and the consequences) are not placed on the correct entity.
- Despite the Consultation Paper's suggestion that placing obligations on head offices would be more efficient than directly placing obligations on individual stores,[8] WWNZ considers that the cost implications are likely to be marginal, given head offices would still have to monitor and manage compliance with the Code at store level. This could involve conducting additional monitoring and auditing exercises to ensure that the stores are compliant with the Code and the head office is not liable for any breaches.
- Smaller stores, regardless of their floor size, should not be excluded from the Code's obligations. There is no evidence that smaller stores are less likely to engage in the behaviours that the Code seeks to address, and this carve out for smaller stores could disproportionately affect certain local markets in which smaller scale stores are more common. Applying a square-metre threshold that does not have a clear link to addressing the issue of imbalance of bargaining power could risk undermining the potential benefits of

[7] Final Report at paragraph 4.137.

[8] Consultation Paper at paragraph 53.

	the Code. Assuming a revenue threshold is put in place for designation, an additional exemption for smaller stores, particularly those that are part of or members of a large grocery retailer, is unnecessary.

QUESTION 4: Do you have any comments on the preliminary assessment of the options against the criteria in **Chapter 3**?

Please type your submission below.

As noted above, WWNZ broadly supports Designation Option A but considers that:

- a much lower turnover threshold should be applied to ensure a broad range of New Zealand's main grocery retailers are included, while also ensuring that small, independent operators are not required to comply;
- a mechanism to designate new retailers which have significant group / global revenue and whose existing or historical New Zealand sales do not accurately reflect their market position should be implemented;
- the Commission should have the ability to:
    - investigate a non-designated retailer at its discretion (e.g. as a result of a complaint) or if directed by the Minister; and
    - designate a grocery retailer where a retailer requests to be designated.

WWNZ also broadly supports Obligation Option A for the reasons provided in response to question 3.

4 Including a purpose statement within the Code and overarching obligations

QUESTION 5: In relation to **4.2 purpose of the Code,** which of the three options do you agree with, and why?

Please type your submission below.

WWNZ supports a Code that promotes competition in the market for the long-term benefit of New Zealand consumers, focusing on conduct that aligns with key obligations under the Code. For this reason, we believe that Option 2 is the most appropriate purpose. Our reasoning is as follows:

- WWNZ agrees that Option 2 is likely to be the broadest purpose that is appropriate for the Code. Additionally, we believe that having a purpose that promotes competition for the long-term consumer benefit should not be seen as a constraint but instead as the appropriate focus of the Code.
- We also support the express inclusion of fundamental conduct issues within Option 2's purpose statement, such as good faith, transparency of supply arrangements, and the provision of a dispute resolution mechanism. However, the prohibition of conduct that may transfer costs or risks is framed too broadly. Transfer of costs or risks is not necessarily problematic; accordingly, the drafting should be clarified to make it clear that the conduct of concern is the inappropriate transfer of costs and risks to suppliers. Except for this change, WWNZ considers that having these clear and targeted purposes will make the Code more effective and durable.
- We believe that Option 1's purpose of improving the balance of negotiating power between suppliers and designated retailers is an important objective. However, we strongly support the centrality of the achievement of consumer benefit within a Code, and this is not recognised in Option 1.
- WWNZ strongly supports empowering economic development of both small suppliers and Māori-owned businesses. However, in our view, the purpose of the Code is not the place to address this. We believe that Option 3 is too broad and will make the Code unnecessarily complex, reducing its durability, as it would be less fit for purpose. Further, the Commission's market study did not have economic development as a core objective, so including this in the purpose statement of the Code, which has been a consequence of the market study, would be misplaced. Instead, we believe that positive economic development outcomes in the grocery industry and for Māori-owned business will flow from establishing a clear and concise Code that focuses on promoting competition for the long-term consumer benefit.

QUESTION 6: Do you see any risks if the purpose of the Code was to:

- address any impacts of the major grocery retailers' trading relationship with the supplier on other grocery retailers, or
- support any wholesale supply arrangements?

If yes, please explain the risks.

Please type your submission below.

The Code should remain focused on promoting competition for the long-term benefit of consumers, without being expanded to include other purposes that may risk conflicting with this core purpose. There are existing competition laws which constrain anti-competitive conduct in commercial arrangements and protect the competitive process. As long as these laws are not infringed, retailers and suppliers should be free to enter into commercial arrangements that are negotiated in good faith and are mutually beneficial, regardless of whether these impact suppliers' trade with other retailers (including wholesale supply arrangements).

Overly prescriptive obligations could have the undesirable effect of reducing innovation and hindering the improvement of retailer-supplier relationships. For example, exclusivity arrangements that support investment and innovation, and co-investment arrangements, will often be pro-competitive as they provide customers with greater choice and new products, and the existing competition law framework is flexible enough to assess the benefits and detriments of such arrangements. The focus of the Code should be on improving retailer and supplier relationships, such as introducing requirements around good faith obligations.

QUESTION 7: In relation to **4.3 overarching obligations**, which of the three options do you agree with, and why?

Please type your submission below.

Good faith obligation is sufficient

WWNZ strongly supports the inclusion of a good faith obligation, and as noted above in response to question 2, we maintain that the good faith obligation should apply to all participants in the grocery sector, including suppliers. WWNZ also supports the Code clearly specifying the good faith obligations so that both retailers and suppliers have clear expectations as to what type of conduct might constitute not acting in good faith.

