

# Review of the Grocery Supply Code

## Draft Report, Decisions and Reasons

5 June 2025



## Executive summary

### The Code seeks to deliver benefits for consumers by ensuring a positive trading environment for grocery suppliers

- X1. The Grocery Supply Code (**the Code**), made under the Grocery Industry Competition Act 2023 (**the Act**) is intended to promote long-term benefits for New Zealand consumers.<sup>1</sup> The Code is intended to do this by promoting fair conduct, transparency and certainty in supply agreements and contributing to a trading environment that includes a diverse range of grocery suppliers competing effectively and confidently.<sup>2</sup> In such an environment we would expect to see innovation and investment enhancing the quality and range of grocery products on offer.
- X2. Having an enforceable code of conduct is important because of the vulnerable position some suppliers face when they substantially rely on New Zealand's major supermarkets as their route to market. The level of reliance creates an imbalance in negotiating power and the potential for suppliers to have to take on costs and risks that are better placed with the retailer.

### The Code is early in its implementation, but it is important to identify any key issues now

- X3. The Code, which came into force on 28 September 2023, sets requirements about agreements between regulated grocery retailers (**RGRs**) and grocery suppliers.<sup>3</sup> It also sets requirements regarding the conduct of RGRs when dealing with grocery suppliers.
- X4. Through our interactions with RGRs we have seen evidence of a significant amount of work to implement the Code, train staff as it was introduced and put processes in place to ensure compliance. However, we have received mixed feedback from suppliers.<sup>4</sup>
- X5. We are now in the second year of the Code's implementation and the Act requires the Commission to review the Code by 28 September 2025.

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<sup>1</sup> The first grocery supply code for the purpose of Part 2 of the Act is the code set out in Schedule Two of the Grocery Industry Competition Regulations 2023.

<sup>2</sup> Section 16 of the Act.

<sup>3</sup> Regulated Grocery Retailers in this context are retailers that have grocery supply code obligations, as set out in section 8 of the Act, these are Foodstuffs North Island Limited; Foodstuffs South Island Limited; and Woolworths New Zealand Limited (including all franchises, transacting shareholders and interconnected bodies corporate of the listed companies).

<sup>4</sup> New Zealand Food and Grocery Council submission "Request for views on issues and opportunities to consider within the review" (16 September 2024) at para 1.4  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf).

- X6. We have sought to assess the operation and effectiveness of the Code and whether changes can be made to enable it to better meet its purpose. This includes identifying opportunities to simplify the Code for easier understanding and implementation.
- X7. This report reflects the draft findings of our review so far.

## **We have considered a range of information sources in this review**

- X8. Our draft findings have been informed by sources including:
- X8.1 submissions on the Request for Views published in August 2024;<sup>5</sup>
  - X8.2 the results of the TRA x Commerce Commission Grocery Supplier Survey (**Grocery Supplier Survey**) which received over 560 responses;<sup>6</sup>
  - X8.3 information gathered through our Anonymous Reporting Tool (**ART**), other enquiries, stakeholder engagement; Commission compliance activities and investigations related to the Code; and
  - X8.4 the independent review of the equivalent code in Australia, the new Australian Code, and the Australian Supermarket Inquiry.<sup>7 8 9</sup>
- X9. We encourage all stakeholders to continue to provide feedback, both on this draft report and on their Code implementation experiences generally.

## **We are aware many suppliers are operating under the agreements they had in place prior to the Code**

- X10. The Code envisages that suppliers will benefit from the transparency and certainty of a written agreement that meets certain requirements.<sup>10</sup>
- X11. We are aware that there were thousands of existing suppliers when the Code came into force.<sup>11</sup> Many of these suppliers have not signed agreements that have been offered to them since the Code was introduced. In these circumstances the suppliers may be operating under their pre-existing agreements.

