

4 April 2014 DRAFT BILL

Commerce (Supermarket Abuse of Buyer Power) Amendment Act

Explanatory Note

This Bill seeks to regulate standards of business conduct in the food and grocery supply chain.

There has been a long history of abuse of buyer power in the food and grocery sector across the world. The huge disparity in the balance of power between buyers and their suppliers has forced many suppliers to sell their products below cost. Due to this abuse of buyer power, suppliers risk being forced to make retrospective compensatory payments to keep their products on buyers' shelves. In light of clear abuse of buyer power, and given the evidence that abuse of buyer power affects consumers as well as suppliers, it is now time for the grocery sector to be regulated by legislation, as it is in other jurisdictions where supermarkets enjoy high market concentration. The aim of such legislation is to balance the power and ensure transparency between suppliers and buyers.

The Bill will be implemented as an amendment to the Commerce Act 1986. It will include a mandatory Code of Conduct and establish the role of the Adjudicator to monitor and enforce the Code.

Mandatory Code of Conduct

Supermarkets must recognise the suppliers' need for certainty with regard to the risks and costs of trading, particularly in relation to production, delivery and payment issues. The mandatory Grocery Code prohibits abuse of buyer power and sets a minimum required standard of behaviour in the food and grocery sector.

Appointment of Adjudicator

This Part 4A creates and appoints the role of the Adjudicator. The Adjudicator will monitor and enforce the Grocery Code. The Adjudicator shall have access to the Commerce Commission resources if and when necessary. This role shall be funded by levies paid by Supermarkets.

Clause by clause analysis

The Commerce (Supermarket Abuse of buyer Power) Amendment Act is an amendment to the Commerce Act 1986.

Clause 1 is the overview of the Part.

Clause 2 sets out the purpose of the Part.

Clause 3 is the outline of the Part.

Clause 4 is the definitions and interpretation section.

Clause 5 sets out the meaning of abuse of buyer power.

Clause 6 and 7 establish a mandatory code of conduct for the food and grocery supply chain and require the code to be incorporated into all supply agreements between Supermarkets and suppliers.

Clause 8 and 9 set out that an Adjudicator will be appointed to monitor and enforce the Grocery Code and sets out how the Adjudicator will be appointed and how long the Adjudicator can hold office for.

Clause 10 sets out that this scheme is to be funded through levies and how the levies are to be charged.

Clause 11 gives the Adjudicator access to the Commerce Commission's resources.

Clause 12, 13, 14, 15 and 16 sets out the general powers of the Adjudicator.

Clause 17 gives the Adjudicator the power to make recommendations.

Clause 18 gives the Adjudicator the power to require the publication of certain information in relation to the investigation.

Clause 19 gives the Adjudicator the power to impose fines.

Clause 20 allows the Adjudicator to recover costs from a Supermarket in certain situations.

Clause 21 sets out the maximum penalty for a breach under the Grocery Code.

Clause 22 sets out the guidance that the Adjudicator must publish.

Clause 23 and 24 sets out that the Adjudicator may give advice and recommendations in relation to the Grocery Code.

Clause 25 and 26 requires the Adjudicator to complete an annual report and to maintain accounts.

Clause 27 sets out how the Adjudicator will be supervised.

Clause 28 and 29 deals with dispute resolution in relation to a dispute between the Supermarket and supplier.

Clause 30 excludes the liability of the Adjudicator and his or her Deputies and staff.

PART 4A

Subpart 1 – Preliminary Provisions

(a) Overview of Part

This Part provides for the regulation of business conduct in the food and grocery supply chain.

(b) Purpose of Part

a. The purpose of this Part is to:

- i. create and enforce a mandatory code of conduct for the food and grocery supply chain;
- ii. regulate the standards of business conduct in the food and grocery supply chain; and
- iii. ensure transparency and certainty in commercial transactions in the food and grocery sector.

(c) Outline of Part

a. This Part provides:

- i. for the enforcement of a mandatory code of conduct;
- ii. for the role and the appointment of the Adjudicator; and
- iii. for the powers of the Adjudicator to investigate Supermarket behaviour.

