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REVIEW OF THE GROCERY SUPPLY CODE – FOODSTUFFS' SUBMISSION IN RESPONSE TO REQUEST FOR VIEWS

Introduction

- 1 The Commerce Commission (**Commission**) is launching a review of the Grocery Supply Code 2023 (**Code**) under Part 2 of the Grocery Industry Competition Act 2023 (**Act**). In a paper released on 1 August 2024, the Commission issued a request for views on issues and opportunities to consider within the review (**Request**).
- 2 Foodstuffs North Island Limited (**FSNI**) and Foodstuffs South Island Limited (**FSSI**) (together, **Foodstuffs**) welcome the opportunity to make a submission in response to the Request.

Request

- 3 The Commission stated in the Request that it is proposing that its assessment of the Code's operation and effectiveness be measured against how well the Code is meeting the purpose of the Code, which is set out in section 16 of the Act. In paragraph 21 of the Request, the Commission separated that purpose into a series of objectives.
- 4 The Request sets out a list of questions. We respond to each of these below.

Submission

- 5 The Code partially came into effect on 28 September 2023, and has been fully in force since 28 March 2024. Since its introduction, FSNI and FSSI have worked constructively with our suppliers and the Commission to implement and comply with the Code.¹ Together with our members, we have worked hard to meet both the letter and spirit of the Code.
- 6 Foodstuffs' view is that the current Code provides the appropriate balance between supporting suppliers and allowing regulated grocery retailers (**RGRs**) to negotiate firmly and fairly with suppliers to best meet the needs of their customers. However, there are opportunities to improve the Code, with a focus on reducing the administrative burden and clarifying some aspects.
- 7 The Commission has noted concerns that suppliers may not be benefiting from the full protections of the Code due to built in carve-out provisions. Foodstuffs' view is that these

¹ Each of FSNI and FSSI has over 1,700 suppliers.



carve-outs/exceptions must be retained. Consistent with the Commission's thinking during the market study into the retail grocery sector, most of the Code focuses on *how* businesses in the market behave, rather than substantive matters.² Permitting mutually agreed and reasonable carve-outs/exceptions to certain Code requirements is consistent with this approach.

- 8 Further, as part of the Code's development, MBIE undertook a detailed analysis of the different options available for a Code. Generally, the "prescriptive code" option was selected as preferred by MBIE. The exceptions/carve-outs to the prescriptive rules were critical to MBIE's assessment of the effectiveness, efficiency and durability of those rules. They were the basis for key design decisions that led to the current Code. Accordingly, their removal would undermine this fundamental premise in the Code's design – that parties can negotiate, in good faith, reasonable exceptions to an otherwise prescriptive regime. The risk of the Code chilling negotiations with suppliers is one that was rightly noted by the Commission in its First Annual Grocery Report released on 4 September 2024.³ Freedom to negotiate is critical to competitive markets.
- 9 It is instructive that the Independent Review of the Australian Food and Grocery Code of Conduct (**Australian Review**) recommended changes to the Australian regime which, when implemented, will largely align it with the current New Zealand position. This suggests that an evolutionary rather than revolutionary approach is appropriate for the New Zealand review, following which the two regimes would remain largely aligned.⁴ Incremental change to the Code would also be reflective of the very short period of time in which RGRs and suppliers have operated in a Code environment.
- 10 Schedule 1 of this submission explains, more specifically, why each carve-out/exception should be retained in the Code.
- 11 Finally, the review must have appropriate regard to our co-operative structures. Co-operatives form an important part of the fabric of the New Zealand grocery market. The Code applies equally to all independently owned members of our co-operatives as well as the support centre functions performed by FSNI and FSSI. Care needs to be taken to avoid unnecessary duplication and placing unnecessary administrative burden on members, particularly those operating smaller stores.⁵ Regarding the administrative burden on both RGRs and suppliers, Foodstuffs notes the concerns cited by the Commission in its First Annual Grocery Report⁶ and suggests some solutions to those concerns in this submission.

² Commerce Commission, *Market study into the retail grocery sector: Final report*, 8 March 2022, 9.154 [Retail Market Study].

³ Commerce Commission, *First Annual Grocery Report | Pūrongo ā-tau tuatahi mō te kai*, 4 September 2024, p 110 [Annual Grocery Report 2024].

