

11 October 2024

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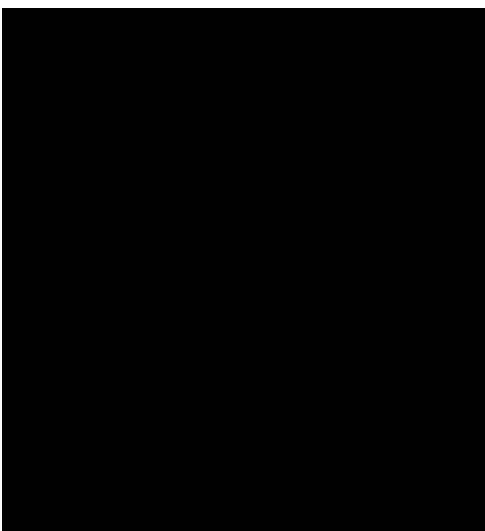
Tēnā koutou

Review of the Grocery Supply Code

Attached are the comments that the New Zealand Food & Grocery Council wishes to present in response to the submissions published on the ***“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”*** paper released on 1 August 2024.

We would welcome the further opportunity to comment.

Ngā mihi nui





COMMERCE COMMISSION REVIEW OF THE GROCERY SUPPLY CODE

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

Cross-submission by the New Zealand Food & Grocery Council

11 October 2024

NEW ZEALAND FOOD & GROCERY COUNCIL

1. Introduction

- 1.1 This cross-submission is made by the New Zealand Food & Grocery Council (**NZFGC**) in response to submissions on the New Zealand Commerce Commission's (the **Commission's**) *Review of the Grocery Supply Code: Request for views on issues and opportunities to consider within the review (Request for Views Paper)*.¹
- 1.2 NZFGC has not commented on every issue raised in the submissions. Where NZFGC has not commented, we rely on our submission dated 16 September 2024 but note that submission was not an exhaustive identification of all issues with the Code given the limited time available to respond to the Request for Views Paper.

2. Application of the Grocery Supply Code

All suppliers should be entitled to the Code's protections

- 2.1 NZFGC does not agree the Grocery Supply Code (**Code**) should be disapplied to certain suppliers.²
- 2.2 Section 15 of Grocery Industry Competition Act 2023 (**GICA**) requires that, before the Commission can make a determination for the disapplication of any provision(s) in the Code (in whole or in part) to a specified supplier or class of suppliers under s 12(1)(b) of GICA, the Commission must be satisfied that:
- (a) doing so is necessary or desirable in order to promote the purpose of GICA;
 - (b) 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
 - (c) the extent of the disapplication is not broader than is reasonably necessary to address the matters that gave rise to the disapplication.
- 2.3 NZFGC considers disapplication of any provision(s) of the Code to a specified supplier or class of suppliers is not necessary or desirable to promote the purpose of GICA. There is no evidence that disapplying the Code to larger suppliers would promote competition and efficiency in the grocery industry for the long-term benefit of consumers.³ NZFGC is also not aware how the Code could be used by large suppliers to avoid providing an explanation for proposed price increases, as suggested by WWNZ. While clause 28(6) of the Code prohibits RGRs from requiring a supplier to disclose commercially sensitive information in relation to a proposed price increase, there is nothing in the Code which suppliers can use to withhold any other information that an RGR needs in relation to a

¹ Commerce Commission *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* (1 August 2024) (**Request for Views Paper**).

² Retail NZ submitted that the Commission should “consider whether any supplier or class of supplier should be removed from the Code's coverage by virtue of the bargaining power held”, Retail NZ *Review of the Grocery Supply Code* (16 September 2024). Woolworths New Zealand also submitted that the “[t]he Code protections should distinguish between large and small suppliers”, Woolworths Group New Zealand *Review of the Grocery Supply Code Woolworths New Zealand Limited Submission* (16 September 2024) at cl 4.4(c), Appendix One (**WWNZ Submission**). Foodstuffs North Island and Foodstuffs South Island submitted that their “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”, Foodstuffs North Island & Foodstuffs South Island *Review of the Grocery Supply Code – Foodstuffs' Submission in response to Request for Views* (16 September 2024) at [6] (**FSNI/FSSI Submission**). Foodstuffs did not recommend any disapplication of the Code for certain suppliers.

