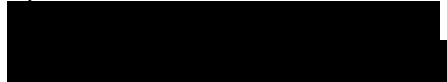


28 February 2024

Mary Devine
Chief Executive Officer
Foodstuffs South Island Limited
Support Centre
167 Main North Road
Christchurch 8051

By email to:



Dear Mary,

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 agreements (GSA).¹ In undertaking this review, we have been considering whether Foodstuffs South Island (FSSI) 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 FSSI's GSA and your compliance with the legislation described above. The content of the GSA provided to us by FSSI has raised potential minor compliance concerns that we would like to draw your attention to.
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

¹ 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.²

4. We have provided more detailed comments later in this letter which seek to highlight our areas of concern. We understand that FSSI 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

5. 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.
6. 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.
7. While the Commission monitors the RGR's compliance, it is the RGR's 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

8. The overarching purpose of the Code, as set out in section 16 of the GICA, is relevant to our assessment of FSSIs 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
- (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.

² 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.

9. The GICA, Code, Commerce Act and FTA also establish a number of compliance obligations for RGRs when dealing with suppliers which include:³

GICA	<ul style="list-style-type: none"> • Section 19 of the GICA creates an obligation for RGRs to comply with the Code. • 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. • 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.
Code	<ul style="list-style-type: none"> • As noted above, section 19 of the GICA creates an obligation for RGRs to comply with the Code. The key parts of Schedule 2 of the Code are: <ul style="list-style-type: none"> ○ 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; ○ Part 2 – Good Faith; ○ Part 3 – Grocery supply agreements: this Part includes matters that must be covered by agreement, unilateral variation and retrospective variation; • 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.
Commerce Act	<ul style="list-style-type: none"> • Under section 27 contracts, arrangements, or understandings substantially lessening competition are prohibited. • Under section 30 no person may – <ul style="list-style-type: none"> ○ enter into a contract or arrangement, or arrive at an understanding, that contains a cartel provision; or ○ give, or require the giving of, a covenant that contains a cartel provision; or

³ 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"> ○ give effect to a cartel provision. ● 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"> ○ that market; or ○ any other market in which the person, or an interconnected person, — <ul style="list-style-type: none"> ▪ supplies or acquires, or is likely to supply or acquire, goods or services; or ▪ supplies or acquires, or is likely to supply or acquire, goods or services indirectly through one or more other persons.
FTA	<ul style="list-style-type: none"> ● Section 7 – A person must not, in trade, engage in conduct that is unconscionable. ● 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.

Our concerns

10. From the information you have provided to us, we wish to draw attention to the following areas of FSSIs GSA:

Area of concern	Details
Lack of transparency and certainty of terms	<ul style="list-style-type: none"> ● Clause 1.3 of your Master Supplier Terms and Conditions (Master Terms) states that these terms do not apply to the existing contractual arrangements you have listed in this clause. However, it is not clear that you have a mechanism to ensure suppliers can renegotiate these existing terms. We are concerned that this could create confusion and ambiguity for suppliers. ● Having multiple underlying agreements whose application differs when there are inconsistencies between them makes FSSI's GSA unnecessarily difficult to navigate and for suppliers to understand the actual terms of the agreement, and what specific terms are negotiable particularly given we understand communications sent

	to suppliers simply invite them to sign and so do not make it clear there is an opportunity to negotiate.
Transport	<ul style="list-style-type: none"> • There are no specific references indicating FSSI must allow the supplier the choice of their preferred transport or logistics service.
Funded promotions - Excess promotional stock	<ul style="list-style-type: none"> • Clause 17.3 (b) of your Master Terms states that FSSI will “agree the Commercial Terms on what happens to any Grocery Products supplied at a promotional price but which remain unsold at the end of the Promotion period.” However, your Commercial Terms state “all Products supplied to us at a promotional price which remain unsold at the end of the applicable promotional period may be sold by us through to Foodstuffs Affiliates or otherwise dealt with by us in our sole discretion.” Under the Code RGRs must agree with the supplier (in writing) on what happens to stock supplied at a promotional price but which remains unsold at the end of the promotional period.
Intellectual property	<ul style="list-style-type: none"> • We are concerned about a lack of reciprocity of terms in the intellectual property terms of your GSA given the “perpetual” and “irrevocable” nature of the terms you are asking suppliers to agree to.
Confidentiality	<ul style="list-style-type: none"> • Your Master Terms do not confirm the position that it is ok for suppliers to share information with the Commission without compulsion.
Product ranging, shelf space allocation and range reviews	<ul style="list-style-type: none"> • Lack of certainty and transparency regarding principles and process applied to ensure compliance with clause 26 including non-discrimination obligations.

11. These 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

12. 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"> • 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"> ○ a declaration of contravention:
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	<ul style="list-style-type: none"> ○ a compensatory order: ○ an order to vary or cancel a contract: ○ an injunction: ○ a pecuniary penalty order. ● Sections 45 and 46 both attract Tier 1 pecuniary penalties. Accordingly, the maximum pecuniary penalty is: <ul style="list-style-type: none"> ○ \$500,000 for a contravention, an attempted contravention, or an involvement in a contravention by an individual; or ○ In any other case, the greater of \$10 million; and if it can be readily ascertained three 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. ● 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. ● Section 120 – Disclosed warning.
Code	<ul style="list-style-type: none"> ● 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"> ○ a declaration of contravention: ○ a compensatory order: ○ an order to vary or cancel a contract: ○ an injunction: ○ a pecuniary penalty order. ● Part 2 of Schedule 1 of the Code notes that Tier 2 and 4 pecuniary penalties are available for certain contraventions of the Code.⁴ ● The maximum penalty for certain Tier 2 contraventions is: <ul style="list-style-type: none"> ○ \$300,000 for a contravention, an attempted

⁴ 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.

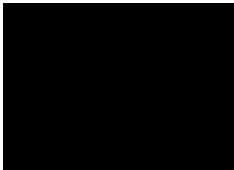
	<p>contravention, or an involvement in a contravention by an individual; or</p> <ul style="list-style-type: none"> ○ In any other case, the greater of \$3 million; and if it can be readily ascertained three times the commercial gain of the contravention, or if it cannot be readily ascertained 3% of turnover of the person that is liable to pay the penalty and all its interconnected bodies corporate. <ul style="list-style-type: none"> ● The maximum penalty for certain Tier 4 contraventions is: <ul style="list-style-type: none"> ○ \$30,000 for a contravention, an attempted contravention, or an involvement in a contravention by an individual; or ○ \$300,000 in any other case.
Commerce Act	<p>The following remedies are available in the case of section 27, 30, and 36.</p> <ul style="list-style-type: none"> ● 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. ● 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. ● Section 81 – cancellation/variation of contract. ● Section 139 – performance injunction.
FTA	<ul style="list-style-type: none"> ● 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"> ○ in the case of an individual, to a fine not exceeding \$200,000; and ○ in the case of a body corporate, to a fine not exceeding \$600,000.

13. 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

14. We ask FSSI 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.
15. In the coming months we will be seeking further information about the agreements that are eventually finalised between FSSI and suppliers to complete our compliance assessment and inform our decisions on next steps.
16. Those next steps may include opening an investigation, making a further request for information and documents and/or requesting that relevant persons employed by FSSI attends a voluntary interview with the Commission. We will keep you informed on the progress of our compliance monitoring in the interim.
17. If FSSI is unsure about its legal obligations, it may wish to seek independent legal advice as soon as possible.
18. Please contact me on [REDACTED] if you have any questions about this letter.

Yours sincerely

A large black rectangular redaction box covering the signature area.

Dr Alice Hume