

PUBLIC SUBMISSION

Review of the Grocery Supply Code

Request for views paper

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Submitter

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Submission on behalf of

On behalf of NZSCA

SUBMISSION BEGINS:

Do you consider the code currently effective in supporting the objectives set out in paragraph 21?

1. The Code has quickly been subverted by the RGR's to protect them and assist in achieving their business objectives. This has been achieved by an overly literal and legalistic definition of delisting and ranging clauses.
2. The RGRs are also using the 'opt out' clauses of the Code to remove protections provided for in the Code.
3. They continue to rely on the large asymmetry of bargaining power, market access and information that they possess.
4. In general the 'opt out' clauses of the Code provide too much scope for continued RGR coercion in areas that were written in to the code to protect suppliers and balance negotiations.
5. It has been hard to judge the effectiveness of the code when there have been no attempts by the Commissioner to enforce the code on the supplier side. The NZSCA would like to see the Commissioner explore supplier retailer negotiations in detail. This should be done in relation to the over-arching principles of the code, of good faith and reasonableness. The current environment would challenge the reasonable definitions of either of these terms.

Following on from Question 6, are there certain objectives within paragraph 21 that you wish to comment on?

6. The objective of fairness is under particular pressure. This has come to be typified in the ranging review process – particularly that run by FSNI. This range review process has become a 'black box' process, resulting in a blind auction amongst suppliers.

7. Critical information such as the substitutability of products, margin expectations, relative product performance and the interpretation of dunnhumby data is not shared, yet is the basis for business critical ranging decisions.
8. Simple questions such as a required margin rate for a category are now replied to with a requirement for 'the best commercial outcome'.
9. The relative performance of products is now treated as commercially sensitive, with all products, regardless of parameters such as brand, provenance forced to compete for each RGR defined 'need state'.
10. This then impacts on suppliers ability to contribute to a competitive, confident or diverse market. Suppliers are not competing in an open market, but competing for a reduced number of SKU spots in each category amongst each other in a single buyer market. In this environment suppliers have low confidence of ongoing market access which is a barrier to further business investment. Consumers can not be confident that they are getting the best of any category's products. What they are getting is the product best able to provide maximised margins at retailer manipulated retail price points. And the market is becoming much less diverse. There is a sweeping trend across all three RGRs to reduce range and SKU count in all categories. The claim of 'efficiency' is being used to gut the New Zealand food industry.

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.

11. The 'opt out' clauses throughout the Code severely weaken the effective protections of the code, giving the RGRs sufficient room to continue with existing business practices or to enforce new ones. A case in point is:
 - 11.1 16(2)(f) – Retailers must not directly require a supplier to make any payment towards the cost of any activity that is undertaken by the retailer in the ordinary course of carrying on a business as a retailer. (f) merchandising (for example stocking shelves and setting up displays):
12. This clause is immediately de-powered in the clause below:
 - 12.1 16(3)(a) Subclause (1) does not apply if – (a) the relevant grocery supply agreement provides for the payment: and (b) the payment is reasonable in the circumstances.
13. With power asymmetry in negotiations FSNI, and also WW use these 'opt out' clauses to enforce the transfer of business costs on to suppliers. There is no evidence of additional staff being employed by the RGRs in the face of this cost transfer and recent WW staff strike action points out the chronic understaffing.
14. This leads to ranging conversations about increasing wastage, particularly in short shelf life departments. With reduced supplier direct merchandising and no additional merchandising from retailers product is poorly rotated on shelf and

wastage rates increase. This inevitably leads to a ranging conversation about a contribution to wastage costs or a threat of de-listing.

Are there any opportunities for improving the content of the Code to support the objectives in paragraph 21?

15. The NZSCA would recommend that 'opt out' clauses are either removed or more narrowly defined to remove their 'de-powering' effect in the Code. These clauses serve to make the Code harder to define and to enforce.

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?

16. RGRs are using the Code to reduce supplier input in ranging and delisting decisions. Through a narrow definition of these processes, retailers are making unilateral decisions dressed up in code language about notice periods and reasonableness. What was a more nuanced and fluid process with more supplier involvement has become a one way notification process. What negotiation remains is largely around one parameter – margin delivered to the retailer.
17. Ranging and de-listing processes have been weaponised as the ultimate point of coercion for all other terms which the retailers seek to enforce.

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

18. NZSCA would encourage the Grocery Commissioner to visit small grocery suppliers in regional New Zealand. These are the businesses most at threat from current retailer business practices.
19. NZSCA would like to see the Commissioner look through the code to the daily experience of dealing with the power imbalance of working in this industry.

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

20. The Code is well intentioned, but has created opportunities for RGRs to focus and increase their power, especially in their leverage over consumer market access.
21. If the code was to be improved in the highly concentrated grocery market that operates in New Zealand consideration should be give to rights of access to consumers.
22. The NZSCA does not purport to have the solution to this problem. However, as market access power is concentrated in the hands of a few key decision makers in each RGR, the responsibility to both the supplier side and consumer side of the market needs to be factored in to these roles. If these buyers act only in the interests of the retailers that will be to detriment of both the ultimate buyers and sellers.