³ GICA, s3.

price increase. Further, the Code does not require that RGRs accept a proposed price increase, only that the RGR engage in any negotiations in relation to a proposed price increase in good faith.⁴

2.4 Further, it is likely that disapplying the Code from some suppliers will have the effect of unduly hindering or obstructing those suppliers from participating confidently in their dealings with the regulated grocery retailers (**RGRs**). Larger suppliers still face an imbalance of bargaining power in their dealings with RGRs given the RGRs' significant market share (the RGRs' combined market share in 2023 was 82%).⁵ As the Commission noted its draft Market Study Report, “[w]hile some suppliers – particularly large suppliers of well-known brands – will be in a relatively strong bargaining position compared to other suppliers, this is relatively rare.”⁶ The Commission subsequently concluded in its Final Market Study Report that “even large suppliers with strong brands are dependent on supermarkets access to New Zealand consumers. In addition, category by category product ranging negotiations between retailers and suppliers may dampen the bargaining power of a large supplier providing products across many different categories”⁷. This position has not changed. As the Commission stated in its first Annual Grocery Report (**Annual Grocery Report**), RGRs are a key route to market for many suppliers⁸ and their gross margins have increased over 2019 – 2023.⁹ Accordingly, it would be unfair (and inconsistent with the Code's key purpose) to place larger suppliers at a further disadvantage in their commercial negotiations with RGRs by not allowing them to rely on the Code's protections.

2.5 In addition, attempting to distinguish between large and small suppliers would be difficult. Woolworths New Zealand (**WWNZ**) has proposed that the Commission consider using “the same definition of “large” applied in s 45 of the Financial Reporting Act 2013 (either assets in excess of \$66 million or revenue in excess of \$33 million)”.¹⁰ Even if the Commission were to consider disapplying the Code to some suppliers (which NZFGC submits it should not for the reasons explained above), adopting the definition of “large” applied in s 45 of the Financial Reporting Act would not be appropriate in the context of the New Zealand grocery industry. WWNZ reported more than \$8 billion in food sales in FY24¹¹, and Foodstuffs North Island (**FSNI**) reported more than \$9 billion in revenue for FY24¹². NZFGC does not consider that a supplier with a revenue of \$33million is “large” in comparison with the RGRs, and (as explained above) larger suppliers still face an imbalance in bargaining power in their dealings with RGRs.

Application of Code to individual retail stores

2.6 NZFGC agrees with FSNI and Foodstuffs South Island (**FSSI**) that “*On the Spot*” branded stores should not be required to negotiate grocery supply agreements (**GSAs**) with suppliers at an individual store level. As explained in NZFGC's submission, requiring individual store level agreements is impractical and unnecessarily increases the cost of compliance.¹³ However, NZFGC does not agree that “*On the Spot*” branded stores should be exempt from the Code in its entirety.¹⁴ While NZFGC acknowledges that “*On the Spot*” stores have a more limited range of groceries, they comprise a significant proportion of the RGR's stores and therefore collectively account for wide national coverage of grocery products sold. For example, the Annual Grocery Report stated that “*On The*

⁴ See cl 28(2), (4) and (5).

⁵ Commerce Commission *First Annual Grocery Report* (4 September 2023), pg. 106 (**Annual Grocery Report 2024**).

⁶ Commerce Commission *Market Study into the Retail Grocery Sector Draft Report* (19 July 2021) at [8.58].

⁷ Commerce Commission *Market study into the retail grocery sector: Final report* (8 March 2022) at [8.61].

⁸ Annual Grocery Report 2024, pg. 105.

⁹ Annual Grocery Report 2024, see Table 5.

¹⁰ WWNZ Submission at [4.4(c)].

¹¹ <https://www.woolworthsgroup.com.au/content/dam/wwwq/investors/asx-announcements/2024/Woolworths%20Group%202024%20Annual%20Report.pdf>

¹² Foodstuffs Consolidated FY24 Financial Statements of Foodstuffs North Island Limited, at 1 (<https://annualreports.foodstuffs.co.nz/numbers>).

¹³ NZFGC Submission on Request of Views Paper, at [4.45].

¹⁴ FSNI and FSSI submitted that “due to their small size, the Code places an unreasonable administrative burden on [“*On the Spot*” branded stores]” and therefore “these convenience stores should be excluded from the Code's requirements”, FSNI/FSSI Submission at [36].