⁴ As noted by the Commission in the Retail Market Study: "One of our major grocery retailers, and a number of suppliers, operate in both Australia and New Zealand. If our recommendation is accepted and a code of conduct is to be adopted in New Zealand, we consider that, where there is a choice of approach, the Australian approach should be preferred unless there is a good reason not to." Retail Market Study, 9.157.

⁵ For example, 225 members operate stores under the Four Square banner.

⁶ Annual Grocery Report 2024, p. 110.



Question 1: Do you consider the Code is currently effective in supporting the objectives set out in paragraph 21 of the Request?

- 12 In response to questions 3 to 6, we provide specific comments regarding the content and implementation of the Code. Subject to those comments, we consider that the current Code is reasonably effective in supporting the objectives set out in paragraph 21 of the Request.
- 13 In Foodstuffs' view, the combination of prescribed rules with reasonable exceptions, together with the overarching obligation of good faith, provides the appropriate foundation for an effective Code.
- 14 To improve the effectiveness of the Code, the Commission may wish to consider, as part of its review, the application of the Code to suppliers. More specifically, Foodstuffs submits that clause 6 of the Code should be amended to provide that RGRs *and* suppliers should, at all times, deal with each other in good faith. The Code currently provides that the extent to which the supplier has acted in good faith is only relevant to an assessment of whether an RGR has acted in good faith.⁷

Question 2: Following on from Question 1, are there certain objectives within paragraph 21 that you wish to comment on?

- 15 Foodstuffs views all the objectives as being important in achieving the overall purpose of the Act, which is to promote competition and efficiency for the long-term benefit of consumers.
- 16 There is a balance to be struck in terms of how the Code best supports these objectives. For example, overly restricting RGRs' ability to undertake category reviews and delist products may, on one hand, be viewed as promoting supplier confidence (in terms of certainty of future dealings with an RGR for existing products), but on the other hand, may ultimately reduce competition between suppliers, reduce innovation, and undermine the objective of promoting a diverse range of suppliers, to the detriment of consumers.⁸
- 17 Foodstuffs' view is that in its current form, the Code generally strikes the balance between objectives appropriately.

Question 3 and Question 4: Are there any issues with the content of the Code that may be impacting the Code's effectiveness in supporting the objectives in paragraph 21? Are there any opportunities for improving the content of the Code to support the objectives in paragraph 21?

- 18 Regarding the content of the Code, Foodstuffs has identified the following opportunities for improvement:

⁷ Grocery Supply Code 2023, cl 6(3)(i) [Code].

⁸ Delistings, in particular those that occur following a competitive process, are pro-competitive because an incumbent product will ordinarily be replaced by a new product that is more innovative or otherwise more attractive or relevant to retail customers.



- 18.1 Ways to address the administrative burden of documenting dynamic agreements between RGRs and suppliers;
- 18.2 Fostering innovation including new product development and engagement with new suppliers;
- 18.3 Clarifying the application of certain provisions (including delisting) to fresh produce;
- 18.4 Clarifying the application of the Code to:
 - 18.4.1 agreements with suppliers that do not involve the supply of groceries (e.g., transport services);
 - 18.4.2 "On the Spot" convenience stores; and
 - 18.4.3 non-retailing RGRs; and
- 18.5 Opportunities for additional protections for suppliers while retaining the right balance of protection and flexibility to negotiate.

19 We address each of these opportunities in further detail below.

Reducing administrative burden

- 20 As the Commission recognises, the Code requires RGRs and suppliers to reach agreement on a range of matters that are dynamic in nature.⁹ In the case of Foodstuffs, these agreements are made both at a support centre and store level. Currently, all of these agreements must be recorded in writing. For example, to comply with this requirement, each time a supplier offers to fund a promotion to one of our stores, the supplier and the store must complete a deal sheet or otherwise agree in writing to undertake the promotion. The feedback we have received from suppliers is that they see the additional documentation as an unnecessary process that distracts from the commercial interaction between sales representatives and store buyers.
- 21 Foodstuffs has reflected on how this issue might be addressed, while continuing to promote the objectives of the Code, including certainty and transparency about the terms of agreements between the parties.
- 22 It is important that the commercial terms of supply between the parties, including promotional funding, are agreed in good faith. However, Foodstuffs proposes the concept of a simple "commercial framework agreement".¹⁰ This would be entered into between a franchisee of an RGR and a supplier, setting out high-level commercial terms but agreeing different ways for the details of each individual promotional or buying deal to be agreed other than in writing. This commercial framework agreement could be for a

⁹ Annual Grocery Report 2024, p 110.

