

1 July 2025

Foodstuffs North Island Limited  
35 Landing Drive, Mangere  
Auckland 2022

Attention: [REDACTED]

By email: [REDACTED]

Dear [REDACTED],

### **Warning from the Commerce Commission for non-compliance with good faith dealing and price increase request provisions of the Grocery Supply Code**

1. The Commerce Commission (**Commission**) has completed its investigation into potential breaches of the Grocery Supply Code (**Code**) in relation to Foodstuffs North Island Limited's (**FSNI's**) treatment of a price increase from [REDACTED] (**the supplier**) under the Code.
2. During the investigation, the Commission collected and analysed evidence from FSNI. Following the Commission's consideration of that information, it has reached a view that FSNI has likely breached section 19 of the Grocery Industry Competition Act 2023 (**the Act**) via non-compliance with clauses 6(1) and 28(2) of the Code.
3. We have also reached a view that FSNI's [REDACTED] category manager, [REDACTED], (**the category manager**) involvement in the same breach under section 125(1)(c) via section 148 of the Act justifies issuing them with compliance advice about their personal obligations to comply with the Code. We have set out our reasons for these views below. We note that only a Court can determine whether there has been a contravention of the Act.
4. In this instance, the Commission's view is the appropriate enforcement response is to issue FSNI with a warning, and the category manager who received and managed the price increase request with compliance advice, rather than issuing legal proceedings. That said, we emphasise this was a finely balanced decision, and civil proceedings were seriously contemplated against both FSNI and the category manager.

5. The purpose of this warning is to inform you of the Commission's views on why there has been a likely breach of the Act and to encourage future compliance. Legal action remains available to the Commission in future if the conduct is repeated.

### **Details of the Commission's investigation**

6. The Commission investigated whether FSNI and the category manager had not communicated an outcome to a request for a price increase by the supplier within the 30-day timeframe set by clause 28 of the Code.<sup>1</sup> During the investigation we also considered the conduct of FSNI and the category manager against the good faith obligations set out in clause 6 of the Code.<sup>2</sup>
7. During the investigation, the Commission obtained and considered information supplied by FSNI in document form and at interview. This included:
  - 7.1 copies of emails between the supplier and FSNI employees who received and managed the price increase request, including the category manager;
  - 7.2 materials used by FSNI to inform its category managers and suppliers about the treatment of supplier price increase requests; and
  - 7.3 explanations from FSNI as to its view of the price increase request and associated interactions.

### **Details of the relevant law**

#### **Purpose of the Grocery Supply Code**

8. The purpose of the Code is to promote the purpose of the Act<sup>3</sup> by:
  - 8.1 promoting fair conduct, and prohibiting unfair conduct, between Regulated Grocery Retailers (**RGRs**) and suppliers;
  - 8.2 promoting transparency and certainty about the terms of agreements between regulated grocery retailers and suppliers;
  - 8.3 contributing to a trading environment in the grocery industry that includes a diverse range of suppliers and in which businesses compete effectively; and
  - 8.4 contributing to a trading environment in the grocery industry that consumers and businesses participate in confidently.<sup>4</sup>

#### **Clause 6 – dealing with suppliers in good faith**

9. Clause 6(1) of the Code requires FSNI to deal with suppliers in good faith at all times.

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<sup>1</sup> [Clause 28 Price increases.](#)

<sup>2</sup> [Clause 6 Obligation to deal with suppliers in good faith.](#)

<sup>3</sup> [Section 3 Purpose.](#)

<sup>4</sup> [Section 16 Purpose of grocery supply code.](#)

10. In determining whether dealings have been conducted in good faith, clause 6(3) of the Code provides a non-exhaustive list of factors which may be taken into account, including:
- 10.1 whether FSNI cooperated to achieve the purposes of the relevant grocery supply agreement (including being responsive and communicative with the supplier);<sup>5</sup> and
  - 10.2 whether FSNI has acted arbitrarily or unreasonably.<sup>6</sup>