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<sup>5</sup> Commerce Commission “Request for views on issues and opportunities to consider within the review” (1 August 2024) [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0021/360282/Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-1-August-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0021/360282/Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-1-August-2024.pdf)

<sup>6</sup> TRA x Commerce Commission “Grocery Supplier Survey Report” (January 2025)

<sup>7</sup> Emerson, Dr Craig “Food and Grocery Code of Conduct Review 2023–24 - Final Report” <https://treasury.gov.au/publication/p2024-534717-final-report>

<sup>8</sup> Competition and Consumer (Industry Codes—Food and Grocery) Regulations 2024 <https://www.legislation.gov.au/F2024L01651/latest/text>

<sup>9</sup> Australian Competition and Consumer Commission “Supermarkets Inquiry Final Report” (February 2025) [https://www.accc.gov.au/system/files/supermarkets-inquiry\\_1.pdf](https://www.accc.gov.au/system/files/supermarkets-inquiry_1.pdf)

<sup>10</sup> Clauses 7 and 8 of the Code.

<sup>11</sup> Commerce Commission analysis of RGR information.

- X12. While it may be simpler and clearer for all parties if agreements that meet Code requirements can be reached, the protections in the Code apply even if a supplier with an existing agreement has not signed a new agreement.<sup>12</sup> There is no requirement for suppliers to sign an agreement.
- X13. We do not have full visibility of individual circumstances and negotiations and the extent that existing agreements are inconsistent with the Code. Therefore, we cannot conclude what the impact of the current state of agreements is. We do however want to understand why offers are not being accepted.
- X14. We have obtained some feedback through the Grocery Supplier Survey including:
- X14.1 Perceived unfairness: many felt the terms favoured the retailer such as chargebacks, high rebates, and insufficient supplier protections, with limited negotiation space, creating an unequal partnership; and
- X14.2 Complexity: respondents noted the agreements' complexity and legal jargon, often requiring legal advice to understand, with many finding the process overwhelming and that the agreements offered little value.<sup>13</sup>
- X15. We will continue to seek to understand common or underlying issues.
- X16. We encourage suppliers to continue to reach out directly or through the ART to help alert us to concerns about the agreements offered.

## **We have received positive feedback about RGR conduct but we have also heard concerns**

- X17. The Grocery Supplier Survey highlighted a range of experiences dealing with RGRs with each RGR receiving ratings from “very positive” through to “very negative” in response to questions about overall experience, a supplier’s ease of dealing with the RGR and fairness.
- X18. Table A provides the full breakdown of responses, which is summarised in the survey report.<sup>14</sup>

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<sup>12</sup> Refer clause 2 of Schedule 1 of the Grocery Industry Competition Regulations 2023.

<sup>13</sup> TRA x Commerce Commission “Grocery Supplier Survey Report” (January 2025) at p24

<sup>14</sup> Aggregated results are provided in TRA x Commerce Commission “Grocery Supplier Survey Report” (January 2025) at p21.

**Table A: Responses to Grocery Supplier Survey on experience with RGRs in the past year<sup>15</sup>**

	Overall experience with [retailer]			Ease of dealing with [retailer]			Fairness in how [retailer] treats me		
	FSNI	FSSI	WWNZ	FSNI	FSSI	WWNZ	FSNI	FSSI	WWNZ
Very positive	8%	12%	9%	9%	11%	11%	9%	10%	11%
Quite positive	22%	27%	30%	19%	27%	32%	18%	26%	28%
Neutral	25%	33%	29%	24%	31%	26%	28%	36%	25%
Negative	21%	13%	13%	22%	15%	13%	19%	13%	16%
Very negative	14%	4%	6%	15%	6%	7%	16%	4%	8%
Don't know	2%	1%	2%	2%	1%	2%	2%	2%	3%
Did not answer	8%	9%	10%	9%	8%	9%	9%	9%	9%

- X19. Woolworths New Zealand (**WWNZ**) and Foodstuffs South Island (**FSSI**) both received more positive than negative ratings. Foodstuffs North Island (**FSNI**) has the lowest experience ratings, with negative ratings outweighing positive across all these measures.<sup>16</sup>
- X20. Suppliers' feedback is important when considering the objectives of the Code, which include contributing to a trading environment that includes a diverse range of grocery suppliers competing effectively and confidently.
- X21. In addition to the ratings above we have received a rich range of feedback that will be used both in this review and our ongoing work to support better implementation of the Code.

