7 July 2023

Market Performance
Building, Resources and Markets
Ministry of Business, Innovation and Employment
PO Box 1473
Wellington 6140

Email: competition.policy@mbie.govt.nz

Dear Sir/Madam

Attached are the comments that the New Zealand Food and Grocery Council wishes to present on the *Consultation paper: Exposure draft – New Zealand Grocery Supply Code of Conduct* and the *Grocery Industry Competition (Grocery Supply Code) Regulations 2023 – Consultation draft.*

Yours faithfully

Raewyn Bleakley
Chief Executive

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 and Grocery Council

7 July 2023

NEW ZEALAND FOOD AND GROCERY COUNCIL

INTRODUCTION

1. The New Zealand Food and Grocery Council (**NZFGC**) welcomes the opportunity to comment on the *Consultation paper: Exposure draft – New Zealand Grocery Supply Code of Conduct* and the *Grocery Industry Competition (Grocery Supply Code) Regulations 2023 – Consultation draft.* We are particularly appreciative of the pace the Ministry of Business, Innovation and Employment has applied to issue the Consultation draft Grocery Supply Code of Conduct (**the draft Code**).

EXECUTIVE SUMMARY

2. The draft Code is broadly consistent with what NZFGC sought in the Grocery Market Study: it is independent and binding on the major retailers, consistent with the Australian regime but is also reflective of the local realities presented by the more constrained duopoly environment.

3. We strongly support the draft Code and note it covers key areas NZFGC sought to have included in a code. We make recommendations in a number of areas to strengthen and clarify provisions which we see as necessary to deliver an effective Code. Our comments are set out in the body of the submission and Attachment A is a markup of the draft Code to illustrate how some of our recommendations could be implemented.

4. Key recommendations include:

   a) **that the definition of Supply Agreement as referred to in the draft Code[1] reflects the reality that there is not a singular or express list of agreements** but rather encompasses all relevant arrangements between retailer and supplier. This has proven to be a loophole in the Australian Code that New Zealand could address.

   b) **it is important for industry participants to have a clear understanding of the meaning of 'good faith'** because this is the overarching principle of the Code. We have concerns that, while the draft Code lists factors to be considered when assessing *good faith,* this core term is not defined. We consider that the factors may be difficult and uncertain to apply in practice, and this approach risks it being very difficult to 'prove' breach of good faith. It would be more efficient to have the greater clarity (efficiency) of a proper definition. For this purpose, we propose a definition for consideration in our comments below.

   c) **placing parameters or limitations in clauses employing reference to *'reasonable'*.** There must be the clearest possible understandings across all parties of what reasonable in the range of clauses means.

   d) **realigning the draft Code with the Australian Code in the following five areas:** (1) being clear on, and adding the onus; (2) no payments for shelf space; (3) no material changes to supply chain procedures except where reasonable notice is given; (4) not requiring transfer or exclusivity as a condition of supply of an equivalent

[1] The draft Code states that *"**grocery supply agreement** has the same meaning that **supply agreement** has in section 14 of the Act." [now section 17].* That section describes a supply agreement as *"... in connection with a regulated grocery retailer... entering into or arriving at an agreement with a supplier (a **supply agreement**)".* Even though the *Legislation Act 2019* at section 19 provides that *"Words in the singular include the plural, and words in the plural include the singular.",* given the volume and nature of agreements and the purpose of a code, we recommend greater specificity (as discussed below).

brand product; and (5) removing clause 27(3)(a) which may delay the time period for which retailers may consider price increases.

e) **promoting transparent and simple payment structures**. Over time a variety of different charges have been introduced and layered upon one another. Often it is not clear to the supplier what different charges they are incurring from the retailer, what exactly they're paying for (and whether they might be paying for it multiple times), and what their total cost of doing business is. This interferes with efficient and informed decision making. Often these charges are percentage based rather than per unit-based meaning that charges are effectively index linked and potentially disconnected from the cost of the service being charged to the supplied. This is 'dead money' not linked to tangible behaviour or investment. There is a significant amount of money that could be saved in removing these charges which would likely be reinvested in the retailer in other ways, in effect converting 'dead money' and making it 'live' by using it to drive identified and agreed outcomes.

5. We also highlight that a notable omission in the draft Code is that it does not explicitly address a key issue facing suppliers, namely the need to conduct multiple product supply negotiations with "Foodstuffs" entities. These take place first with each of the head offices of Foodstuffs North Island and Foodstuffs South Island, often followed by further renegotiation by individual retail outlets under the same banner as the head offices. This adds to transaction costs, increases uncertainty, and significantly leverages their buyer power (all of which is inconsistent with the purpose of *Grocery Industry Competition Act 2023* (**the Act**)). Head office negotiated and agreed terms should prevail across individual stores (while still maintaining the ability of suppliers to choose to deal directly with local retailers, and for suppliers to decide to make local variations). We understand this may be the intent, but this should be clarified in the Code, with plain English guidance from the Grocery Commissioner for clarity.

6. Above all else, NZFGC recommends the draft Code is implemented as soon as possible. In particular, there is an urgent need for the 'good faith' provisions to apply immediately. This would address and, we hope, arrest the poor dealings still being applied to suppliers at what seems to be an accelerated rate. In this interim period where the industry knows a Code is coming but before the Code has been implemented, NZFGC has received multiple reports of some retailer actions that the draft Code would prohibit. Suppliers perceive that this may be the last chance some retailers have to engage in or entrench certain behaviours before the Code comes into effect.

7. NZFGC looks forward to the implementation of the Code, and the accompanying dispute resolution scheme, and to working with retailers to create a more transparent, efficient and collaborative trading environment that facilitates growth and innovation in New Zealand's grocery sector.

COMMENTS

Consultation paper: Exposure draft – New Zealand Grocery Supply Code of Conduct

Introduction

8. NZFGC agrees with objectives set out for the draft Code covering promoting fair conduct, promoting transparency and contributing to the trading environment. Importantly, NZFGC sees the draft Code's prime role as addressing "an imbalance in negotiating power between the major grocery retailers and their suppliers" as set out in the introduction to the Consultation Paper.

9. NZFGC's comments follow the sequence of Parts A, B and C in the Consultation Paper.

Part A – How the Code will work

10. The purpose of the Act is to promote competition **and** efficiency in the grocery industry for the long-term benefit of consumers in New Zealand. The purpose of the draft Code is to promote this purpose by:

    a. promoting fair conduct, and prohibiting unfair conduct, between regulated grocery retailers, the related parties referred to in section 14A, and suppliers;

    b. promoting transparency and certainty about the terms of agreements between regulated grocery retailers, the related parties referred to in section 14A, and suppliers; and

    c. contributing to a trading environment in the grocery industry in which businesses compete effectively and consumers and businesses participate confidently and that includes a diverse range of suppliers.

11. The Code will initially apply to specified "*regulated grocery retailer*s" named in clause 8 of the Act and comprising Foodstuffs North Island, Foodstuffs South Island and Woolworths New Zealand, including their "*franchisees*", "*transacting shareholders*" and other relevant parties. As the Consultation Paper notes "[T]he Code will therefore apply to the majority of New Zealand's supermarket brands, including Countdown, Pak'nSAVE, New World and Four Square"[2].

12. Performance will be monitored and enforced by the Commerce Commission (**Commission**) led by the new Grocery Commissioner (**Commissioner**). A dispute resolution scheme (**DRS**) is also to be appointed under the Act. Details of the DRS have not been released yet so the details of how suppliers may seek to enforce their rights under the Code is unclear at this time. It is also worth reinforcing the significance of the Commission's role in this regard, including its power to issue "*Corrective Notices*" under section 117 of the Act (albeit subject to procedure). Given the inherent power imbalance, there may be a natural reticence for many (particularly smaller) suppliers to jeopardise trading relationships by following the DRS.

13. The draft Code is closely modelled on the Australian Code which is entering its second formal review since establishment 5 years ago. New Zealand therefore has the benefit of lessons from these reviews and there are likely benefits and efficiencies from relatively consistent rules in Australia and New Zealand, particularly for suppliers who operate in, or seek to expand their operations to, the trans-Tasman market.

