

# Update on the Grocery Supply Code

## NZFGC Webinar

19 September 2023

Pierre van Heerden – Grocery Commissioner



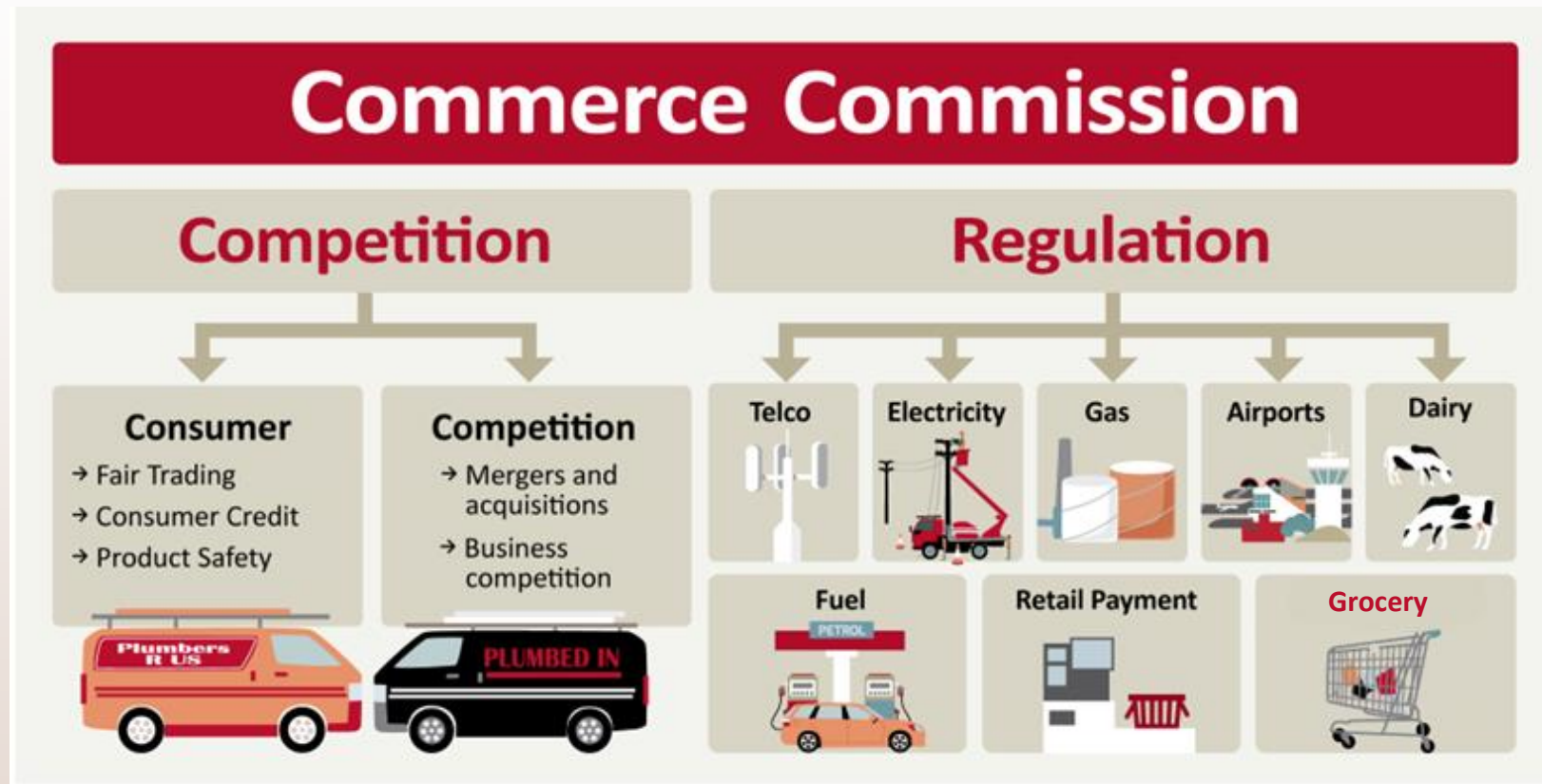
# The Commerce Commission



- We are New Zealand's primary competition, fair trading and consumer credit, and economic regulatory agency.
- We play a crucial role in ensuring New Zealand's markets are competitive, consumers are well informed and protected, and sectors with little or no competition are appropriately regulated.