(d) Interpretation

Buying Team means those employees of a Supermarket from time to time whose role includes at least one of the following:

- a. direct involvement in buying Groceries for resale;
- b. the interpretation and application of the provisions of the Code or this Order;
- c. immediate management responsibility for any or all of those employees described in (a) and (b) above;

De-list means to cease to purchase Groceries for resale from a Supplier, or significantly to reduce the volume of purchases made from that Supplier. Whether a reduction in volumes purchased is 'significant' will be determined by reference to the amount of Groceries supplied by that Supplier to the Supermarket, rather than the total volume of Groceries purchased by the Supermarket from all of its Suppliers;

Groceries means any product normally sold in Supermarkets, **Grocery** shall be construed accordingly;

Payment or Payments means any compensation or inducement in any form (monetary or otherwise) and includes more favourable contractual terms;

Primary Buyer means, in relation to any individual Supplier, the employee or employees within a Supermarket's Buying Team who are responsible from time to time for the day-to-day buying functions of the Supermarket in respect of that individual Supplier;

Promotion means any offer for sale at an introductory or a reduced retail price, whether or not accompanied by some other benefit to consumers that is in either case intended to subsist only for a specified period;

Reasonable Notice means a period of notice, the reasonableness of which will depend on the circumstances of the individual case, including:

- (a) the duration of the Supply Agreement to which the notice relates, or the frequency with which orders are placed by the Supermarket for relevant Groceries;
- (b) the characteristics of the relevant Groceries including durability, seasonality and external factors affecting their production;
- (c) the value of any relevant order relative to the turnover of the Supplier in question; and
- (d) the overall impact of the information given in the notice on the business of the Supplier, to the extent that this is reasonably foreseeable by the Supermarket;

a Supermarket will **'Require'** particular actions on the part of a Supplier if the relevant Supplier does not agree, whether or not in response to a request or suggestion from the Supermarket, to undertake an action in response to ordinary commercial pressures. Where those ordinary commercial pressures are partly or wholly attributable to the Supermarket, they will only be deemed to be ordinary commercial pressures where they do not constitute or involve duress (including economic duress), are objectively justifiable and transparent and result in similar cases being treated alike. The burden of proof will fall on the Supermarket to demonstrate that, on the balance of probabilities, an action was not Required by the Supermarket;

Senior Buyer means, in relation to any individual Supplier, an employee (or employees) within a Supermarket's Buying Team, who manages the Primary Buyer (or Primary Buyers) for that Supplier (or is otherwise at a higher level than the Primary Buyer within the management structure of the Supermarket);

Shrinkage means losses that occur after Groceries are delivered to a Supermarket's premises and arise due to theft, the Groceries being lost or accounting error;

Supermarket means:

- (a) each of those persons specified in Schedule 1;
- (b) any person with a turnover exceeding [\$] per annum whom the Adjudicator regards as trading in New Zealand as a supermarket (as that term is generally understood in New Zealand) and whom the Adjudicator designates in writing as a Supermarket for the purposes of this Act; and
- (c) any person who carries on the whole or a substantial part of the business of any of the persons specified in (a) and (b) above;

Supermarket Own Brand Products means and includes all those Grocery products which carry names or trademarks which the Supermarket owns or are licensed to it or Grocery products which it produces, processes or manufactures or has produced, processed or made for it by any contractor, including without limitation a Supplier;

Supplier means any person carrying on (or actively seeking to carry on) a business in the direct supply to any Supermarket of Groceries for resale in New Zealand, and includes any such person established anywhere in the world, but excludes any person who is part

of the same group of interconnected bodies corporate as the Supermarket to which it supplies; and

Supply Agreement means any written agreement between the Supermarket and the Supplier governing the supply of Groceries.

Wastage means Groceries which become unfit for sale subsequent to them being delivered to Supermarkets.