Fair dealing obligation is unworkable

However, we consider that including a general fair dealing obligation in the Code would be unworkable due to its subjective and uncertain nature. "Fairness" is an inherently subjective concept where every person has a different perspective on what is considered fair. Further, perceptions of unfair conduct are not necessarily always indicative of conduct that has a negative impact on consumers. For example, conduct perceived unfair by one party may have the effect of lowering prices, and improving range, quality and service for consumers.

We believe that a fair dealing obligation is also too uncertain for ordinary commercial conduct. This is because it will not provide a meaningful guide as to how a retailer is to act in a given transaction, and the inevitable result will be that retailers may hold back in strategic negotiations in fear of being found to have breached the fair dealing obligation. It is these strategic negotiations, where each retailer advocates for its (and its customers') interests, that can ultimately lower prices through competition for the long-term consumer benefit. We believe that imposing an uncertain fair dealing obligation where market participants will be unable to form clear, confident, and consistent views about whether certain conduct is lawful or not, even with the assistance of external legal advice, is inappropriate and not in line with the objective of improving dealings between retailers and suppliers, and the purpose of the Code of promoting competition in the grocery market. In fact, it could hinder competition by preventing participants engaging in genuine commercial (and competitive) conduct.

Accordingly, if a fair dealing obligation is to be a feature of the Code, it is important that fair dealing is clearly defined and focuses on the fairness of the process, rather than the outcome. WWNZ notes that the below obligations have been identified in the Consultation Paper as potential fair dealing obligations:

- Avoid discrimination or distinction between suppliers: We believe that this requirement is problematic as differentiating between suppliers is a fundamental practice when acquiring groceries from suppliers, and necessary for effective competition in the supplier market. Suppliers come to retailers with different offerings of price, quality, innovation, and stock supply certainty, and these points of differentiation strengthen the competition. By picking the best offerings and declining others, retailers would be making a distinction between suppliers - but this is essential for the efficient and cost-effective acquisition of groceries by retailers to, in turn, provide competitive prices and greater choice to consumers. Furthermore, while delisting is perceived negatively, it is a reality of retailing and provides the opportunity (and physical space) for new and innovative products to be offered (and, therefore, opportunities for new suppliers) where other products may no longer be responding to consumers' wants and needs. For these reasons, we do not support a broad requirement to avoid all differentiation. Instead, we support a requirement not to

discriminate in an unreasonable, punitive, or retaliatory manner, and this type of undesirable conduct is already accounted for under the proposed good faith obligation.

- Recognise the supplier's need for certainty around the risks and costs of trading: Risks and costs of trading can be clearly outlined by the retailer, but we do not believe it is possible to provide certainty around risks because this can never be achieved due to changing customer behaviour and other external factors, which are out of the retailer's control. A requirement to consider if the outcome is "fair" should not be allowed to drive and determine commercial decisions. This is because a "fair" outcome is extremely complex to define on an objective basis, and different stakeholders' perspectives on what is a fair outcome are likely to vary considerably. As the retailer, we are also focused on delivering good outcomes for our customers as well as our suppliers, and we think that this obligation could create an unhelpful and unnecessary conflict. We believe that including this obligation as a limb of the good faith obligation (as per Option 2) would appropriately focus on the fairness of the process and conduct, but not seek to inappropriately impose a subjective evaluation of the outcomes.

Alternative proposal: "no unconscionability" obligations

If the Government is seeking to introduce the concept of fairness into the grocery sector's commercial dealings, WWNZ instead proposes a "no unconscionability" obligation. This is because it is a more certain and better understood concept. A similar obligation is found under the Fair Trading Act 1986 ("**FTA**"), which includes a new prohibition against unconscionable conduct in trade (coming into effect 16 August 2022).[9] This is similar to the prohibitions that apply in Australia.[10] It is expected that conduct which is "against conscience by reference to the norms of society", as interpreted by the Australian courts, will be caught by this new prohibition.[11] Such an obligation will provide more certainty to retailers and suppliers, as all parties will have a more meaningful guide as to what conduct is proper and lawful. Furthermore, having an express "no unconscionability" obligation under the Code, in addition to the prohibition under the FTA, provides suppliers with additional, and potentially more timely and suitable, avenues for resolution. For example, suppliers could utilise the dispute resolution mechanism under the Code instead of High Court proceedings under the FTA.

Good faith obligations

WWNZ supports the proposed good faith obligations (as described in Option 1) subject to the following comments:

- Be responsive and communicative: We believe that an assessment of what constitutes being "responsive and communicative" will often be subjective, and dependent on the issues being considered and the context. For example, one instance of not responding to an email immediately may be seen as not being responsive and communicative by one party, but appropriate in the circumstances by another party. Accordingly, the Code should be appropriately drafted to ensure that the requirements are not prescriptive (except perhaps to clarify that isolated instances would not amount to a breach), and that the broader context must be considered before a breach is found.

[9] Fair Trading Amendment Act 2021, section 6.

[10] Competition and Consumer Act 2010 (Cth, Australia), schedule 2, section 20.

[11] Office of the Minister of Small Business, Office of the Minister of Commerce and Consumer Affairs, *Unfair Commercial Practices: Policy Decisions* (24 July 2019) at paragraph 21, see: https://www.mbie.govt.nz/dmsdocument/6621-unfair-commercial-practices-policy-decisions-proactiverelease-pdf.