<sup>15</sup> Data from TRA analysis in association with TRA x Commerce Commission "Grocery Supplier Survey Report" (January 2025).

<sup>16</sup> TRA x Commerce Commission "Grocery Supplier Survey Report" (January 2025), p21.

## **We have focused on parts of the Code that provide flexibility to negotiate**

- X22. A key concern in relation to the effectiveness of the Code is the limited ability for suppliers to push back on retailer demands or behaviour because of a fear of damaging relationships and/or losing shelf space. Feedback suggests that, in areas where the Code allows for flexibility to negotiate, the suppliers most in need of the protection of a Code may end up agreeing to whatever is asked of them.
- X23. The impact may be that instead of providing flexibility the exceptions become a baseline for negotiations. In this context, we have looked carefully at the parts of the Code that provide a “carve-out” (i.e. exception) from a requirement where this is provided for in the relevant grocery supply agreement.<sup>17</sup> These clauses relate to unilateral variations, off-setting of payments to suppliers and some of the payments suppliers make to retailers. We have also looked at clause 20 which allows for negotiation regarding excess stock purchased at a promotional price.

## **Payments to retailers are also a priority for attention given the scale and complexity of payments we have observed**

- X24. Information provided to the Commerce Commission (**the Commission**) by RGRs indicates the total annual value of rebates, discounts or payments received from suppliers across all three RGRs to be more than \$5 billion.<sup>18</sup>
- X25. There are a range of descriptors for these various payments. Our analysis suggests that promotional funding, in its various forms, make up almost two-thirds of the value of the payments.<sup>19</sup>
- X26. The Grocery Supplier Survey asked respondents if they had agreed to rebates, discounts or payments in relation to a list of examples. Funding toward scheduled “specials” or price reductions was the most commonly identified from our list (approximately half of respondents).<sup>20</sup> 28% of respondents identified merchandising as something they had agreed a rebate, discount or payment for.<sup>21</sup>
- X27. The Code includes specific clauses related to categories of payments from suppliers to RGRs as shown in Table B.

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<sup>17</sup> An exception to an otherwise prohibited activity.

<sup>18</sup> Commission analysis of information provided by RGRs.

<sup>19</sup> Commission analysis of information provided by RGRs.

<sup>20</sup> TRA x Commerce Commission “Grocery Supplier Survey Report” (January 2025) at p27.

<sup>21</sup> TRA x Commerce Commission “Grocery Supplier Survey Report” (January 2025) at p27.

**Table B: Code clauses restricting payments from suppliers to RGRs**

Type of payment	Clause in the Code	Current setting
Payments for shrinkage <sup>22</sup>	Clause 13	Prohibits payments
Payments for wastage	Clause 14	Allowed subject to requirements, including that payments are provided for in agreements and reasonable in the circumstances
Payments as condition of being a supplier	Clause 15	
Payments for retailer’s business activities*	Clause 16	
Funding promotions	Clause 17	

*\*Merchandising, including setting up displays and stocking shelves, is specifically identified in the Code as a “retailer’s business activity”.*

- X28. Less than a quarter of grocery supplier survey respondents indicated they were satisfied with the value they receive for the payments, rebates and discounts they provide.<sup>23</sup> We have also received specific feedback within submissions and the supplier survey about dissatisfaction with payments made for merchandising.
- X29. We are concerned that the Code is not currently effective in meeting its purpose in relation to these payments. Currently the clauses of the Code that allow for payments to retailers (as well as some other clauses with carve-outs) include obligations on RGRs to provide written explanations describing the reasonableness of the payments in the circumstances<sup>24</sup>. We do not think the requirement for written explanations is well known to suppliers or operating as well as intended.
- X30. Generally, we also consider there would be benefits in relation to the purposes of the Code, including efficiency, transparency and certainty, if the range of payments were simpler, with fewer variants. This would also have co-benefits in relation to our regulatory monitoring.