Spot” accounts for 73 retail stores out of 192 retail stores in the FSSI network (as at December 2023).¹⁵ NZFGC considers that removing the requirement for store level agreements would reduce compliance costs for these stores, while ensuring that suppliers are protected in their dealings with a significant proportion of the RGRs stores.

- 2.7 NZFGC also disagrees with the proposal that the Code be disapplied from non-retailing RGRs.¹⁶ The Code should apply to all RGR dealings with suppliers of groceries, including any dealings which occur through the RGRs’ interconnected bodies corporate. This ensures suppliers are appropriately protected under the Code in any of their dealings with RGRs and their related companies/subsidiaries.
- 2.8 In addition, the Commission should also consider the provision of additional services supplied by the RGR to suppliers (whether directly through the RGR or via a third-party) or services that the RGRs require suppliers to acquire from third-parties, to ensure there are appropriate guardrails in place to protect suppliers.
- 2.9 If the Commission were to consider disappling the Code in any way (for example, disappling the requirements in cl 8 of the Code to RGR agreements with suppliers that do not involve a supply of groceries¹⁷) this would need to be very carefully considered. The industry is complex, and care must be taken not to reduce protections for suppliers by creating loopholes in the Code’s application.

3. Good faith obligations

- 3.1 The Commission’s power to issue a new Code under s 12 of GICA does not permit the Commission to impose obligations (such as an obligation of good faith) on grocery suppliers.¹⁸ Accordingly, the Commission cannot make the current express obligation on RGRs to deal with suppliers in good faith reciprocal in a new or amended Code as has been suggested,¹⁹ and this is appropriate given the purpose of the Code is to address the significant imbalance of bargaining power between suppliers and the RGRs. NZFGC notes that this does not mean that bad faith conduct by suppliers is not relevant under the Code; the Code takes into account whether a supplier has acted in good faith when dealing with an RGR in determining whether an RGR has acted in good faith towards that supplier.²⁰ The approach in the Code is consistent with the approach taken in Australia,²¹ where the imbalance in bargaining power is not as significant as in New Zealand.

4. Administrative burden

- 4.1 FSNI and FSSI have proposed the concept of a simple “*commercial framework agreement*” to reduce the administrative burden created by the Code and also suggested the Commission could consider an alternative approach to requiring RGRs to give notice each time they seek to rely on provisions in their GSAs contracting out of protections in the Code.²²

¹⁵ Annual Grocery Report 2024, pg. 17.

¹⁶ FSNI/FSSI Submission at [37].

¹⁷ FSNI/FSSI Submission at [35].

¹⁸ Section 12 provides that the Commission can make a determination which sets out a grocery supply Code which “may apply to, and impose duties on, all regulated grocery retailers or related parties referred to in section 18, or a class of regulated grocery retailers or those related parties”.

¹⁹ FSNI and FSSI submitted 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.*” (see FSNI/FSSI Submission at [14]).

²⁰ Clause 6(3)(i) of the Code.

²¹ In the Australian Food and Grocery Code of Conduct, clause 28(1) provides that “[t]he retailer or wholesaler must at all times deal with suppliers lawfully and in good faith within the meaning of the unwritten law as in force from time to time.” Clause 28(3)(c) states that, whether the supplier has acted in good faith, can be taken into account in determining whether a retailer or wholesaler has acted in good faith.

²² FSNI/FSSI Submission at [41], noting that: “*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*

4.2 NZFGC agrees that the current approach under the Code whereby RGRs offer lengthy GSAs which incorporate many other documents by reference (in an often-confusing hierarchy) is impractical and creates confusion as to the terms of the suppliers' contractual relationships with RGRs, which was an issue that the Code was originally intended to resolve. While NZFGC would need more information about the commercial framework agreement proposed by FSNI/FSSI before it can comment specifically on this proposal, NZFGC agrees that the Commission needs to explore options to reduce the administrative burden on both suppliers and RGRs and the complexity of the commercial arrangements. NZFGC welcomes the opportunity to work with the Commission and the RGRs on the possible solutions to reduce the administrative burden while still appropriately protecting suppliers in their dealings with the RGRs.

5. De-listing rules

5.1 NZFGC agrees that the de-listing rules in the Code need to be clarified. In addition, NZFGC considers the Code should clarify (as it does in Australia) that in any dispute relating to de-listing of suppliers' products, the burden/onus is on the RGR to establish they have complied with the Code's de-listing requirements.

