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REVIEW OF THE GROCERY SUPPLY CODE – FOODSTUFFS' CROSS-SUBMISSION ON THE SUBMISSIONS RECEIVED ON 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**).
- 2 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**). Submissions were due on 16 September 2024 and were published on the Commission's website on 19 September.
- 3 Foodstuffs North Island Limited (**FSNI**) and Foodstuffs South Island Limited (**FSSI**) (together, **Foodstuffs**) appreciate the opportunity to cross-submit on the submissions the Commission has received.
- 4 Foodstuffs has identified some key themes arising across a number of the submissions, and comments on each of those below. Separately, in Schedule 1, we respond to some specific points made by individual submitters.

Key themes

- 5 Foodstuffs has identified the following key themes from submissions the Commission received:
 - 5.1 It is too early to reliably review the Code;
 - 5.2 Guidance from the Commission to all parties would assist the industry's understanding of the Code;
 - 5.3 The negative narrative that regulated grocery retailers (**RGRs**) are “contracting out” of the Code's protections is wrong;
 - 5.4 The Code must be fit for purpose for co-operatives; and
 - 5.5 There are concerns about suppliers being unwilling or unsure about signing grocery supply agreements, which undermines the purpose of the Code.
- 6 We comment on each theme below.

It is too early to reliably review the Code
- 7 Foodstuffs shares the concerns submitters have regarding the timing of the review.



- 8 We agree with the submission that it is too early to be able to reliably evaluate the impact of the Code or to contemplate significant changes. It is noteworthy that MBIE had concerns around a review beginning before the impacts of the Code are able to be evaluated. As has been noted, the review was announced just 126 days after the formal grace period for existing agreements ended.
- 9 The Code needs to be given more time to "bed-in" before an assessment of its effectiveness and the upsides of the current Code can sensibly be made. A period of stability is also needed given the significant work and investment involved by all parties in the rollout of the Code.¹ Key concepts such as "good faith" and "reasonableness" are central to the operation of the Code. All participants' understanding of how these concepts are to be applied in practice will be refined over time, with the benefit of experience.
- 10 Having reviewed the issues raised by submitters relating to the timing of the review, Foodstuffs agrees that:
- 10.1 It is critically important that the Commission maintains an open mind as to the review's conclusions, takes a principled approach, and avoids predetermination;
 - 10.2 All stakeholders must be given the opportunity to comment on the issues and options in a focused way prior to conclusions being reached and draft amendments being prepared;²
 - 10.3 Any changes to the Code in its early stage of implementation should properly be incremental in nature, rather than revolutionary;³ and
 - 10.4 Any substantial changes should be subject to a careful cost-benefit analysis.
- 11 Finally, there is a high risk of unintended consequences due to the timing of the review and associated messaging from the regulator. Suppliers are still negotiating and signing up to grocery supply agreements. Care will need to be taken to ensure that suppliers remain willing to engage constructively with RGRs despite the review. Foodstuffs is already seeing evidence that the timing of the review is materially impacting progress with signing grocery supply agreements.⁴

Guidance from the Commission

- 12 Rather than amendments to the Code, we agree with the submission that the Commission should look to communicate with RGRs and suppliers, or publish guidance, on the areas where the objectives of the Code could be better achieved. The Government Expectations for Good Regulatory Practice state that regulators are expected to "provide accessible, timely information and support to help regulated parties understand and meet their regulatory obligations."

¹ For example, to date, FSNI and suppliers have signed approximately 740 contracts, and FSSI and suppliers have signed approximately 572. This process would presumably need to be repeated if the Code is substantially amended as part of this review.

² Foodstuffs North Island Limited & Foodstuffs South Island Limited, *Review of the Grocery Supply Code – Foodstuffs' Submission in response to Request for Views, 16 September 2024*, at [47] [Foodstuffs Submission].

³ Foodstuffs Submission at [9].

⁴ For example, an FSNI supplier recently cited the Commission's concerns regarding "contracting out" of Code protections, when refusing to engage in any way with FSNI's proposed grocery supply agreement.

13 We support the call for publication of additional guidance on the Code's protections. At least one supplier has suggested that written examples of what is and is not acceptable conduct would be helpful.⁵

14 Foodstuffs confirms that it would value the opportunity to explore with the Commission whether guidance similar to that already provided in respect of grocery supply agreements can be produced. Also, it would be helpful for the Commission to proactively engage with participants including providing feedback where a process is compliant (as part of its educative approach in these early stages of the Code's implementation).

The negative narrative that RGRs are “contracting out” of the Code's protections is wrong

15 Submitters argue that RGRs' current ability to "contract out" of "key protections" under the Code undermines the effectiveness of those protections and places the burden on suppliers to monitor whether RGRs have appropriately contracted out, entrenching the imbalance of bargaining power. They say that RGRs are using the exception provisions to remove protections under the Code, and that those provisions provide too much scope for continued RGR coercion.

16 Foodstuffs strongly disagrees with these submissions. The reference to "contracting out" of the Code is inaccurate and unhelpful – there is no ability to "contract out" of the Code. Rather, the provisions cited by submitters reflect the Code's fundamental premise that commercial parties are free to negotiate, in good faith, reasonable contractual terms to govern their commercial relationship.

17 The focus of grocery codes is properly on how businesses in the market behave, rather than regulating the substance of commercial negotiations that take place within a bargaining framework. Substantive regulation of the type proposed by submitters inevitably creates a "one-size-fits-all" approach that would be unworkable and discourage competition in upstream markets. We agree with the submission that parties' ability to agree matters contemplated by the Code allows flexibility and is recognised as being beneficial to suppliers. This aligns with the detailed explanation Foodstuffs provided in its earlier submission of why each exception should be retained in the Code.