- Provide information in time for suppliers to respond: We support this requirement, but again, consider the Code should not attempt to be prescriptive in terms of what timely provision of information is, given this will be highly dependent on the circumstances at hand.
- Generally engage in the trading relationship in good faith: We believe that the good faith obligation would be significantly more effective if suppliers are also required to act in good faith (discussed further below).
- Not put the supplier under duress and not retaliate against the supplier: We agree with a requirement that retailers should not engage in non-commercial or unreasonable conduct that punishes a supplier. However, we believe that these requirements (as currently drafted) are unworkable as a decision's impact on a supplier can be subjective. For example, a retailer's decision (such as delisting a product) could have an adverse impact on a supplier (and result in that supplier feeling commercial pressure, which it could perceive as duress), even when it is reasonable, commercially justified, and does not amount to bad faith. Therefore, to provide clarity and avoid ambiguity, we suggest including definitions of duress and retaliation. We also believe that the focus of these requirements should be on **how** the retailer puts the supplier under duress, or **how** the retailer retaliates, as this is what demonstrates good or bad faith. These modifications will make the obligations more effective and durable.

We also note that caution should be exercised with prescribing a long list of obligations in addition to the general good faith obligation because there could be conflict between the more specific obligations. We believe that the obligations under the Code should be focused on the process and conduct of retailers and suppliers, and be clearly worded in order to ensure compliance, and achieve the purpose of promoting competition in the market for the long-term consumer benefit.

Incentives on Suppliers

As discussed, WWNZ believes that, alongside an obligation of good faith on designated retailers, the Code should also contain an overarching principle of good faith applicable to suppliers. While we agree that the Code should incentivise suppliers to conduct themselves in good faith in their dealings with retailers, which reflects the reality that suppliers can potentially engage in bad faith practices, we consider suppliers should also be regulated by the Code. This is because, in practice, the conduct of suppliers can also have an impact on the ability of the retailer to comply with its obligations under the Code, and all participants should have the same obligations to act in good faith (recognising that, as set out above, in other areas of New Zealand law, mutuality of good faith obligations is seen as critical to achieving good faith relationships). We also agree that there are minimal risks from expecting suppliers to conduct themselves in good faith if that is already the obligation on retailers. We suggest that this overarching incentive of good faith should be integrated into Option 1 in the same manner as section 6B(3)(h) of the Australian Code, where the conduct of the supplier is included as a consideration when determining whether a retailer has acted in good faith. Further, we suggest that the Code should define good faith principles for suppliers such as truthfulness and transparency, to provide clarity and avoid ambiguity.

QUESTION 8: Do you have any views on how to incorporate tikanga Māori or Te Ao Māori in the Code?

Please type your submission below.

WWNZ considers that having a good faith obligation under the Code will benefit all participants in the grocery sector, including Māori participants. To support a sector which incorporates tikanga Māori views, and has regard to Te Ao Māori, WWNZ considers that the Code should be supported by guidance, which could establish ways in which retailer and supplier relationships could be managed in a manner consistent with these relevant principles.

QUESTION 9: How can the Code best incorporate economic development objectives, including those of Māori

Please type your submission below.

As above, WWNZ considers that the most effective way of obtaining positive outcomes for the grocery sector and New Zealand is to focus the purpose of the Code on promoting competition for the long-term benefit of New Zealand consumers, which includes Māori. If the Code can achieve better competitive outcomes, the expectation is that better economic outcomes will ensue. Broadening the scope and objectives of the Code risks making it less effective.

WWNZ does, however, support the concept of a periodic review, whereby the Commission (as the grocery sector regulator) is required to assess and measure the effectiveness of the Code, using certain economic criteria, to determine whether the Code remains fit for purpose or needs to be updated. WWNZ favours this evidence-based approach to regulation.

Further, certain Government economic policy objectives could be communicated by way of a government policy statement, which the Commission would be required to take into account under section 26 of the Commerce Act.

QUESTION 10: Do you have any comments on the preliminary assessment of the options against the criteria in **Chapter 4**?

Please type your submission below.

N/A.

5 Requirements for supply agreements

QUESTION 11: In relation to **5.2 Requirements for supply agreements to be written and contain minimum content**, which of the options do you agree with, and why?
Is there any content that you think should be required in grocery supply agreements but is not mentioned?

Please type your submission below.

WWNZ agrees that measures that increase the certainty and transparency of the terms and conditions of grocery supply agreements are desirable. However, some measures may be better suited as principles rather than mandatory requirements, as described below.

WWNZ supports that the Code includes a requirement that all grocery supply agreements be written in plain English, and that a copy be provided to the supplier, as there are benefits to both parties of having clear expectations between them. Furthermore, WWNZ supports the requirement of the grocery supply agreements being consistent with the Code, and containing minimum content, as outlined by the Commission. There will of course be compliance costs for some grocery retailers who are required to ensure their contracts meet the necessary standards under the Code. However, WWNZ considers that a consistent and fair approach to supply agreements should help ensure a level playing field amongst grocery retailers and deliver greater certainty and transparency for suppliers.

QUESTION 12: In relation to **5.3 limiting unilateral and retrospective variations**, which of the options do you agree with, and why?

Please type your submission below.