14. NZFGC strongly supports how the draft Code is envisaged to work.

[2] Consultation Paper, para 16

15. A critical area where the draft Code departs from the Australian Code however, is that the Australian Code clearly states that, in disputes, retailers have the onus to prove exceptions they seek to rely on.[3] The draft Code replaces this with a requirement that retailers must give written reasons if they seek to rely on an exception. NZFGC **supports** the addition of the requirement to give written reasons, as this assists with transparency and communication in the more common situation of interactions which aren't escalated into a dispute. However, this is not a replacement for the burden of proof in a dispute. Currently it appears unclear who the onus would be on, though it would be appropriate for it to be the retailer given it would be the retailer seeking to rely on the exception, consistent with the requirement of written reasons.

16. NZFGC **recommends** the draft Code is realigned with Australia in expressly providing that in disputes, retailers have the onus to prove exceptions they seek to rely on. The burden of proof has significant practical implications and affects parties' incentives to proactively comply with the draft Code.[4]

17. Retailers should also have this onus when the Grocery Commissioner seeks penalties, noting the Commission's comment on the importance of independent enforcement in recommending the introduction of a Code:[5]

> *Where an industry is characterised by significant imbalances in bargaining power, and there is the potential for retaliation against suppliers who make complaints, self-enforcement and dispute resolution processes alone are unlikely to be sufficient. This is further reinforced by the high cost of, and time taken to conclude, civil litigation in New Zealand, and the disparity of resources between some suppliers and major grocery retailers.*

18. Significantly, the Australian Code was a product of negotiation between retailers and suppliers in Australia given its voluntary nature. Further, there is a significantly higher level of retail concentration in New Zealand than in Australia. The Australian Code therefore may not necessarily be drafted to best promote fair conduct and achieve the other purposes of the Code, given it needed retailer approval, which naturally have their own interests. The Australian Code itself is also undergoing its own review "*amid effectiveness concerns*".[6] Future reviews of the Code should look closely at appropriate revisions, including earlier than the 2-year mandatory review if appropriate.

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[3] One example is clause 12(4) (Payments to suppliers) of the Australian Code, which reads:

(2) The retailer or wholesaler must not:
(a) set off any amount against a supplier's invoice or remittance unless the supplier has consented in writing to the set-off of the amount; or
(b) require a supplier to consent to set off such an amount.
(3) Subclause (2) does not apply if:
(a) the grocery supply agreement provides for the amount to be set off; and
(b) the set-off is reasonable in the circumstances.
(4) In any dispute, the retailer or wholesaler has the onus of establishing the matters in subclause (3).

[4] If there is no scope for the onus of proof to be clarified in the Code, it should be provided for in the main Act, and in the interim it should be noted that written reasons provided by the retailers will be representations subject to the Fair Trading Act.

[5] Commerce Commission *Market study into the retail grocery sector: Final report* (8 March 2022): https://comcom.govt.nz/__data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf at [9.185].

[6] https://www.foodnavigator-asia.com/Article/2023/01/24/australia-launches-grocery-code-review-amid-effectiveness-concerns#

Part B – Policy proposals included in the Draft Code

Schedule 1 – transitional, savings and related provisions

Part 1 – Transitional provisions

19. A grace period of 6 months from the (unspecified) *commencement* date is provided for, after which the requirements of the draft Code apply regardless of any provisions of existing agreements to the contrary (other than for the *good faith* obligations which have immediate effect).

20. In principle, NZFGC supports the transitional provisions being set at 6 months. This is adequate time for variations to be notified as this need not await formal commencement. A Code could be in place from the outset but there is some uncertainty (and potential for delay) regarding when section 15 (Obligation to comply with grocery supply code) commences as the Act provides that *Commencement* is as specified by Order in Council but no later than 9 months after Royal assent[7]. Retailers could have effectively 15 months after Commencement to meet this requirement. Given some current poor retailer behaviour, commencement as quickly as possible is strongly supported.

Schedule 2 – Grocery Supply Code

Clause 5 – application of existing agreements

21. Retailers must offer to vary supply agreements in writing within the 6-month period but the draft Code does not require a supplier to have signed the variation. The offers to vary must be *reasonable* and meet the *good faith* requirements set out in the Code and the Act.

22. NZFGC agrees with the steps retailers must take within 6 months of the Code coming into force. However, determining the reasonableness of variations could present a point of friction and uncertainty. Both the *reasonable* and *good faith criteria* (as currently framed in the draft Code) are potentially problematic.

Q1	Are there any ways the transitional provisions could be improved?

23. The grace period provisions are complex and empower retailers to offer variations on their terms, having the opposite effect of the purpose of the Code in further enhancing their negotiating power. While the grace period provisions only apply for the 6-month duration of the grace period, variations agreed to in this period can be binding on retailers and suppliers for a long time after and have much more permanent effects.

24. There is a potentially significant exception for inconsistencies with the grocery supply agreement form requirements which can continue beyond the grace period if a *reasonable variation offer* is made but rejected. There is, as noted, scope for considerable uncertainty as to what is 'reasonable', noting also that in the absence of further guidance/enforcement by the Commission the regulated grocery retailer's 'position' (regardless of its reasonableness) will likely be the default. Unreasonable variation offers currently still satisfy the clause 5 obligation to offer variations.

25. While the good faith obligation still applies, the examples in clauses 4 and 5 of Schedule 1 raise doubt as to the ability to rely on the good faith obligation – we would expect that the retailers acting in good faith would seek to abide by the Code as much as they can even if their existing agreements provide more favourable terms, but the example in clause 4 states that the more favourable term in the existing agreement would

[7] Section 2(2) (Commencement) provides that section 19 (Obligation to comply with grocery supply code) comes into force:

(a) on a single date set by Order in Council; but

(b) 9 months after Royal assent, if that section has not commenced by then.

prevail during the grace period and does not appear to have regard to the good faith obligation. Speedy commencement of the Code and implementation of 'good faith' is particularly important in order to curb pre-Code poor retailer behaviour we understand is continuing to be applied to suppliers.

26. The clause 5 example highlights the scope for uncertainty and differing views – in the example the supplier thinks 3 months is unreasonably long but the premise of the example is "if the retailer has made a reasonable variation offer".

27. We provide some potential wording in Attachment A that tries to further clarify the effect of the grace period provisions. Plain English guidance from the Grocery Commissioner on how these provisions will operate in practice, or guidance from the retailers on how they intend to approach the transition to the Code, would be helpful in facilitating a smooth transition and reducing uncertainty.

28. We also **recommend** that the meaning of 'existing agreement', and 'grocery supply agreement' make clear that contracts held by manufacturers for the production of private label products are agreements covered by the Code. Confirmation that contracts held by manufacturers for the production of private label products are also covered by this change is important for the industry.

Q2	Will there be any unintended consequences as result of the transitional provisions as drafted?

29. NZFGC understands that in Australia, grocery retailers sought to distinguish between "Terms and Conditions" and "Commercial Arrangements" (often called terms). Terms and Conditions are around supply/quality etc and are very generic. Australian grocery retailers initially sought to focus the "supply agreement" discussions around Terms and Conditions and to firewall the commercial elements away from the Code. This was overcome through discussions and came to mean all agreements.

30. NZFGC **recommends** it is important to make it clear at the outset that the Code is referring to all agreements in place with suppliers and not to single out specific elements or agreements in a package. See also the response to Q4 below.

Part 2 – Good faith

31. Clause 6 sets out provisions requiring retailers to deal with suppliers in good faith.

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Q3	Are there any ways that clause 6 could be improved to be more effective in supporting fair conduct between suppliers and retailers?

32. The overarching obligation of good faith must be a clear and effective provision. It must capture the spirit and intentions of the purpose of the Act and the Code because it is not possible for specific obligations to address all future scenarios. A strong overarching principle allows the Code to be interpreted in light of retailer practices as they appear or evolve. This was an important aspect to the success of the UK Code.

33. We have concerns however that, while the draft Code lists factors to be considered when assessing *good faith,* this core term is not defined. We submit that this may be difficult and uncertain to apply in practice, and risks being interpreted as very difficult to 'prove' breach of. It would (consistent with the Act's purpose) be more efficient to have the greater clarity (efficiency) of a proper definition.

