

9 February 2024

**Attn: Chris Quin**

Chief Executive Officer  
Foodstuffs North Island  
Foodstuffs Landing Drive  
35 Landing Drive, Mangere  
Auckland 2022

By email to: [REDACTED]

Dear Chris,

**Grocery Supply Agreements - Commerce Commission compliance monitoring under the Grocery Industry Competition Act 2023, Fair Trading Act 1986 and Commerce Act 1986**

1. The Commerce Commission (Commission) has been monitoring regulated grocery retailer (RGRs) compliance in relation to their grocery supply agreement (GSA).<sup>1</sup> In undertaking this review, we have been considering whether Foodstuffs North Island Limited (FSNI) has complied with certain provisions of the Grocery Industry Competition Act 2023 (GICA) and Grocery Supply Code 2023 (Code). However, we also note the potential application of the Commerce Act 1986 (Commerce Act) and the Fair Trading Act 1986 (FTA) in relation to RGR dealings with suppliers.
2. Based on the information currently available to us, we have completed a preliminary assessment of FSNI's GSA and your compliance with the legislation described above. The content of the GSA provided to us by Foodstuffs North Island (FSNI) has raised potential compliance concerns that we would like to draw your attention to. We would suggest that FSNI consider making changes to its GSA to better comply with the purpose of the new regulatory regime. If FSNI continues to use its current GSA without amendment, we have concerns you may be in breach of the relevant legislation.
3. In our open letter to the grocery sector regarding the introduction of the Code dated 14 September 2023 we noted our expectation that RGRs would actively work to

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<sup>1</sup> Under clause 3(1) of Part 1 of Schedule 2 of the Code, a "grocery supply agreement" has the same meaning that "supply agreement" has in section 17 of the Act. Under section 17(a)(i) a "supply agreement" is defined as "a regulated grocery retailer entering into or arriving at an agreement with a supplier."

comply with both the spirit and the letter of the Code and emphasised the importance of the purpose of the Code.<sup>2</sup>

4. Our overarching concern is that in its current form FSNI's GSA is complex and difficult for a supplier to navigate, and that this does not align with the purpose of the Code as set out in section 16 of the GICA. In particular, that the Code is intended to promote the purpose of the GICA by "**promoting transparency and certainty about the terms of agreements between regulated grocery retailers, the related parties referred to in section 18, and suppliers.**"<sup>3</sup>
5. We have provided more detailed comments later in this letter which seek to highlight our areas of concern. We understand that FSNI is well advanced in the process of getting suppliers to sign their new GSAs and we therefore urge you to consider our feedback immediately.

### **The Commission's role**

6. The Commission is New Zealand's primary competition, consumer, and economic regulatory agency. Our vision is that New Zealanders are better off because markets work well, and consumers and businesses are confident market participants.
7. The Act has given us new responsibilities for monitoring and regulating the grocery sector. These new responsibilities are in addition to the existing work we do in the grocery sector under the Commerce Act 1986 and the FTA.
8. While the Commission monitors the RGR's compliance, it is their responsibility to ensure they are compliant at all times. The Commission recommends that, as a matter of best practice, RGRs should regularly review their procedures and policies for compliance with the GICA, Code, Commerce Act and FTA to ensure they are, and remain, compliant.

### **The law**

9. The overarching purpose of the Code, as set out in section 16 of the GICA, is relevant to our assessment of FSNI's Code compliance. Section 16 of the GICA states:

#### **16 Purpose of grocery supply code**

The purpose of the grocery supply code is to promote the purpose of this Act by—

- (a) promoting fair conduct, and prohibiting unfair conduct, between regulated grocery retailers, the related parties referred to in section 18, and suppliers; and

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<sup>2</sup> Refer to our "Open letter to the grocery sector – Introduction of the Grocery Supply Code" dated 14 September 2023 - [https://comcom.govt.nz/\\_\\_data/assets/pdf\\_file/0026/328355/Open-letter-to-the-grocery-sector-Introduction-of-the-Grocery-Supply-Code-14-September-2023.pdf](https://comcom.govt.nz/__data/assets/pdf_file/0026/328355/Open-letter-to-the-grocery-sector-Introduction-of-the-Grocery-Supply-Code-14-September-2023.pdf)

<sup>3</sup> Refer section 16(a) of the GICA.