WWNZ points out that there are already legal requirements on businesses including grocery retailers, which may address the Government's concerns around retrospective and/or unilateral variations. In particular, there are two significant recent amendments to the FTA, coming into effect on 16 August 2022, which will provide a degree of protection from this type of conduct:

- The first is that the existing unfair contract terms regime will be strengthened and extended, such that standard form contracts relating to the supply of goods/services ordinarily acquired for commercial use, and with a relationship value of less than $250,000 per year, are prohibited from including "unfair" contract terms. "Unfair" terms include a provision which would cause significant imbalance in the parties' rights and obligations arising under the contract, would cause detriment (whether financial or otherwise) to a party if it were applied, enforced or relied on, and is not reasonably necessary in order to protect the legitimate interest of the party who would be advantaged by the term. This prohibition will capture any instances of unfair variations in the context of smaller supplier relationships (where we understand most of the concerns arise). We also note that the Government has said it "will implement changes to the Fair Trading Act unfair contract terms regime to allow private action in respect of unfair contract terms and raise the transaction value cap for grocery supply contracts," (thereby raising the application of that regime to relationships in the grocery sector beyond the $250,000 per year threshold).[12]
- The second is the introduction of a prohibition on unconscionable conduct in the context of an "in trade" relationship. However, unlike the unfair contract terms regime, there is no value threshold so this prohibition would apply to supply arrangements with larger suppliers too. Based on the key enforcement themes from Australia's equivalent regime, large retailers requiring onerous terms in agreements with smaller suppliers may be subject to particular scrutiny under this regime.

While there will be a cost associated with a myriad of different compliance obligations, WWNZ recognises that there may be benefits in setting clear expectations regarding variations for the sector in the context of the Code. In that regard, and bearing in mind the other legal protections available, WWNZ would support a principle in the Code of prohibiting retrospective and unilateral variations, except there should be scope to permit such variations where this is specifically set out in the grocery supply agreement in sufficient detail, is reasonable in the circumstances, and where reasonable notice is given.

[12] *Government response to the Commerce Commission's final report on the New Zealand retail grocery sector* at page 4, see: https://www.mbie.govt.nz/assets/government-response-to-the-commerce-commissions-final-report-on-the-new-zealand-retail-grocery-sector.pdf.

QUESTION 13: Do you have any comments on the preliminary assessment of the options against the criteria in **Chapter 5**?

Please type your submission below.

N/A.

6 Obligations in relation to product supply and placement

QUESTION 14: In relation to **6.2 Changes in supply chain processes,** which option do you think is best, and why?
Are suppliers being pressured to use a retailer's own logistics services and if so, what is the impact?

Please type your submission below.

WWNZ's suppliers are not pressured to use WWNZ's own in-house logistics services. WWNZ offers this service as it provides competitive terms as well as efficiencies if suppliers choose to use it. However, suppliers should not be mandated to use a retailer's logistics services and should be free to exercise their discretion when it comes to the selection of a logistics services provider (provided that the supplier's selected provider enables it to satisfy its supply obligations under any supply agreement).

However, it is important that the Code is sufficiently flexible to allow retailers to respond to changes in the commercial environment. WWNZ's distribution centres are complex operations, with a significant number of deliveries from various suppliers arriving daily, and transport providers collecting goods for delivery to WWNZ stores. WWNZ is already heavily incentivised to operate efficient supply chain procedures, and while we invest significantly in resources and technology to ensure this process runs smoothly, external factors, such as extreme weather events and disruptions to the national transport network, mean that schedules have to change, and sometimes necessarily at the last minute. We do not think it would be fair or appropriate to require compensation in these circumstances.

WWNZ therefore considers Option 2 (a prohibition on material unilateral changes) to be unworkable and potentially very challenging to manage in practice. For example, it is not possible to know in advance when, and in relation to which suppliers' material, unilateral changes might be required. By permitting some supply agreements to include the ability to make material unilateral changes (because it is "reasonable in the circumstances"), but not others, also creates a potential discrimination issue. Therefore, WWNZ considers it fairer to manage logistical issues and conflicts based on objective requirements at the time, rather than to introduce different tiers of suppliers.

Accordingly, Option 1 would ensure the necessary commercial flexibility and avoid unintended consequences. Option 1 could be strengthened by including requirements that where changes do occur, those changes should be reasonable in the circumstances, and to provide reasonable notice of a change.

QUESTION 15: In relation to **6.3 fresh produce standards and quality specifications,** do you think the Code should include specific provisions about fresh produce and if yes, please explain what you think it should include?

Please type your submission below.

WWNZ is strongly supportive of the Code including specific provisions about fresh produce, and considers the approach taken in the Australian Code to be the correct one. As such, we support the prescriptive approach in Option 2, requiring designated retailers to have defined standards, and to operate in accordance with protocols outlined in the Code regarding prompt acceptance or rejection of fresh produce.

QUESTION 16: In relation to **6.4 Obligations in relation to ranging, shelf allocation, and delisting**, which option do you think is best, and why?

Please type your submission below.

WWNZ supports the approach to ranging, shelf allocation and delisting in Option 2, namely that:

- a retailer should make decisions with regard to pre-defined ranging and shelf allocation principles;
- a retailer should provide suppliers with advance notice of range reviews; and
- delisting should be in accordance with grocery supply agreements, and for genuine commercial reasons, and that suppliers are given reasonable written notice of any changes, as well as the ability to engage in dispute resolution if required.

WWNZ does not support Option 3, which would prohibit any notice of advance warning of delisting to be provided prior to, or as part of, a range review process. The unintended consequence of this approach is that a supplier is not given the opportunity to address the poor performance of its product prior to a ranging decision being made, which is a key part of working collaboratively with suppliers. Product performance should form part of everyday conversations between category managers and suppliers, as it gives suppliers an opportunity to address emerging issues early and avoids unexpected surprises during range reviews. Removing the ability to have these conversations outside the formal setting of a range review would be detrimental to a good working retailer-supplier relationship.