34. The 2018 independent review of the Australian Code found "*that the current good faith provision is not fulfilling its role within the Grocery Code*".[8] Suppliers raised concerns that good faith was too difficult to apply in practice, that there was significant uncertainty in the industry regarding the meaning of good faith, and that the term was open to broad interpretation leading to conflicting views.[9] While voluntary factors for consideration have since been added to the good faith obligation to assist with interpretation,[10] good faith is still undefined. NZFGC considers there is scope for the same problems around interpretation to arise in New Zealand which will discourage suppliers from relying on the good faith obligation, lead to a lack of remedy for situations not covered by the prescriptive obligations and incentivise retailers to focus their energy on finding exceptions to prescriptive obligations rather than pro-actively acting towards the purposes of the Code.

35. We **recommend** good faith should not be narrowly interpreted. The Commission, in recommending a good faith obligation to follow the Australian Code, stated that:[11]

> "*While these concepts are distinct, good faith is central to the UK Code's concept of fair dealing, and the Australian Food and Grocery Code has expanded its concept of good faith to an extent where they substantially overlap*".

36. The FindLaw legal dictionary refers to fair dealing in its explanation on 'good faith' and defines 'good faith'as:[12]

> *[translation of Latin **bona fides**]*
> *: honesty, fairness, and lawfulness of purpose*
> *: absence of any intent to defraud, act maliciously, or take unfair advantage*

37. Given the inherent conflict of retailers being customers and competitors (with their private label offerings), and consistent with the above, the good faith definition should incorporate '*fair dealing*'. We note the Australian Code also seeks to incorporate the concept of 'fair dealing' as a guiding principle for Code Arbiters after the 2018 independent review had found "*it is was clear that stakeholders broadly support a*

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[8] Australian Government Treasury *Independent Review of the Food and Grocery Code of Conduct: Final Report* (September 2018): https://treasury.gov.au/sites/default/files/2019-03/Independent-review-of-the-Food-and-Grocery-Code-of-Conduct-Final-Report.pdf at 30.
[9] Australian Government Treasury *Independent Review of the Food and Grocery Code of Conduct: Final Report* (September 2018): https://treasury.gov.au/sites/default/files/2019-03/Independent-review-of-the-Food-and-Grocery-Code-of-Conduct-Final-Report.pdf at 27.
[10] The ACCC has also provided further guidance and examples: https://www.accc.gov.au/business/industry-codes/food-and-grocery-code-of-conduct/acting-in-good-faith-under-the-food-and-grocery-code
[11] Commerce Commission *Market study into the retail grocery sector: Final report* (8 March 2022): https://comcom.govt.nz/__data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf at [9.160].
[12] https://dictionary.findlaw.com/definition/good-faith.html; The definition goes on to note "*The meaning of good faith, though always based on honesty, may vary depending on the specific context in which it is used. A person is said to buy in good faith when he or she holds an honest belief in his or her right or title to the property and has no knowledge or reason to know of any defect in the title. In section 1-201 of the Uniform Commercial Code good faith is defined generally as "honesty in fact in the conduct or transaction concerned." Article 2 of the U.C.C. says "good faith in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." Similarly, Article 3 on negotiable instruments defines good faith as "honesty in fact and the observance of reasonable commercial standards of fair dealing," a definition which also applies to the provisions of Article 4 on bank deposits and collections and Article 4A on funds transfers. The U.C.C. imposes an obligation of good faith on the performance of every contract or duty under its purview. The law also generally requires good faith of fiduciaries and agents acting on behalf of their principals. There is also a requirement under the National Labor Relations Act that employers and unions bargain in good faith."*

Grocery Code that ensures that suppliers are afforded both fairness of process (good faith) and fairness in outcomes (fair dealings)".[13]

38. The UK Code provides clearer guidance on fair dealing:[14]

> "*Fair and lawful dealing will be understood as requiring the Retailer to conduct its trading relationships with Suppliers in good faith, without distinction between formal or informal arrangements, 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.*"

39. Merriam Webster also defines fair dealing as:[15]

> *: the transacting of business in a manner characterized by candor and full disclosure and free of self-dealing*
> *specifically : such transacting undertaken by a corporate officer on his or her own behalf*

40. The consultation paper also explains the intent of the good faith obligation at paragraph 32 (emphasis added):

> "*The intent of including an overarching good faith obligation in the Code is to ensure that retailers engage in fair processes when dealing with suppliers, and* ***do not leverage their negotiating power to coerce suppliers into accepting unfavourable terms****. The obligation directs fairness of processes, for clarity and objectiveness. It does not include any specific requirements for fairness of outcomes.*"

41. We **recommend** that the above concepts are incorporated in the meaning of good faith, and that the intention of the good faith obligation, particularly the part in bold above, is explicitly incorporated within the meaning of good faith. The Code should provide guidance on the meaning of good faith, rather than relying on a list of factors which may be taken into account. This could be by a definition along the lines of the below:

> *"*a retailer acts in good faith when they act honestly, fairly, transparently, free of self-dealing, without taking unfair advantage, without leveraging their negotiating power to coerce suppliers into unfavourable terms, and consistently with the purpose of this code."

42. Or the Code could provide more direction on the factors by specifying that the factors may indicate that a retailer has not acted in good faith in their dealings with a supplier, along the lines of the below:

> "Any of the following factors, without limitation to any other relevant factors, may indicate that a retailer has not acted in good faith in their dealings with a supplier:".

Part 3 – Grocery supply agreements – content of grocery supply agreements and variations to supply agreements

43. Part 3 comprises 4 clauses covering form of agreements (to be in writing – clause 7), content (clause 8) and unilateral and retrospective variations (clauses 9 and 10).

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[13] Australian Government Treasury *Independent Review of the Food and Grocery Code of Conduct: Final Report* (September 2018): https://treasury.gov.au/sites/default/files/2019-03/Independent-review-of-the-Food-and-Grocery-Code-of-Conduct-Final-Report.pdf at 30; see also recommendation 4.
[14] UK Groceries Supply Code of Practice at paragraph 2.
[15] https://www.merriam-webster.com/legal/fair%20dealing

Q4	Are there any ways in which clause 7 and 8 could be improved to provide greater transparency and certainty to suppliers

44. The term ‘supply agreement’ is merely defined as an agreement with a supplier, and this definition is found in the Act rather than the Code itself. We **recommend** the Code itself also defines the meaning of a supply agreement. This will promote the effectiveness of the Code by making it more accessible and understandable to retailers and suppliers, who will be the main day-to-day users of the Code.

45. A ‘supply agreement’ could be mistakenly taken to mean a single document. In practice, there are a suite of agreements that each supplier may have with a retailer, and it is the collection of agreements that comprises ‘the supply agreement’. For example, the supply agreement could include all the following (illustrative only, not exhaustive):

    a) Terms and Conditions – usually issued by the retailer setting out a broad range of logistical and legal requirements (often housed in a portal)
    b) Trading Terms – sets out the commercial investment support by the supplier. (wholesale discounts, promotional coop etc)
    c) Case Deals – discounts which subsidise the promotional discount of product instore. Note suppliers often fund 100% of discounts seen by consumers
    d) Growth Incentives – in various forms suppliers agree to additional discounts paid annually(normally) based on the retailers purchases or sales
    e) Marketing Support – payments for a wide variety of elements; floor media, radio, online features, magazine etc
    f) Merchandising Agreements – to provide labour to assist in the current merchandising of products instore, may include shelf filling which is really a core function of retailer
    g) New product shelf resets – retailers expect suppliers to fund the resetting of shelves after a category review. Often based on a suppliers share of category rather than actual supplier benefit.
    h) Wastage Agreements – payments for small damages
    i) Logistics agreements – including pallet dehire and a multitude of other elements
    j) Data access – purchase of data either directly or through a retailer exclusive third party
    k) Settlement Discounts – discounts offered to the retailer to pay their invoices on a certain frequency / on time
    l) Event Support – retailers ask/expect suppliers to fund their “event” activity, eg collectables. This can be a profit generating activity for retailers.
    m) Sampling – provisions of material for instore giveaways
    n) Study Tour and Conference funding – suppliers are asked to pay a levy to fund retailers conferences and trade tours.
    o) Various policies – for example sustainability or ethical sourcing policies which refer to the policies being included in standard contract documentation and that signing and complying with the policies is a requirement of doing business with a retailer.

46. For the avoidance of doubt or actions to exclude certain agreements as outside ‘the supply agreement’, it would be helpful to make clear that a supply agreement is not singular.

47. There is typically value attached to any agreement between the parties and NZFGC needs to be assured that all the agreements between grocery retailers and suppliers are captured.

