

Review of the Grocery Supply Code

Under Part 2 of the Grocery Industry Competition Act 2023

Request for views on issues and opportunities to consider within the review

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Glossary

Term	Definition
Act	Grocery Industry Competition Act 2023
Australian Code	Australian Food and Grocery Code of Conduct
Bill	Grocery Industry Competition Bill
Code or New Zealand Code	Grocery Supply Code 2023
Commission	Commerce Commission
MBIE	Ministry of Business Innovation and Employment
RGR	Regulated Grocery Retailer

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Foreword from the Grocery Commissioner

When the Grocery Supply Code (Code) was introduced, I wrote an open letter outlining my vision for a more competitive grocery sector with a trading environment that is fairer and more encouraging to confident and innovative suppliers, and Kiwis getting more choice and more competitive prices from increased competition between suppliers, wholesalers and retailers.

The first review of the Code is an important checkpoint to ensure we have the right rules in place to help move us toward that vision.

I'm aware of concerns about if the Code is doing enough to address existing power imbalances in the grocery sector. I want to hear your ideas, experiences and perspectives about the Code to help inform if change is needed. There are options for how you provide these to me. You can choose to respond to the questions in this consultation paper or you can choose a different format following the instructions provided. You can also use the Anonymous Reporting Tool that we have in place.

I recognise many of the businesses that the Code seeks to protect are still becoming familiar with the Code and what it is intended to achieve. We have included background information that may be helpful to you. You can also contact my team at grocery.regulation@comcom.govt.nz if you have questions.

I also recognise that there has been a substantial amount of work already to promote compliance with the Code. My intention is not to create further disruption, but to identify if there are opportunities to make improvements. I look forward to hearing your views.

Pierre van Heerden
Grocery Commissioner

Request for Views

Purpose

1. This paper provides an opportunity for interested parties to provide views to the Commerce Commission (**Commission**) about the issues to consider within a review of the Grocery Supply Code 2023 (**Code**) under s 20 (1) of the Grocery Industry Competition Act 2023 (the **Act**).¹
2. The Code sets rules about the conduct and supply agreements between Regulated Grocery Retailers (**RGRs**) and their grocery suppliers.
3. The purpose of this review is to:
 - 3.1 Assess the operation and effectiveness of the Code; and
 - 3.2 Assess whether the Code should be amended, revoked or replaced to better achieve its purpose.²
4. Your views are important as this will influence the scope, focus, and overall approach we adopt in reviewing the Code. In particular, it is important that we know of all the material issues which parties think need to be considered, so we can properly plan our review.
5. We are seeking:
 - 5.1 Submissions in response to this paper by 5pm, 16 September 2024; and
 - 5.2 Cross-submissions (an opportunity to respond to others' submissions) by 5pm, 30 September 2024.
6. As discussed below, if after considering views, we consider that the Code should be amended to better achieve its purpose, we will follow the process to make a new code under s 13(1) of the Act by publishing a draft code and our reasons for consultation.

Context

Background to the Code

7. Provisions for a grocery supply code to regulate conduct between grocery retailers and suppliers are included in Part 2 of the Act.
8. The reasons for introducing a Code in New Zealand included:
 - 8.1 To provide more transparency and certainty for suppliers when dealing with grocery retailers;

¹ Schedule 2 of the Grocery Industry Competition Regulations 2023.

² Section 20(4) of the Grocery Industry Competition Act 2023. Note the process for amending the Code also requires revoking and replacing the Code. Under clause 5 of Schedule 1 of the Act the first Code is revoked as soon as the Commission makes a determination under s 12(1)(a) of the Act to replace the first Code.