**We are required to report to the Minister on our findings, but we also propose to use our powers to tighten the Code’s settings**

- X31. This draft report has a dual purpose. It summarises the review’s findings regarding the operation and effectiveness of the Code and our preliminary opinion that the Code should be amended to enable it to better meet its purpose under the Act. It also introduces a new draft Code and sets out our draft decisions and reasons for the proposed changes.

<sup>22</sup> Shrinkage is the loss of grocery products after the retailer has taken possession of them.

<sup>23</sup> TRA x Commerce Commission “Grocery Supplier Survey Report” (January 2025) at p31.

<sup>24</sup> for clause 17 (funding promotions) the explanation must only be provided if requested by a supplier.

## **We will continue to support the implementation of the Code through compliance and enforcement activities**

X32. We have received a significant amount of feedback through this process including a lot of concerns about the processes surrounding ranging and delisting decisions. Our compliance work is ongoing and benefits from your feedback. We encourage suppliers to report details of conduct to us. You can do this directly with the Commission or through the ART.

## **In addition we are responding to calls for more guidance about how the Code’s provisions should operate in practice**

X33. The New Zealand Food and Grocery Council (**NZFGC**) has stated that “like any new regulation, there is uncertainty about how the new protections and obligations apply in practice, and guidance is needed to create a trading environment where businesses can participate confidently”.<sup>25</sup>

X34. The RGRs have also cited the need for guidance.<sup>26, 27</sup>

X35. We expect guidance will develop over time as the Code is tested. but acknowledge the desire for direction more immediately. We have identified some areas we propose as priorities and invite views on whether there are other specific parts of the Code that could benefit from guidance.

X36. We intend to promote the operation and effectiveness of the Code through both guidance and proposed amendments to the Code set out in the table below. Where we reach enforcement decisions relating to breaches of the Code, we also expect these to have an education/deterrent effect.

X37. When making our decisions in this review we have been aware of the burden and cost this may impose on RGRs and we have taken this into account when making our decisions.

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<sup>25</sup> New Zealand Food and Grocery Council submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at para 1.4

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

<sup>26</sup> Woolworths New Zealand submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at para 3.4

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0023/362507/Woolworths-New-Zealand-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0023/362507/Woolworths-New-Zealand-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

<sup>27</sup> Foodstuffs North & South Island submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at para 43

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf)

