

Grocery Commissioner Webinar hosted by NZFGC 19 September 2023

Key Messages from the Webinar

Introduction

- The Grocery Supply Code is made under the Grocery Industry Competition Act 2023 (GICA).
- The purpose of the GICA is “To promote competition and efficiency in the grocery industry for the long-term benefit of consumers in New Zealand”.
- In addition to providing for a Grocery Supply Code and Wholesale Access regime, the GICA provides the Commission with wide powers to monitor competition and efficiency in the grocery industry and to address behaviour by participants that is anti-competitive/ harmful to New Zealand consumers.
- Locating the grocery regulator within the Commerce Commission leverages its experience from other regulatory systems and connections with work by the Fair Trading and Competition branches in the grocery area.

Information about the Supply Code

- The Grocery Supply Code is similar to the Australian Food and Grocery Code of Conduct, but they are not the same.
- The Australian Code requires retailers to opt-in, while the New Zealand Grocery Supply Code (**Code**) applies automatically to Woolworths and Foodstuffs who are referred to as “Regulated Grocery Retailers” or RGRs under the GICA. The Code does not apply to retailers who are not RGRs.
- There are some provisions that were not carried over into the New Zealand Code and some provisions that were developed specifically for the New Zealand Code. Please read the New Zealand Code carefully, even if you are familiar with the Australian Code.
- The rules in the Code broadly fall into three categories:
 - The Code requires some behaviours from RGRs including an overarching obligation to act in good faith;
 - The Code prohibits certain conduct completely; and
 - The Code prohibits certain conduct unless it’s agreed to and provided for in the supply agreement and is reasonable in the circumstances.
- In regard to this last category, we emphasise that you do not have to agree to “contract out” of a protection. A factsheet summarising the key features of the Code is available on the Commerce Commission website at <https://comcom.govt.nz/regulated-industries/grocery> You can also find an open letter setting out our expectations for the RGR’s on this page.
- We want to understand what is happening in practice so that we can address patterns of RGR behaviour that might raise concerns, but we cannot give you advice on your individual contract negotiations.
- We encourage you to seek legal advice on your rights under the Code.

Collective discussions

- During the seminar, we suggested that you could discuss issues collectively and with the NZFGC. Raewyn noted there were concerns about breaching the Commerce Act and that further guidance would be needed.

Sections 184-189 of the Grocery Industry Competition Act 2023 provide that regulations can be made to allow for collective bargaining.

In the absence of such regulations being in place, it is important to be mindful of avoiding anti-competitive behaviour. Further information about cartels and collaboration between competitors can be found on our website here:

<https://comcom.govt.nz/business/avoiding-anti-competitive-behaviour/what-is-a-cartel>

Our guidance does not replace legal advice.

If there is interest in establishing a mechanism for collective bargaining we will need to discuss this with MBIE as they would be developing the regulation.

Collation of questions from webinar.

Our responses to the questions at the webinar are set out below. They are based on the provisions in the Code and do not cover matters outside the ambit of the Code. As noted above, you should get your own legal advice if you still have concerns.

Question 1

Fact: The code of conduct in its format allows for retailers to negotiate themselves out of most clauses through an agreement with a Supplier. [REDACTED] himself said at the recent supplier forum the code says. “You can’t do something unless you agree it. But you can if you agree it with us.” This was in reference to Merchandising.

Statement: We as a company have said no to Merchandising and we are facing very direct questions every meeting we have as its clearly a firm agenda for FSNI where the inference is you WILL sign up to this term.

How is the Commissioner going to tackle these key issues with the Retailer in question?

- Clause 16 of the Code prohibits RGRs from requiring a supplier to make a payment towards the costs of their business activity such as merchandising, transport of goods between their distribution centres, amongst other examples. (There are substantially similar restrictions relating to payments as a condition of stocking or listing grocery products – clause 15, and payments for funding promotions – clause 17.)
- Clause 16 does allow the parties to agree to contract out of this protection but there is an added requirement for the RGR to establish that the agreed payment is reasonable in the circumstances, and they must provide suppliers with a written explanation of why they think it is reasonable in the circumstances. Accordingly, simply obtaining the supplier’s agreement is not enough.
- We will be asking the RGRs to explain their approach to these types of negotiations and how they are ensuring that what they are offering is reasonable in the circumstances, including asking them to provide us with copies of their written explanation to the supplier where there has been agreement to make payment towards a RGR’s business activity.