- 8.2 To prevent grocery retailers from using their strong negotiating power to force suppliers to accept unfavourable terms, such as costs and risks that the retailers are better placed to manage; and
 - 8.3 To benefit both consumers and suppliers by creating better incentives for suppliers to innovate and invest in new grocery products.³
9. The content of the Code, which was enacted approximately two months after the Act, is largely modelled on the Australian Food and Grocery Code of Conduct (**Australian Code**).⁴
10. More information about the development of the Code,⁵ its alignment with the Australian Code, and the recent review of the Australian Code is provided in the background information attached (**Attachment A**).⁶

The first review of the Code must be completed within two years

11. Section 20(1) of the Act requires the Commission to complete a review of the Code within two years of it coming into force. The Code came into force on 28 September 2023 and the review must therefore be completed by 28 September 2025.
12. The Commission is required to provide a report to the Minister of Commerce and Consumer Affairs as soon as practicable after completing the review.⁷

The Act defines the purpose of the review

13. Section 20(4) of the Act sets out the purpose of the review is to:
- 13.1 Assess the operation and effectiveness of the Code; and
 - 13.2 Assess whether the Code should be amended, revoked or replaced.
14. The Act gives the Commission the power to revoke and replace the first Code via a determination.⁸ If after considering views, we consider that the Code should be amended to better achieve its purpose, we plan to develop a determination as part of the review process.

Process for developing a determination

15. The process the Commission must follow to develop a determination to amend, revoke or replace the Code is set out in section 13 of the Act, which states that the Commission must:

³ <https://www.mbie.govt.nz/dmsdocument/27496-grocery-supply-code-of-conduct-update-on-consultation-and-agreement-on-regulations-proactiverelease-pdf>

⁴ https://www.afp.gov.au/~media/Committees/clac_ctte/Food_and_Grocery_2015/regulation.pdf

⁵ <https://www.mbie.govt.nz/business-and-employment/business/competition-regulation-and-policy/market-studies/market-study-into-supermarkets>

⁶ <https://treasury.gov.au/review/food-and-grocery-code-of-conduct-review-2023>

⁷ Section 20(1)(b) of the Act.

⁸ Under clause 5 of Schedule 1 of the Act the first Code is revoked as soon as the Commission makes a determination under s12(1)(a) of the Act to replace the first Code.

- 15.1 Publish a draft determination;
 - 15.2 Publish a statement of its reasons for proposing to make a determination; and
 - 15.3 Consult persons, or representatives of the persons, that the Commission considers will be substantially affected by the determination.
16. This consultation must include consultation about the matters referred to in section 196(1)(e) of the Act which relates to the level of pecuniary penalty for contraventions of the Code.⁹
17. Under section 12 of the Act, the Commission must also consider the purpose of the Grocery Supply Code set out in section 16 before making the determination.¹⁰
18. Under section 15 of the Act, before the Commission can disapply a grocery supply code to any RGRs, a related party of a RGR, or a supplier, it must also be satisfied that:
- 18.1 Doing so is necessary or desirable in order to promote the purpose of the Act;
 - 18.2 The disapplication is unlikely to have the purpose, effect, or likely effect of unduly hindering or obstructing a supplier or class of suppliers from participating confidently in their dealings with a person to whom the code would otherwise apply; and
 - 18.3 The extent of the disapplication is not broader than is reasonably necessary to address the matters that gave rise to the disapplication.
19. We will follow the above processes as applicable if changes are proposed as part of this review.

Operation and effectiveness of the Code

20. We are proposing that our 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.
21. The purpose can be separated into the following series of objectives:
- 21.1 Promote the purpose of the Act;¹¹
 - 21.2 Promote fair conduct between RGRs and suppliers;¹²

⁹ Section 13(2) of the Act.

¹⁰ <https://www.legislation.govt.nz/act/public/2023/0031/latest/link.aspx?id=LMS818358#LMS818358>

¹¹ The purpose of the Act is to promote competition and efficiency in the grocery industry for the long-term benefit of consumers in New Zealand.

¹² The parties that currently have supply code obligations, as defined in section 18 of the Act, are: Foodstuffs North Island, Foodstuffs South Island, Woolworths New Zealand and their related parties.

- 21.3 Prohibit unfair conduct between RGRs and suppliers;
- 21.4 Promote transparency about the terms of agreement between RGRs and suppliers;
- 21.5 Promote certainty about the terms of agreement between RGRs and suppliers;
- 21.6 Contribute to a trading environment in which businesses compete effectively;
- 21.7 Contribute to a trading environment where consumers and businesses participate confidently; and
- 21.8 Contribute to a trading environment that includes a diverse range of suppliers.