(b) promoting transparency and certainty about the terms of agreements between regulated grocery retailers, the related parties referred to in section 18, and suppliers; and

(c) contributing to a trading environment in the grocery —

(i) in which businesses compete effectively and consumers and businesses participate confidently; and

(ii) that includes a diverse range of suppliers.

10. The GICA, Code, Commerce Act and FTA also establish a number of compliance obligations for RGRs when dealing with suppliers which include:<sup>4</sup>

<p>GICA</p>	<ul style="list-style-type: none"> <li>• Section 19 of the GICA creates an obligation for RGRs to comply with the Code.</li> <li>• Under section 45 RGRs must ensure that its wholesale agreements do not unduly hinder or obstruct a wholesale customer from developing or maintaining its own trading relationship with any supplier.</li> <li>• Under section 46 RGRs must not engage in conduct that has the purpose, effect, or likely effect of preventing or restricting a wholesale customer from receiving (directly or indirectly) the benefits of a range-, quantity-, or frequency-based discount, payment, or rebate made available to a regulated grocery retailer directly or indirectly by, or on behalf of, a supplier in certain circumstances.</li> </ul>
<p>Code</p>	<ul style="list-style-type: none"> <li>• As noted above, section 19 of the GICA creates an obligation for RGRs to comply with the Code. The key parts Schedule 2 of the Code are:             <ul style="list-style-type: none"> <li>○ Part 1 – Preliminary: in particular this Part references the purpose of the Code under section 16 of the GICA, when the Code applies and the obligation to vary existing agreements so that they are consistent with the Code;</li> <li>○ Part 2 – Good Faith;</li> <li>○ Part 3 – Grocery supply agreements: this Part includes matters that must be covered by agreement, unilateral variation and retrospective variation;</li> </ul> </li> </ul>

<sup>4</sup> Under the Code “supplier” means a person carrying on (or actively seeking to carry on) a business of supplying groceries for sale by another person (whether or not that other person is the person supplied).

	<ul style="list-style-type: none"> <li>• Part 4 – Conduct generally: this part is broken into the following subsections – transport or logistic services, paying suppliers, requiring payments from suppliers and other conduct.</li> </ul>
Commerce Act	<ul style="list-style-type: none"> <li>• Under section 27 contracts, arrangements, or understandings substantially lessening competition are prohibited.</li> <li>• Under section 30 no person may – <ul style="list-style-type: none"> <li>○ enter into a contract or arrangement, or arrive at an understanding, that contains a cartel provision; or</li> <li>○ give, or require the giving of, a covenant that contains a cartel provision; or</li> <li>○ give effect to a cartel provision.</li> </ul> </li> <li>• Under section 36 a person that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in: <ul style="list-style-type: none"> <li>○ that market; or</li> <li>○ any other market in which the person, or an interconnected person,— <ul style="list-style-type: none"> <li>▪ supplies or acquires, or is likely to supply or acquire, goods or services; or</li> <li>▪ supplies or acquires, or is likely to supply or acquire, goods or services indirectly through 1 or more other persons.</li> </ul> </li> </ul> </li> </ul>
FTA	<ul style="list-style-type: none"> <li>• Section 7 – A person must not, in trade, engage in conduct that is unconscionable.</li> <li>• Section 26B – if a Court has declared that a term in a standard form trade contract is an unfair contract term, a person must not include the unfair contract term in a standard form contract (unless the term is included in a way that complies with the terms (if any) of the decision of the court); or apply, enforce, or rely on the unfair contract term in a standard form contract.</li> </ul>