Question 2

(a) Is this type of unilateral change to store classification without notice or debate to the suppliers or consent from the supplier (and/or without modification to the original agreement regarding terms) tenable under the Grocery Act or Code of Contact?

- As noted above, clause 16 prohibits RGRs from requiring a supplier to make a payment towards the costs of their business activities unless the supplier agrees and the RGR has established that the agreed payment is reasonable in the circumstances. RGRs are required to provide suppliers with a written explanation of why they consider the payment is reasonable in the circumstances.

(b) The second concern is that some suppliers feel they were coerced into providing an additional trading term for in store merchandising services conducted by the stores or face delisting – so they reluctantly signed an agreement providing a merchandising fee to maintain the Article Numbers associated with their products. Without these Article Numbers remaining “live” in the retailers’ systems the stores are not able to order the product. Without core ranging the Article Numbers that are still live are optional to the stores. Without either Core Ranging or “Live” Article Numbers essentially the suppliers business with FSNi is finished. These points were amplified in negotiations with FSNi personal and Suppliers signed agreements under duress.

- Clause 18 of the Code covers delisting and establishes that RGRs may only delist a supplier’s product in accordance with any terms set out in the grocery supply agreement and for genuine commercial reasons. Accordingly, simply obtaining the supplier’s agreement is not enough. What amounts to genuine commercial reasons is set out in clause 18(3).
- As noted above clause 16 prohibits merchandising payments unless suppliers contract out of this protection and the agreed payment is reasonable in the circumstances.
- Clause 6 of the Code also requires RGRs to act in good faith and sets out several factors that may be taken into account to determine whether they have acted in good faith. This includes considering whether the trading relationship has been conducted without duress.
- We will be asking the RGRs to explain how they are ensuring what they are proposing is reasonable. In the meantime, we also encourage businesses to get legal advice on their specific circumstances, noting that there are specific provisions in regard to delisting within the Code.

Question 3

If agreements were forced upon suppliers and they have proof there was resistance to the imposition of these terms at the time of negotiations are the contracts valid or void? If the contract is deemed void will any ongoing negotiation be governed by the new Code?

- Under clause 1(2)(b) of Part 1 of Schedule 1 of the GICA, if the Code applies to an existing agreement it does not entitle any person to terminate or cancel the agreement.
- Clause 3 of Part 2 of Schedule 1 provides that RGRs have until 28 March 2024 to offer their suppliers any necessary variations to existing agreements to ensure they are consistent with the Code. After this date terms in existing agreements which amount to contraventions of the Code may give rise to enforcement action by the Commission which may include a pecuniary penalty. Suppliers will also be able to refer a dispute arising from requirements under the Code to the dispute resolution scheme established under Schedule 2 of GICA.
- Clause 6 of the Code requires RGRs to act in good faith in its dealings with suppliers, including in relation to existing grocery supply agreements from 28 September 2023.
- We encourage you to get legal advice on your specific situation.

Question 4

In relation to FSN’s CMT (Centralized Merchandising Term).

(a) What rights do suppliers have to retain their current merchandising arrangements vs transferring over to the CMT model if they have not explicitly agreed to do so in writing with FSN? For clarity we

have not been asked if we would like to join this but informed that it is a requirement that FSN expect suppliers to come into this model and pay the same % to all Banners and Categories regardless of previous levels of merchandising investment, resulting in an increase in total costs.

- As noted above, clause 16 prohibits merchandising payments unless suppliers contract out of this protection and the agreed payment is reasonable in the circumstances.
- As also noted above, clause 6 requires RGRs to act in good faith and sets out several factors that may be taken into account to determine whether they have acted in good faith. This includes considering whether the trading relationship has been conducted without duress.

(b) Will the new Grocery Supplier Agreements that are required in future under the Code supersede the (open term ended) FSN Net Buying Agreement contacts?