18 The narrative that RGRs are trying to remove the Code's protections in their grocery supply agreements is wrong. All matters in the agreements, including promotional funding and business activity charges, remain entirely subject to the Code's restrictions. In their agreements, the RGRs are simply reflecting the Code's requirements for certain matters to be set out, and these must be negotiated and agreed by the parties without duress. Calling this out as a "default 'contracting out' position" is unhelpful and mischievous.

19 The "removal of Code protections" narrative also disregards RGRs' central obligation to at all times deal with suppliers in good faith. This obligation goes to the heart of addressing concerns around power imbalances between RGRs and suppliers (while recognising the benefits of retaining freedom in contracting).⁶ To the extent that there is uncertainty around what constitutes good faith in practice, this is best resolved by the passage of time and Commission guidance.

⁵ Goulter's Vinegar Products Ltd, *Submission on the Review of the Grocery Supply Code Request for Views paper*, 20 August 2024, at [8].

⁶ Australian Treasury, *Independent Review of the Food and Grocery Code of Conduct – Final Report*, June 2024, p 59.

Code fit for purpose for co-operatives

- 20 The submissions on this topic reinforce the need for a Code that is fit for purpose for a co-operative. As Foodstuffs has submitted, co-operatives form an important part of the fabric of the New Zealand grocery market. Local, individual owner-operators play a critical role in serving our communities, and this should be reflected in the Code.
- 21 In particular, the Code should clarify that there is no general requirement for every store to enter into its own store-specific agreement (where stores do not have their own specific commercial terms, they can just issue purchase orders under the terms of a centrally-agreed grocery supply contract). Also, the Code should allow for the concept of a simple "commercial framework agreement" between a store and a supplier, setting out high-level commercial terms and agreeing different ways for each deal to be agreed other than in writing.⁷

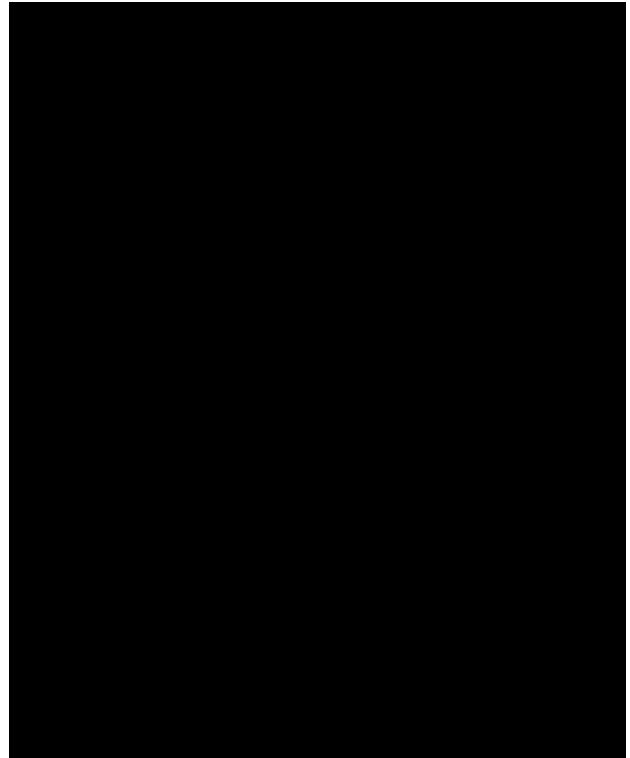
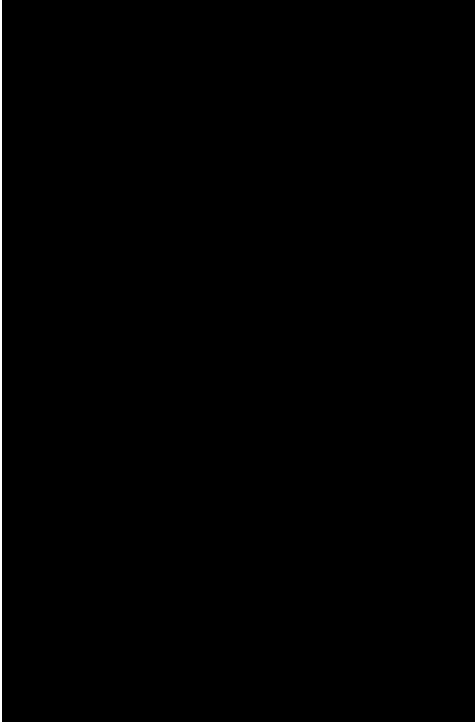
Suppliers being unwilling or unsure about signing grocery supply agreements

- 22 Everyone agrees that Code-compliant grocery supply agreements should be in place for all suppliers as soon as reasonably practicable.
- 23 Having reviewed the submissions on this issue, Foodstuffs' view is that a combination of the following steps is likely to lead to the best outcome:
- 23.1 The imposition of a duty on suppliers to deal with RGRs in good faith. This would at least require suppliers to be reasonably responsive and communicative with RGRs about the terms of grocery supply agreements.
 - 23.2 Enhanced education by the Commission and collaboration with RGRs, including avoiding messaging that could lead to suppliers being unwilling to even review (let alone sign) Code-compliant grocery supply agreements. The opportunity for RGRs to provide to suppliers clear and simple guidance on any exceptions in agreements would assist with this process.
 - 23.3 Giving all parties time and space to work through their supply arrangements, consistent with the fundamental principle of freedom of contract.
- 24 Once a reasonable time has elapsed, the position can be reviewed.
- 25 Any alternative "one-size-fits-all" approach where the Commission imposes "default" supply terms would not capture the multitude of commercial arrangements between RGRs and suppliers, and lessen/remove competition in the upstream markets. Such regulatory interventions are used sparingly and generally in the case of natural monopolies such as electricity lines companies.
- 26 In Foodstuffs' view, the transitional provisions of the current Code adequately address the position of existing suppliers who have not yet signed a new grocery supply agreement.