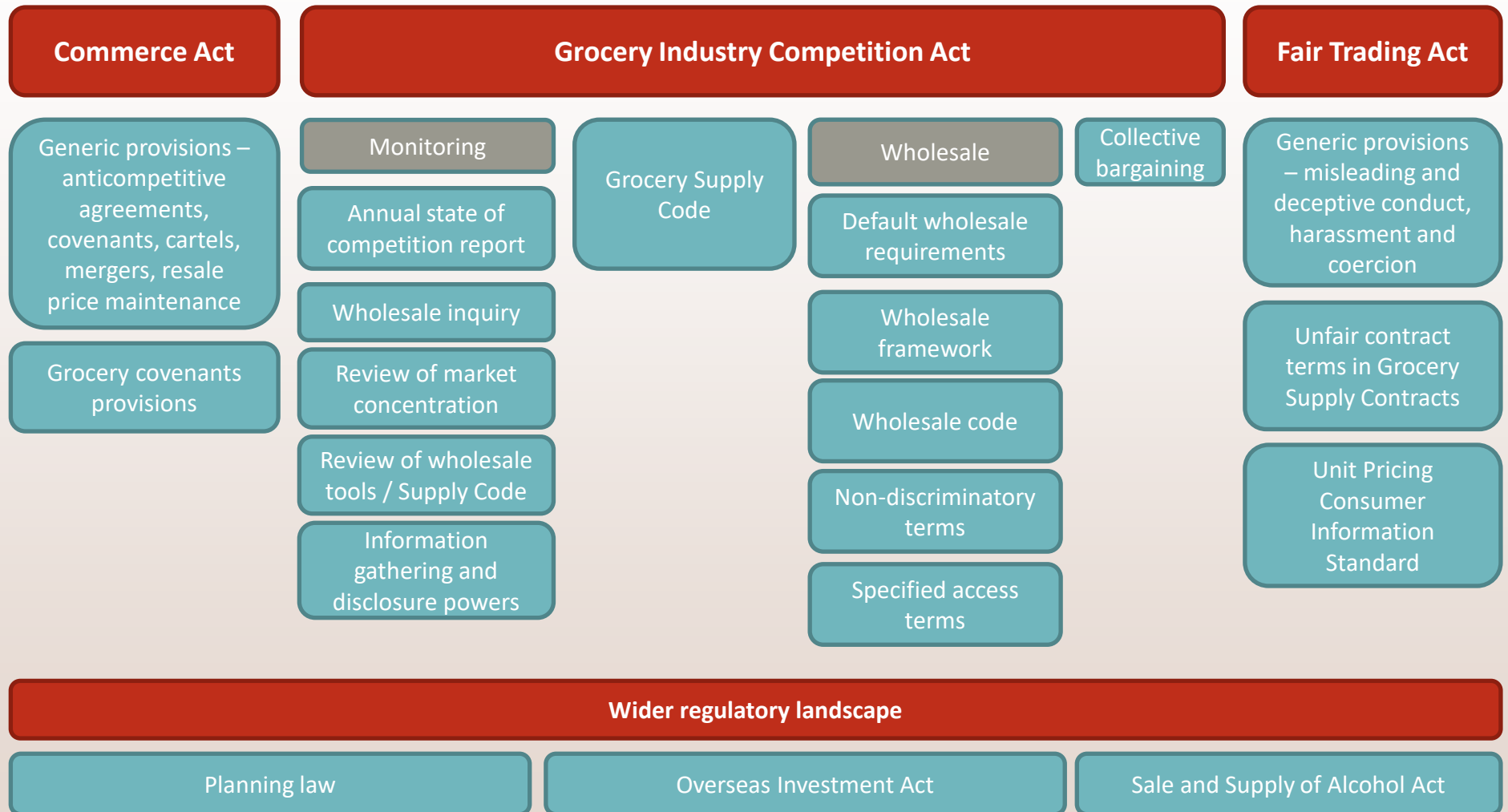
# The Commerce Commission



# The Grocery Regulatory Landscape



# The Commission's Grocery regulatory framework



# Four main features created by the Grocery Industry Competition Act 2023 (GICA)

## Grocery Commissioner

Appointment of a Groceries Commissioner to oversee the changes promoted by the Act and manage the regulatory framework created.