(e) Meaning of Abuse of Buyer Power

Means any behaviour which exerts and abuses a clear disparity in the balance of power between the Supermarket and the Supplier including, but not limited to, behaviour which breaches the Grocery Code.

Subpart 2 – The Grocery Code

(f) Mandatory Code

Schedule 2 to this Part 4A sets out the mandatory Grocery Code. It is a breach of this Act to contravene any part of the Grocery Code.

(g) Duty to Incorporate Code

A Supermarket must not enter into or perform any Supply Agreement unless that Supply Agreement incorporates the Grocery Code and does not contain any provisions that are inconsistent with the Grocery Code.

Subpart 3 – Adjudicator

Appointment and Role of Adjudicator

(h) Appointment of Adjudicator

- a. There is hereby created a position of the Adjudicator to monitor and enforce the provisions under this Part 4A.
- b. The Minister may appoint a person to hold office as the Adjudicator in accordance with this Act.
- c. The Minister may appoint a Deputy Adjudicator from time to time, where the Adjudicator is unable to perform his or her duties.
- d. The terms and conditions of such appointments (including for example remuneration and allowances) shall be as determined by the Minister.

(i) Term of Office

- a. A person holds and vacates office as the Adjudicator in accordance with the terms of his or her appointment, but:
 - i.a person's initial term of office may not be more than four years;
 - ii.a person may be appointed for one or two further terms of office;
 - iii.a further term may not be more than three years;
 - iv.a person may resign by giving written notice to the Minister; and

v.the Minister may dismiss the person if satisfied that the person is unable, unwilling or unfit to perform his or her functions.

(j) Levy Funding

- a. The Adjudicator may require Supermarkets to pay a Levy towards the Adjudicator's expenses;
- b. The Adjudicator must inform each Supermarket of:
 - i.the amount of any levy payable by the Supermarket; and
 - ii.when payments are due.
- c. A Levy required to be paid under this section is recoverable by the Adjudicator as a debt.

(k) Commerce Commission Staff

The Adjudicator shall have access to the resources of the Commerce Commission's office to assist in an investigation at any given time. The Commerce Commission shall provide staff, premises, facilities or other assistance to the Adjudicator (with or without charge).

Powers of Adjudicator

(l) Powers of Adjudicator

The Adjudicator has the power to do anything that is calculated to facilitate the carrying out of the Adjudicator's functions or is conducive or incidental to the carrying out of those functions.

(m) Investigations

- a. The Adjudicator may investigate whether a Supermarket has breached the Grocery Code if the Adjudicator believes that—
 - i.the Supermarket may be in breach of the Grocery Code; or
 - ii.the Supermarket has failed to follow a recommendation made under section 17.
- b. The Adjudicator may of his or her own volition, initiate an investigation to determine whether Supermarkets are complying with the Grocery Code, either generally or in respect of particular Grocery items.
- c. The Adjudicator may not carry out an investigation until the guidance required by section 22(a)(1) has been published.

(n) Information Powers

- a. The Adjudicator may, for the purposes of an investigation, require a person or Supermarket —
 - i.to provide documents in the person's possession or control;
 - ii.to provide other information in the person's possession or control.
- b. The Adjudicator may, for the purposes of monitoring whether a Supermarket has followed a recommendation made under section 17, require the Supermarket—

i.to provide documents in the Supermarket's possession or control;

ii.to provide other information in the Supermarket's possession or control.

c. The Adjudicator may require the Supermarket to keep, maintain and produce any documents specified in writing by the Adjudicator that relate to the operation of any provisions of this Part and the Grocery Code.

d. A requirement imposed under this paragraph may include a requirement for information to be provided orally.

e. A requirement is imposed by giving a written notice specifying—

i.to whom the information is to be provided;

ii.where it is to be provided;

iii.when, or the time by which, it is to be provided;

iv.the form and manner in which it is to be provided; and

v.the possible consequences of failing to comply.

f. If a notice requires an individual to attend at a particular place the Adjudicator must offer to pay necessary travelling expenses.

g. It is an offence for a person intentionally to fail to comply with a requirement under this Schedule.

h. It is an offence for a person knowingly to provide false information in response to a requirement under this section.

i. A person may not be required under this paragraph to do anything that the person could not be compelled to do in civil proceedings before the High Court in New Zealand.