5.2 NZFGC agrees that a decision not to stock a product at the end of a trial period should not be treated as a delisting decision,²³ however the Commission needs to take care to ensure that any clarifications to the Code to ensure that such decisions are not subject to the delisting rules only apply to genuine trial periods and do not create a loophole to the delisting rules.

5.3 NZFGC would welcome the opportunity to discuss the de-listing rules further with the Commission as the review progresses to ensure any new or amended Code has effective de-listing rules which appropriately protect suppliers in their dealings with RGRs.

6. Contracting out provisions

6.1 NZFGC's position on the contracting out provisions is outlined at [4.15] – [4.19] of its Submission of 16 September 2024. We do not intend to repeat those points, save to make the following observations:

(a) NZFGC agrees there needs to be a degree of flexibility to allow RGRs and suppliers to contract out of certain of the protections in the Code from time to time by negotiation and where doing so benefits suppliers. However, the Code does not currently strike the right balance between the need for commercial flexibility and the primary purpose of the Code: to address the imbalance in bargaining power between RGRs and suppliers. As explained in NZFGC's earlier submission, the ability for RGRs to contract out in the manner provided for under the Code significantly undermines the effectiveness of the Code's protections and places an unfair burden on suppliers to monitor RGR compliance.

(b) NZFGC does not agree with the suggestion that suppliers with higher margins will be in a better position to bear costs/risks in the retailer/supplier relationship.²⁴ The comparison of a manufacturer's margin with a retailer's margin is misleading because it ignores the very different cost structures and risks of manufacturing and retail businesses.

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.

²³ FSNI and FSSI have proposed a clarification to the de-listing rules so 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." (see FSNI/FSSI Submission at [26]).

²⁴ FSNI/FSSI Submission at [3.5(e)].

7. Promotional funding

- 7.1 NZFGC's position is as outlined in its earlier submission: contracting out of the protections in the Code including cl 17(1) (funding promotions) should be permitted only in very limited circumstances and only where there is a clear benefit to that supplier.
- 7.2 The suggestion that "*the practice of supplier promotional funding involves suppliers charging higher upfront invoice prices to retailers, with discounts to achieve an overall lower "net price" provided to retailers through promotional funding*"²⁵ is not an accurate reflection of the purpose of promotions or how prices are negotiated. Promotions are not a tool used by suppliers to negotiate higher upfront prices to retailers. There are many different types of promotional activities and they are used from time to time for a range of reasons, including to encourage consumers to trial a product, increase product awareness, increase volume during a lower demand period etc. If all supplier-funded promotional activity was prohibited under the Code, this would have significant negative implications for suppliers and consumers by removing a key element of the competitive process. The issue that the Commission should be considering as part of its review is how best to redress the imbalance of bargaining power that exists between suppliers and the RGRs in negotiations about supplier-funded promotions.

8. Fresh produce

- 8.1 It has been submitted that the current "*24-hour rejection period for fresh produce gives rise to practical difficulties*" under the Code and that 48 hours is a "*more reasonable and realistic time period*".²⁶ NZFGC supports the 24-hour rejection period for fresh produce and disagrees this should be extended to 48 hours. As NZFGC previously submitted during the MBIE consultation process a rejection period of more than 24 hours is inappropriate given the short shelf-life of fresh fruits and vegetables and as, after more than 24 hours, damage could occur to fresh produce that is out of the supplier's control.²⁷

9. Review process

- 9.1 NZFGC agrees with FSNI/FSSI's suggestion that the Commission should consider adding an additional step in its Code Review process to allow stakeholders to comment on any proposed solutions to resolving the issues with the Code before the Commission issues its draft review conclusions and (if changes are proposed) a draft Code for comment.²⁸ This will enable the Commission to seek valuable feedback from industry participants before it begins any substantive drafting processes.

²⁵ WWNZ Submission at [3.6]

²⁶ FSNI/FSSI Submission at [33].

²⁷ NZFGC Consultation paper: Exposure Draft – New Zealand Grocery Supply Code of Conduct and the Grocery Industry Competition (Grocery Supply Code) Regulations 2023 – Consultation Draft – Submission by the New Zealand Food & Grocery Council (7 July 2023) at [117].

²⁸ FSNI/FSSI Submission at [47].