¹⁰ In the case of Foodstuffs, this commercial framework agreement would form part of the grocery supply agreement between FSNI or FSSI and the supplier.



12-month period and able to be terminated on reasonable notice by either party, in which case the default provisions of the Code would apply.

23 At the heart of this proposal is a mutually agreed "contracting-in" regime which allows suppliers to provide products in an administratively efficient manner while meeting their commercial objectives. We would value the opportunity to work with the Commission and suppliers to further develop this proposal.

24 Finally, it may also be useful for the Code (or the Commission) to clarify that, in the case of a franchise, there is no general requirement for every franchisee to enter into its *own* store specific agreement. Rather, it is sufficient for stores to issue purchase orders under the terms of a centrally agreed grocery supply contract. It is only where stores have their own specific commercial terms that an additional agreement or document is required.

Fostering innovation

25 Foodstuffs is committed to engaging with suppliers who are looking to introduce new, innovative products to market. Enabling and supporting quality innovation and new product development is essential to responding to evolving consumer demand, and allows Foodstuffs to effectively compete in retail markets.

26 To encourage the trialling of new products, Foodstuffs proposes that the delisting rules in the Code are clarified, such that a decision by an RGR to cease stocking a product at the end of a mutually agreed trial period is not a decision to delist under the Code.

27 The Code already provides that a decision by an RGR not to extend an agreement or enter into a new grocery supply agreement following the expiry of a fixed term grocery supply agreement is not a decision to delist a product.¹¹ However, the focus of this exception is on the supply agreement between the parties, rather than the particular products supplied under it. In Foodstuffs' view, it would create greater certainty if the exception also specifically addressed agreed trials for individual new product lines under an overarching existing grocery supply agreement that has no fixed term.

28 The above clarification would support the Code's objectives including contributing to a trading environment that includes a diverse range of suppliers and in which businesses compete effectively.

Fresh produce – delisting and rejection

Delisting

29 Listing, in the manner contemplated by the Code, assumes manufactured products with a consistent available supply, which is not the case for fresh produce given it has a range of different attributes.¹² For example, fresh produce generally is not branded (the majority is sold "loose") and products are fungible. With product lines numbering in the hundreds, the extent to which a particular supplier/grower is on-shelf is generally determined by multiple factors such as weather, transport challenges, seasonality, etc.

¹¹ Code, cl 18(6).

¹² Similar issues arise in respect of clause 26 of the Code, as fresh produce is not "ranged" in the same manner as manufactured products.



Also, geography matters in produce and there is a need for geographic flexibility based on availability of produce in particular regions.

- 30 So, unlike dry groceries, the idea that fresh produce is "listed" or "ranged" does not sit neatly with the dynamic operation of the supply chain (often involving daily/weekly trading). There is also the added complexity that, where the produce is acquired at wholesale, the relevant supplier is the wholesaler and not the grower.
- 31 One solution to ensure the Code's delisting provisions better reflect fresh produce's characteristics is that the Code sets out when fresh produce is considered listed in the range of products an RGR sells. This could be where an RGR has specifically committed to purchase an agreed volume of the grower's produce, with a clear expectation on the part of both parties that such produce forms part of the RGR's retail offering.¹³
- 32 This is with a view to supporting the Code's effectiveness in promoting certainty about the terms of agreement between RGRs and suppliers, and contributing to a trading environment where businesses participate confidently.

Rejection

- 33 Foodstuffs submits that the 24-hour rejection period for fresh produce gives rise to practical difficulties. Defects may not be reasonably discoverable within that time period. In Foodstuffs' view, 48 hours is a more reasonable and realistic time period, balancing the interests of both suppliers and RGRs.