(o) Investigation Reports

a. Following an investigation, the Adjudicator must—

i.publish a report on the outcome of the investigation; and

ii.consider whether to use any of the enforcement powers under section 16.

b. An investigation report must, in particular, specify—

i.any findings that the Adjudicator has made;

ii.any action that the Adjudicator has taken or proposes to take; and

iii.the reasons for the findings and any action taken or proposed.

c. It is not necessary for an investigation report to identify the Supermarket concerned.

d. If a Supermarket is identified in a report, the Supermarket must have been given a reasonable opportunity to comment on a draft of the report before publication.

(p) Enforcement Powers

a. If, as a result of an investigation, the Adjudicator is satisfied that a Supermarket has broken the Grocery Code, the Adjudicator may take one or more of the following enforcement measures—

- i. make recommendations;
- ii. require information to be published;
- iii. impose financial penalties.

(q) Enforcement – Recommendations

a. The Adjudicator may make recommendations to the Supermarket as to how to comply with the Grocery Code.

b. The Adjudicator must monitor whether its recommendation has been followed.

(r) Enforcement – Requirements to Publish Information

a. The Adjudicator may require the Supermarket to publish information relating to the investigation.

b. The publication requirement is imposed by giving written notice to the Supermarket specifying—

- i. what information is to be published;
- ii. how it must be published; and
- iii. the time by which it must be published.

c. The Adjudicator may enforce this section 18 by bringing civil proceedings to obtain an injunction or any other appropriate remedy or relief.

(s) Enforcement – Financial Penalties

a. The Adjudicator may impose a financial penalty under section 21.

b. The financial penalty is imposed by giving the Supermarket written notice specifying

- i. the grounds for imposing the penalty;
- ii. the amount of the penalty;
- iii. the period within which it must be paid; and
- iv. how it must be paid.

c. The Supermarket may appeal against the imposition of a financial penalty or its amount to the High Court of New Zealand.

d. Financial penalties under this section are recoverable by the Adjudicator as a debt.

e. Financial penalties received by the Adjudicator must be paid to the Crown.

(t) Recovery of Investigation Costs

a. The Adjudicator may require a Supermarket to pay some or all of the costs of an investigation (including any costs incurred in exercising the enforcement powers) if satisfied that the Supermarket has broken the Grocery Code.

b. The Adjudicator may require a person to pay some or all of the costs of an investigation if the Adjudicator carried out the investigation as a result of a complaint by the person which, the Adjudicator is satisfied, was vexatious or wholly without merit.

c. A requirement to pay costs is imposed by giving written notice specifying—

i.the grounds for imposing the requirement to pay costs;

ii.how much is to be paid; and

iii.by when the costs are to be paid.

d. Costs required to be paid under this section are recoverable by the Adjudicator as is debt.

(u) Penalties

The Adjudicator may impose a fine of up to \$[] under section 19.

Guidance and Advice

(v) Guidance

a. The Adjudicator must publish guidance about—

i.the criteria that the Adjudicator intends to adopt in deciding whether to carry out investigations;

ii.the practices and procedures that the Adjudicator intends to adopt in carrying out investigations;

iii.the criteria that the Adjudicator intends to adopt in choosing whether to use the enforcement powers and which ones; and

iv.the criteria that the Adjudicator intends to adopt in deciding the amount of any financial penalty under section 19.

b. In addition, the Adjudicator may publish guidance about the practices and procedures that the Adjudicator intends to adopt in carrying out other functions.

c. The Adjudicator may publish guidance about—

i.the application of any provision of the Grocery Code;

ii.steps that Supermarkets need to take in order to comply with the Grocery Code;

iii.any other matter relating to the Grocery Code.

d. Before publishing guidance under this section the Adjudicator must consult any persons he or she thinks appropriate.

e. The Adjudicator must publish the first guidance under subsection (a)(i), (ii), (iii) and (iv) within 6 months beginning with the day on which this Part comes into force.

f. Where there is any guidance in force under this section, the Adjudicator must take account of it in carrying out functions.