The Code also must recognise that the fast-moving nature of the grocery industry does not always align with a pre-planned schedule and must ensure that a retailer retains the ability to respond to market changes and changes in customer needs, which may require unscheduled range changes. Examples of this could include unscheduled new product launches by a supplier, decisions to take measures to address stock shortages, and significant changes in customer behaviour that require an urgent adjustment to product range. Notice should not be required for the introduction of additional products. However, if a change results in delisting, or significant changes in product distribution for a supplier, then the retailer should be required to provide reasonable notice of, and the commercial or customer-driven reason for, the change.

We support the adoption of requirements that make delisting processes more transparent and certain. It is also important that the Code avoids a situation where more prescriptive delisting processes restrict the ability of a retailer to respond to changing customer needs and market conditions, for example, by introducing new and innovative products, or by responding to consumer demand for lower prices.

QUESTION 17: In relation to **6.5 Other obligations,** which option do you think is best, and why? Please comment on the range of different areas – confidential information, intellectual property, business disruption, freedom of association, whistle-blower protections, pressure to opt out of wholesale supply arrangements, exclusive supply clauses and 'most favoured nation' price clauses.

Please type your submission below.

WWNZ supports the principles outlined in the Australian grocery code, namely confidential information, intellectual property rights, the transfer of intellectual property, business disruption, and freedom of association. WWNZ considers these principles are suitable to the New Zealand commercial environment, and the requirement that a retailer respect the supplier's data / information should not be controversial, as it reflects what should be the current practice in any event.

WWNZ supports the above principles extending to taonga as mātauranga Māori, recognising the cultural importance of certain intellectual property.

WWNZ agrees that whistle-blower and anti-retaliation protections may assist in bringing undesirable behaviour to light through the regulator and dispute resolution body and supports these protections as a measure to improve conduct in the industry.

We do not believe that retailers should be able to pressure suppliers into opt-out clauses to the wholesale access regime, and we support the measures in the Code to limit this behaviour and protect these suppliers.

In addition, as outlined in response to Question 2 above, because supplier consent to wholesale sales and promotional funding is so critical to WWNZ (or any wholesaler in New Zealand, as is the case overseas) being able to offer a competitive wholesale product offering to other retailers, suppliers should also be obliged to deal with grocery retailers / wholesalers in good faith. This should include an obligation to consider, in good faith, any requests from a grocery wholesaler for "wholesale" terms that would enable a grocery wholesaler to supply products competitively (and to pass through promotional funding) to other retailers.

QUESTION 18: Do you have any other comments about issues relating to product supply and placement?

Please type your submission below.

While WWNZ supports the intent of the options outlined, we would emphasise that the grocery industry is dynamic, fast-paced, and needs to remain highly responsive to ever-changing customer needs, product offerings, external factors such as inflation, logistical challenges, and opportunities. It is vital that both retailers and suppliers are able to act quickly and with agility in response to these, and any regulatory Code must strike the right balance between the need for this agility, the need for transparency, and the appropriate allocation of risks and costs. New Zealanders will not be best served by an industry constrained by overly prescriptive or restrictive protocols.

QUESTION 19: Do you have any comments on the preliminary assessment of the options against the criteria in **Chapter 6**?

Please type your submission below.

N/A.

7 Obligations in relation to payment, price increases, and promotions

QUESTION 20: In relation to **7.2 Payment terms and set-offs**, which option do you think is best, and why?

Please type your submission below.

WWNZ considers that Option 2, requiring payments to be made in accordance with supply agreements, and permitting set-offs where provided for in a supply agreement (so long as they are reasonable and agreed to in the circumstances), recognises that the practical elements of a commercial relationship will vary between individual retailers and suppliers, while still providing a reasonableness test that ensures a level of consistency. Option 2 also provides suppliers with certainty and protection, while preserving the ability for both parties to negotiate the most suitable terms for their individual relationship.

For the reasons above, we would not support the inclusion of prescribed payment terms.

QUESTION 21: In relation to **7.3 Responses to price increases**, which option do you think is best, and why?

Please type your submission below.

WWNZ strongly supports a Code that improves the transparency and certainty of price increase processes and believes that the Code could go further to ensure transparency and certainty is provided by both retailers and suppliers in relation to their communication around price increases.

WWNZ supports the prescriptive approach under Option 2, which ensures transparent and prompt responses are provided to suppliers in respect of potential price increases. WWNZ supports the provision for subsequent negotiations in good faith by both retailers and suppliers.

QUESTION 22: In relation to **7.4 Payments for shrinkage and wastage**, which option do you think is best, and why?

Please type your submission below.

WWNZ supports a combination of Options 1, 2 and 3.

WWNZ supports the principle that payments for shrinkage should be prohibited but believes that (as provided for in Option 2), the retailer and supplier should be able to discuss ways to mitigate the risk or costs of shrinkage.

We consider that payments for wastage (as provided for in Option 1), should take place in accordance with the grocery supply agreement and the commercial relationship between the retailer and supplier.

We also support a sunset clause (as provided for in Option 3), however, we consider that this should be extended to 12 months. The lead time on some stock is close to six months after being ordered, therefore, six months may not be sufficient time in all cases.

QUESTION 23: In relation to **7.5 Payments for retailer's business activities, product placement, and as a condition of being a supplier**, which option do you think is best, and why?