⁷ Foodstuffs Submission at [22].

Next steps

- 27 We appreciate the opportunity to contribute to the review process, including to cross-submit on the submissions the Commission received on the Request.
- 28 Please do not hesitate to contact us if you have any questions regarding this cross-submission.



SCHEDULE 1 – FOODSTUFFS' RESPONSE TO SPECIFIC SUBMISSIONS MADE

SUBMISSION	ISSUE RAISED	FOODSTUFFS' RESPONSE
<p>Woolworths New Zealand</p>	<p>WWNZ supports the Code, but it is too early to properly evaluate the Code's impact or contemplate significant changes. A review now would lead to duplicative regulatory costs/changes. Suppliers are still signing up to grocery supply agreements. The Australians' first review came only after their code had been in force for several years. Communication and guidance would better support the Code's objectives than this early review.</p>	<p>Foodstuffs agrees, for the reasons set out in paragraphs 7 - 11 of this cross-submission.</p>
	<p>Commission has not set out the concerns it wants to remedy, which risks unintended consequences. No substantive compliance concerns have been raised with WWNZ.</p>	<p>Foodstuffs agrees that the Commission has not set out the concerns it wishes to remedy (apart from a general statement around the exceptions). This is one reason why Foodstuffs considers that a key step in the review should be 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.</p>
	<p>Review should be fair and open-minded – care should be taken to ensure preexisting views are put to one side and the outcome is not predetermined.</p>	<p>Foodstuffs agrees, and reiterates its point in paragraph 10.4 above regarding the need for a cost-benefit analysis of any substantial changes.</p>
	<p>By relying on the Code's exceptions, RGRs are not "contracting out" of the Code – the Code expressly contemplates flexibility in grocery supply agreements for certain agreed matters.</p>	<p>Foodstuffs agrees, for the reasons set out in paragraphs 15 - 19 of this cross-submission.</p>
	<p>WWNZ's view is that it is too soon to evaluate the impact of the Code or contemplate significant changes. But if the Commission disagrees and does contemplate changes to the Code, the following are potential improvements to consider:</p>	

	<ul style="list-style-type: none"> The good faith obligations should be reciprocal. 	Foodstuffs agrees, and this is consistent with its earlier submission on this topic.
	<ul style="list-style-type: none"> There should be obligations or incentives for suppliers to agree to written supply terms. 	Foodstuffs agrees that the mutual obligation of good faith is relevant here.
	<ul style="list-style-type: none"> Code should distinguish between large and small suppliers – for example, large suppliers can push through cost increases to the detriment of consumers. 	Foodstuffs does not believe this is workable and could result in unintended consequences. For example, it would be unfortunate if the Code made it more difficult to deal with smaller rather than larger suppliers.
	<ul style="list-style-type: none"> Code should apply to all "substantial size" NZ grocery retailers, including Costco, The Warehouse and Chemist Warehouse. 	Foodstuffs agrees that the Code should apply to retailers of a "substantial size" including those named by WWNZ, so as to create a level playing field between competing retailers. This can be achieved if the relevant retailers are designated under the existing section 11 of the Act, in particular, section 11(3)(b)(ii) which contemplates designation that "would be likely to promote competitive neutrality". This approach would also bring consistency for suppliers in their dealings with substantial retailers.
Retail NZ	The operation of the Code could be improved by disapplying some suppliers, specifically large and multinational suppliers.	Foodstuffs agrees with Retail NZ that a range of suppliers do have material countervailing market power.
New Zealand Winegrowers	Extend the definition of "groceries" in the Code to include wine, thereby extending the benefits of the Code to wine producers as suppliers to RGRs.	<p>The focus of the Code should remain on products where there are fewer distribution channels outside supermarkets. For products such as alcohol, there are more distribution channels and options for suppliers as an alternative to RGRs. In these circumstances, transactions within the bargaining framework between suppliers and RGRs can simply be allowed to take place without the overlay of the Code product-specific rules. This reduces the risk of unintended consequences resulting from unnecessary regulation, such as creating an unlevel playing field between RGRs and competing retail suppliers of the relevant products.</p> <p>In any event, Foodstuffs deals with all its suppliers reasonably and in good faith. Also, from a practical perspective, Foodstuffs offers the same form of grocery supply agreement across all suppliers.</p>

New Zealand Specialist Cheesemakers Association	The exceptions allow for coercion/RGRs to continue existing business practices, and remove/weaken the protections. They should be removed or narrowed.	Foodstuffs disagrees, for the reasons set out in paragraphs 15 to 19 of this cross-submission. Any coercion would be a clear breach of good faith as defined in the current Code.
	It is hard to judge the Code's effectiveness when the Commission has not attempted to enforce it "on the supplier side". Commissioner should explore supplier-retailer negotiations in detail, in relation to the overarching principles of the Code of good faith and reasonableness. The current environment "would challenge the reasonable definitions of either of these terms".	Foodstuffs disagrees that any of its current practices are unreasonable or that it does not deal with suppliers in good faith. Both the Commission and suppliers have multiple ways to raise any concerns with us.
	RGRs use the language of the Code as a cloak for unreasonable unilateral decisions around ranging and delisting.	Foodstuffs disagrees. We have put significant time and resource into ensuring that our ranging and delisting decisions are reasonable and otherwise comply with the Code. To the extent that ranging and delisting decisions are unreasonable, this would be a breach of the current Code – no amendments to the Code are required.
	Benefits are being paid for, e.g., merchandising, but are not being received (e.g., no evidence of additional staff being employed by RGRs in the face of this cost transfer) – this leads to poor rotation and therefore being asked to pay for more wastage or face threats of delisting.	Regarding merchandising, it is not in Foodstuffs' interests to keep products off shelves. FSNI's successful merchandising program has been well-received by suppliers. At store level, members continue to increase team numbers to undertake in-store merchandising. Requiring a supplier to pay for wastage in the circumstances described would be a breach of the current Code and, among other things, any aggrieved supplier can access the dispute resolution scheme.
	The FSNI range review process is a "black box" blind auction – not sharing expectations/information with suppliers. Compromises supplier diversity/contributions to market, instead focuses on maximum margins. RGRs are reducing range/SKU count, "weaponising" range reviews and delisting processes.	Foodstuffs disagrees. Foodstuffs openly shares a range of data with suppliers including anonymised customer data and margin expectations. Ranging discussions are part of commercial negotiations with decisions to delist being made for genuine commercial reasons, supported by customer and commercial data and using a range of tools to assist with robust decision-making. With regard to sharing of information, Foodstuffs is also mindful of the need to treat all suppliers equally, and the need to respect suppliers' confidential information.