**Clause 28 - price increase requests**

11. Clause 28 of the Code describes how supplier price increase requests must be handled by FSNI. Relevant to this investigation are the requirements that within 30 days of being informed by the supplier of the price increase, FSNI must, in writing, notify the supplier whether it:
- 11.1 accepts the price increase;<sup>7</sup> or
  - 11.2 accepts an increase in the price of the groceries supplied under the agreement but does not accept the amount of the price increase;<sup>8</sup> or
  - 11.3 does not accept the price increase.<sup>9</sup>
12. Alternatively, the Code provides that if FSNI needs further information from the supplier to make an informed decision about the price increase request, the 30-day period does not start until the supplier has provided that information to FSNI.<sup>10</sup>
13. In the event that FSNI accepts a price increase request, but not the amount of the price increase requested, or rejects the price increase request, suppliers are entitled to enter into good faith negotiations with FSNI in respect of the request.<sup>11</sup>

**Non-compliance with the Code is a contravention under the Act**

14. Section 19 of the Act requires FSNI, as an RGR, to comply with the Code. A failure to comply with the Code makes FSNI potentially liable for a civil liability remedy under the Act (including an order to pay a pecuniary penalty or compensation).<sup>12</sup>

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<sup>5</sup> Clause 6(3)(b).

<sup>6</sup> Clause 6(3)(c).

<sup>7</sup> Clause 28(2)(a).

<sup>8</sup> Clause 28(2)(b).

<sup>9</sup> Clause 28(2)(c).

<sup>10</sup> Clause 28(3)(a).

<sup>11</sup> Clause 28(4)).

<sup>12</sup> Section 124 Civil liability remedies available under this subpart.

## The Commission's view

15. The Commission's view is that there is sufficient evidence to establish that FSNI has likely breached section 19 of the Act via non-compliance with clauses 6(1) and 28(2) of the Code. The reasons for the Commission's view are set out below.

### Key facts established

16. On 16 January 2024, FSNI contacted the supplier in response to an earlier enquiry from the supplier about a vendor transfer request.<sup>13</sup> During this contact, FSNI invited the supplier to complete a *"Supplier Price Adjustment template"* and *"confirm if there is a List price increase/decrease required"*.<sup>14</sup>
17. In the Commission's view, the supplier's same-day completion of the Supplier Price Adjustment template directing an increase in the list price of the goods, is a price increase request for the purposes of clause 28 of the Code. Beyond the invitation to complete the Supplier Price Adjustment template in ways that contemplated a potential increase in the list price, FSNI continued to refer to the request as a price increase request when discussing the request internally, and with the supplier.<sup>15</sup>
18. On 24 January 2024 FSNI's category manager asked the supplier to provide a *"full break down of current list with terms and proposed, along with rationale"*. The supplier provided the requested information later that day.<sup>16</sup>
19. We view this as a request from FSNI for further information to inform its consideration of the price increase request. This request for additional information means the 30-day period to inform the supplier of the outcome of the price increase request did not commence until 24 January 2024.<sup>17</sup> There were no further information requests from FSNI after 24 January 2024.
20. FSNI did not inform the supplier of the outcome to their price increase request within 30 days of this date. The outcome of the price increase request – being acceptance – was not communicated to the supplier until 26 April 2024.<sup>18</sup> This is well outside the 30-day period the outcome had to be communicated within, which expired 30 days after 24 January 2024.

### Our view

21. Rather than deal with the price increase request as required by clause 28 of the Code, FSNI engaged in behaviours which in our view amount to not dealing with the supplier in good faith, under clause 6(1) of the Code.

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<sup>13</sup> We understand the vendor transfer process to involve amending the supplier in FSNI's systems associated with the supply of the grocery items in question.

<sup>14</sup> FSNI employee email to supplier 16 January 2024.

<sup>15</sup> FSNI employee and category manager email exchange with supplier 23 January 2024; FSNI employee and category manager emails to supplier 24 January 2024; Category manager email to their manager 9 February 2024.

<sup>16</sup> FSNI category manager email to supplier 24 January 2024.

<sup>17</sup> Clause 28(3)(a).

<sup>18</sup> FSNI employee email to supplier 26 April 2024.

22. In our view, FSNI did not cooperate with the supplier to achieve the purposes of the relevant grocery supply agreement, and its category manager acted arbitrarily and unreasonably when dealing with the supplier.
23. Our view is based on FSNI's category manager taking the following actions in respect of the price increase request:
- 23.1 telling the supplier they expected that price increase requests would be discussed in advance of application;<sup>19</sup>
  - 23.2 feigning an inability to consider price increase requests due to a category review;<sup>20</sup>
  - 23.3 referring to requirements for price increase requests which are not within the Code, and are contrary to the 30-day period in which outcomes for price increase requests must be communicated;<sup>21</sup>
  - 23.4 directing another FSNI staff member not to make changes after the staff member explained there was no procedural obstacle to implementing the price increase request;<sup>22</sup> and
  - 23.5 telling their manager they were not responding to the supplier's objections to the way the price increase request was being handled.<sup>23</sup>