Please type your submission below.

WWNZ supports Option 2 and the prohibition of arrangements that compel supplier payments or require them as a condition of the contract.

However, WWNZ considers that the Code should provide for payments and/or investments that a supplier may wish to make in legitimate and targeted marketing and promotional activity - for example, to build awareness, trial and repeat purchasing of their product - so long as this investment is voluntary and at their discretion, and is not compelled, or presented as a condition for being ranged by a retailer.

QUESTION 24: In relation to **7.6 Payments for promotions and promotional buying**, which option do you think is best, and why?
What are your views on promotional buying and investment buying?

Please type your submission below.

WWNZ supports the principles outlined in all options but is concerned that the Code will enable the continuation of investment / forward buying as a practice in New Zealand.

We believe that investment and forward buying (i.e. retailers over-ordering at supplier promotional wholesale prices for sale later) is a practice that results in an unproductive industry overhead, and is not in the long-term interests of consumers. The practice results in suppliers funding retailers beyond any agreed specific promotional investment (thereby reducing commercial certainty for suppliers), reduces commercial transparency between supplier and retailer, creates manufacturing inefficiencies for suppliers (by resulting in "lumpy" purchasing patterns, which are harder to plan for), and bloated supply chain pipelines (by resulting in retailers storing excess inventory in their network).

For this reason, in both the UK and Australian codes, where the retailer over-orders from a supplier at a promotional wholesale price, it must compensate the supplier for any over-ordered groceries which it sells at a price higher than the promotional resale price connected to that promotional wholesale price.[13] WWNZ supports a similarly prescriptive approach to investment / forward buying.

WWNZ considers that grocery supply agreements should allow for promotion payments, provided that they are agreed and reasonable in the circumstances. Promotions are an important growth tool for both retailers and suppliers and provide significant benefits to consumers. Retailers and suppliers are incentivised to invest in promotional activity, and it is key that these investments continue for consumers. However, suppliers should not be compelled to make such payments, and they should not be a condition of a supply agreement for being a supplier.

[13] Australian Code, schedule 1, clause 20(2), and UK Code, clause 14(2) (noting that the UK Code goes further and places an obligation on the retailer to "take all due care, when ordering from a supplier at a promotional wholesale price, not to over-order", with compensation as the backstop).

QUESTION 25: Do you think requests from retailers for payments for data services is an issue and if so, why?

Please type your submission below.

WWNZ does not consider there is any issue with the approach taken by WWNZ to the provision of data services to suppliers. In our view, suppliers should be free to procure data services at their discretion, and this should not form part of an underlying supply condition in a grocery supply agreement.

QUESTION 26: Are there any other instances where requests for payments should be limited? If so, what are the issues and how should they be addressed in a Code?

Please type your submission below.

WWNZ considers that the Code should prevent any requirements for payment that fall outside of a grocery supply agreement or are not otherwise agreed. WWNZ believes that, in recognising that the industry is dynamic and fast-paced, with plenty of opportunity for suppliers and retailers to invest in activities that can grow their businesses, the Code should allow for requirements for payments to be agreed, provided that the supplier has an opportunity to consider whether the payment reflects a reasonable transfer of value between the retailer and supplier and decline the request from the retailer at its discretion.

QUESTION 27: Do you have any comments on the preliminary assessment of the options against the criteria in **Chapter 7**?

Please type your submission below.

N/A.

8 Dispute Resolution

QUESTION 28: Do you have any comments about the current state of dispute resolution (for example, the processes that are used or the nature of disputes)?

Please type your submission below.

WWNZ agrees, as noted in the Consultation Paper, that minor disputes between retailers and their suppliers are generally resolved quickly and to the satisfaction of both parties, reflecting the size and pace of the grocery sector.[14]

WWNZ has an existing dispute resolution process in its supplier charter, which provides for disputes to be brought to the attention of a senior manager for internal review and resolution, as noted in the Consultation Paper.[15] This process involves active engagement with the supplier and WWNZ's reviewers and allows for timely resolution (WWNZ uses best efforts to resolve disputes within 14 days). We ensure that suppliers will not be prejudiced in their relationship with WWNZ as a result of raising a dispute. This process does not prevent any supplier from raising the matter in another forum.

We find the current process effective at resolving disputes with our suppliers. However, we recognise the potential value that an independent dispute resolution process may provide to the industry as a whole and we support its creation, provided that the dispute resolution regime is cost effective and preserves the ability for self-resolution.

[14] Consultation Paper at paragraph 207.

[15] Consultation Paper at paragraph 208. See also WWNZ *Woolworths New Zealand Supplier Charter* at clause 5: https://www.countdown.co.nz/media/9959/wwnz-supplier-charter-180618.pdf.

QUESTION 29: Do you have any comments on the particular criteria in **Chapter 8.5** used to undertake the preliminary assessment of options for dispute resolution?

Please type your submission below.

WWNZ considers that the criteria are fit for purpose and sufficiently encompass the recommendations made by the Commission in its Final Report.

QUESTION 30: In relation to **Chapter 8.6 The options for New Zealand**, which of the three options do you think will work best, and why?

Please type your submission below.

WWNZ believes Option 3 (Negotiate-Adjudicate) is the most appropriate option.