Clarifying application of Code

Application to agreements with suppliers that do not involve the supply of groceries

- 34 The definition of "grocery supply agreement" in the Code is broad. It captures *any and all* agreements between an RGR and a supplier. This technically includes agreements that do not involve a supply of groceries (such as transport agreements).
- 35 Clause 8 of the Code requires RGRs to ensure that each grocery supply agreement specifies a range of matters. However, in the case of agreements that do not involve the supply of groceries, a number of the requirements will not be applicable. Foodstuffs suggests that clause 8 be clarified so that there is a clear delineation between requirements that apply to agreements for the actual supply of groceries, and other agreements that technically fall within the definition of a grocery supply agreement. For example, in a transport agreement, it would only be the matters in subclauses (d) and (f) that might apply.

¹³ Foodstuffs notes the EU Directive on unfair trading practices in business-to-business relationships in the agricultural and food supply chain focuses on cancellation of orders of "perishable agricultural and food products at such short notice that a supplier cannot reasonably be expected to find an alternative means of commercialising or using those products", rather than any restriction on delisting. This is also an approach that could be considered as part of the review. See article 3(1)(b)) [EU Directive].



Application to On the Spot

- 36 As the Commission is aware, the “On the Spot” branded stores are franchisees of FSSI and as such the Code applies to them. These members are individually owned and operated small convenience stores (as opposed to full service grocery retailers) and accordingly do not have the same influence with suppliers as a larger retail store. In addition, due to their small size, the Code places an unreasonable administrative burden on them when it comes to grocery supply agreements direct with suppliers. As such, we believe these convenience stores should be excluded from the Code’s requirements. This would not have a material effect on suppliers, noting that FSSI would still have Code obligations for purchases made by it on behalf of an On the Spot store.

Application to non-retailing RGRs

- 37 The definition of “regulated grocery retailer” technically captures all interconnected bodies corporate of FSNI and FSSI.¹⁴ This includes subsidiaries which do not carry on business as a grocery retailer and supply groceries to consumers.¹⁵ Currently, *all* the provisions of the Code apply to each of those subsidiaries. This gives rise to technical issues with applying the Code (for example, such subsidiaries do not list groceries). Also, from an operational perspective, such businesses operate outside the Code environment with the result that their suppliers are unfamiliar with the matters that the Code covers (including grocery supply agreements). For all parties (including the suppliers of these businesses), this creates an administrative burden that is unnecessary to achieve the objectives of the Code.
- 38 Accordingly, Foodstuffs submits that as part of the Code review the Commission considers the extent to which each provision of the Code should apply to non-retailing subsidiaries of the major supermarkets. It is noteworthy that section 18 of the Act contemplates that the Code will only be extended to related parties in the supply chain where this is necessary or desirable to promote the purpose of the Act.

Opportunities for additional protections for suppliers

- 39 Foodstuffs considers that the current Code provides the appropriate balance between supporting suppliers and allowing RGRs to negotiate firmly and fairly with suppliers, and the mutually agreed and reasonable exceptions to certain Code requirements are important to achieving this balance. However, we recognise that it is important that suppliers understand their protections under the Code and how these exceptions can be agreed.
- 40 For this reason, Foodstuffs supports the adoption of the Australian Review’s recommendation that at the time of negotiating a new grocery supply agreement, retailers provide to suppliers clear and simple guidance on any exceptions in that agreement.¹⁶ This would assist suppliers in deciding whether to give their informed

¹⁴ Grocery Industry Competition Act 2023, s 8.

¹⁵ For example, in the case of FSNI, Leigh Fish falls within this category. It is part of the supply chain, but does not undertake any retail functions.

¹⁶ Australian Treasury, *Independent Review of the Food and Grocery Code of Conduct – Final Report, June 2024*, pp. 63-64 [Australian Review].



agreement to such exceptions, supporting the Code's objectives (in particular, promoting transparency/certainty about terms of agreements).

- 41 The Australian Review suggested that to reduce compliance costs this could be standardised (for example, involving a one-page information sheet with a list of exceptions). Foodstuffs agrees with this approach. The Australian Review did not recommend requiring notices to be provided each time an exception is relied on as our Code does currently in respect of business activity charges, payments for wastage, etc. Presumably, this was on the basis that the one-page information sheet is more useful to suppliers than notices that are provided after the exceptions are agreed in the grocery supply agreement. The Commission may also wish to consider this issue as part of its review.

Question 5 and Question 6: Are there any issues with the way the Code is being operated or implemented that may be impacting its effectiveness in supporting the objectives in paragraph 21? Are there any opportunities for improving the operation or implementation of the Code to support the objectives in paragraph 21?