48. The 'cloud' of supply agreement documents with multiple additional charges being required of suppliers on an ad-hoc basis often means it is not clear to the supplier what different charges they have with the retailer, what exactly they're paying for (and whether they might be paying for it multiple times), and what their total cost of doing business is. This makes it difficult for suppliers to make informed decisions in deciding which products to focus on, because profitability, which would normally be determined by consumer preferences and demand in a competitive market, may be unknown or may be determined by a variety of charges. This is not a trading environment in which suppliers can compete confidently.

49. We **recommend** adding an obligation that:
    a. firstly, retailers should consider existing charges with a supplier and consider if the charges can be consolidated, or if a summary could be provided to the supplier. This would promote transparency and efficiency.
    b. secondly, that if a retailer intends to add a new charge or fee on the supplier, it should first consider whether it can use an existing charge or price (eg by renegotiating the level of that charge or price) to achieve the same purpose.
    c. thirdly, that if a retailer intends to add or increase a charge or fee on a supplier, it must provide its rationale for the charge or increase (including an explanation of what the charge is for) and the supplier should have rights to accept or decline the charge consistent with the rights the retailers have to accept or decline price increases in clause 27. As currently drafted, the supplier should have the right to accept or decline the charge or increase within 30 days (including accepting the charge but not the amount of the charge) and requesting further information needed from the retailer to make an informed decision would 'stop the clock' – as submitted in response to Q42 we recommend that the time for response 'clock' is not stopped in either case. This would just provide suppliers the same rights to negotiate with retailers on more balanced grounds.

50. Further, these charges are often percentage based rather than per unit meaning that charges are effectively index linked and potentially disconnected from the cost of the service being charged to the supplier. This is 'dead money' not linked to tangible behaviour or investment. There is a significant amount of money that could be saved in removing these charges, converting the 'dead money' into 'live money' that can be reinvested in the retailer in other ways to drive identified and agreed outcomes (eg sales promotions or endcap displays). Another example is continuing to apply a charge for household mailouts even though these have been replaced by electronic notices.

51. Clause 8(d) provides one of the matters that must be covered in the grocery supply agreement is "if the agreement is intended to operate for a limited time only, the term of the agreement". NZFGC considers when the term is unlimited, there could be confusion what the term of the agreement is (eg whether the termination period of the agreement should be interpreted as the term of the agreement).

52. For clarity, we **recommend** the term of the agreement should always be a matter covered in the grocery supply agreement (ie removing the "if the agreement is intended to operate for a limited time only" part).

Q5	Is clause 9 flexible enough to allow for reasonable unilateral variations to be made to supply agreements?

53. Clause 9 relies heavily on the application of *'reasonable'* eg the variation is reasonable (cl 9(2)I), the supplier is given reasonable notice (cl 9(2)(d)), determining whether the

variation is reasonable (cl 9(3)) and a written explanation of the retailer's notice why 'the variation is reasonable' (cl 9(5)(a)).

54. We appreciate that this is intended to provide a degree of objectivity into the test. However, there could still be considerable uncertainty on interpretation of these provisions. Greater clarity or specificity, and/or setting limits on the outer bounds of what is reasonable could usefully be applied to avoid abuse.

55. This was an area of considerable confusion and frustration in Australia in the early transition of the Australian Code as retailers usually maintain 'portals' where supply arrangements, Terms and Conditions etc are kept and updated. NZFGC understands the retailers were advising suppliers whenever they were updating 'technical' elements (such as delivery changes). The retailers were doing so by email, by advising that, for example: "a change has been made to delivery Terms and Conditions". This was determined to be a unilateral change by retailers for suppliers and that the general notice given to suppliers did not allow for negotiation AND put the burden of identifying the changes on the supplier. Many considered this unreasonable. This was eventually addressed but we submit strongly that the New Zealand Code should be clear on this from the outset.

56. Unilateral variations are commonly advised in this way in New Zealand too, for example sustainability or ethical sourcing policies being advised to suppliers via email, without the chance to disagree to (often outrageous) policy terms such as unannounced inspections of suppliers' facilities.

57. NZFGC **recommends** the addition of a new 2(cA) along the lines of:

> "the variation is clearly identifiable as to the relevant area in the grocery supply agreement to which it refers;"

58. We **recommend** supplier consent to unilateral variations must also be written. This provides both retailers and suppliers with more certainty.

Q6	Will clause 9 be effective in preventing retailers from using their negotiating power to make unreasonable unilateral variations?

59. The effectiveness or otherwise of the provisions in clause 9, taking into account measures to address the issues that suppliers in Australia faced, will necessarily take time to emerge.

60. Clause 10 prohibits retailers from making retrospective variations to the supply agreement.

Q7	Is clause 10 fit for purpose? Are there any circumstances where retrospective variations should be permitted

61. NZFGC considers clause 10 to be fit for purpose. There are no circumstances where retrospective variations should be permitted.

Q8	Will there be any unintended consequences as result of how these provisions are drafted?

62. NZFGC does not consider there will be unintended consequences. However, for clarity, nothing in the Code should be taken to prevent the ability of a supplier to negotiate

directly with individual stores, franchisees or transacting shareholders, rather than the main regulated retailer. This may require specific coverage in guidance.

63. The Code does not explicitly refer to the retailers' wholesale arms. We assume they are captured under the Code as a related party of the retailer. We recommend making the position clear in the Code or related guidance, otherwise retailers could establish their wholesale arms as the buyers of all grocery goods to circumvent their obligations as recognised grocery retailers.

Part 4– Conduct generally
Subpart 1 – transport and logistics

64. Clause 11 prohibits a retailer from requiring suppliers to use a particular transport or logistics service.

Q9	Are there any ways in which clause 11 could be improved to support transport and logistic arrangements which suit both parties?

65. The service standards the retailer is able to impose on suppliers should be provided on condition that they not be greater than those provided by transport or logistics services in which the retailer has an interest. The objective should be that the supplier is able to select the most efficient transport option for their business and allowing the supplier a direct relationship with that provider without pressure for declining any particular freight options encouraged or insisted upon by the retailer. Similarly, the provision of merchandising should be a choice of the supplier, not required by a retailer. A clause to this effect would add to the general understanding of the objective and it would avoid entrenching inefficiency, creating barriers to transporter entry and encourage further concentration of the transport sector.

66. As discussed further below in Q16 regarding clause 16 of the draft Code (Payments for retailer's business activities), a significant issue currently is the allocation of liability to suppliers for redistribution of goods that occurs *after* the retailer has taken ownership of those goods. This is a retailer cost that suppliers have no control over.

67. Retailers set clear Service Level Agreement (**SLA**) requirements that goods must be delivered 'On Time In Full'. This can be dependent on the redistribution portion ie that retailers redistribute goods to stores after taking ownership in a timely fashion so that the goods are delivered on time. The supplier has no control over this, as the retailer has taken ownership and it is the retailer who controls their own distribution centre, yet it is the supplier that may be liable for any penalties if the goods are not delivered on time.

68. We **recommend** that clause 11 also provides that a retailer must not impose service standards on a supplier in respect of transport or logistics that occurs after ownership has transferred to the retailer or if the goods are otherwise within the control of the retailer or an agent of the retailer.

Q10	Will there be any unintended consequences as result of how this provision is drafted?

69. An express provision for retailers to impose service standards provides a way out for retailers to circumvent this provision and adding conditions to that opportunity might avoid it being circumvented.

70. We appreciate that retailers are likely to tighten up the specifications for delivery and this may not necessarily be a negative consequence but may have impacts for some suppliers.

71. An ongoing issue in this area in Australia concerns the retailers' reverse logistics providers (ie retailers' own fleets) often being "sold in" by retailer buying teams. If these fleets do not perform or miss their own delivery slots, the retailer considers the arrangement to be "third party" and not their problem. It is difficult if not impossible for suppliers to manage effectively or terminate a retailer owned supply provider for poor performance or to maintain optimum efficiency. A provision that addresses this issue in terms of redress for the supplier in addition to standards of performance would greatly strengthen the provisions concerning reverse logistics suppliers.

Part 4– Conduct generally
Subpart 2 – Paying suppliers

72. Clause 12 sets out provisions around payments to suppliers.

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Q11	Are there any ways in which clause 12 could be improved, to help ensure timely payments and give appropriate clarity over payment terms for suppliers?