Preservation of internal resolution of issues as the first port of call is important as it allows for faster, more efficient, and less costly resolution. WWNZ has already invested a significant amount of effort in ensuring it maintains good supplier relationships and regularly monitors supplier sentiment and feedback. Therefore, WWNZ also believes it could be detrimental to the retailer-supplier relationship if disputes could only be made to an independent third party. Disagreements and differences of opinion are a commercial reality in any sector, and it is important that there are procedures in place to support a working and collaborative relationship to allow them to be resolved, rather than an adversarial one. Self-resolution also helps to ensure that any formal dispute resolution system is not overburdened with minor complaints which can be resolved through standard internal processes.

In that regard, WWNZ is pleased to see that the Minister has proposed not to prevent parties from voluntarily engaging in dispute resolution on a commercial basis.[16]

However, as discussed above at Question 28, we recognise the value that an independent dispute resolution process can provide as an effective backstop measure where internal resolution has not been unsuccessful, and where escalating through court proceedings may be prohibitive or undesirable for a variety of reasons.

Unfortunately, the Minister's Cabinet paper redacts much of the description of the proposed approach for dispute resolution. The Cabinet paper also suggests that the "timing overlap" between the current consultation on the dispute resolution process under the Code, and the Minister's proposal to Cabinet on the dispute resolution process, was "unavoidable due to the need to advance policy decisions for legislation at pace".[17] This is disappointing given the importance of these decisions for New Zealand consumers, suppliers, and retailers. The Minister has, however, requested delegated authority from Cabinet "to make further decisions adjusting the dispute resolution scheme for the Code of Conduct to respond to relevant feedback from public consultation".[18] Therefore, we expect that, as a key participant in the Code, our feedback will be genuinely considered and the proposal to Cabinet will be amended where there are good reasons to do so.

WWNZ considers that the use of adjudication (where self-resolution has not been successful) is likely to be more efficient and cost-effective, whereas arbitration tends to be more drawn out. This can particularly impact smaller suppliers and may act as a deterrent in seeking dispute resolution.

We also note that, while not specified in the options, we would support the inclusion of an exception to costs (as in the UK Code) where the supplier's claim is vexatious or wholly without merit, in which case costs should be assigned at the adjudicator's discretion. WWNZ considers that this will not

[16] Cabinet Paper *Grocery sector regulator, dispute resolution approach and monitoring and enforcement framework* (26 July 2022) at paragraph 29.
[17] Cabinet Paper *Grocery sector regulator, dispute resolution approach and monitoring and enforcement framework* (26 July 2022) at paragraph 41.
[18] Cabinet Paper *Grocery sector regulator, dispute resolution approach and monitoring and enforcement framework* (26 July 2022) at paragraphs 41-42.

undermine the objectives of a Code and will reduce the risk that adjudications are brought by suppliers in bad faith. The adjudicator should also be required to conduct an initial assessment of any complaint before it is escalated as a formal complaint, to ensure that trivial and unsubstantiated complaints are appropriately dismissed.

QUESTION 31: Do you have any comments on the preliminary assessment of the options against the criteria in **Chapter 8**?

Please type your submission below.

N/A.

9 Monitoring, compliance and enforcement

QUESTION 32: Do you have any views on the Australian and UK approaches to monitoring, compliance obligations, and enforcement, and which might be most effective for New Zealand?

Please type your submission below.

Monitoring and reporting functions

WWNZ understands from the publicly released Cabinet paper (as noted above at question 9) that a decision has already been made that the Commission will be the relevant grocery sector regulator, supported by a Grocery Commissioner.[19]

WWNZ considers that the legislation should not be overly prescriptive regarding the mandatory reporting requirements imposed on the Commission or Grocery Commissioner.

For example, a requirement for the Commission to conduct an annual survey and to produce an annual report appears to be an appropriate level of monitoring and reporting. Cabinet has agreed that the Commission will have statutory powers for information-gathering based on its powers under the Commerce Act, which are extensive.[20] Accordingly, the Commission has scope to increase its monitoring activities if it has good reason to do so. In that regard, we would like to see the legislation require the Commission to satisfy itself that there are reasonable grounds before it embarks on additional monitoring exercises. Responding to information requests can be extremely resource and time intensive, and could materially increase costs, and these costs would not have been able to be appropriately considered when carrying out the initial cost/benefit analysis for the proposed regulatory framework.

Enforcement

WWNZ considers the position taken by the Minister and agreed to by Cabinet regarding pecuniary penalties is excessive, with Cabinet having agreed that the Grocery Industry Competition Bill will provide for civil penalties which could be up to 10% of the relevant designated retailer's turnover.[21]

In our view, the penalties proposed are disproportionately high and are out-of-step with a market the size of New Zealand. Additionally, they are excessive compared to the UK and Australian regimes which the New Zealand regime is being modelled off. In Australia, no pecuniary penalties are imposed under its code. In fact, in 2018 the independent review of the Australian code "carefully considered the merits of civil penalties" and determined that it was "not suitable for the Grocery Code".[22] It was concluded that there were other remedies of more relevance to suppliers, such as fulfilment of purchaser orders and compensation for loss or damage. Furthermore, the review noted that the ACCC already had the ability to impose substantial pecuniary penalties under its consumer law powers in relation to unconscionable conduct. As of 16 August of this year, the

[19] Cabinet Paper *Grocery sector regulator, dispute resolution approach and monitoring and enforcement framework* (26 July 2022) at paragraphs 1, 5 and 18.
[20] Cabinet Paper *Grocery sector regulator, dispute resolution approach and monitoring and enforcement framework* (26 July 2022) at paragraph 43.
[21] Cabinet Paper *Grocery sector regulator, dispute resolution approach and monitoring and enforcement framework* (26 July 2022) at paragraph 50.
[22] The Australian Government the Treasury *Independent Review of the Food and Grocery Code - Final Report* (September 2018) at page 50, see: https://treasury.gov.au/sites/default/files/2021-08/Independent-review-of-the-Food-and-Grocery-Code-of-Conduct-Final-Report.pdf

Commission will have similar powers. Following the Australian approach, it would be a prudent option to commence the regime without pecuniary penalties and assess whether they are indeed required following a review of the regime.