(w) Binding rulings and Advice

a. The Adjudicator may, of its own volition or in response to a request, issue a binding ruling as to the proper interpretation of any aspect of the Grocery Code.

b. The Adjudicator may give advice on any matter relating to the Grocery Code to suppliers or Supermarkets.

(x) Recommendations to Minister

If the Adjudicator considers it appropriate for any changes to be made to the Grocery Code, he or she must recommend them to the Minister.

Additional Duties of Adjudicator

(y) Annual report

a. After the end of each reporting period the Adjudicator must prepare and publish a report describing what the Adjudicator has done during the period.

b. The report must include a summary of—

i. disputes referred to arbitration under the Grocery Code;

ii. investigations carried out by the Adjudicator; and

iii. cases in which the Adjudicator has used the enforcement measures under section 16.

c. If the Adjudicator has made recommendations under section 17, the report must include an assessment of whether they have been followed.

d. The report must set out any recommendations that the Adjudicator has made to the Minister for changes to the Grocery Code.

e. As well as publishing the report, the Adjudicator must send a copy to—

i. the Minister; and

ii. the Commerce Commission.

f. The Minister must lay a copy of the report before Parliament.

g. In this section "reporting period" means---

i. the period beginning with the day on which this Part comes into force and ending with the following 30 June; and

ii. each successive period of 12 months.

(z) Accounts

a. The Adjudicator must keep proper accounts and proper records in relation to the accounts.

- b. For each financial year the Adjudicator must prepare a statement of accounts in respect of that financial year.
- c. The statement must be in whatever form the Minister directs.
- d. The Adjudicator must send a copy of the statement, within a period specified by the Minister, to the Minister.
- e. The Minister must examine, certify and report on the statement.
- f. The Minister must lay before Parliament a copy of the certified statement and of the report.

Supervising the Adjudicator

(aa) Review of Adjudicator and Guidance from the Minister

- a. The Minister must review the Adjudicator's performance for each review period.
- b. The first review period is the period ending on the first 30 June that is at least 2 years after this Part comes into force.
- c. Subsequent review periods are each successive period of 3 years after the first review period
- d. A review must, in particular—
 - i. consider how much the Adjudicator's powers have been exercised; and
 - ii. assess how effective the Adjudicator has been in enforcing the Grocery Code.
- e. As soon as practicable after a review period, the Minister must—
 - i. publish a report of the findings of the review for that period; and
 - ii. lay a copy of the report before Parliament.
- f. In carrying out a review, the Minister must consult—
 - i. the Adjudicator;
 - ii. the Commerce Commission;
 - iii. any other person the Minister thinks appropriate.
- g. As a result of the findings of a review, the Minister may give guidance to the Adjudicator about any matter relating to the Adjudicator's functions.
- h. The Adjudicator is to take account of the guidance in carrying out functions.

Subpart 4 – Dispute Resolution

(bb) Arbitration

- a. If a supplier refers a dispute to arbitration under the Grocery Code, the Adjudicator must either—
 - i. arbitrate the dispute; or

ii. appoint another person to arbitrate.

b. If a Supermarket refers a dispute to arbitration under a supply agreement, the Adjudicator may accept appointment as the arbitrator.

c. Any such arbitration shall proceed in accordance with the Arbitration Act 1996

(cc) Confidentiality

a. The Adjudicator may not make an unauthorised disclosure or information relating to an arbitration under the Grocery Code or under a supply agreement if—

i. the information identifies a party to the arbitration; or

ii. the Adjudicator thinks that the identity of a party to the arbitration could be deduced from it.