#### FSNI's response

24. FSNI raised in its communications with the Commission that clause 28 of the Code applies where the supplier informs the retailer, in writing, of an increase in the price of groceries supplied "*under the agreement*", and that it does not contemplate a scenario where the price increase is to take effect for groceries that are to be supplied by another supplier under a different agreement.<sup>24</sup>
25. The argument here is that clause 28 is not engaged in the scenario investigated, as the supplier was asking for the price increase to apply where their grocery items were supplied under a different vendor's Grocery Supply Agreement, as would be the case once a 'vendor transfer' had occurred for the grocery items in question.

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<sup>19</sup> "*You have included a significant list price increase in this change which you hadn't mentioned to me*" (original emphasis) FSNI category manager email to supplier 23 January 2024.

<sup>20</sup> "*I am not currently in a position to review cost increases as the [category] review has commenced*" FSNI category manager email to supplier 23 January 2024.

<sup>21</sup> "*For any list price adjustments, these need to be presented with 12 weeks notice to review prior to implementation date.*" FSNI category manager email to supplier 24 January 2024.

<sup>22</sup> "*We can action list price changes at the same time as vendor changes, we don't need to adhere to the 12 weeks if this is the case.*" FSNI employee email to FSNI category manager 24 January 2024. "*I was referring to the time for me to review the new proposed pricing.*" FSNI category manager email reply 24 January 2024.

<sup>23</sup> "*I haven't responded to this – as far as I'm concerned, I was advised of a cost increase on 23<sup>rd</sup> Jan, and have advised this will take 12 weeks as per our process.*" FSNI category manager email to their manager 9 February 2024.

<sup>24</sup> FSNI Response to Commission 24 July 2024.

### *Our view of FSNI's response*

26. In our view, clause 28 can easily address scenarios like the one involved. If FSNI was genuinely of the view that it could not agree to a price increase, "*because the price increase was not for groceries supplied under the agreement*" it could have simply informed the supplier of this and discharged its duties via clause 28(c). FSNI did not do so.
27. We note that during its interactions with the supplier, FSNI at no time raised procedural concerns with the price increase request being connected to a vendor transfer request. In fact, FSNI invited price increase requests to be made as part of the vendor transfer process, if desired by the supplier.
28. It is only during our investigation that FSNI has identified this technical argument why clause 28 should not apply, which for the reasons set out above, we do not agree with.

### **Outcome of the Commission's findings**

29. Due to the conduct as outlined, the Commission is of the view that FSNI, through the category manager:
  - 29.1 did not treat the supplier in question in good faith at all times as required by clause 6(1) of the Code, leading to a likely contravention of section 19 of the Act; and
  - 29.2 failed to communicate the outcome of price increase request to the supplier within 30 days, as required by clause 28(2) of the Code, leading to a likely contravention of section 19 of the Act.

### *Dealing with suppliers in good faith*

30. Clause 6(3)(b) of the Code requires FSNI to cooperate to achieve the purposes of the relevant grocery supply agreement. FSNI's response to the price increase request does not demonstrate cooperation to facilitate the supply of the supplier's grocery products. Cooperation in this instance would have involved clearly and accurately explaining the process, and working with the supplier to ensure it fully understood FSNI's procedural requirements, so the supplier could meet them.
31. Cooperation also includes being responsive and communicative. FSNI's category manager made an apparently deliberate decision not to respond to the supplier between 24 January 2024 and 9 February 2024, while at the same time acknowledging to their manager that the engagement from the supplier was in respect of a price increase request.
32. Clause 6(3)(c) of the Code also requires FSNI not to act arbitrarily or unreasonably. FSNI's category manager sent the supplier an email which appears to involve actions which may be considered arbitrary or unreasonable. The category manager's stated expectation that list price increases would be discussed with them appears based on personal whim, rather than any reason or system, and the refusal to review the price

increase request due to a category review is not an action that is provided for, or acceptable under the Code.