Issues and/or opportunities for improvement

- 22. To help focus and inform our review we are seeking your views on whether the above objectives are being effectively supported by the Code, as well as any issues that are impacting the operation and effectiveness of the Code or opportunities to improve.
- 23. Issues could be related to the effectiveness of the current content of the Code, including any;
 - 23.1 Unfair conduct by grocery retailers that is not currently addressed by the Code;
 - 23.2 Unintended consequences of the clauses within the Code;
 - 23.3 Issues with understanding or interpreting the Code;
 - 23.4 Issues surrounding the exceptions within the Code/the ability to “contract out” of certain protections;
 - 23.5 Issues that are not currently described in the Code;
 - 23.6 Issues that occur where the retailer in question is not an RGR subject to the Code;
 - 23.7 Issues where the supplier is not dealing directly with the RGR (e.g., trading through a wholesaler); and
 - 23.8 Issues where the products supplied to the RGR are not within the definition of “groceries” (e.g., alcoholic beverages).¹³

¹³ Groceries is defined within section 5 of the Act and includes fresh produce, meat, seafood, or meat substitutes, dairy products, bakery products, chilled or frozen food, pantry goods or dry goods, manufacturer-packaged food, non-alcoholic drinks, personal care products, household and pet care products.

24. We are also seeking your views in relation to the operation of the Code. For example, this could be in relation to:
- 24.1 Instances where supply agreements have not been reached and if so, why this was the case;
 - 24.2 The administrative effort required to comply with the Code;
 - 24.3 The level of awareness of the Code; and
 - 24.4 The way the Code has been interpreted and/or represented by some parties.

Questions

25. The following list of questions is intended to help you to provide your views. You can choose to answer any or all of these questions within your submission. Please provide any evidence you have which supports your views.

Question #	Consultation question
Question 1	Do you consider the Code is currently effective in supporting the objectives set out in paragraph 21?
Question 2	Following on from Question 1, are there certain objectives within paragraph 21 that you wish to comment on?
Question 3	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?
Question 4	Are there any opportunities for improving the content of the Code to support the objectives in paragraph 21?
Question 5	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?
Question 6	Are there any opportunities for improving the operation or implementation of the Code to support the objectives in paragraph 21?
Question 7	Do you have any suggestions about steps to include within the review process to support input into the review?
Question 8	Do you have any other comments you would like us to consider when planning this review process?

Options for providing your views

26. We have provided a feedback form based on the questions above to assist you to provide your views.¹⁴ Alternatively, you could choose to email a submission in your chosen format to grocery.regulation@comcom.govt.nz with the subject line “Grocery supply code review: Request for views submission”.
27. We acknowledge the sensitive nature of the matters covered by the Code and that some submitters may prefer to provide their views confidentially. There are two ways to do this.
28. Firstly, if you wish to provide commercially sensitive information in a submission, we request that you provide, as necessary, confidential and public versions of your submission. When including commercially sensitive or confidential information in your submission, we offer the following guidance:
 - 28.1 Please provide a clearly labelled confidential version and public version. We intend to publish all public versions on our website;
 - 28.2 Please provide reasons alongside any information in the confidential version as to why it is commercially sensitive or confidential information; and
 - 28.3 The responsibility for ensuring confidential information is not included in a public version of a submission rests entirely with the party making the submission.
29. If we consider disclosure of information for which confidentiality is claimed to be in the public interest, we will consult with the party that provided the information before any public disclosure of that information is made.
30. Alternatively, if you would like to put forward views anonymously you can do this through the Anonymous Reporting Tool at this web address <https://report.whistleb.com/en/comcom-grocery>. These views will be summarised and considered as part of the review report. Please reference the “grocery supply code review” within your anonymous report.

Next steps

31. Following consideration of the information, issues and opportunities raised in response to this request for your views we will plan our review in more detail.