### Our concerns

11. From the information you have provided to us, we are particularly concerned about the following areas of FSNI's GSA:

Area of concern	Details
Good faith	<ul style="list-style-type: none"> <li>• Lack of transparency and certainty about the terms of your GSA.</li> <li>• Throughout your Grocery Supplier Contract (excluding Fresh Produce) (GSC) you state that your GSC applies <b>“to the extent it complies with the Code.”</b> This language does not provide suppliers with transparency and certainty about what is being offered/agreed. There are multiple provisions in the GSC that adopt this style of drafting, and this effectively requires suppliers to have a detailed knowledge of what is permissible under the Code to determine exactly what is and isn't allowed.</li> <li>• The concerns listed below also inform our overall concern that good faith is not being complied with, particularly as FSNI's GSC appears to be out of step with the approaches taken by the other RGRs. This is an area that is developing as RGR's consult on and make changes to their contracts. We are not in a position to share specific examples at this stage but note these differences will be visible to suppliers who deal with more than one RGR.</li> </ul>
Lack of transparency and certainty of agreement terms	<ul style="list-style-type: none"> <li>• The hierarchy, and number of other agreements which make up FSNI's GSA causes uncertainty and confusion. For example, your GSC states that it is not intended to replace or change the existing agreements listed in clause 1.10 and 1.11 and that these documents all take priority over the GSC. Having multiple underlying agreements whose application differs when there are inconsistencies between them makes FSNI's GSA unnecessarily difficult to navigate and for suppliers to understand the actual terms of the agreement.</li> <li>• Related to this issue, your GSA is made up of multiple agreements that are not available to suppliers in one place, despite the need for the agreements to be read to together. For example, some of the agreements that make up your GSA are available via your portal, while others are not. This makes your GSA unclear and makes it difficult for suppliers to determine what the actual terms of your GSA are.</li> </ul>

	<ul style="list-style-type: none"> <li>Your GSC is not written in plain language which makes it difficult to understand what is being agreed. The lack of a definitions section in your GSC adds to this ambiguity.</li> <li>We are also concerned that FSNI's portal terms can be easily updated unilaterally without supplier knowledge.</li> </ul>
Delisting	<ul style="list-style-type: none"> <li>There is nothing in your GSC which specifies how you will deal with delisting.</li> <li>Your GSC does not specify your delisting terms and we would expect to see this given clause 8(g) of the Code sets this out as a matter that must be covered by the GSA. The Code's purpose of ensuring transparency and certainty about the terms of agreements also supports the inclusion of delisting terms so suppliers are clear what terms apply when their products are delisted.</li> <li>Other RGR's also specifically include provisions on delisting in their GSA and we would expect to see FSNI do the same.</li> </ul>
Unilateral variation	<ul style="list-style-type: none"> <li>We have concerns regarding a lack of visibility around any potential unilateral changes to agreement terms (e.g. via FSNI's supplier portal) which is inconsistent with the purpose of the Code and your good faith obligations.</li> </ul>
Transport	<ul style="list-style-type: none"> <li>Clause 1.10.5 of your GSC states that existing transport arrangements stay in place. However, this does not make it clear to suppliers that they now have a choice regarding the transport or logistics services they use.</li> </ul>
Wastage	<ul style="list-style-type: none"> <li>The wording of clause 5.12.3 in your GSC regarding managing inventory is unclear. The current wording could be interpreted as asking suppliers to pay for stock that has expired while in your store.</li> <li>Your GSC does not expressly and unambiguously set out the circumstances in which you intend to require a supplier to make a payment to cover any wastage of groceries. As mentioned above you appear to use multiple terms to cover situations which meet the definition of "wastage" under the Code. For example, your GSC uses the terms "wastage", "defective items" and "minor damage allowance" to refer to situations that fall under the definition of wastage e.g. groceries that are unfit for sale. This creates ambiguity about whether these are all situations where you require payment to cover situations meeting the definition of wastage, or whether</li> </ul>