	<p>Small suppliers are the businesses "most at threat from current retailer business practices."</p>	<p>With regard to its own practices, Foodstuffs disagrees. We have a genuine focus on promoting small suppliers and a proven track record of assisting those suppliers emerge and succeed within our co-operatives. This includes through the Foodstuffs Emerge program which recognises and enables product innovation by small and start-up suppliers.</p>
	<p>Rights of access to consumers should be a focus.</p>	<p>To the extent that it is appropriate to recognise a supplier's right of access to retail consumers, this is already captured in the range review and delisting provisions of the Code.</p>
<p>New Zealand Food & Grocery Council</p>	<p>Power imbalances between RGRs and suppliers remain. Power imbalance is more extreme in NZ, so while the Australian and UK codes were a helpful starting point, the Code needs to better reflect the difficulties presented by the more constrained effective duopoly environment in New Zealand.</p>	<p>There is no evidence that any power imbalance between suppliers and RGRs is more "extreme" in New Zealand than other jurisdictions and/or that would justify the Code being amended to reflect particular difficulties in New Zealand. Concerns regarding retailer-supplier power imbalances have been raised across a range of jurisdictions with different market structures and codes ultimately developed to address relevant conduct.</p>
	<p>The "contracting out" exceptions undermine protections and entrench power imbalance:</p> <ul style="list-style-type: none"> • The exceptions need to apply only in "very limited circumstances". • It is unclear what "reasonable" is for the purposes of these exceptions. • Template options/case studies/examples would be useful. • RGRs should provide written explanations as to why they believe the criteria set out in the exception provisions is met on each occasion (currently for some exceptions, this is just on request) and these explanations should be tailored to the specific circumstances. 	<p>Foodstuffs disagrees with the exceptions being characterised as "contracting out" of the Code for the reasons set out in paragraphs 15 - 19 of this cross-submission, and they should be retained in their current form.</p> <p>As discussed in Foodstuffs' earlier submission, there are clear reasons for each exception including to preserve flexibility in supplier relationships and to promote competition in upstream markets.</p> <p>Reasonableness is a well-understood concept, and the Code already appropriately describes the relevant factors involved in the assessment. Matters such as the weight given to relevant factors should be assessed on a case-by-case basis, and prescribing a one-size-fits-all approach is not appropriate.</p> <p>Requiring written explanations in all cases would impose significant administrative burden for little or no benefit to suppliers.</p>

	<ul style="list-style-type: none"> • The burden should not be on suppliers to monitor RGRs' compliance with the exception provisions. • Set-off rights should be subject to resolving disputes about that set-off; explicit approval should be required prior to a deduction being made. • At a minimum, the RGRs should bear the burden of proving their conduct is reasonable in the event of any dispute. 	<p>If a supplier has concerns regarding an exception, there are a number of channels for that supplier to raise concerns including with the Commission and/or through the dispute resolution scheme.</p> <p>As discussed in Foodstuffs' earlier submission, 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. Requiring explicit approval every time prior to a deduction being made gives rise to an unreasonable administrative burden on all parties.</p> <p>Given the significant civil penalties that arise from a breach of the Code, Foodstuffs' view is that the ordinary rules of evidence should continue to apply as set out in section 141 of the Act.</p>
	<p>There is uncertainty about how protections/obligations under the Code apply in practice. Investigations of potential breaches may help clarify what is/is not acceptable. This includes good faith – a principle of "fair dealing" may be more appropriate.</p>	<p>We agree that over time, it is likely that any uncertainties regarding how the Code will apply in practice will be resolved. This illustrates that further time is needed for the Code to bed-in. We believe that the definition of good faith is fit for purpose, and it is not helpful to bring in the concept of fair dealing which is used in the Financial Markets Conduct Act 2013.</p>
	<p>The definition of "groceries" should be inclusive/capture all products that RGRs supply. For example, it is not immediately clear whether it would capture household products such as scrubbing brushes, magazines and newspapers, gift wrap, socks, underwear, and party decorations. There are a range of products which are sold through the supermarkets that NZFGC considers ought to be captured by the definition (if they are not already), including dust pans, buckets, cookware, toys, electronic goods, drink bottles, hot water bottles, electric blankets, and baby products.</p>	<p>As noted above, the focus of the Code should remain on products where there are fewer distribution channels outside supermarkets. As is the case with alcohol, for general merchandise products such as the ones listed here, there are many more distribution channels and options for suppliers as an alternative to RGRs. As noted, Foodstuffs deals with all its suppliers reasonably and in good faith.</p>
	<p>It is unclear how Code protections apply where a supplier has not agreed the grocery supply agreement/apply to existing grocery</p>	<p>Foodstuffs' view is that the existing Code adequately makes clear that the protections of the Code apply to all suppliers and how the provisions of the Code apply to existing grocery supply</p>