¹⁴ The feedback form is accessible on the Review of the Grocery Supply Code project webpage available at <https://comcom.govt.nz/regulated-industries/grocery>

32. At this stage our indicative next steps are:

Next steps	Indicative timeframe
Submissions in response to request for views received	Due 5pm, 16 September 2024
Cross-submissions received	Due 5pm, 30 September 2024
Draft review conclusions and if changes are proposed draft statement of reasons for changes and draft code published for comment	First quarter 2025
Final review conclusions and if changes are made final statement of reasons for changes and final code published	Mid-2025
Report to the Minister about the review's outcome	As soon as practicable after the review is complete

Attachment A: Background Information about development of the Grocery Supply Code

Purpose

- A1. The purpose of this attachment is to provide further background about the development of the Code in 2022 and 2023 led by the Ministry of Business Innovation and Employment (**MBIE**). Information is also provided on the Australian Code given it has been a key influence in the Code's development to date.

What prompted the development of a Code of Conduct in New Zealand?

- A1. The Code was one of a package of interventions implemented by the Government in 2023 in response to findings and recommendations within the Commerce Commission's Final Report on the Market Study into the Retail Grocery Sector (**Market Study**).¹⁵
- A2. The Code is part of the response to findings that many suppliers in New Zealand have limited ability to negotiate with major grocery retailers, and that in some cases major grocery retailers were using their strong negotiating position to:
- A3.1 Transfer costs and risks to suppliers, despite retailers being better placed to manage them;
 - A3.2 Reduce transparency and certainty over terms of supply; and
 - A3.3 Limit suppliers' ability or incentive to provide favourable supply terms to other grocery retailers.
- A3. The Market Study found that suppliers' incentives to innovate and invest are likely to be adversely affected by this type of conduct in ways that ultimately harm consumers. For example, this could lead to reduced production or capacity, lower product quality and fewer new product offerings being available for New Zealand consumers. Other grocery retailers may also face reduced access to supply of groceries, affecting their ability to enter or expand. There is a risk of prices rising in the future if some suppliers exit the market, reducing competition between the remaining suppliers.
- A4. Recommendation 6 of the Market Study references the Australian Food and Grocery Code of Conduct (**Australian Code**) which has been developed in response to similar issues in Australia and implemented in 2015.¹⁶ The recommendation also notes the UK has also addressed similar concerns through a Groceries Supply Code of Practice.¹⁷

¹⁵ <https://comcom.govt.nz/about-us/our-role/competition-studies/market-study-into-retail-grocery-sector>

¹⁶ <https://www.legislation.gov.au/F2015L00242/latest/text>

¹⁷ <https://www.gov.uk/government/publications/groceries-supply-code-of-practice>

- A5. Given one of New Zealand’s major grocery retailers, and a number of suppliers, operate in both Australia and New Zealand the Market Study recommended following the Australian approach, “unless there is a good reason not to”, but to make the Code of Conduct mandatory for the retailers, lawmakers choose to apply it to (Australia’s Code is a “prescribed voluntary industry code of conduct”, which means retailers and wholesalers choose to become signatories to it). The Market Study recommended that the Code apply to the major grocery retailers Foodstuffs North Island, Foodstuffs South Island and Woolworths NZ.
- A6. While it was noted some suppliers – particularly large suppliers of well-known brands – will be in a relatively strong bargaining position compared to other suppliers, the Market Study found that suppliers are typically significantly more dependent on retailers than the retailers are on suppliers, and therefore likely to experience an imbalance in power.

Development process

- A7. The development of the Code included:
- A7.1 An initial consultation on the Code;
 - A7.2 Development of the Act that provides for the Code; and
 - A7.3 Consultation on the draft Code.