- RGRs have until 28 March 2024 to offer their suppliers any necessary variations to ensure existing agreements are consistent with the Code, including the requirements in clause 16 which relate to merchandising fees. After this date the provisions of the Code apply irrespective of what is in the agreement.
- We will be discussing merchandising with RGRs as discussed above but encourage you to get legal advice on your specific situation.

(c) If so, will suppliers be able to renegotiate their terms with FSN to reflect the actual financial situation of being in the NBM and specifically items like the Four Square display term % where no such display program exists or the NWN instore display % term where numbers of displays have decreased materially resulting in a doubling or more of the average cost to suppliers per store?

- Clause 17 prohibits RGRs from charging for the costs of promotions unless suppliers contract out of this protection and the and payment is reasonable in the circumstances.
- We will also be discussing this further with the RGRs.

Question 5

The Foodstuffs North Island's buying team have been subtly threatening deletion if suppliers don't pay the merchandising terms. At the recent FNI supplier meeting they said if a supplier doesn't pay for merchandising now, then the term won't be requested. But this is untrue, as I know of a supplier who was forced to pay 6% terms as they felt they would be deleted if they didn't pay. Can this be reversed?

- There are provisions to prevent the type of delisting threat you are describing.
- As discussed above, the Code includes the following restrictions on RGRs: clause 6 - requirement that RGRs act in good faith (which includes considering whether the trading relationship has been conducted without duress), clause 16 - payments for RGR's business activities (including merchandising fees), and clause 18 - requirements regarding the delisting of products which apply from 28 September 2023 for new agreements. As further discussed above, RGRs have until 28 March 2024 to bring agreements entered into before that date into compliance with the requirements in the Code.
- We encourage suppliers to seek legal advice on their agreements if they have concerns.

Question 6

FSNI continue to tell the suppliers that all stores are 100% on board with all the changes to display, promotional and merch terms and changes, however a lot stores tell us they don't agree at all and in

fact we saw that at the foodies connect last week from the store representatives. It feels like the stores are feeling intimidated to challenge HO like so many of the suppliers. Is this an area that can be investigated further with the stores.

- Yes, it will be important for us to understand what is happening at a store level and it is important that we receive information from suppliers about these kinds of issues so they can be raised with the RGRs.

Question 7

Is the Commissioner going to tell Foodstuffs to cease and desist with these merchandise terms or just advise suppliers of options?

- Before considering any action we would need more information to understand what Foodstuff's is requiring and whether this could be inconsistent with any requirements of the Code.
- We intend to actively monitor compliance with the Code and welcome information from suppliers where they have concerns about compliance.
- GICA provides a range of enforcement options for contraventions or attempted contraventions of the Code and we will consider our response once we have sufficient information to reach a properly considered view.

Question 8

(a) If negotiations have been kicked off with FSSI but not yet landed, is this deemed to be retrospective or not?

(b) In the eyes of the code?

- Under clause 10 of the Code an RGR must not vary a supply agreement with retrospective effect. However, this question seems to be more about the status of ongoing negotiations as the new Code comes into effect rather than a change to an agreement that would apply to a period in the past.
- New agreements entered into from 28 September 2023 onwards must comply with the Code. In the case of agreements made before that date, RGRs have until 28 March 2024 to offer their suppliers variations to ensure the agreements are consistent with the Code
- We encourage you to seek legal advice regarding the negotiation of new agreements or the variation of existing agreements.

Question 9

There are varying reports out of Australia as to how effective the code has been over there. How will you know whether the NZ code is improving the situation for suppliers or not?

- We need to hear from suppliers in order to understand whether the Code is working is working and will be developing different ways to do this, including actively monitoring compliance with the Code.

The Commission is also responsible for reviewing and amending the Code in the future and we will be taking issues suppliers raise regarding the Code into consideration during this process.

Question 10

Will the commission conduct independent audits on Retailer behaviour?

- We have the ability to gather information directly from the RGRs but we also need to hear from suppliers so we can identify issues require further investigation.

Question 11

(a) Why is Alcohol not included in the definition of GICA?

(b) Can a retailer treat an alcohol supplier in a way that doesn't comply with the Code?