## Table C: Summary of draft decisions and reasons

Clause	Draft decision	Draft reasons
<b>Obligation to offer to vary existing agreements so that they are consistent with code clause 5</b>	<p>Provide a one-month period (after the new Code comes into force, which is proposed to be six months after decisions are made) for RGRs to offer changes to existing agreements to make them consistent with any new Code requirements.</p> <p>Provide that RGRs will not be in breach after the one-month period if they act in accordance with the Code and certain other criteria are met.</p>	<p>The amendments are required to ensure that retailers are proactive in reviewing the content of GSAs/existing agreements for consistency with the requirements in the new Code and, in the case of inconsistency, offering to vary the GSAs/existing agreements. A RGR that complies with the updated Code requirements in circumstances where their compliance is inconsistent with the GSAs/existing agreements will receive the protections under clause 1(2) of Schedule 1 to the Act. We have proposed amendments to provide a mechanism for RGRs to ensure their GSAs/existing agreements do not breach any of the new Code requirements. This protection is like that provided for in clause 5 of Schedule 1 of the current regulations which apply to the current Code.</p>
<b>Unilateral variation of agreement clause 9</b>	<p>Add requirements to the Code for retailers to keep records in relation to the use of this provision and provide those records to the Commission on request.</p>	<p>The obligation to keep records in relation to each instance of a unilateral variation increases the incentives on RGRs to ensure that the conduct is fair in the circumstances and helps to promote transparency and certainty about the terms of agreements for suppliers.</p> <p>The requirement to provide the records to the Commission on request would also make the process of monitoring compliance with this clause more efficient. It also incentivises retailers to ensure they are acting reasonably when making unilateral variations, in order to reduce the potential for harm occurring.</p>
<b>Transport or logistics services clause 11</b>	<p>Prioritise guidance in relation to requirements for crates.</p>	<p>Hort NZ has raised issues with RGRs requiring growers to use specified support service companies, such as crate suppliers<sup>28</sup>.</p>
<b>Payments to suppliers clauses 12(2) to 12(4)</b>	<p>Add requirements that if a RGR is making set-offs, a supplier is able to obtain an itemised summary of payments and set-offs for the financial quarter.</p>	<p>The ability to request a summary of payments will help to increase transparency for suppliers about what payments and deductions have occurred and the reasons for them. This will increase suppliers' ability to detect incorrect charges and improve overall understanding of the range of payments they are making.</p>

<sup>28</sup> Horticulture New Zealand submission "Submission on review of the Grocery Supply Code" (16 September 2024) at p4

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0018/362502/Horticulture-New-Zealand-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0018/362502/Horticulture-New-Zealand-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

Clause	Draft decision	Draft reasons
	Prioritise development of guidance for this clause.	Guidance will be prioritised to promote the fair use of set-offs.
<b>Payments for wastage</b> clause 14	Change this provision, no longer allowing for payments for wastage while groceries are in the RGR's effective control.	We are concerned that the current provision may be used unfairly given the inherent pressure on suppliers to agree to terms to obtain/maintain ranging with retailers. We also consider RGRs are best placed to manage the risks related to wastage costs while groceries are in their effective control. The example provided by Foodstuffs of supplier's merchandisers causing damage seems a limited circumstance to support the need for the clause as currently written. <sup>29</sup> We consider the purposes of the Code, including prohibiting unfair conduct by RGRs and promoting certainty for suppliers, would be better met with a simpler prohibition on wastage payments. We do not consider products that are recalled for food safety reasons to be included and this could be recovered by the retailer.
<b>Payments as condition of being a supplier</b> clause 15	Add requirements to the Code for retailers to keep records in relation to the use of this provision and provide those records to the Commission on request.	<p>The obligation to keep records in relation to any payments as a condition of being a supplier increases the incentives on RGRs to ensure that the conduct is fair in the circumstances. It helps to promote transparency and certainty about the terms of agreements for suppliers.</p> <p>The requirement to provide the records to the Commission on request would make the process of monitoring compliance with this clause more efficient and increase the RGRs' incentives to comply.</p>

<sup>29</sup> Foodstuffs North & South Island submission "Request for views on issues and opportunities to consider within the review" (16 September 2024) at Schedule One [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf)