	<p>“defective items” and “minor damage allowance” fall under something else.</p>
Shrinkage	<ul style="list-style-type: none"> <li>It is ambiguous when shrinkage will be charged given the “where the Code applies” wording in clause 5.16 of your GSC. It appears that you will charge for shrinkage in some circumstances e.g. where the supplier offers to pay, alcohol etc.</li> </ul>
Requiring payments for retailer’s business activities	<ul style="list-style-type: none"> <li>The “Foodstuffs charges” section of your GSC focuses on the payment of fees that have already been agreed. However, it does not outline the process FSNI intends to follow to agree with suppliers making payment towards any of the business activities outlined in clause 16(2) of the Code on an ongoing basis. It is not clear if it is your intention for suppliers to agree upfront to all charges going forward or for suppliers to be given information relating to individual charges and agree as they go.</li> <li>The “Review of charges” provision of your GSC does not appear to meet the requirements of clause 16 of the Code for situations where FSNI wishes to have suppliers make payment towards any of the business activities outlined in clause 16(2) of the Code. It is not clear whether the requirements of clause 16 particularly in relation to the issue of written statements to suppliers are being met via other written communications we are not aware of.</li> </ul>
Funding promotions	<ul style="list-style-type: none"> <li>We are concerned that the process for suppliers and FSNI to agree on the funding of promotions is not clear and transparent for suppliers as it is not clearly set out in your GSC.</li> </ul>
Funded promotions	<ul style="list-style-type: none"> <li>Your GSC does not set out the process that FSNI intends to follow to reach agreement with suppliers for situations where funded promotions result in excess promotional stock, e.g. investment buying.</li> </ul>
Intellectual property	<ul style="list-style-type: none"> <li>We are concerned about a lack of reciprocity of terms in the intellectual property terms of your GSC given the “perpetual” and “irrevocable” nature of the terms you are asking suppliers to agree to.</li> </ul>
Confidentiality	<ul style="list-style-type: none"> <li>As with the intellectual property terms of your GSC we are concerned about a lack of reciprocity in the confidentiality terms of your GSC.</li> </ul>

	<ul style="list-style-type: none"> <li>• It is not clear what the purpose is for collection of supplier information referred to at clause 25(2) of the Code.</li> <li>• We have concerns that the GSC explicitly authorises supplier information to be shared amongst all Foodstuffs entities including member stores and private label company.</li> <li>• Your GSC does not confirm the position that it's OK for suppliers to share information with the Commission without compulsion.</li> </ul>
Product ranging, shelf space allocation and range reviews	<ul style="list-style-type: none"> <li>• Lack of certainty and transparency regarding principles and process applied to ensure compliance with clause 26 including non-discrimination obligations.</li> </ul>
Dispute resolution process	<ul style="list-style-type: none"> <li>• Concern regarding reasonableness of a process which requires suppliers to raise an issue with FSNI's CEO.</li> <li>• Your GSC does not signal to suppliers that they may use the dispute resolution scheme under the GICA where disputes arise.</li> </ul>

12. These concerns are not an exhaustive list, but they are the key concerns we have identified at this time based on the information you have currently provided. These may evolve as we make further progress in our compliance assessment and where we receive new information from you.



### Commission's enforcement powers and available remedies

13. With respect to RGR's dealings with suppliers, the Commission has several enforcement options available under the GICA, Commerce Act and FTA including:

GICA	<ul style="list-style-type: none"> <li>• Under section 124 of the GICA, section 45 and 46 are considered civil liability provisions. Accordingly, the following civil liability remedies are available for a breach of these provisions: <ul style="list-style-type: none"> <li>○ a declaration of contravention:</li> <li>○ a compensatory order:</li> <li>○ an order to vary or cancel a contract:</li> <li>○ an injunction:</li> <li>○ a pecuniary penalty order.</li> </ul> </li> <li>• Sections 45 and 46 both attract Tier 1 pecuniary penalties. Accordingly, the maximum pecuniary penalty is: <ul style="list-style-type: none"> <li>○ \$500,000 for a contravention, an attempted contravention, or an involvement in a contravention by an individual; or</li> <li>○ In any other case, the greater of \$10 million; and if it can be readily ascertained 3 times the commercial gain of the contravention, or if it cannot be readily ascertained 10% of turnover of the person that is liable to pay the penalty and all its interconnected bodies corporate.</li> </ul> </li> <li>• Given these provisions are civil liability provisions the Commission may also give notice that an RGR take corrective action in certain circumstances under section 117.</li> <li>• Section 120 – Disclosed warning.</li> </ul>
Code	<ul style="list-style-type: none"> <li>• Under section 124 of the GICA, via section 19, the Code is considered a civil liability provision. Accordingly, the following civil liability remedies are available for a breach of the Code: <ul style="list-style-type: none"> <li>○ a declaration of contravention:</li> <li>○ a compensatory order:</li> <li>○ an order to vary or cancel a contract:</li> </ul> </li> </ul>