Initial consultation

- A8. MBIE released its initial consultation paper on the Code on 6 July 2022.¹⁸
- A9. The consultation, which ran for five weeks, considered which grocery retailers should be bound by the Code and the mechanism for dispute resolution.
- A10. The paper also sought feedback on potential options for the proposed “main components” of the Code (the rules regarding conduct and agreements between grocery retailers and their suppliers). The first option was described as taking a high-level principle-based approach to drafting the main components (relatively similar to the UK Code), the second a more prescriptive approach consistent with the Australian Code, and the third an alternative that builds on the second option and removes some components that may not be necessary in New Zealand.
- A11. Nineteen submissions received in response to this consultation are available on the MBIE website.¹⁹

¹⁸ <https://www.mbie.govt.nz/dmsdocument/22647-new-zealand-grocery-code-of-conduct-consultation-paper>

¹⁹ <https://www.mbie.govt.nz/have-your-say/grocery-code-of-conduct>

Development of the Act

- A12. Proposals related to the Code were included within the Grocery Industry Competition Bill introduced on 21 November 2022. These include the Code’s purpose, the powers to make, monitor, enforce and amend the Code, and provisions for a dispute resolution scheme.
- A13. Information about the passage of the Grocery Industry Competition Bill (Bill) is available on the New Zealand Parliament’s website.²⁰ This includes links to submissions made during this process. Royal assent (when the Bill becomes an Act) occurred on 26 June 2023.

Consultation on a draft Code

- A14. On 9 June 2023, when the Bill was in its later stages, and MBIE considered it likely that an Act would be in place soon, MBIE released an “exposure draft” (a draft Code in its regulatory format) and an accompanying consultation paper.
- A15. The exposure draft was largely modelled on the Australian Code with some differences. The exposure draft, supporting consultation paper that provides explanation of the draft, and the fourteen submissions received in response are available on MBIE’s website.²¹

Alignment between the Grocery Supply Code 2023 and the Australian Code

- A16. Following consultation on the exposure draft, the “Grocery Supply Code 2023” was made. The following section describes areas of alignment and differences between the New Zealand and Australian codes. Where relevant, it also discusses the final recommendations from an independent review of the Australian Code completed in June this year.²² The Australian Government has announced they will be adopting all of the Independent Reviewer’s recommendations.²³ Some of the recommendations would further align the Australian Code to the New Zealand Code (and its supporting framework) and some are new ideas or initiatives.

Regulatory status and enforcement

- A17. The New Zealand Code is included within Schedule 2 of Part 2 of the Grocery Industry Competition Regulations 2023 and came into force on 28 September 2023.²⁴
- A18. As mentioned earlier in this attachment, a key difference between the Australian and New Zealand codes is that the New Zealand Code is mandatory for those retailers that are “Regulatory Grocery Retailers” under section 8 of the Act.

²⁰ <https://bills.parliament.nz/v/6/5050fc02-3c04-4f82-9536-e22dce6509b5?Tab=history>.

²¹ <https://www.mbie.govt.nz/have-your-say/draft-grocery-supply-code-of-conduct>

²² <https://treasury.gov.au/review/food-and-grocery-code-of-conduct-review-2023>

²³ <https://treasury.gov.au/publication/p2024-534717>

²⁴ The Act and the Code can be accessed at www.legislation.govt.nz.

- A19. The independent review of the Australian Code has recommended that the Australian Code be re-made as a mandatory code to help strengthen it. Currently the Australian Code is enforceable by the Australian Competition and Consumer Commission, but with a limited range of enforcement tools that do not include penalties for breaches.
- A20. For clauses that provide essential protections for suppliers, the independent review has recommended penalties of up to \$10 million, three times the benefit reasonably attributable to the contravention, or where the benefit cannot be determined, 10 per cent of a supermarket's annual turnover in the preceding twelve months, whichever is greatest. These penalties would be higher than the current maximum penalties for breaches of the New Zealand Code, which are for an individual, a maximum of \$200,000, and in any other case, the greater of \$3 million, or the commercial gain, or if this cannot be easily established, 3 per cent of turnover of the Regulated Grocery Retailer group in the relevant accounting period.