b. The Adjudicator may not make an unauthorised disclosure of information that the Adjudicator thinks might cause someone to think that a particular person has complained about a Supermarket failing to comply with the Grocery Code.

c. For the purposes of this section a disclosure of information is unauthorised unless—

i. the Adjudicator has obtained the required consent; or

ii. the disclosure is required, under rules of court or a court order, for the purposes of legal proceedings of any description.

d. In the case of information to which subsection (a) applies, the required consent is the consent of the parties to the arbitration;

(dd) Exemption from liability for damages

The following are exempt from liability in damages for anything done or omitted in the exercise or purported exercise of their functions:

a. the Adjudicator;

b. the Deputy Adjudicator;

c. acting Deputy Adjudicators;

d. staff working for the Adjudicator.

SCHEDULE 1

Supermarkets

SCHEDULE 2

CODE OF PRACTICE

PART 1 Fair Dealing

1. Abuse of Buyer Power prohibited

A Supermarket must not engage in any Abuse of Buyer Power with a Supplier. A Supermarket must at all times deal with its Suppliers fairly and lawfully. Fair and lawful dealing will be understood as requiring the Supermarket to conduct its trading relationships with Suppliers in good faith, without duress and in recognition of the Suppliers' need for certainty as regards the risks and costs of trading, particularly in relation to production, delivery and payment issues.

2. Business Disruptions

In its dealings with Suppliers, a Supermarket must not threaten business disruption or termination of a Supply Agreement without reasonable grounds. In addition, a Supermarket must allow each Supplier regular and continuous access to market sales data on reasonable commercial terms.

PART 2 Supply Agreements

3. A Supermarket must ensure that all the terms of any agreement with a supplier for the supply of Groceries for the purpose of resale in New Zealand are recorded in writing and signed by all parties, as well as any subsequent contractual agreements or arrangements made under or pursuant to or in relation to that agreement.
4. A Supermarket must not enter into a Supply Agreement with a Supplier unless the Supplier has a written copy of the Supply Agreement and of all terms and conditions which are intended by the Supermarket and the Supplier to be incorporated, but are not fully documented, in the Supply Agreement.
5. Written terms of a Supply Agreement must be held by the Supermarket for a period of 5 years after the relevant Supply Agreement has expired or otherwise come to an end.
6. Written terms of any agreements or contractual arrangements made under or pursuant to a Supply Agreement must be held by the Supermarket for a period of 5 years after the obligations in the relevant agreement or arrangement have expired or otherwise come to an end.
7. All such records held by the Supermarket in accordance with paragraphs 5 and 6 must be made available on request to the Supplier to which they relate.
8. A Supply Agreement must contain the following information:
 - any requirements the Supermarket has in respect of the delivery of Groceries under the Supply Agreement;
 - any circumstances in which the Supermarket may reject Groceries delivered by the Supplier;
 - the period within which the Supermarket will pay the Supplier for the purchase of the Supplier's Groceries and the circumstances (which must in case be reasonable) in which a payment, or any part of a payment, may be withheld or delayed;

- if the Grocery Supply Agreement is only intended to operate for a limited time, the term of the Supply Agreement;
- any quantity and quality requirements relating to the Groceries covered by the Supply Agreement must be specified in clear terms;
- if the Grocery Supply Agreement provides for termination by one or more parties to it, the circumstances in which it may be terminated; and

PART 3 Variation of Agreement

9. Variation of Supply Agreements and Terms of Supply

- A Supply Agreement must not be varied unilaterally.
- A Supermarket must not vary any Supply Agreement retrospectively, and must not request or Require that a Supplier consent to retrospective variations of any Supply Agreement.

10. Changes to Supply Chain Procedures

A Supermarket must not directly or indirectly Require a Supplier to significantly change any aspect of its supply chain procedures during the period of a Supply Agreement.

PART 4 Prices and Payments

11. Payments Due

A Supermarket must pay a Supplier for Groceries delivered to that Supermarket's specification in accordance with the relevant Supply Agreement, and, in any case, within a reasonable time after the date of the Supplier's invoice. Any discounts for prompt or early payment may only be claimed if payment is made strictly in accordance with the criteria for such discounts.