	<ul style="list-style-type: none"> <li>○ an injunction:</li> <li>○ a pecuniary penalty order.</li> <li>● Part 2 of Schedule 1 of the Code notes that Tier 2 and 4 pecuniary penalties are available for certain contraventions of the Code.<sup>5</sup></li> <li>● The maximum penalty for certain Tier 2 contraventions is:             <ul style="list-style-type: none"> <li>○ \$300,000 for a contravention, an attempted contravention, or an involvement in a contravention by an individual; or</li> <li>○ In any other case, the greater of \$3 million; and if it can be readily ascertained 3 times the commercial gain of the contravention, or if it cannot be readily ascertained 3% of turnover of the person that is liable to pay the penalty and all its interconnected bodies corporate.</li> </ul> </li> <li>● The maximum penalty for certain Tier 4 contraventions is:             <ul style="list-style-type: none"> <li>○ \$30,000 for a contravention, an attempted contravention, or an involvement in a contravention by an individual; or</li> <li>○ \$300,000 in any other case.</li> </ul> </li> </ul>
<p>Commerce Act</p>	<p>The following remedies are available in the case of section 27, 30, and 36.</p> <ul style="list-style-type: none"> <li>● Section 74A – enforceable undertakings: The Commission may accept a written undertaking given by, or on behalf of, a person in connection with any matter relating to the enforcement of this Act.</li> <li>● Section 81 – anticipatory or restrictive injunctions: The court may, on the application of the Commission or any other person, grant an injunction restraining a person from engaging in conduct that constitutes or would constitute a contravention of section 27, 30, and 36.</li> <li>● Section 81 – cancellation/variation of contract.</li> <li>● Section 139 – performance injunction.</li> </ul>

<sup>5</sup> Clause 9 of Part 2 of Schedule 1 of the Code sets out the clauses of the Code that attract Tier 2 pecuniary penalties while clause 10 notes the clauses of the Code which attract Tier 4 penalties.

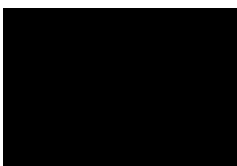
FTA	<ul style="list-style-type: none"> <li>• Under section 40 every person who contravenes a provision of Part 1 (except sections 9, 14(2), 23, or 24), Part 3, or Part 4 commits an offence and is liable on conviction— <ul style="list-style-type: none"> <li>○ in the case of an individual, to a fine not exceeding \$200,000; and</li> <li>○ in the case of a body corporate, to a fine not exceeding \$600,000.</li> </ul> </li> </ul>
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14. Only the courts can decide if there has been a breach of the GICA, Commerce Act and/or FTA. A court can impose severe penalties where it finds the law has been broken.

### Next steps

15. We ask FSNI to reflect on the issues we have identified in this letter and to consider making changes to its GSA to meet the requirements of the Code in a way which best promotes the purpose of the Code. If FSNI continues to use its current GSA without amendment we have concerns you may be in breach of the Act.
16. In the coming months we will be seeking further information about the agreements that are eventually finalised between FSNI and suppliers to complete our compliance assessment and inform our decisions on next steps.
17. Those next steps may include opening an investigation, making a further request for information and documents and/or requesting that relevant persons employed by FSNI attends a voluntary interview with the Commission. We will keep you informed on the progress of our compliance monitoring in the interim.
18. If FSNI is unsure about its legal obligations, it may wish to seek independent legal advice as soon as possible.
19. Please contact me on [REDACTED] if you have any questions about this letter.

Yours sincerely



Dr Alice Hume  
**Head of Grocery**