73. Clause 12(4) provides the supplier an opportunity to ask the retailer to explain why a set-off sanctioned in the supply agreement is reasonable. If a set-off is likely to seem unreasonable to the supplier, it would seem more efficient for the retailer to set out why the set-off is reasonable at the outset instead of applying an unreasonable set-off and hoping the supplier will not query it. Many suppliers would not, in the face of actions available to the retailer to apply to suppliers, make a request. So for retailers, it would be a revenue advantage to apply a set-off irrespective of reasonableness.

74. We note that clause 14(3) (discussed below) requires a retailer to give a full written explanation of an issue related to wastage without the need for the supplier to formally request it.

75. Clause 12(3) should replicate this provision and require the retailer to provide a written explanation of why a set-off is reasonable in the circumstances without the supplier having to request it.

Q12	Do you think a maximum payment period should be set by the Code?

76. Yes, NZFGC considers a maximum payment period should be set by the Code. Discussion around prospective business payments practices regulations noted there is no common understanding of an invoice and NZFGC considers a definition of an invoice, when an invoice is deemed to be received, and guidance, are critical elements to ensure businesses are able to properly comply.

Q13	If a maximum payment time is set, do you think 20 calendar days from receipt of invoice is appropriate?

77. The prospective business payments practices regulations proposed measuring payment practices from 20 days from receipt of invoice. We consider therefore 20 days to be appropriate.

78. The reason for this is that the current arrangement is typically a 30-day payment term but this usually means on average payments are made at around 45 days. The experience in Australia was widespread confusion. Each retailer defined what '30 day' and '14 day' meant. Further, in Australia, anyone with a set of trading terms that said 'weekly' was in the grey zone.

79. Clarity on this clause would be of great benefit to all in the grocery market.

Part 4– Conduct generally
Subpart 3 – Requiring payments from suppliers

80. Clauses 13 and 14 cover payments for shrinkage and wastage, clause 15 covers payments for conditions of being a supplier and clause 16 covers payments for a retailer's business activities.

Q14	Are there any ways in which clauses 13 and 14 could be improved to ensure more efficient, and fairer, allocation of costs due to shrinkage and wastage?

81. There may be a risk of the retailers subverting the intent of this provision by utilising their new line acceptance process. Retailers consider products that require a new EAN (barcode) as being new lines in their system, requiring suppliers to submit them as new products. This could arise due to a simple change such as a packaging format change, a label change, product weight adjustment or regulatory requirements rather than a product be genuinely "new". The retailer may insert a "wastage" requirement in this new line process.

82. The intent in the Code is to stop any payments for shrinkage (always outside a supplier's influence) and to mirror the Australian Code as most recently amended, requiring that the retailer only seek a reasonable wastage payment AND requiring that they negotiate in good faith any current unreasonable wastage arrangements.

83. It is worth noting that retailers in Australia have used their 'new line' process to make this clause meaningless, requiring suppliers to consistently leverage the 'reasonableness' test. Anytime a product goes through a significant change, new pack size or changed product ingredients, then the retailer considers this a 'New Product' which is then treated as a new SKU with a new barcode. The retailer then inserts a provision in their new line submission form stating that all new products will have a waste agreement. Since this is applied equitably and retailers retain the right to choose what they stock, the outcome is cost to the supplier.

84. There have also been examples of suppliers renegotiating their waste agreements under the Australian Code to more reasonable levels. The money saved in this process is almost always reinvested in the retailer in other ways, in effect converting 'dead money' and making it 'live'. The current Australian Code (V2) made some provisions for requiring the retailers to not penalise suppliers for renegotiating poor or biased waste agreements.

Q15	Is the six-month timeframe set out in clause 14(2)(g) appropriate? Do you consider that this timeframe should be shorter (for example, 30 days) or longer (for example, 12 months)?

85. If retained as drafted, then a 6-month timeframe must be considered the maximum time for a supplier to receive a retailer's claim for payment and should definitely be no longer in the small New Zealand market. In Australia the period is inconsistently applied by retailers but is no shorter than the financial year plus one year. This voluntary arrangement with its inconsistency is challenging for suppliers, particularly smaller suppliers with limited resources. Therefore, for New Zealand, and for smaller suppliers especially where business payment timeframes are one week to one month, allowing the biggest debtor a 6-month period of grace seems unbalanced. We strongly support a lesser timeframe of 3 months.

Q16	Are there any ways in which clauses 15,16 and 17 could be improved to ensure more efficient and equitable sharing of costs?

86. The provisions are comprehensive. However, clause 15(2)(a) and (b) may also result in an interpretation that requires a supplier to pay for promotions at any time and/or that there is a requirement to promote products in a new line situation. Both are poor outcomes for suppliers. Retailers that require supplier investment should not be unilaterally enabled by this clause.

87. On clause 16, we understand that a significant issue currently is that retailers require a supplier to pay for redistribution of goods *after* the retailer has taken ownership of those goods. It will be important that clause 16 (payments for retailer's business activities) clearly prohibits this. Transfer of ownership usually occurs at delivery into a retailer distribution centre (DC). That is, the supplier pays for their own distribution freight cost from their DC into the retailers' DC, and retailers are responsible for their costs in redistributing the goods to stores. Distributing product from the retailer's wholesale distribution centre to their retail outlets should be seen as a normal cost of running a retail/wholesaler business. It is important to distinguish distribution costs while the supplier still has control of the goods as distinct from distribution costs after title and control have passed to the retailer, as it is the retailer which has control over the latter and is best placed to manage those costs.

88. As discussed in the response to Q9, a related issue is the application of 'On Time In Full' requirements (and charges when these are not met) to distribution services which the retailer has control over. Retailers set clear SLAs of 'On Time In Full' delivery of products that suppliers must meet. Suppliers must then ensure the 'on time' of their transporters, and currently also the retailer's transporters which the supplier has no control over.

89. NZFGC considers that clause 17(5) is much the same as clause 12(4) in terms of a supplier having to request an explanation from the retailer. Clause 17(5) should be amended to require the retailer to provide a written explanation of why funding a promotion should be paid by the supplier without the supplier having to request it.

Q17	Should payments as a condition of supply be allowed in cases other than for new products?

90. NZFGC does not consider payments as a condition of supply be allowed in any cases other than for new products. To do otherwise stifles the opportunity to expand product ranges or particular products for consumer choice.

Q18	Is the description of what constitutes a new product, set out in clause 15(2)(ii), appropriate?

91. NZFGC considers that clause 15(2)(b)(i) should be subject to conditions. As well, the parameters around clause 15(2)(b)(iii) relating to payments for new products needing to be 'reasonable' having regard to the costs and risks to the retailer, may make the balance of this clause meaningless because of the breadth of leverage available to the retailer by this provision.

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Q19	Should clause 17 include an additional restriction which prohibits retailers from requiring suppliers to fully fund the cost of promotions?

92. Yes, there should be a restriction on requiring suppliers to fully fund the cost of promotions because both retailers and suppliers are beneficiaries of the results of promotions.

Q20	Do you have any other comments on clauses 15, 16 and 17

93. Clause 16(2) should not be an exhaustive, positive list but rather should include the phrase “but is not limited to” after “includes”.

94. Clause 17(2)(b) has proven problematic in the Australian context and should be amended. In practice, this means that a retailer can require the supplier to participate in promotional activities.

95. The mitigation in clause 17(3) provides little or no protection when, in practice, the retailer can insist the supplier is benefiting from “brand exposure” etc while the commercial cost may actually be detrimental. There is no formula for an independent body to determine if there is benefit or not. We **recommend** 17(3)(a) is amended to “the supplier’s view on the likely benefits to it from the promotion” to give respect to supplier autonomy and a supplier’s ability to determine whether a promotion would be beneficial for its own product.

Part 4– Conduct generally
Subpart 4 – Other conduct

96. Clauses 18 and 19 cover delisting products and process requirements to delisting. These follow the Australia Code but include two additional provisions which require retailers to give fresh fruit and vegetable suppliers 6 months’ notice of delisting and require retailers to conduct a range review before delisting.

Q21	Are there any ways in which clauses 18 and 19 could be improved to provide greater certainty and transparency regarding delisting decisions?