## Grocery Supply Code

Creation of a new Grocery Supply Code of Conduct setting out the rules of engagement for interactions between Regulated Grocery Retailers (RGRs) and suppliers.

## Wholesale Supply

New wholesale supply regime creates obligations on RGRs to set up systems to facilitate wholesale supply to other grocery retailers.

## Dispute resolution, monitoring and enforcement

Creates the framework for a new dispute resolution body to deal with disputes between RGRs and suppliers or wholesale customers (currently being set up by MBIE).

The Act also provides the Commission with a wide and flexible range of monitoring and enforcement powers to use as necessary to support regulation of the industry.

# Our powers, functions and duties

## Purpose of the Act:\*

**“To promote competition and efficiency in the grocery industry for the long-term benefit of consumers in New Zealand”.**

## Functions of the Commission:

**Monitor** competition and efficiency in the grocery industry

Carry out **inquiries, reviews and studies** in relation to grocery industry

Act as a **regulator**. Including monitoring compliance and taking enforcement action.

Disseminate **information**

**Co-operate** with other law enforcement or regulatory agencies

Keep under **review** the law and practices that are relevant to its other functions

\*There are also separate purposes specific to the Grocery Code (s16), Wholesale Supply regime (s21) and Annual Report (s175).

# Working to the spirit of the Act



- Be aware, while the Code puts obligations on RGRs the conduct of a supplier is a factor for determining whether a retailer has acted in good faith
- You should make sure your business is aligned with the purpose of the Act – to promote competition for the benefit of New Zealand consumers
- We have a wide range of powers to look at all participants in the market and address behaviour that is anti-competitive/harmful to NZ consumers



# Working to the spirit of the Act



“While the Code is primarily directed at RGRs, we will be using all our powers under the Act to identify and act against any conduct by any participant that may hinder or obstruct the purpose of the Act (promoting competition and efficiency in the grocery sector for the long-term benefit of New Zealand consumers) being achieved. For example:

- More powerful suppliers encouraging problematic or prohibited behaviour by RGRs towards their rivals;
- Unfair trading practices, such as retail price maintenance; and
- Behaviour that may be contrary to the spirit and purpose of the Act, such as unreasonably limiting supply to retailers in a way that is ultimately detrimental to New Zealand consumers.”

# The Grocery Supply Code of Conduct



# Background

- We acknowledge that a supply code of conduct like those in Australia and UK has been advocated for by suppliers and the NZFGC for years.
- The need for a Code was supported by the Market Study into the retail grocery sector, which found that competition is not working well for many suppliers who rely on business with major grocery retailers in NZ , and that there is an imbalance in bargaining power with those retailers.
- The “Grocery Supply Code 2023” is the first iteration of the Code and has been included as Schedule 2 within the Grocery Industry Competition Regulations 2023.
- While the making of the Code (led by MBIE) required an Order in Council, the Commission now takes over responsibility for the Code and future iterations will be made by the Commission.
- However, the process for extending the Code to other retailers would go back to the Minister and require a further Order in Council.

# How does the Code differ from the Australian Code?

- The New Zealand Code is mandatory
- Our Code also includes additional provisions:
  - Prohibiting requirements to use certain transport and logistics (clause 11)
  - Prohibiting conduct that unduly hinders or obstructs supply to competitors (clause 22).
- The Dispute Resolution Scheme (still in development, established by MBIE)
- The Australian Code includes provisions that were not carried over into the New Zealand Code (but could be looked at further in the future)
  - Rules regarding payments for better positioning of groceries (clause 16 of Australian Code),
  - Changes to supply chain procedures (clause 22 of Australian Code) and
  - Duty to train staff with respect to the code (clause 40 of Australian Code).

# Other differences between NZ and Australian Codes



- For certain clauses the New Zealand Code includes requirements for retailers to provide written explanations about how they have satisfied the rules of the Code.
- Differences in the way that the Codes address “investment buying”. The Australian Code requires that the retailer must not “over order” and must pay the difference for any over-ordered stock, while the New Zealand Code requires the retailer and supplier to agree what will occur in this scenario.
- Merchandising and transport between distribution centres and stores have been included as examples of business activities where payment is prohibited unless included in the supply agreement and reasonable in the circumstances.
- The New Zealand Code requires supply agreements to be written in “plain language”.