33. The category manager's rigid application of a timeframe that exceeded the permissible timeframe under clause 28(2) of the Code, with no apparent thought given to the impact this might have on the supplier, and their generally uncooperative approach, means their conduct would likely be considered unreasonable. This is aggravated by the apparent operational capability of FSNI to implement price increases at short notice.
34. The category manager as a representative of FSNI appears to have dealt with the supplier, in respect of its price request, in ways that were arbitrary, unreasonable, and uncooperative. This is likely non-compliance with clause 6(1) of the Code.

#### *Communicating the outcome of price increase requests*

35. The Commission considers that FSNI invited the supplier to confirm whether in completing the Supplier Price Adjustment form they were seeking an increase to the price.
  - 35.1 FSNI called it a price increase request internally on numerous occasions;<sup>25</sup> and
  - 35.2 The supplier used a form supplied by FSNI intended for price increase requests titled 'Supplier Price Adjustment', and which some FSNI staff acknowledged was the appropriate form for price increase requests.<sup>26</sup>
36. FSNI received additional information sought in respect of the price increase request on 24 January 2024. FSNI was required to communicate the outcome of the price increase request by 23 February 2024, but did not do so until 26 April 2024. This is likely non-compliance with clause 28(2) of the Code.

#### **Enforcement action for breaching the Act**

37. Where the Commission considers that a person or business may have breached the Act, there are a range of potential enforcement responses available.
38. Following the investigation and considering all the available information, the Commission has decided to issue a warning to FSNI, rather than issuing civil proceedings.
39. In deciding on the appropriate enforcement response in this case, the Commission has considered the extent of the harm, the seriousness of the conduct, and the public interest.
40. FSNI should be under no misapprehension that we view the circumstances discussed in this letter as serious misconduct. A category manager within FSNI appears to have

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<sup>25</sup> FSNI emails 23 January 2024, 24 January 2024, 8 February 2024 and 9 February 2024.

<sup>26</sup> "Complete the attached SPA (Supplier Price Adjustment) template to ensure the product articles details in our systems are correct. Please confirm if there is a List price increase/decrease required." FSNI employee email to supplier 16 January 2024.

obstructed and delayed a supplier price increase request from being actioned, by taking actions which are clearly contrary to the Code's good faith requirements and the requirements relating to supplier price increase requests.

41. We note FSNI's advice to us that following its enquiries, there were not any other instances of price increase request outcomes managed by the category manager at the relevant time taking more than 30 days to communicate to suppliers.
42. Should we identify further instances of non-compliance with the Code by FSNI, we reserve the right to take further action in relation to this matter, including seeking the imposition of a pecuniary penalty through civil proceedings if appropriate.
43. A court can impose penalties where it finds the law has been broken. Under the Act, non-compliance with clause 6(1) and 28(2) of the Code is subject to the tier 2 maximum penalty under the Act. For an individual this means the maximum penalty is \$200,000, or in any other case the greater of \$3 million and the value of any commercial gain resulting from the contravention; or if that can't be readily ascertained 3% of the company turnover.

#### **Consequences of this Warning**

44. This warning represents the Commission's view that the conduct in which FSNI engaged is likely to have breached the Act and that legal action remains available to the Commission in future if the conduct is repeated.
45. The Commission may draw this warning to the attention of a court in any subsequent proceedings brought by the Commission against FSNI.
46. The Commission may also take this warning into account in the event of continued or repeated similar conduct by FSNI or its category managers.

#### **Publication**

47. This warning is public information and will be published on the case register on the Commission website.
48. The Commission intends to redact some details from the published version of this letter, including personal information, the name of the supplier and category manager, and details of the specific category involved.
49. The Commission will be making public comment about our investigation and conclusions, including issuing a media release, making comment to media or otherwise publicising the outcome (such as on our social media forums).

#### **Further information**

50. The Commission encourages you to regularly review your compliance procedures and policies and seek legal advice about the application of the Act to your business.
51. The Commission has published a series of fact sheets and other resources to help businesses comply with the legislation we enforce. These are available on the

Commission website at [www.comcom.govt.nz](http://www.comcom.govt.nz). We encourage you to visit the Commission website to better understand your obligations and the Commission's role in enforcing the Act.

52. You can also view the Act and other legislation at [www.legislation.co.nz](http://www.legislation.co.nz).

**Review of our decision**

53. You are entitled to request a review of our decision to issue this warning only if you identify relevant material that was not considered as part of our decision. You must request a review within one month of this warning being issued. Any review will be handled in accordance with the Commission's complaints process. Please submit any review request to [REDACTED].

Yours sincerely



Pierre van Heerden

Grocery Commissioner