97. Clause 18(1)(c) requires a range review by the retailer to be conducted before delisting can take place. There is no transparency required of the range review. Clause 26 requires a range review to be conducted in alignment with principles but at no point is the range review transparent. The range review should be transparent and available to suppliers.

Q22	Will requiring a range review, ahead of any delisting decisions, be an effective way of ensuring fair and transparent delisting decisions?

98. A range review before delisting will only be effective if transparency is applied.

Q23	Does providing six-month notice of delisting fresh fruit and vegetables provide sufficient warning for such suppliers?

99. NZFGC agrees with Horticulture New Zealand that 6 months is sufficient notice for delisting fresh fruit and vegetables. At least six months is required given the seasonality of fresh produce and planting schedules.

Q24	Will there be any issues in complying with the process requirements set out in clause 19?

100. NZFGC queries clause 19(4) and the term ‘promptly’. A category review cycle could be 13-16 weeks so in this cycle is ‘promptly’ 7 days or 2 or 3 weeks?

Q25	Are there any aspects of clauses 18 and 19 which may have unintended consequences?

101. These clauses have no effect when supply agreements can be terminated with 30 days' notice. Instead, there could be a clause that prohibits a retailer from requiring a supplier to pay for any clearance costs.

102. Delisting should reflect the provisions in the Australian Code V2. By this we mean that where a retailer substantially reduces distribution across stores, this has the effect of delisting products in those stores.

103. Retailers in Australia are required to provide advice to the supplier that the supplier can seek a formal review for the delisting decision and that such a review must be conducted within a timeframe set out in the Australian Code.

104. Clause 20 covers funded promotions agreed to by both the supplier and retailer.

Q26	Are there any ways in which clause 20 could be improved

105. NZFGC is pleased to see a provision requiring the retailer who over-orders a promotional product to pay the supplier the difference between the promotional price and the full price for sales of promotional products after the conclusion of the promotion.

106. NZFGC is puzzled by the consultation paper's statement at paragraph 60 that:

> "*Like other promotional activities, investment buying may have benefits to consumers. Any restrictions around such practices must therefore be carefully framed to manage any undesirable impact on consumers if the restrictions result in reducing the frequency of such activity. We are interested in how the restrictions at clause 20 (particularly those described above) might impact current practices regarding investment buying and funded promotions.*"

107. Clause 20(2)(c) of the Code only requires that when investment buying occurs, the promotions taken advantage of must be passed on to consumers. The only type of investment buying which it would discourage therefore is when discounts are not passed on to consumers. It should be incontestable that investment buying without pass through has no benefit to consumers.

108. In the earlier consultation, both retailers supported the Australian Code approach to investment buying. Woolworths further echoed similar concerns about investment buying without pass through:[16]

> "*We believe that investment and forward buying (i.e. retailers over-ordering at supplier promotional wholesale prices for sale later) is a practice that results in an unproductive industry overhead, and is not in the long-term interests of consumers. The practice results in suppliers funding retailers beyond any agreed specific promotional investment (thereby reducing commercial certainty for suppliers), reduces commercial transparency between supplier and retailer, creates manufacturing inefficiencies for suppliers (by resulting in "lumpy" purchasing patterns, which are harder to plan for), and bloated supply chain pipelines (by resulting in retailers storing excess inventory in their network). For this reason, in both the UK and Australian codes, where the retailer over-orders from a supplier at a promotional wholesale price, it must compensate the supplier for any over-ordered groceries*

[16] Woolworths NZ: submission on the Grocery Supply Code of Conduct (July 2022): accessible at https://www.mbie.govt.nz/document-library/search?keywords=grocerycodeofconductsubmission2022grocerysectorrefroms&df=&dt=&submit=Search&sort=desc at Q24.

which it sells at a price higher than the promotional resale price connected to that promotional wholesale price. WWNZ supports a similarly prescriptive approach to investment / forward buying."

109. Most retailers are using a "pay by scan" model which renders this clause of limited or no value. Further, retailers are able to nullify this clause in the Australian environment by saying that the only orders they make are purchase orders. By so doing, the provision is never actually in force because retailers cannot physically order less than what is on their purchase order.

110. Nonetheless, one improvement could provide that "promotionally agreed forecasts" are considered to be an order.

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Q27	Do you have any other concerns regarding investment buying which are not addressed by this draft section of the Code?

111. No, our concerns regarding investment buying have been expressed.

Q28	What effect will clause 20 have on current practice regarding investment buying and funded promotions? Will there be flow-on impacts for retail prices?

112. Please see the responses to preceding questions.

Q29	Instead of the requirements set out in clause 20(2)(c) [paying the supplier the difference between promotional and full price] – would it be better to require retailers to sell any over-ordered product, bought at the supplier's reduced price, at the price listed during the promotional period?

113. NZFGC does not consider this would be an improvement. It would give less flexibility to retailers. It could also have unintended consequences given it is a departure from the Australian Code and UK Code.

Q30	Do you have any other comments on this clause or the practice of investment buying generally?

114. Third parties are unlikely to be able to detect breach of the investment buying provision. The Grocery Commissioner should consider the degree to which it can monitor compliance with this provision with its information gathering powers.

115. Clause 21 covers fresh produce standards and quality specifications.

Q31	Does clause 21 effectively address issues faced by suppliers of fresh fruit and vegetables

116. NZFGC supports comments made by Horticulture New Zealand in its submission on this clause. However, we understand clause 21(8) is copied from the Australian Code and that in the Australian environment this has been shown to be meaningless. The average inventory holding of fresh produce across the system is 8-15 days. A 30-day notice period is therefore of no value and a shorter period, say 7 days, might have some weight.

Q32	Is the 24-hour cut off proposed for accepting fresh produce appropriate? If not, why not?

117. NZFGC aligns with Horticulture New Zealand in considering 24 hours as appropriate given the short shelf-life of fresh fruits and vegetables. After more than 24 hours, damage could occur to the fresh produce that is out of the control of the supplier.

Q33	Is the 48-hour cut off for notifying suppliers of the rejection of fresh produce appropriate? If not, why not?

118. Similarly, NZFGC aligns with Horticulture New Zealand in considering 48 hours as appropriate.

Q34	Should similar protections apply to suppliers of other perishable produce, such as seafood and meat?

119. NZFGC considers that in general, similar protections should apply to suppliers of other perishable and fast moving products, such as seafood and meat.

120. Clause 22 prohibits duress being applied to suppliers for supplying other retailers, Clause 23 relates to prohibiting threats of business disruption and clause 28 provides for suppliers to have freedom of association.

Q35	Will clause 22 be effective in preventing retailers from pressuring suppliers to desist from supplying other parties?

121. Clause 22 is an express prohibition as is clause 23. NZFGC considers this to be adequate noting that a breach of the clause would also likely be a breach of the good faith obligation.

Q36	Will clause 22, 23 and 28 cause any unintended outcomes?

122. Clause 23 is unacceptable if it **allows retailers to threaten a supplier** and disrupt their business if they have "reasonable grounds".

123. Clauses 24 and 25 concern intellectual property and confidential information. Clause 24(1) requires the retailer to respect the intellectual property held by suppliers.

124. If supplier intellectual property has not been respected to date, it is unlikely to be in the future without stronger constraints. In any case, the intention of clause 24(4) is uncertain in relation to relevant actions by the supplier in regard to the retailer's intellectual property rights.

Q37	Are there any ways in which clause 24 and 25 could be improved to adequately address issues relating to suppliers' intellectual property?

125. Clause 24 might usefully include a provision similar to clause 25(3) that requires the retailer to establish and monitor systems to ensure compliance with clauses 24(1) and (3).

126. NZFGC suggests that if a supplier requests a retailer to show how information considered by the supplier to be confidential came into the possession or knowledge of the retailer independently of the supplier, then the retailer must provide that information.

127. The confidential information provision does not meet best practice confidentiality protocols or management of conflicts of interest. Retailers have an inherent position of conflict when they are both customer and competitor of the supplier. It is not normal

commercial practice to provide some types of confidential information which may be provided to a customer, to a competitor, for example information on recipes, cost, prices etc. Disclosure could even raise risks around cartel conduct (suppliers have no choice but to provide information to competitors (retailers) which they would not normally provide to competitors because they have the dual role of customer/reseller).