12. No Right to Set-off

A Supply Agreement must not include provisions under which a Supermarket may set-off any payment due from a Supplier to a Supermarket.

13. No Obligation to Contribute to Marketing Costs

A Supermarket must not, directly or indirectly, Require a Supplier to make any Payment towards that Supermarket's costs of:

- buyer visits to new or prospective Suppliers;
- artwork or packaging design;
- consumer or market research;
- the opening or refurbishing of a store; or
- hospitality for that Supermarket's staff.

14. No Payments for shrinkage

A Supply Agreement must not include provisions under which a Supplier makes Payments to a Supermarket as compensation for Shrinkage.

15. No Payments for Wastage

A Supermarket must not directly or indirectly Require a Supplier to make any Payment to cover any Wastage of that Supplier's Groceries incurred at that Supermarket's stores

16. No Payments for Better Positioning

Unless in relation to a Promotion, a Supermarket must not directly or indirectly Require a Supplier to make any Payment in order to secure better positioning or an increase in the allocation of shelf space for any Grocery products of that Supplier within a store.

17. Limited Circumstances for Payments as a Condition of being a Supplier

Subject to paragraph 20(a), a Supermarket must not directly or indirectly Require a Supplier to make any Payment as a condition of stocking or listing that Supplier's Grocery products.

18. Compensation for Forecasting Errors

- A Supermarket must fully compensate a Supplier for any cost incurred by that Supplier as a result of any forecasting error in relation to Grocery products and attributable to that Supermarket unless that Supermarket has prepared those forecasts in good faith and with due care, and following consultation with the Supplier.
- A Supermarket must ensure that the basis on which it prepares any forecast has been communicated to the Supplier.

19. No Tying of Third Party Goods and Services for Payment

A Supermarket must not directly or indirectly Require a Supplier to obtain any goods, services or property from any third party where that Supermarket obtains any Payment for this arrangement from any third party.

**PART 5
Promotions**

20. Promotions

- (a) A Supermarket must not, directly or indirectly, Require a Supplier predominantly to fund the costs of a Promotion.
- (b) Where a Supermarket directly or indirectly Requires any Payment from a Supplier in support of a Promotion of one of that Supplier's Grocery products, a Supermarket must only hold that Promotion after Reasonable Notice has been given to that Supplier in writing.

21. Due Care to be Taken when Ordering for Promotions

- (a) A Supermarket must take all due care to ensure that when ordering Groceries from a Supplier at a promotional wholesale price, not to over-order, and if that Supermarket fails to take such steps it must compensate that Supplier for any

Groceries over-ordered and which it subsequently sells at a higher non-promotional retail price.

- (b) Any compensation paid in relation to paragraph 21(a) above will be the difference between the promotional wholesale price paid by the Supermarket and the Supplier's non-promotional wholesale price.
- (c) A Supermarket must ensure that the basis on which the quantity of any order for a Promotion is calculated is transparent.
- (d) Once a Supermarket has placed an order for a Grocery product with a Supplier in connection with a Promotion, unless Reasonable Notice is given, it must not, without the Supplier's written consent:
 - i. cancel the order; or
 - ii. reduce the order by more than 10 percent.

PART 6 Supermarket Own Brand Products

22. Confidential Information

If a Supplier discloses Confidential Information to a Supermarket in connection with the Supply of the Grocery Products, the Supermarket must:

- only use such information for the purpose for which it is disclosed; and
- only disclose or make available such information to those within the Supermarket who need to have that information in connection with that purpose.

Supermarkets must have appropriate and sufficient systems in place to ensure and to prove, to the Adjudicator's satisfaction, compliance with this obligation.

23. Intellectual Property

Supermarkets and Suppliers will respect and shall not infringe on each other's respective intellectual property rights including but without limitation to branding, packaging and advertising.