	supply agreements – suppliers should be entitled to the Code's protections regardless.	agreements. Among other things, RGRs and suppliers should be entitled to rely on agreements entered into prior to the Code to the extent those agreements remain consistent with the Code.
	Having a grocery supply agreement spread across various documents creates uncertainty – grocery supply agreements should prevail over other incorporated terms/policies and contain additional minimum content.	RGRs and suppliers should be free to agree in good faith the documents making up their commercial relationship and the order of priority that applies. A one-size-fits-all approach to order of priority such as the one suggested by the NZFGC is unlikely to be the best outcome (including reducing competition due to increased standardisation across RGRs and suppliers).
	Grocery supply agreements generally have "imbalanced" clauses e.g., regarding termination, etc – Code protections should extend to these.	Among other things, the definition of good faith requires an RGR to act reasonably. This includes in the negotiation of the grocery supply agreement and is apposite in any assessment of whether any clauses in the agreement are imbalanced. Accordingly, the current Code is adequate to address issues of this type.
	Suppliers face significant costs and uncertainty dealing with both RGR head offices and stores – the Code should address this. RGRs and stores also apply the Code inconsistently – the Code should require RGRs to train their buying teams.	As discussed in paragraphs 20 - 21 of this cross-submission, the Code needs to be fit for purpose for a co-operative, and Foodstuffs has proposed a number of solutions to address this issue. Foodstuffs already trains its buying teams. Whether prescriptive regulation is needed should be assessed once the Code has had a reasonable time to bed-in.
	Code compliance generally places administrative burden on suppliers (and RGRs). RGRs' multiple versions of grocery supply agreements (following Commission feedback) have contributed to this. Some suppliers still have not been provided with compliant grocery supply agreements. The Commission has also not communicated as to whether it considers the reissued grocery supply agreements comply with the Code.	Foodstuffs strongly rejects any suggestion that it has not provided suppliers with compliant grocery supply agreements. On that basis, further steps by the Commission with regard to grocery supply agreements are not required.
	Suppliers are hesitant to raise issues due to Commission's OIA obligations and fear of retaliation – express anti-retaliation protections should be introduced into the Code.	Foodstuffs' view is that protection against retaliation is adequately covered by the current good faith obligation. See clause 6(3)(d) of the Code which expressly references the RGR not acting in a way that constitutes retaliation.

	<p>Given the short period of time that the Code has been in operation, there are likely other issues with the Code which have not yet materialised.</p> <p>NZFGC expects further consultation before the Commission issues any proposed amendments to the Code.</p>	<p>Foodstuffs agrees that further consultation with all stakeholders (consistent with maintaining an open mind and taking a principled approach) would be desirable before the Commission issues any proposed amendments to the Code.</p>
	<p>To the extent they are separate legal entities, RGR head offices should be made jointly/severally liable with individual stores for breaches of the Code.</p>	<p>Foodstuffs has committed to Code compliance on a co-operative-wide basis. The current liability regime appropriately reflects that Foodstuffs stores are independently-owned businesses.</p>
	<p>The Commission should reconsider the notice periods under the Code – many of them are too long. For example, as the average inventory holding of fresh produce is 8 – 15 days, the 30-day notice period for an RGR to make a claim for damaged grocery products or shortfall is of no value.</p>	<p>Foodstuffs' view is that the current notice periods appropriately balance the interests of RGRs and suppliers. Among other things, if changes in this area were proposed, these would require careful cost-benefit analysis.</p>
Horticulture New Zealand	<p>Code does not capture the majority of fresh produce transactions. Growers experience the most frustration at the first point of sale with wholesalers – not retailers. Seek an expansion of the Code or introduction of a Horticultural Code to capture first points of sale (i.e. transactions with wholesalers).</p>	<p>Foodstuffs views this issue as one for the Commission to engage with growers and wholesalers on.</p>
	<p>RGRs require growers to use specified crate suppliers. Supply chain disruptions have been caused by crate shortages and growers being unable to contract with other crate suppliers due to commitments with RGRs. The Code should capture crate use.</p>	<p>Each Foodstuffs co-operative has crate agreements with two suppliers to provide choice to growers but still deliver efficiencies in the supply chain to deliver the best cost to customers. Foodstuffs has fostered competition which has increased the number of crates in the pool over the last 5 years.</p>
	<p>RGRs "retroactively" extend specials – after a joint promotion, the price that RGRs pay remains at the promotional price and does not return to the pre-promotional level.</p>	<p>Under the current Code, any extension of a special price offered to an RGR, whether in connection with a promotion or otherwise, would need to be agreed by the parties in good faith.</p> <p>It should be noted that produce is all about supply and demand and prices change weekly and sometimes daily. A price that is very</p>

		competitive one week may not be the next week because of a shortage of supply in the market. Pricing moves to react to this volume in the market and give the grower the best opportunity to sell the produce.
Brewers Association of New Zealand	Alcoholic beverages, primarily beer, should be considered "groceries" under the Code.	See our comments in response to New Zealand Winegrowers above.
Anonymous Reporting Tool	<i>General</i>	
	The Code does not provide strong protection, as RGRs still have a position of power, and navigating agreements requires legal resource.	In Foodstuffs' view, the current Code applies the appropriate protections to support the bargaining framework within which bilateral transactions are negotiated (of course, with no guarantee of a certain outcome from any particular interaction). In all cases, Foodstuffs deals with suppliers in good faith. Regarding legal resource, Foodstuffs' grocery supply agreements are written in plain language as required by the Code and Foodstuffs is also willing to engage with any questions suppliers have regarding the agreements.
	Grocery supply agreements at a store level are complex.	As noted, a focus of the review should be ensuring that the Code is fit for purpose for co-operatives. The submissions by Foodstuffs on this topic in paragraphs 20 - 21 above address this.
	There are concerns about eligibility for store displays being linked to an RGR's merchandising requirements.	In the South Island, where suppliers predominantly carry out merchandising, FSSI has a reasonable expectation that suppliers that participate in its centralised display program will merchandise so that displays are well-represented. Otherwise, Foodstuffs confirms that eligibility for store displays is not linked to discussions regarding merchandising.
	Clarification of "good faith" would support the Code's operation.	As Foodstuffs has submitted, all participants' understanding of how the concept of good faith is to be applied in practice will be refined over time, with the benefit of experience.
	Interactions with all RGRs focus on margin expectations and pricing.	These topics are key matters for commercial bilateral negotiations within the bargaining framework between RGRs and suppliers with no guaranteed outcome. This is a competitive process between suppliers in upstream markets. The current Code provides the