128. Best practice would require that confidential supplier information should be ringfenced to retail operations and should not be accessible by staff involved with private label operations. There would be protocols around how information would be stored and accessed, and information would not be provided to those reseller personnel who had roles as competitors (in private label).

129. As currently drafted an employee could be deemed to receive information on a 'need to know' basis but still have dual roles. Similarly, there should be internal requirements that all parties receiving confidential information have confirmed that they are complying with the obligations in the Code. We **recommend** specific requirements as normally seen in information protocols, or otherwise simply a 'best practice' reference. For example, clause 25(3) to add the phrase "best practice confidentiality" after the word "monitor".

130. Regardless, consistent with the ability of the Commission under section 181 (monitoring compliance with duties) of the Act, we **recommend** that there be a specific annual certification that the confidentiality provisions have been complied with.

Q38	Will clauses 24 and 25 support greater investment in product development?

131. Experience of breaches with intellectual property and confidentiality to date will likely take some time to be set aside so in the short term, investment may not take flight but in the medium to long term it is the outcome we would be hoping to see.

132. The consultation paper seeks feedback in particular about Taonga and mātaurangi Māori.

Q39	Is there any part of your product, or the production of your product, which holds special cultural significance for you as a supplier? If yes, are you aware of any issues with respect to the supply of your product that may require protection over and above those provided at clause 24 and 25? Do you have any advice for how the Code could address these issues?

133. NZFGC is not technically a supplier and has not had any examples of culturally significant products provided by members however we respect this is an important area and we defer to other submitters or advisers who may be more expert in the area.

134. Clause 26 concerns product ranging, shelf space allocation and range reviews. It requires retailers to publish product ranging principles and shelf space allocation principles. Suppliers must have lead time warning of range reviews. To some extent this happens now. The issue is 'reasonable time' as well as equivalent access to sales purchase data collected by retailers to substantiate statements from the retailer about the relative performance of products in the range or the performance of the suppliers' product from the retailers' perspective.

.Q40	Are there any ways in which clause 26 could be improved, to help ensure greater transparency and consistency of decisions relating to range reviews and shelf allocation?

135. Clause 26 could be improved through the inclusion of a provision that would provide equity in the knowledge available on which ranging decisions were made. The imbalance of knowledge is used as justification for decisions and, if suppliers pay, as a revenue stream for the retailer.

Q41	Do you have any other comments on this clause?

136. The implementation of clause 26 is a significant area of concern. The Australian Code envisaged that the retailers would provide 'hurdle rates' (the minimum rate of return on a project or investment required by a manager or investor) on key transparent metrics to enable the supplier to participate or not. In most cases in the Australian environment, the retailers provide very "general" concepts rather than tangible metrics.

137. We **recommend** that the retailer must not require the supplier to purchase data from the retailer nor create metrics for product ranging, shelf space allocation or range reviews that are not available to the supplier.

138. The range review process must provide adequate time for the supplier to participate in the range reviews outcomes. Suppliers, even local manufacturers may have packaging or ingredient supply chains that are at least 3-6 months in length and often longer. The review process sometimes requires suppliers to purchase these inputs with no certainty that the retailer will range. In a duopoly this creates waste when suppliers are then not ranged or unnecessary cost (eventually passed to the consumer) by the need to air freight supplies and/or employ overtime to meet launch schedules. The usual outcome is that the retailer initially rejects the item. The supplier then has the product "in production" so, in desperation and to save at least some costs, the supplier strikes a new, unfavourable deal. This is a retailer negotiation tactic.

139. We note that retailer sustainability or ethical sourcing policies require air freight to be avoided yet the range review process can force it to be used. As well, during the first Covid lockdown, it became apparent that without airfreight, certain food inputs that were reliant on air freight would not have been available and neither would have the resultant products been available in New Zealand. Policies need to be flexible on these issues.

140. Clause 27 concerns price increases. It sets out the conditions that must apply for the clause to be applied and then requires the retailer to provide the supplier with its response to/view of a request for a price increase within 30 days.

Q42	Will this clause help improve the process for seeking price increases?

141. The clause is flawed because the retailer response clock does not commence until the retailer has all the information it seeks from the supplier. In any event, clause 27(3)(a) is an unreasonably long period (currently proposed as 30-day notice). The retailer information sought could comprise one question a week for months. The statutory timeline should commence as set out in clause 27(2).

142. Clause 27(3) is not present in the Australian Code, and we consider its addition would have adverse effects. It makes the application of the price increase clause more complex, creating uncertainty and the potential for loopholes and delays. NZFGC **recommends** removing clause 27(3). The retailer will still be entitled to request information from the supplier and it is in the supplier's interest to provide information to the retailer so it can make an informed decision.

143. It should be noted that the 30-day period in clause 27(2) is merely to notify the supplier whether it accepts or does not accept the price increase. Negotiations may still need to ensue about the *amount* of the price increase. The 30-day period therefore is just to ensure negotiations at least start within 30 days.

144. In Australia, all suppliers must be offered a supply agreement and, even in the absence of such an agreement, the retailer is required to meet the Australian Code provisions. NZFGC understands that an issue in Australia is Australian retailers could then request (in extremely firm terms or make it a condition in their supply agreements) that a supplier gives an additional 12 weeks' notice (effectively 90 days) of a price increase. As a result, the cumulative time of 30 days plus 90 days becomes a very long timeframe.

145. We **recommend** the 30 day time period is slightly adjusted to 28 days (4 weeks) so that it can be counted in weeks, and that there is an overall timeframe of 42 days (6 weeks). As part of good faith, we expect the retailer would inform suppliers about their decision under clause 27(2) without delay, which may provide more time for negotiations if needed. For example, if the retailer expects negotiations will likely take more than 2 weeks, and has decided earlier than the 28 days that it will accept the price increase but not the amount, then it would be bad faith for the retailer to delay notifying the supplier until the end of the prescribed 28 day period. For more certainty, clause 27(2) could specify the notification must be without delay.

146. We also expect as part of good faith, the retailer would not require an additional notice period before the price increase comes into effect. For example, if the supplier gives 6 weeks' notice for a price increase, and this is accepted by the retailer, then the price increase should come into effect 6 weeks from the date of the supplier's notice, not the date of the retailer's notice of acceptance.

Q43	Is the timeframe for responding to a price increase appropriate? Are there classes of produce which may justify shorter time periods for response?

147. Please our comments above.

Q44	Do you have any other comments on this clause?

148. No, we have no other comments on this clause.

Penalty levels

149. The Act provides for three different tiers of civil penalty levels that might apply for breaches of the legislation applicable to the Code then identifies the relevant tier that is to apply. This is $200,000 for an individual and the greater of $3 million or the value of commercial gain or 3% of annual turnover, for any other case.

150. Maximums are rarely, if ever, applied and in this case a lesser penalty might be considered by either of the duopolies as an irritation rather than a serious impediment to address behavioural change. This takes into account estimated excess profits of $1 million a week across the regulated grocery retailers.

151. NZFGC therefore favours the Tier 1 civil penalty level which provides maximum penalties of $500,000 for an individual and $10 million or three times the value of any commercial gain or 10% of annual turnover. This would be consistent with the maximum penalties for breach of the Australian Code (which are treated as breaches of the Australian Competition and Consumer Act).

Q45	Do you think the maximum penalty is set at a level which will sufficiently deter non-compliance?

152. As noted above, maximums are rarely, if ever, applied and in this case a lesser penalty would not present as a serious impediment to address behavioural change. NZFGC does not believe the maximum penalty is set at a level which will sufficiently deter non-compliance.

Q46	Do you think the maximum penalty level is proportionate to the level of harm which may be caused by non-compliance?

153. No, the impact of harm on a single supplier will be many times greater and is not proportionate.

Q47	Do you think any parts of the Code should attract higher or lower tiers of penalty levels? If so, which parts, and why?

154. No. Penalties are a last resort to action and decisions on application rest with the Courts. They are intended to operate as a deterrent to the intent of Code and this should not be segmented.

Q48	Do you have any other comment on the maximum penalty levels which will apply to breaches of the Code?

155. Breaches of the Code by retailers have the prospect of having a profound effect on both suppliers and consumers and the penalties should be reflective of the imbalance of power between these two affected groups and retailers.

Q49	Will requirements to provide written statements when relying on exceptions improve compliance and transparency in relation to the use of such exceptions?