# Purpose of the Code

The Code supports the purpose of the GICA by:

- Promoting fair conduct and prohibiting unfair conduct
- Promoting transparency and certainty about the terms of agreements; and
- Contributing to a trading environment in the grocery industry:
  - in which businesses compete effectively and consumers and businesses participate confidently; and
  - that includes a diverse range of suppliers



# Who does the Code apply to?

- The Code puts obligations on RGRs and associated parties (e.g. franchisees, subsidiaries)
- Applies to RGRs' dealings with anyone supplying them with groceries, or actively seeking to supply them with groceries.
- Groceries are defined in the GICA:

Fresh produce

Meat, Seafood

Dairy products

Bakery products

Chilled or frozen food

Pantry or dry goods

Packaged food

Non-alcoholic drinks

Personal care products

Household consumables

Pet care products



# What rules are in the Code?

- We will be releasing a factsheet summarising the content of the Code
- The Code is largely based on the Australian Grocery Code of Conduct and:
  - Requires certain behaviours from RGRs including obligation to act in good faith
  - Prohibits certain types of conduct completely
  - Prohibits certain conduct, unless it's provided for in the supply agreement and reasonable in the circumstances.  
*You don't have to agree to 'contract out' of anything*



# Transition period

- Code in force from **28 September 2023**
- If you have a current agreement that's inconsistent with the Code, the relevant RGR has until **28 March 2024** to offer you variations to make it consistent



# Don't 'contract out' of protections



- **Don't 'contract out'** of protections provided by the Code **unless it's of benefit to you**, for example you don't have to agree to pay for merchandising.
- You should seek legal advice on your rights under the Code.
- NZFGC will be making training on the Code available.

# Delisting

- We know that some suppliers are concerned about delisting if they don't agree to opt out of protections
- The Code creates a process around delisting. Delisting can only occur in line with an agreement or for genuine commercial reasons.
- You can ask for a written statement on the reasons for delisting.



# We will need your feedback



- The Commission is required to review and report on the supply code within two years of it coming into force, and at least every five years after that
- The reviews will include:
  - Assessing operation and effectiveness
  - Recommending whether the Code should be amended, revoked or replaced
- We can change the Code at any time, with consultation
- If we don't know about it, we can't act on your behalf.
- We will be looking at issues that emerge from the Dispute Resolution process and review the Code accordingly

# Making a report/sharing information



- Anyone can make a report to the Commission about a party in the grocery sector at any time. This could be about a breach of the new rules introduced by the Act (including the Grocery Supply Code) or the Fair Trading or Commerce Acts.
- Reports can be made via the following channels:
  - Completing the online form on the Commission website at <https://comcom.govt.nz/make-a-complaint>;
  - Calling us on 0800 943 600; or
  - Emailing [contact@comcom.govt.nz](mailto:contact@comcom.govt.nz).

# Protecting your identity

- We understand that you might be concerned that informing us about possible wrongdoing could put you in an adverse position if your identity is revealed.
- You should raise your desire to remain anonymous with the Commission *prior* to making a report/submitting information. Doing so gives us grounds to refuse a request for that information, using section 9 of the OIA.
- We value information provided from complaints and have experience in other regulatory areas of protecting information and mechanisms available to us to protect your identity.

# Breaches

- Pecuniary penalties
  - RGRs have an obligation to comply, and contravention of the Code attracts civil liability remedies.
  - for an individual, a maximum of \$200,000.
  - In any other case, the greater of
    - \$3 million, or
    - the commercial gain, or if this cannot be easily established, 3% of turnover.
- Private enforcement
  - Other parties, not just the Commission, can seek relief (compensation, variation/cancellation of contract, injunction).

# Contact us



Call: 0800 943 600

Write: Contact Centre, PO Box 2351, Wellington 6140

Email: [market.regulation@comcom.govt.nz](mailto:market.regulation@comcom.govt.nz)

Website: [comcom.govt.nz/](http://comcom.govt.nz/)