- Alcoholic drinks were excluded as part of the development of the GICA and suppliers therefore cannot rely on the RGRs' obligations in the Code in relation to the supply of alcohol. The reason provided for the exclusion was "this maintains a policy focus on minimising alcohol-related harm over promoting competition in the retail alcohol market"¹.
- As we will be monitoring goods and services supplied by RGRs we would welcome information on whether alcohol suppliers are treated differently by RGRs.

Question 12

What powers does the Grocery Commissioner have when it comes to the behaviour of RGRs towards suppliers of alcohol?

- We have broad monitoring and reporting powers that apply to all goods and services supplied by RGRs, including alcohol.

Question 13

Emerging craft brewers and other supplier have reported issues interacting with RGRs. Can they expect the same protections as other suppliers or are they on their own battling the much more powerful retailers still?

- Alcoholic drinks are excluded. We will be monitoring to see if alcohol suppliers are treated differently to suppliers covered by the Code and welcome any information.

Question 14

Defining collaborative negotiation. When does this become Cartel arrangement?

- Thank you for raising this issue. Further information is available here:
<https://comcom.govt.nz/business/avoiding-anti-competitive-behaviour/what-is-a-cartel>

Question 15

(a) Can NZFGC collectively bargain on behalf of suppliers?

- Regulations would need to be developed to enable collective bargaining.

(b) Are there specific provisions or rules around this or can we ask NZFGC to do it on any issue?

¹ see Para 41 https://www.parliament.nz/resource/en-NZ/53SCED_ADV_129934_ED11466/030c0c0b06932f28eae617c7bbba23a4480513bf

- The rules still need to be developed to enable this. We are interested in hearing what sort of arrangement you would be looking for.

Question 16

- (a) Can it be challenged that the new terms are against the Retail price when a supplier can't dictate the Retail price? Only the retailer can determine, set and change that therefore leaving the supplier with no control of their costs.
- (b) How will the code cover price increases where a retailer refuses to accept the price increase knowing that the supplier is unable to not ship to them due to their volume being a majority of their business.
- Clause 28 of the Code includes provisions which address the process of the negotiation of price increases where a RGR has a supply agreement with a supplier. This includes a requirement that the RGR negotiate in good faith. However, the Code does not require the RGR to accept price increases. Our broader monitoring work will be seeking to understand how prices are set at both the wholesale and retail level.

Question 17

Is there any recourse through the GICA or GSC if a supplier is facing factual and real inflationary pressure but a RGR refuses to accept a price increase?

- See our response to question 16.

Question 18

(a) If a competitor is rushing through a sole supply agreement and offering cheap product as well as cash rebates to gain market control and to push the smaller guys out to beat the September 28 deadline.

(b) Can this type of deal be revisited as we are being pushed into a corner to offer a similar deal if not better to keep shelf space, and products on shelf, if we don't agree we will have no homes for our product and will have to downsize our business to survive. This is happening right now and the stores are lapping it up.

- As noted above clause 6 creates an obligation on RGRs to deal with suppliers in good faith. This includes an obligation to avoid unreasonable discrimination or distinction between suppliers. If suppliers have concerns about being discriminated against they should provide information about this to the Commission.

Question 19

The PNSNI Display Coop Agreement states that FSNI will charge for the privilege of being ranged in PNS stores, as shown below. Is this legal?

- Payments for promotions and RGRs' business activities are prohibited by clauses 17 and 16 of the Code unless the suppliers agree to make the payments and they are reasonable in the circumstances We will be asking the RGRs to explain their approach to these types of negotiations and how they are ensuring that what they are offering is reasonable in the circumstances.

QUOTE

*The Store Display Co-op Charge is an amount charged by FSNI to **reflect the aisle shelf ranging** and expected off location display programme, which supports the promotion programme as agreed between the parties.*

END QUOTE

Further, they state that if they don't hear back from us, they will assume we agree to the agreement. Is this legal?

QUOTE

*Can you please sign each document and send them back to NAME OF FSNI STAFF MEMBER by **COB Wednesday 27 September 2023**. If we do not receive the signed documents back, we will work off the assumption that it is agreed to unless we are told otherwise.*

END QUOTE

- The Code sets out requirements for a supply agreement including that they are written and in plain language.
- We encourage you to seek legal advice on this specific situation.