24. License

Supermarkets shall not directly or indirectly Require a Supplier to transfer or exclusively license any intellectual property right held by the Supplier in a Grocery Product as a condition or term of supply of an equivalent Supermarket Own Brand Product.

25. Supermarket's Own Brand

A Supermarket's ranging of its Own Brand Products and allocation of shelf space will be principled and transparent in the following ways:

- Supermarkets must publish or otherwise provide to all Suppliers that contract with them product ranging and shelf allocation principles;
- Supermarkets will act in accordance with the product ranging and shelf space allocation principles published/provided to their Suppliers and update these from time to time as required;

- Supermarkets will provide affected Suppliers, a reasonable time in advance of any range review, with clearly-expressed written notice of the relevant:

iii.purpose of the range review; and

iv.key criteria governing ranging decisions.

- Following the conclusion of a range review, a Supermarket will provide affected Suppliers with a reasonable period of time during which the Suppliers may discuss the outcome of such range review, including the basis for the Supermarket's final decision;
- Supermarkets' published shelf-space allocation principles must be applied without discrimination in favour of Supermarket Own Brand Products.

PART 7 Other Duties

26. No Unjustified Payment for Consumer Complaints

- (a) Subject to paragraph 26(c) below, where any consumer complaint can be resolved in store by a Supermarket refunding the retail price or replacing the relevant Grocery product, that Supermarket must not directly or indirectly Require a Supplier to make any Payment for resolving such a complaint unless satisfied on reasonable grounds the consumer complaint is justifiable and attributable to negligence or default or breach of a Supply Agreement on the part of that Supplier.
- (b) Subject to paragraph 26(c) below, where any consumer complaint cannot be resolved in store by a Supermarket refunding the retail price or replacing the relevant Grocery product, that Supermarket must not directly or indirectly Require a Supplier to make any Payment for resolving such a complaint unless:
 - (i) the Payment is reasonably related to that Supermarket's direct costs arising from that complaint; and
 - (ii) that Supermarket has verified that the consumer complaint is justifiable and attributable to negligence or default on the part of that Supplier; and
 - (iii) a full report about the complaint (including the basis of the attribution) has been made by that Supermarket to that Supplier; and
 - (iv) the Supermarket has provided the Supplier with adequate evidence of the fact that the consumer complaint is justifiable and attributable to negligence or default or breach of a Supply Agreement on the part of the Supplier.
- (c) A Supermarket may agree with a Supplier an average figure for Payments for resolving customer complaints as an alternative to accounting for complaints in accordance with paragraphs 26(a) and 26(b) above. This average figure must not exceed the expected costs to the Supermarket of resolving such complaints.

27. Duties in relation to De-listing

- (a) A Supermarket may only De-list a Supplier for genuine commercial reasons. For the avoidance of doubt, the exercise by the Supplier of its rights under any Supply Agreement (including this Code) or the failure by a Supermarket to fulfil its obligations under the Code or this Order will not be a genuine commercial reason to De-list a Supplier.
- (b) Prior to De-listing a Supplier, a Supermarket must:
 - (i) provide Reasonable Notice to the Supplier of the Supermarket's decision to De-list, including written reasons for the Supermarket's decision. For the purposes of this paragraph 'Reasonable Notice' will include providing the Supplier with sufficient time to have the decision to De-list reviewed using the measures set out in paragraphs 27(b)(ii) below; and
 - (ii) inform the Supplier of its right to have the decision reviewed by a Senior Buyer, as described in paragraph 28 of this Code.

28. Senior Buyer

- (a) A Supermarket's Senior Buyer will, on receipt of a written request from a Supplier, review any decisions made by the Supermarket in relation to the Code or this Order.
- (b) A Supermarket must ensure that a Supplier is made aware, as soon as reasonably practicable, of any change to the identity and/or contact details of the Senior Buyer for that Supplier.

PART 8 Dispute Resolution

29. Dispute Resolution

If a dispute arises as to whether a Supermarket has not complied with this Code, a Supplier may initiate the dispute resolution process under section 28 of the Act.