156. Yes, but it is not a replacement for the Australian Code provisions that in disputes, retailers have the onus to prove exceptions they seek to rely on. Written statements do not address the burden of proof in disputes. Dispute resolution and enforcement is a critical component to the effectiveness of the Code.

157. As discussed in Part A, NZFGC **recommends** the Code is realigned with Australia in providing that in disputes, retailers have the onus to prove exceptions they seek to rely on. The burden of proof has significant practical implications and affects parties' incentives to proactively comply with the Code.

Q50	Will there be any be significant costs, or issues, in complying with these requirements?

158. NZFGC does not consider there will be significant costs or issues in complying with the written statement requirements.

Part C – Other proposals MBIE is consulting on

159. There are some provisions in the Australian Code which are not included in the draft Code.

160. NZFGC considers there is no reason to depart from the Australian Code in including provisions on payments for better positioning of groceries, changes to supply chain procedures, and transfer of intellectual property rights.

Q51	Do you agree with the decision not to include restrictions from the Australian Code relating to payments for shelf allocation?

161. No. Without restrictions for payments and relying only on shelf space allocation principles (in s26(1)(b)), there are no tangible parameters as to the application or content of the principles (bias in the principles that might favour particular products in a range) nor how the principles might be applied. Two alternatives are available for the draft Code and both could be used:

a) replicate the detail from the comparable clause in the Australian Code
b) add requirements around the external approval of the principles, what would be best practice and who might advise on the appropriateness of the principles such as requiring they be submitted to the Grocery Commissioner for assessment of robustness.

Q52	Are you aware of any issues relating to payments for shelf positioning, or allocation, which may require specific protections in the Code, over and above those provided at clause 26?

162. The UK Code prohibits payments for positioning or space unless connected with a Promotion. UK Tesco had implemented a program to arbitrarily charge suppliers for shelf space but this was withdrawn after the Adjudicator argued it went against the principles of the code, if not the letter of the law. Nonetheless, the lack of payments has some risk. Its omission opens up the duopoly to 'auctioning' off shelf space which would be detrimental to small medium suppliers and may also remove/reduce consumer access to unique and innovative products. Products that provided 'health' benefits but had slower velocity on shelf may not be able to 'rent' shelf space. On balance NZFGC **favours** supporting both the disciplines around principles and payments for shelf space.

163. An area that has been frequently and most recently drawn to our attention relates to merchandising – the stacking of shelves being undertaken by a third party on behalf of the product owner. We understand considerable pressure is being applied by some retailers to the retailer taking on this activity for a percentage based fee, there are compelling reasons for some suppliers to maintain responsibility for merchandising their product. It is not clear where in the Code this might be addressed.

Q53	Do you agree with the decision not to include protections from the Australian Code relating to changes in supply chain procedures?

161. The Australian Code relating to supply chains reads:

"(1) The retailer or wholesaler must not directly or indirectly require a supplier to make any material change to supply chain procedures during the period of the grocery supply agreement concerned.

(2) Subclause (1) does not apply if:

(a) the retailer or wholesaler gives the supplier reasonable written notice of the change; or

(b) the retailer or wholesaler compensates the supplier for any net resulting costs, losses or expenses incurred or suffered by the supplier as a direct result of the retailer or wholesaler failing to give reasonable notice of the change.

(3) Paragraph (2)(b) does not prevent a supplier from waiving a right to compensation under that paragraph.
(4) This clause has effect subject to clause 9 (unilateral variation of agreement)."

164. We **recommend** these provisions be included in the New Zealand draft Code in order to provide a level of discipline on the supply chain arrangements.

Q54	Are you aware of any issues relating to changes to supply chain procedures which may require specific protections in the Code, beyond those included at clauses 8 and 9?

165. As noted above, the additional requirements would provide some support for arrangements overall.

Q55	Do you agree with the decisions not to include protections from the Australian Code relating to the transfer of intellectual property rights?

166. No, NZFGC strongly **recommends** there be protections around the transfer of intellectual property rights beyond those in the Australian Code.

Q56	Are you aware of any issues relating to the transfer of intellectual property, beyond those included at clauses 24 and 25?

167. Yes. NZFGC strongly **recommends** there be greater protections around the transfer of intellectual property rights and confidentiality beyond those in clauses 24 and 25.

Q57	Do you have any further feedback on the consultation draft of the Code, in addition to the points you have already raised?

168. No, we have no further feedback on the consultation draft of the Code above the points already raised.

Q58	Are there any other provisions which are included in the Australian Code which may be beneficial in New Zealand

169. Clause 40 of the Australian Code provides obligations to train staff on the Code. The UK Groceries (Supply Chain Practices) Market Investigation Order 2009 similarly provides duties to train staff at Article 8. The New Zealand draft Code does not appear to have an equivalent duty for retailers to train staff.

170. We **recommend** the New Zealand draft Code adopts the Australian provision on the duty of retailers to train staff. We strongly believe this will improve the effectiveness of the Code and be more efficient overall in increasing understanding of the Code. It is important that training obligations flow through to all stores and buying teams to ensure full coverage.

171. In terms of cost, in our view, the retailers can easily comply with the training obligations – and decrease future compliance costs – by simply adding effective training modules to those they would be expected to have in place in relation to other legislation such as the Commerce Act, the Fair Trading Act, Health and Safety at Work Act etc. Self-paced, online training for small business is clear and cost effective if person-to-person training is not possible/available. It is already available from training experts for the likes of food safety competency and in the hospitality sector for bar and serving staff.

Q59	Are there any issues connected with supply of groceries to major retailers which are not addressed by the Code? If so, do you have any suggestions for how they should be addressed?

172. As discussed in the response to Q4, a common and significant issue is the various different charges a supplier may have with a retailer that makes the cost to serve retailers uncertain or even unknown. We **recommend** that steps are taken towards simplifying arrangements to promote transparency and efficiency.

173. Another issue relates to access to data. Retailers collect raw data from their checkouts, loyalty cards, and online sales, and may also obtain other proprietary insights data from credit cards. Suppliers can pay for access to retailer data, which is processed through a third party to produce higher level insights. This data obviously provides valuable information to suppliers, but more importantly retailers often use this data to make decisions and use it in metrics that are benchmarks for their assessments. Currently it is therefore essential to access the retailer's data to properly engage with retailers on some decisions. Even if the supplier obtains the data from another source, the retailer may rely on its own data and if the supplier has not seen the retailer's data, it has no way of properly understanding or engaging with the retailer.

174. Retailers have a monopoly over their own data so naturally, can charge monopoly prices. For example, NZFGC understands that the price of retailer data may be significantly more expensive than data from an independent source and the equivalent in Australia. Purchasing the data may not even be an option for smaller suppliers who cannot afford it. Further, even if retailer data is purchased, there are still layers of data that are not shared and the retailer may disagree with suppliers on the basis of this data which the suppliers do not have access to.

175. There is complete information asymmetry with no real way of validating the representations being made. The issue goes straight to the heart of the issues being discussed around good faith and transparency. These practices could also potentially constitute misuse of substantial market power or potentially unsubstantiated or otherwise misleading representations (although without purchasing the data the supplier has no way of at least making partly informed decisions).

176. As discussed in response to Q41, we **recommend** that the retailer must not require the supplier to purchase data from the retailer nor create metrics for product ranging, shelf space allocation or range reviews that are not available to the supplier. We encourage the Commission and Grocery Commissioner to remain live to this data issue and to take further steps if the issue persists, including considering if the Code should include other provisions to address this issue.

177. As discussed in the Executive Summary, another key issue facing suppliers is the need to conduct multiple product supply negotiations with "Foodstuffs" entities. These take place first with each of the head offices of Foodstuffs North Island and Foodstuffs South Island, often followed by further renegotiation by individual retail outlets under the same banner as the head offices. This adds to transaction costs, increases uncertainty, and significantly leverages their buyer power (all of which is inconsistent with the purpose of the Act). Head office negotiated and agreed terms should prevail across individual stores (while still maintaining the ability of suppliers to choose to deal directly with local retailers, and for suppliers to decide to make local variations). We understand this may be the intent, but this should be clarified in the Code, with plain English guidance from the Grocery Commissioner for clarity.

178. Finally, while we make mention of some personal liability in response to Q37 regarding confidentiality, we recommend that the Code should also give rise to individual liability for deterrent purposes – whether via the Act or the Code.