Clause	Draft decision	Draft reasons
<b>Payments for retailer's business activities (including merchandising)</b> clause 16	Change this provision, no longer allowing for payments for the activities covered by this clause, which include: (a) a buyer's visit to the supplier: (b) artwork or packaging design: (c) consumer or market research: (d) the opening or refurbishing of a store: (e) hospitality for the retailer's staff: (f) merchandising (for example, stocking shelves and setting up displays): (g) the transport of goods within a retailer's business, which may include transport between distribution centres and retail stores.	By definition, this clause is intended to cover activities undertaken by a retailer in the ordinary course of carrying on their business. Currently payments are only allowed in specific circumstances. Based on what we have heard and seen, we consider that this provision may be used unfairly given the inherent pressure on suppliers to agree to terms to obtain/maintain ranging. <sup>30</sup> RGRs are also best placed to manage these costs and allocating them to the RGRs promotes efficient behaviour. We consider the purposes of the Code, including prohibiting unfair conduct by RGRs and promoting certainty for suppliers, would be better met with a prohibition on such payments.
<b>Funding promotions</b> clause 17	Add requirements to the Code for retailers to keep records in relation to the use of this provision and provide those records to the Commission on request.  Prioritise development of guidance for this clause.	The obligation to keep records in relation to each instance of promotional funding increases the incentives on RGRs to ensure that the conduct is fair in the circumstances. It also helps to promote transparency and certainty about the terms of agreements for suppliers.  The requirement to provide the records to the Commission on request would make the process of monitoring compliance with this clause more efficient and increase the RGRs' incentives to comply.  The prioritisation of guidance seeks to enhance certainty regarding what conduct is allowed.
<b>Funded promotions</b> clauses 20(2) to (3)	Clause to be amended to require retailers to pay suppliers the difference in price for any products bought from suppliers at a promotional price but not sold to consumers at the promotional price.	We consider that the current approach of requiring an agreement between retailers and suppliers on what happens to additional stock not sold during a promotional period is likely ineffective given the inherent pressure on suppliers to agree to terms to obtain/maintain ranging with retailers.

<sup>30</sup> "Anonymous C" submission "Request for views on issues and opportunities to consider within the review" (16 August 2024) at para 6

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0030/362496/Anonymous-C-Submission-on-the-Review-of-the-Grocery-Review-Code-Request-for-Views-paper-16-August-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0030/362496/Anonymous-C-Submission-on-the-Review-of-the-Grocery-Review-Code-Request-for-Views-paper-16-August-2024.pdf).

Clause	Draft decision	Draft reasons
		During consultation on the draft Code in 2023 Foodstuffs (FSNI and FSSI) submitted that investment buying (ordering excess stock at a promotional price) is a key tool in the current environment of frequent promotions to enable Foodstuffs' members to achieve the best cost prices and ultimately lower prices for customers. , <sup>31</sup> However, the level of saving passed on to the consumer is not transparent under this practice. We consider that the purposes of the Code would be better met if suppliers are paid the difference for stock purchased but not sold at a promotional price.
<b>Unduly hindering or obstructing supply to competitors</b> clause 22	Remove “to competitors” from the title of this clause	We do not consider that the words “to competitors” properly reflects the intended and appropriate application of that clause. The clause was introduced to ensure that suppliers are free to make decisions that are in their commercial interest, as well as to ensure that RGRs are not using market power to weaken the wholesale supply of groceries. There is a particular risk that RGRs may engage in conduct with the purpose, effect, or likely effect of unduly hindering or obstructing a supplier from supplying groceries to their competitors. There is also a broader risk that RGRs may engage in conduct that unduly hinders or obstructs suppliers supplying parties other than their own competitors. Consistent with the existing text of the clause, which refers to “unduly hindering or obstructing a supplier from supplying to any other party”, we consider the prohibition in clause 22 is intended to cover such conduct.
<b>New provision - Retaliation</b> ( clause 30)	Add new clauses similar to those included in the recently made Australian code, explicitly prohibiting retaliation in response to suppliers exercising rights under the Code.	To expressly prohibit retaliatory behaviour that would discourage use of the Code.

X38. Some minor changes to improve the readability of the Code have also been included as identified in Attachment B.

X39. All proposed changes to the Code are identified in Attachment C.

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<sup>31</sup> Foodstuffs North Island Limited and Foodstuffs South Island Limited, together (Foodstuffs) Consultation on New Zealand Grocery Supply Code of Conduct (July 2023) at page 13 <https://www.mbie.govt.nz/dmsdocument/27426-foodstuffs-2023-submission-on-draft-grocery-supply-code-of-conduct>.