		appropriate foundation for how these discussions should take place i.e., transparently and otherwise in good faith.
	All RGRs should provide more specific detail on performance metrics used for assessing performance and informing category reviews.	Consistent with the Code, Foodstuffs already shares, at an appropriate level of detail, its metrics for assessing performance and informing category reviews. As noted above, this includes sharing a range of data with suppliers including anonymised customer data and margin expectations.
<i>FSNI and FSSI</i>		
	It has become harder to do business with FSNI and FSSI since the Code was introduced (but easier to do business with WWNZ). Responses from FSNI and FSSI can be slow or not provided, but they expect timely response from suppliers. There are limited opportunities to engage in FSNI and FSSI category reviews – more engagement and face to face discussion would support good faith bargaining.	<p>Foodstuffs is disappointed to receive this feedback. We are constantly engaging with suppliers and always endeavour to do so in a timely way.</p> <p>Category reviews are a critical part of how we ensure that the best products are on our shelves the meet the needs of our customers. Accordingly, we encourage suppliers to participate to ensure a variety of options are available and promote competition between suppliers. Foodstuffs' structured category review process balances this objective, and the finite resource available to engage with each supplier.</p>
<i>FSNI</i>		
	The Cost Price Template process places pressure on suppliers.	FSNI's Commercial Proposal Template process is simply a way for FSNI and suppliers to transparently engage in bilateral good faith negotiations within the bargaining framework. It is critical that the Code does not "reduce the ability of the major grocery retailers to negotiate fairly but firmly with suppliers" ⁸ – this will ultimately lead to higher prices for consumers. The good faith requirement of the Code means that there can be no duress, and it is only ordinary commercial pressures that apply to the parties.
	Display terms deliver less displays than what would have been received through direct store negotiation.	Reasonable store co-op charges are agreed in good faith between FSNI and suppliers as part of commercial negotiations and reflect access to in-store promotional activities in a banner, including but

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

		not limited to our display program. Our display program is built around customer insights to maximise the effectiveness of displays for the benefit of suppliers.
	The best price in the market can be requested for promotional deals.	It is unsurprising that FSNI requests the best price for a promotion as part of the bargaining framework. The Code allows this provided that the level of promotional funding is reasonable, and the supplier is always free to not participate in the promotional deal.
	The onus is on the supplier to reject merchandising terms rather than it being an exception, and favour is given to those who accept.	As was canvassed over the course of the retail market study, responsibility for merchandising is a matter for commercial negotiation between RGRs and suppliers. There are clear efficiency gains when merchandising is undertaken by stores. Where merchandising is undertaken by stores, merchandising terms are agreed in good faith. Effective merchandising is important to both RGRs and suppliers and support for merchandising (whether by way of a term or in-store support by a supplier which meets FSNI's standards) is one way in which suppliers can differentiate their offering.
	Merchandising term discussions should be separate from the category review process.	It is efficient for merchandising terms to be discussed and negotiated in good faith with a supplier during a category review. Merchandising terms are negotiated on a supplier-by-supplier basis rather than across a category, so the implementation process including relevant timing is separate.
	<i>FSSI</i>	
	The FSSI practice of setting target margins per SKU does not provide opportunity for negotiation.	The Code specifically contemplates that an RGR may notify the supplier of reasonable commercial sales or profitability targets. ⁹ FSSI shares these targets with suppliers on a transparent basis.

⁹ Grocery Supply Code 2023, cl 18(3)(b).

<p>Anonymous A</p>	<p>The Code's objectives that relate to "fair conduct", and supplier diversity, are not being supported.</p> <p>RGRs are getting around fairness requirements through procedural means and eventual agreement by suppliers.</p>	<p>Foodstuffs disagrees. The concept of good faith is fundamental to the Code's objective of fair conduct. It is in Foodstuffs' interest to promote supplier diversity as this is essential to responding to evolving consumer demand, and allows Foodstuffs to effectively compete in retail markets.</p> <p>RGRs cannot circumvent good faith obligations through any processes or by obtaining agreement by suppliers. As noted in paragraphs 15 - 19 of this cross-submission, there is no ability to contract out of the Code.</p>
	<p>Observations of the health of the industry are indicative of how the Code is working:</p> <ul style="list-style-type: none"> • Large suppliers are recording record losses, and most others are suffering extreme margin compression • Start-ups are unsustainable • Significant deletions of product ranges (and reduced consumer choice) • RGRs are not interested in product innovation (Foodstuffs Emerge is just good PR) and are reducing range/increasing margin • People exiting the industry due to the stress of dealing with RGRs 	<p>The profitability of large suppliers, and the sustainability of start-ups, are beyond the ambit of the Code and the control of the RGRs. Also, there is no transparent or comprehensive data/reporting framework to enable parties to engage on the topic of supplier profitability and margin compression in an informed way.</p> <p>Foodstuffs' product ranging decisions are data-driven and ultimately determined by consumer choice. 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.¹⁰</p> <p>Similarly, product innovation is key to how RGRs compete with each other. Foodstuffs is proud to host Foodstuffs Emerge to recognise product innovation by small and start-up suppliers. Foodstuffs Emerge is a national competition that sees category winners get valuable support from industry leaders and Foodstuffs mentors, plus a fast-tracked journey for their product onto supermarket shelves in New World stores across New Zealand. It is noteworthy that this year the level of innovation was such that Foodstuffs awarded "highly commended" prizes in addition to the overall winner.</p>

¹⁰ In FY24, each of FSNI and FSSI registered on their respective systems over 6,000 new products.