- 42 Foodstuffs is fully committed to playing its part in the operation and implementation of the Code to support the objectives in paragraph 21 of the Request.
- 43 In terms of opportunities for improvement, Foodstuffs notes that the checklist that the Commission circulated regarding the contents of a grocery supply agreement was well received as a useful tool for suppliers and an indication of the Commission's approach to grocery supply agreements. Foodstuffs would value the opportunity to explore with the Commission whether there are other areas where similar guidance can be produced to assist suppliers and RGRs.

Question 7: Do you have any suggestions about steps to include within the review process to support input into the review?

- 44 We appreciate the opportunity to contribute to the review process.
- 45 Foodstuffs has considered the indicative timing for the process, including for cross-submissions to the responses to the Request. Foodstuffs' view is that the allowance of two weeks for cross-submissions is insufficient to gather views from industry participants, including RGRs. Further, it is likely that the time period will in fact be less than two weeks once confidentiality issues and the like have been worked through to enable submissions to be published.
- 46 Given that the final report is not due to be published until mid-2025, we do not see the need for this very limited timeframe. Foodstuffs submits that a period of at least two months for cross-submissions is appropriate.
- 47 Also, the Commission may wish to consider adding an additional step to its proposed process. Once the Commission has had the opportunity to consider responses and cross-submissions to the Request, Foodstuffs suggests that the Commission prepare a further consultation paper setting out possible options to address any issues identified in its review (including from the responses to the Request), together with the Commission's preferred approach. This would allow all stakeholders the opportunity to comment on the issues and options in a focused way prior to conclusions being reached and draft



amendments being prepared as contemplated by the process under section 13 of the Act.

Question 8: Do you have any other comments you would like us to consider when planning this review process?

48 Foodstuffs has no further comments at this stage, and looks forward to participating in the review process.

Next steps

49 Please do not hesitate to contact me if you have any questions regarding this submission.

Kind regards,



Julian Benefield
General Counsel & Company Secretary

foodstuffs NORTH ISLAND



SCHEDULE ONE - ANALYSIS OF EXCEPTIONS

Clause	Code Rule	Rationale for agreed exceptions
9	No unilateral variation of agreements	<ul style="list-style-type: none"> - There are a range of circumstances where it is reasonable for a grocery supply agreement to be varied without the supplier's agreement. One example is legislative change. - If every variation needed to be agreed in writing, this would impose very significant time and administrative burdens on both RGRs and suppliers. - Any unilateral variation must be contemplated by the grocery supply agreement, reasonable in the circumstances, and the RGR's conduct is subject to the overarching duty of good faith. This offers sufficient protection against RGRs using their negotiating power to make unreasonable unilateral variations.
12	No right of set-off without consent	<ul style="list-style-type: none"> - The ability to set off amounts validly owing to RGRs is an important mechanical tool to efficiently manage the commercial interactions between the parties. The right to set off is procedural in nature and does not alter the underlying substantive rights as between the parties. - Allowing a grocery supply agreement to provide for a right of set-off (without the need for additional written consent) reduces transaction costs. Mandating that suppliers must in every case give written consent to a set-off would, given the volume of transactions Foodstuffs enters into, impose an unreasonable administrative burden on all parties. - Set-off is also a legitimate tool to preserve an RGR's rights where a supplier becomes insolvent. This is recognised in the Companies Act 1993 which provides for liquidation set-off.¹⁷ - In every case, the set-off claimed must be reasonable in the circumstances. As was noted in the Australian Review, issues arise where a grocery code "allow[s] supermarkets to evade paying suppliers by setting off amounts that are not clearly owed by the supplier to the supermarket."¹⁸ The Code does not permit this.

¹⁷ Companies Act 1993, s 310.

¹⁸ Australian Review, p. 60.