## **We plan to implement Code amendments through a new Code made by determination, and to provide a transition period of six months**

X40. The current Code was made by Order in Council, but the Act enables future codes to be made by the Commission via determination. Alongside this draft report we present a new draft Code. We propose allowing a period of six months from when we make the new final Code before any Code changes come into effect. As noted in Table C, our draft decision is also to add a requirement in clause 5 of the Code for RGRs to offer to vary existing agreements so they are consistent with the Code within one month after the new Code comes into effect. We consider one month to be sufficient time since RGRs will have had six months to prepare the communications making those offers.

## **The timing of the decisions on penalties**

X41. The penalties that apply to contraventions of the Code will continue to be determined by way of regulations by Order in Council. We must consult on recommendations for these penalties as part of the draft determination.<sup>32</sup> The Minister then has a role in determining how to take forward our recommendations. Our draft decisions in relation to penalties are to recommend retaining the current penalties that apply to the Code and recommending a Tier 2 penalty be set for contraventions of the proposed new provisions for retaliation.

X42. The Commission will work with MBIE to ensure the decision-making on penalties is as efficient as possible. As noted above we propose a transition period of six months for the changes to the Code to take effect. We therefore anticipate that the new regulations will be made within this six-month period and ideally soon after the new Code has been made.

X43. The first Code was made by the Governor-General, by Order in Council made on the recommendation of the Minister, in accordance with clause 4 of Schedule 1 of the Act. Under clause 5 of Schedule 1, the first Code made under clause 4 is revoked as soon as a determination made by the Commission under section 12(1)(a) comes into force.

X44. It follows that if the Commission makes a determination, this will involve a revocation of the first Code.

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<sup>32</sup> Section 13(2) of the Act.

## **Other concerns have been raised that we will consider over time or highlight to the Minister as applicable**

X45. Where concerns have been raised that seek solutions outside of the scope of our powers, we propose to highlight this to the Minister as part of our final report. Where they sit within our current powers, we have sought to identify key concerns for immediate action as identified in the table above and record other areas to support further information gathering and prioritisation over time.

## **Your views are important to help further inform our assessment and to determine whether the proposed changes are necessary and desirable**

- X46. We invite submissions on this report which includes our draft decisions and reasons for changes to the Code, as well as the new draft Code. We would also welcome alternative proposals to address the concerns that we have identified. We can work with you to determine which parts (if any) of your submission are published.
- X47. Submissions should be provided to us either via email or an online form available on our website at <https://comcom.govt.nz/regulated-industries/grocery/review-of-the-grocery-supply-code>. Please email submissions to [grocery.regulation@comcom.govt.nz](mailto:grocery.regulation@comcom.govt.nz) with the subject line “Submission: Grocery Supply Code Review”.
- X48. If you would like to put forward views anonymously you can do this through the Anonymous Reporting Tool (**ART**) at <https://report.whistleb.com/en/comcom-grocery>. These views will be summarised and considered as part of the review report. Please include the words “supply code review” within your anonymous report and “for final report” (or similar), in which case we will summarise your views (with no identifying features) in the final report.

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## Associated documents

Publication date	Reference	Title
1 August 2024	978-1-991287-61-8	<a href="#">Request for views on Issues and opportunities to consider within the review</a>
5 June 2025	n/a	<a href="#">TRA X Commerce Commission Grocery Supplier Survey</a>