		Foodstuffs negotiates firmly and fairly with suppliers, consistent with the obligation of good faith.
	<p>RGRs use their power to extract further margin, by performing range reviews (and stating expected % margin increase) where they say there will be comprehensive deletions of a "brand". Suppliers must either concede to RGR terms or face deletion of their entire brand.</p> <p>Any concession is only good for a single range review (and not even that as we have seen products brought back due to "consumer requests" even after agreeing exclusivity), then the supplier faces the prospect of deletion again as other suppliers offer greater margin to get back in. There is never a conversation about a retail price decrease. RGRs use the power imbalance to extract concessions and agreement to their terms.</p>	<p>Consumer-driven range reviews and associated decisions to delist to make way for new or more profitable products are simply examples of legitimate conduct within a bargaining framework between RGRs and suppliers which is pro-competitive and ultimately for the benefit of consumers.</p> <p>Commercial terms are negotiated in good faith, rather than extracted by the improper use of a power imbalance.</p>
	Supplier rebates being indexed to scan prices is unfair. When RGRs increase retail price, rebates increase proportionately.	As allowed for under the Code, commercial terms are a commercial matter to be agreed in good faith within the Code framework.
	Concessions made e.g., the merchandising term, are not translating at store level. Additional staff are not employed/store staff do not know which suppliers have conceded to the term. Suppliers regret their decision, but it would be almost impossible to reverse this term once agreed.	As noted, it is not in Foodstuffs' interests to keep products off shelves. FSNI's successful merchandising program has been well-received by suppliers. At store level, members continue to increase team numbers to undertake in-store merchandising. Stores are made aware of suppliers who have agreed to the term. If requested by a supplier, FSNI will meet and discuss in good faith any merchandising term.
	The intent of the Code is good, but with the severe power imbalance, suppliers concede to any terms due to the risk to their business. RGRs divide and conquer – over time it becomes a <i>fait accompli</i> .	As noted, commercial terms are agreed in bilateral negotiations within the bargaining framework between RGRs and suppliers, with no guaranteed outcome. This is a competitive process between suppliers in upstream markets. The current Code provides the appropriate foundation for how these discussions should take place i.e., transparently and in good faith.
	The onus is on suppliers to make a complaint, requiring legal counsel (high hurdle). Most suppliers would feel it is pointless, with an indeterminate and potentially adverse outcome. Suspect	There are a number of channels for suppliers to raise concerns that do not require legal counsel including with the Commission and/or through the dispute resolution scheme. Foodstuffs rejects

	<p>the whistle blower initiative has not delivered results – suppliers all get trapped by complicit agreement (under duress).</p>	<p>the notion that suppliers are trapped by complicit agreement and duress.</p>
	<p>Without more retail competition, the only other avenue is to introduce collective bargaining. Grocery Commissioner could act as arbiter on specific issues raised by a collective/NZFGC, and impose additional procedural requirements on RGRs e.g., provide evidence that they delivered a benefit to consumer/ supplier and if not, then the RGR must unwind the term.</p> <p>The Code could provide for this – a greater focus on supplier-agreed concessions (exclusivity, distribution, merchandising, displays/co-op) and whether suppliers think they received the benefit – not just focusing on the process to agreement.</p>	<p>Foodstuffs is willing to deal with any supplier or group of suppliers. However, outside this submission, there appears to be little support for collective bargaining (noting that section 184 of the Act gives the power to introduce regulations exempting suppliers from Commerce Act 1986 restrictions that would otherwise apply to the relevant arrangements). Clause 29 of the Code protects freedom of any association between suppliers.</p> <p>The current Code adequately addresses issues of benefits to suppliers by requiring that relevant supplier payments are reasonable. As noted above, suppliers can raise concerns with the Commission and/or through the dispute resolution scheme.</p>
<p>Anonymous B</p>	<p>The Code does not go far enough to limit RGR behaviour, particularly the use of market power and threat of deletions.</p> <p>Merchandising services are "ruled out by the Code as suppliers' responsibility" but stores still demand merchandising or charge for it. If we remove or reduce merchandising services, we face the threat of deletion.</p>	<p>As noted, commercial terms are agreed in bilateral negotiations within the bargaining framework between RGRs and suppliers, with no guaranteed outcome. The current Code provides the appropriate foundation for how these discussions should take place i.e., transparently and in good faith.</p> <p>Merchandising services are not "ruled out" by the Code as suppliers' responsibility. Where merchandising arrangements are agreed, this is in good faith. Effective merchandising is important to both RGRs and suppliers and support for merchandising (whether by way of a term or in-store support by a supplier which meets Foodstuffs' standards) is one way in which suppliers can differentiate their offering.</p>
	<p>About the only improvement since the Code's implementation is when deleting a product, RGRs are a <i>little</i> more helpful in moving through stock so we are not left with dated stock. This effort only lasts 2-3 months yet we are expected to carry more stock than this, particularly long lead time imported products.</p>	<p>Under the existing Code RGRs are required to give reasonable notice of a delisting, a requirement which Foodstuffs and its stores comply with.</p>