Dispute resolution

- A21. Another key difference between the two Codes is that the dispute resolution mechanisms for the Australian Code are set out within the code, whereas New Zealand's grocery dispute resolution scheme is provided for in the Act. The independent review recommended the Australian Code should provide parties with avenues for mediation and arbitration to resolve disputes. The New Zealand grocery dispute resolution scheme which is currently being established and is overseen independently from the Code (by MBIE) includes provision for mediation and adjudication to resolve disputes.

Transition period

- A22. Both the Australian Code and the New Zealand Code provide a transition/grace period of six months for retailers to make offers (as applicable) to existing suppliers to align their grocery supply agreements with the requirements of the respective Codes. The Australian Code provides a further six months to vary the agreement once the offer is accepted.
- A23. The grace period for the Regulated Grocery Retailers (RGRs) under the New Zealand Code ended on 28 March 2024.

Main Provisions

- A24. This section is a summary and is not a complete list of inclusions and differences between the main provisions of the Australian and New Zealand codes. Submitters are encouraged to read the relevant regulation directly for complete information.
- A25. Both the New Zealand and the Australian Code include an overarching obligation to deal with suppliers in good faith and a list of matters that may be taken into account when determining whether a retailer acted in good faith. The New Zealand Code has additional matters "provision of information to the supplier in a timely manner" and "whether the retailer has avoided unreasonable discrimination or distinction between suppliers".

- A26. The independent review of the Australian Code has recommended “ensuring that retribution captured under the obligation to act in good faith includes action taken against suppliers for exercising their rights under the Code”.
- A27. Other recommendations from the review to help address fear of retribution include that are not part of the New Zealand Code include:
- A27.1 Requiring that any incentive schemes and payments that apply to a supermarket’s buying teams and category managers are consistent with the purpose of the code; and
- A27.2 Requiring supermarkets to have systems in place for their senior managers to monitor the commercial decisions made by their buying teams and category managers in respect of a supplier who has pursued a complaint through mediation or arbitration.
- A28. The New Zealand and Australian codes are largely aligned on other main provisions including (among others) that grocery supply agreements must be in writing and retained, matters to be covered by agreement, unilateral variation of agreement, retrospective variation of agreement, payments, delisting, business disruption, intellectual property rights, confidential information, price increases and freedom of association.
- A29. The New Zealand Code has additional clauses for transport and logistics and unduly hindering or obstructing supply to competitors. The New Zealand Code also includes merchandising as an example of “retailer’s business activities”.
- A30. The Australian Code has additional clauses for payments for shelf positioning, supply chain procedures, and includes specific duties to train staff with respect to the code.

Exceptions/ Carve-outs

- A31. Both the Australian and New Zealand codes include provisions that enable exceptions for conduct ordinarily not allowed under the Code where these are included in grocery supply agreements and the exceptions are reasonable.
- A32. This is an area that was looked at carefully in the independent review of the Australian Code, including consideration of removing all exceptions. The independent reviewer concluded this could have the unintended consequence of preventing a supermarket and a supplier reaching arrangements that were genuinely beneficial to both parties.
- A33. To ensure that exceptions are agreed only where they are of mutual benefit, the reviewer recommended that all exceptions be subject to a reasonableness test that considers the benefits, costs and risks to the supplier and the supermarket in agreeing the exception (rather than just selected clauses). A new requirement for supermarkets to communicate clearly, in writing, the exceptions that are proposed in a grocery supply agreement was also recommended.

- A34. The New Zealand Code currently provides for such written statements. These requirements were included, despite some submitters concerns about the potential for administrative burden, to help in establishing the basis of the retailer's actions in the event of any dispute or enforcement action taken by the Commission. It was also proposed that they would promote compliance with the Code.

Fresh produce

- A35. Suppliers of fruit and vegetables are recognised as an industry of special vulnerability due to the perishable nature of their products. Both the Australian and New Zealand codes include specific provisions in this area. A difference is that the New Zealand Code specifies fresh produce standards or quality specifications must be reasonable. The independent review of the Australian Code recommends this should also be included in the Australian Code as well as other changes to strengthen protections for suppliers of fruit and vegetables. These include obligations on supermarkets for grocery supply agreements to specify the basis for determining prices and supermarket forecasts to be conducted with due care.