14	No payments for wastage while groceries are under an RGR's effective control	<ul style="list-style-type: none"> - A balanced and effective Code should allow allocation of risk to the party that is best placed to manage that risk. There are circumstances where suppliers are best placed to manage the risk of wastage, even where groceries are under the effective control of an RGR. For example, where suppliers are merchandising at stores, or where suppliers are responsible for inventory management. - It is therefore important that the Code permits the parties to agree wastage payments, to cover these circumstances. - The other requirements of the wastage provisions of the Code provide further protection for suppliers. - As the Australian Review noted, if reasonable exceptions to code rules (such as the one allowing payments for wastage) were not allowed, RGRs may seek to reduce risks in other ways, such as by reducing the price they pay for a product, which could be a blunter instrument for managing the risk.¹⁹
15	No payments as condition of being supplier	<ul style="list-style-type: none"> - The exception to the rule is narrow (i.e., a promotion or new product). - This appears to strike the appropriate balance between certainty for suppliers and fostering competition and innovation.
16	No payments for an RGR's business activities	<ul style="list-style-type: none"> - As was submitted to the Australian Review, there are a range of circumstances in which a supplier may be happy to share the costs of an RGR's ordinary business.²⁰ The Australian Review highlighted the benefits of retaining freedom of contracting, including freedom to agree payments for business activities. - The exceptions in the current Code allow for the reasonable allocation of costs in respect of activities that benefit both the supplier and the RGR. - All grocery codes that we are aware of recognise that supermarkets and suppliers should be free to agree, in good faith, allocation of payments for activities such as those contemplated by clause 16 of the Code. This is consistent with the principle common to those codes that the focus of the code is on process, rather than on substantive matters. For example, the UK Code provides that:²¹

¹⁹ Australian Review, p. 61.

²⁰ Australian Review, p. 59-62.

²¹ UK Grocery Code, paragraph 6.



		<p>"Unless provided for in the relevant Supply Agreement between the Retailer and the Supplier, a Retailer must not, directly or indirectly, Require a Supplier to make any Payment towards that Retailer's costs of:</p> <ul style="list-style-type: none"> ▪ buyer visits to new or prospective Suppliers ▪ artwork or packaging design ▪ consumer or market research ▪ the opening or refurbishing of a store or ▪ hospitality for that Retailer's staff" <p>- Finally, various payments along the lines of those contemplated by clause 16 of the New Zealand Code are considered "grey practices" under the EU Directive. These are allowed provided they are, among other things, "agreed in clear and unambiguous terms at the conclusion of the supply agreement or in a subsequent agreement between the buyer and the supplier".²²</p>
17	No requiring suppliers to fund promotions	<p>- It is fundamentally important that RGRs retain the ability to negotiate and agree the level of supplier-funded promotional activity. In the New Zealand environment, suppliers are a key driver of promotional activity to increase sales volumes and have the corresponding ability to negotiate a net price into store that accounts for the benefit of such promotional activity. Negotiation and agreement of promotional funding promotes competition in the retail markets for groceries, which leads to lower prices for consumers. Retaining this ability is also consistent with the grocery codes in other jurisdictions that Foodstuffs is aware of. This is unsurprising, given the critical role that retailers play in negotiating with suppliers effectively on behalf of consumers.</p> <p>- As currently drafted, clause 17 of the Code best supports the Code's objectives because it clearly allows supplier funding for promotions that is agreed in good faith and that is reasonable.</p> <p>- Reliance on the exception by RGRs practically removes the need for a case-by-case analysis as to whether the promotional funding is <i>directly or indirectly required</i> by the RGR or whether it is wholly supplier-led.</p>

²² EU Directive, [27].



		<ul style="list-style-type: none">- If the exception is removed, all promotional activity will need to be driven solely by suppliers (to avoid the risk that RGRs are perceived to be directly or indirectly requiring funding), with the associated chilling effect on price negotiations between suppliers and RGRs. - On its face, the UK Code restricts, to some extent, the ability of supermarkets to agree supplier funding for promotions.²³ However, the UK Code contains an express definition of when a supermarket will be considered to have "Required", among other things, promotional funding (which is the focus of the restriction). In summary, promotional funding is not "Required" when the supplier has agreed to the funding in response to ordinary commercial pressures (i.e., there is no duress, and any commercial pressure from the supermarket is objectively justifiable, transparent, and applied in a non-discriminatory way). Substantively, this mirrors the requirement of good faith under the Code, so there is little, if any, practical difference between the two regimes.
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²³ Under paragraph 13(1) of the UK Grocery Code there is an absolute prohibition that provides that "A Retailer must not, directly or indirectly, Require a Supplier predominantly to fund the costs of a Promotion."