	RGRs are increasingly demanding margin and have new and inventive ways to take more margin through terms we receive no benefit for (we were "railroaded" into it before the Code came into effect).	As noted, margin is a commercial matter agreed in bilateral negotiations within the bargaining framework between RGRs and suppliers, with no guaranteed outcome. Ultimately, buying well from suppliers is critical to stores' delivery of value to customers. RGRs and suppliers should be entitled to rely on agreements entered into prior to the Code to the extent those agreements remain consistent with the Code.
	RGRs constantly index market pricing then demand further discounts to meet their competitors' pricing, with the threat of deletion for not agreeing (despite them often making more margin than their competitor anyway).	In a competitive retail market, negotiated pricing within the bargaining framework is dependent on a range of factors, including competitor pricing. Foodstuffs rejects any suggestion that it threatens suppliers with deletion, but rather negotiations are in good faith.
	RGRs demand that key products come into DCs at higher costs, but this makes it too expensive to deliver the remaining products direct to store in smaller quantities.	There is no demand or requirement that suppliers deliver products into DCs. Delivery arrangements are agreed in good faith.
	"Blunt and heavy" measures are needed to break the duopoly. Break PAK'nSAVE away from Foodstuffs and force divestment. Limit banner numbers by geography and population. Increasing competition and supplier options is the only way to improve margin for suppliers/keep RGRs honest.	This is outside the ambit of the Code review. However, Foodstuffs strongly disagrees, and notes that the proper focus of the Code should be on the long-term interests of consumers rather than improving supplier margins.
	The market is now 20% private label – it is growing faster than branded products and "killing suppliers". There should be a "cap" in each category. Private label should also be more obvious to consumers and not disguised as branded products.	The quoted percentage is incorrect. Also, as submitted during the retail market study, there are significant benefits to customers from private label offerings. The current Code appropriately addresses concerns raised regarding intellectual property and non-discrimination with regard to shelf allocation. Further regulation of the type described is not appropriate.
	The shift in power away from brands is limiting R&D and brand building because there is no margin left for marketing/product development.	Foodstuffs has no incentive to reduce suppliers' ability to market and further develop their products. Private label products increase competition in upstream markets for the benefit of consumers.
Anonymous C	Stores must have core range and recommended range products on shelf, so there is no opportunity to sell goods in Foodstuffs	As noted above, ranging discussions are part of commercial negotiations with decisions being supported by customer and commercial data and using a range of tools to assist with robust decision-making. These negotiations are part of the bargaining

	<p>stores. Small businesses cannot compete financially with larger suppliers to meet Foodstuffs' financial demands.</p>	<p>framework which is a competitive process between suppliers in upstream markets, without guarantee of outcome. Within this framework, Foodstuffs has a genuine focus on promoting small suppliers and a proven track record of assisting those suppliers emerge and succeed within our co-operatives. In particular, the ability for stores to locally range in addition to core range and recommended range provides an opportunity for small suppliers. In addition, the category review process allows medium and smaller suppliers to have all the same ranging opportunities as larger suppliers enabling them to grow their business without the need to invest in all of the capabilities seen in large suppliers.</p>
	<p>We are still bullied to pay merchandising and promotion fees but stores still expect us to also merchandise, with threats of deleting if we do not comply.</p>	<p>Merchandising and other terms are agreed in good faith. Where merchandising terms are agreed at centre level within a co-operative, suppliers are not required to provide merchandising.</p>
Anonymous D	<p>Large suppliers should be put on notice for "anti-competitive behaviour". Large suppliers can dominate shelf space at the expense of smaller suppliers, using joint business plans to demand shelf space in return for better terms – negotiations that include demands of shelf space should be illegal.</p> <p>It benefits the large suppliers that there is a supermarket duopoly.</p>	<p>This is more an issue for large suppliers to comment on. Foodstuffs has no incentive to encourage or condone anti-competitive arrangements in relevant upstream markets.</p>
	<p>It appears milk has not been advertised or discounted since the start of the Commission's review of the Code.</p>	<p>The level of promotions for any product is data and consumer-driven. There is no connection with the Commission's review of the Code.</p>
Goulter's Vinegar Products Ltd	<p>References (without providing details) at least 3 occasions of "immoral unfair treatment" since the Code came out.</p>	<p>As noted above, suppliers can raise concerns with the Commission and/or through the dispute resolution scheme.</p>
	<p>Before the Code came out, we were "disadvantaged" because of "certain directives FSNi may have given to the stores".</p>	<p>It is unclear what is being alleged here, noting that the alleged conduct predated the Code.</p>
	<p>The Code is clear and concise, but examples for each point e.g., what is unfair conduct between RGRs and suppliers, may help with clarity for suppliers/buyers.</p>	<p>Over time, it is likely that any uncertainties regarding how the Code will apply in practice will be resolved. This illustrates that further time is needed for the Code to bed-in.</p>

	<p>The "truth" about what suppliers are experiencing should be exposed.</p>	<p>As noted above, suppliers can raise concerns with the Commission and/or through the dispute resolution scheme.</p>
	<p>Suggests that suppliers understand "what is fair" but "perhaps there is misinterpretation from the stores as to what is expected of them". The buyers have always had all the power.</p>	<p>Foodstuffs trains its buying teams on compliance with Code obligations, and negotiates firmly and fairly with suppliers (consistent with the obligation of good faith).</p>
	<p>It is not right to put a (small) supplier on EDLP only and drop all their promotions, but then allow large suppliers to run promotions. The category manager told us to do EDLP and we are losing sales because of this.</p>	<p>Foodstuffs engages in good faith with suppliers regarding pricing and promotional strategies.</p>
	<p>Suppliers are not raising their experiences due to fears of losing shelf space and the Commission should let them know it is okay to come forward with the truth of what is going on/assure them they will be protected.</p>	<p>As noted above, suppliers can raise concerns with the Commission and/or through the dispute resolution scheme. Protection against retaliation is adequately covered by the current good faith obligation.</p>