If pecuniary penalties are to be a feature of the regime (which it appears Cabinet has decided ahead of this subsequent consultation process), penalties should not be imposed immediately following a breach of the Code; they should operate as a back-stop to be used as a "last resort" where a participant has failed to adhere to a direction from the regulator to comply, particularly given that incentives already exist to comply with Code obligations (i.e. avoiding the time and cost involved with dealing with allegations, and potential reputational damage).

The size of penalties proposed are modelled off section 80 of the Commerce Act 1986, which imposes pecuniary penalties for restrictive trade practices. We cannot see how a breach of the Code's obligations (e.g. to have supply agreements in writing, to avoid unilateral agreement changes, to have fresh produce standards, and to deal with suppliers in good faith) can be considered the same level of severity as restrictive trade practices (which include cartel provisions and taking advantage of market power to restrict entry by, or eliminate, other competitors) so as to warrant similar penalties.

It is important, for regulation to be effective, that the consequence of inaction or non-compliance appropriately matches and targets the conduct in question. There are other remedies that would be more appropriate and effective, as described below:

- The Commission would have the ability to issue notices of corrective action - this is an effective way of achieving compliance. Failure to comply with a notice could then reasonably be subject to a pecuniary penalty.
- The Commission, or any other affected party, would have the ability to apply to the court for an injunction to prevent contravention of the Act or the Code, or require a party to do an act or thing they have refused or failed to do.
- The Commission would have the ability to issue warnings, which could be required to be disclosed.
- The Commission would have the ability to make an interim or preliminary order to preserve the status quo, or to stop conduct a party is engaging in to preserve the status quo, while a dispute goes through the dispute resolution process.

There could also be unintended consequences of having excessive penalties for breaches of the Code, and such penalties may even be counterproductive to the objectives of the regime. In particular, contributing to a statutory purpose of promoting competition, and preserving incentives to innovate and to negotiate with suppliers is important. With such significant and immediate penalties threatened, this may have a chilling effect on retailers' ability to negotiate competitive input prices, or to explore novel or innovative arrangements with suppliers that benefit suppliers and consumers. Therefore, WWNZ strongly recommends that MBIE and the Minister reconsider the application of these significant penalties and focus on more productive enforcement tools.

It is noted, however, that the Cabinet paper does indicate that "decisions on the detailed tiers for how specific pecuniary penalties above may apply to specific provisions will be addressed as part of the drafting".[23] Accordingly, at the very least, the Act should make it clear that pecuniary penalties may only be pursued by the Commission where there has been an instance of non-compliance in relation to another enforcement measure, i.e. so they operate as a backstop. For example, equivalent provisions of the Retail Payment System Act 2022 which apply to merchants' failure to comply with a corrective notice could be adopted.

Furthermore, while still very high, the level of pecuniary penalties under the Retail Payment System Act, which apply to merchants' failure to comply with standards, would be more proportionate than those under the Commerce Act, i.e. in the case of an individual, $200,000 for each act or omission; or in any other case, $600,000 for each act or omission. While not entirely comparable (given it is a form of economic regulation), the purpose and the design of the Retail Payment System Act is more comparable than the Commerce Act.

Should penalties based on turnover be considered, imposing penalties up to 10% of turnover is significantly out of line with other markets such as the UK approach, where the Groceries Code Adjudicator can impose penalties only up to 1% of turnover (which again reflects the seriousness of breach). As noted above, in Australia, the ACCC cannot impose penalties under the code.

[23] Cabinet Paper *Grocery sector regulator, dispute resolution approach and monitoring and enforcement framework* (26 July 2022) at paragraph 52.

QUESTION 33: Do you have any comments on the potential compliance costs (for suppliers and designated retailers) from the proposed content of the Code of Conduct?

Please type your submission below.

A Code that promotes competition in the market for the long-term benefit of New Zealand consumers should also consider the cost of compliance. It is in the interests of all parties to keep compliance costs to a reasonable level, so as to reduce adding further cost (and therefore price) pressures in the grocery sector.

WWNZ expects there could be significant costs associated with compliance. The extent of these costs will not be able to be determined until the final form of the Code has been determined. However, we expect there will be staff resources, costs, and time costs associated with dispute resolution, as well as the training of staff to ensure relevant teams understand the Code, its importance, and the processes involved to comply with it. We expect that, if the UK approach is followed, the most costly aspect of a monitoring, compliance, and enforcement regime will be reporting obligations, which, as we discuss at Question 32, are not required under the Australian approach.

QUESTION 34: Do you have any views on how the Code should be implemented?

Please type your submission below.

WWNZ supports a phased implementation of a Code, including sufficient time for the alteration of supply agreements (a minimum of 12 months is reasonable, given the volume of contracts that may need to be reviewed to ensure compliance), and to appoint and train new staff on compliance.

QUESTION 35: Do you have any other comments on the matters discussed in **Chapter 9?**

Please type your submission below.

N/A.