## Glossary

Term/Abbreviation	Definition
<b>Act</b>	Grocery Industry Competition Act 2023
<b>ART</b>	The Commission’s Anonymous Reporting Tool
<b>Commission</b>	Commerce Commission
<b>Code</b>	Grocery supply code provided for by Part 2 of the Act, currently the “Grocery Supply Code 2023” located in Schedule 2 of the Grocery Industry Competition Regulations 2023
<b>Fresh produce</b>	refers to products such as fruit, vegetables and mushrooms
<b>Groceries</b>	Defined in the Act as goods in any of the following categories: fresh produce; meat, seafood or meat substitutes; dairy products; bakery products; chilled or frozen food; pantry goods or dry goods; manufacturer-packaged food; non-alcoholic drinks; personal care products; household consumables; and pet care products.
<b>Grocery supply agreement (GSA)</b>	Defined in the Code as having the same meaning that <b>supply agreement</b> has in <a href="#">section 17</a> of the Act - an agreement with a supplier; in the context of the Code this would be an agreement with a supplier in connection with the supply of groceries.
<b>FSNI</b>	Foodstuffs North Island Limited
<b>FSSI</b>	Foodstuffs South Island Limited
<b>MBIE</b>	Ministry of Business, Innovation and Employment
<b>Minister</b>	Associate Minister of Commerce and Consumer Affairs
<b>NZFGC</b>	New Zealand Food & Grocery Council
<b>Private label</b>	Also known as home brands, own brands, store brands or generic products. These are products that are manufactured for sale under a retailer’s brand.
<b>Promotion</b>	Defined in the Code as <ul style="list-style-type: none"> <li>(a) any offer for sale (whether or not accompanied by some other benefit to a customer)— <ul style="list-style-type: none"> <li>(i) at an introductory or reduced price, or involving non-standard sales activity; and</li> <li>(ii) as agreed between a retailer and a supplier; and</li> <li>(iii) that is intended to last only for a specified period; or</li> </ul> </li> <li>(b) any advertising or other in-store or online marketing activity (including a giveaway or an in-store product placement or promotional display)— <ul style="list-style-type: none"> <li>(i) as agreed between a retailer and a supplier; and</li> <li>(ii) that is intended to last only for a specified period</li> </ul> </li> </ul>
<b>Request for views paper</b>	The request for views on issues and opportunities to consider within the review published on 1 August 2024

<b>RGR</b>	Regulated Grocery Retailer. Currently defined in section 8 of the Act as Foodstuffs North Island Limited; Foodstuffs South Island Limited; and Woolworths New Zealand Limited (including all franchises, transacting shareholders and interconnected bodies corporate of the listed companies).
<b>Wastage</b>	Defined in the Code as groceries that are unfit for sale
<b>WWNZ</b>	Woolworths New Zealand Limited

# Chapter 1: Introduction

## Review of the grocery supply code

- 1.1 The Grocery Industry Competition Act 2023 (**the Act**) requires the Commerce Commission (**the Commission**) to review the Grocery Supply Code (**the Code**) within two years of the Code coming into force and to report to the Minister as soon as practicable after completing the review.<sup>33</sup>
- 1.2 The purpose of the review, as set out in Section 20(4) of the Act is to:
  - 1.2.1 Assess the operation and effectiveness of the Code; and
  - 1.2.2 Assess whether the Code should be amended, revoked or replaced.
- 1.3 We are now in the second year of the Code’s implementation and this document reflects the draft findings of our review so far.

## This paper

- 1.4 This draft report has a dual purpose. It describes our review and our preliminary view that the Code should be amended to enable it to better meet its purpose under the Act. It also sets out our draft decisions and reasons for the proposed changes and is accompanied by a new draft Code.

## We invite submissions

- 1.5 We invite submissions and feedback on this draft report and the new draft Code, as well as the reasons contained in the report for the amendments proposed. We would also welcome alternative proposals to address the concerns that we have identified. Submissions are due by **5pm Friday 18 July 2025**.
- 1.6 Submissions should be provided as an electronic copy in an accessible form. Please email submissions to [grocery.regulation@comcom.govt.nz](mailto:grocery.regulation@comcom.govt.nz) with the subject line “Submission: Grocery Supply Code Review”.
- 1.7 We acknowledge the sensitive nature of the matters covered by the Code and that some submitters may prefer to provide their views confidentially. There are several ways to do this.
- 1.8 If you wish to provide commercially sensitive information in your submission, we request that you provide confidential and public versions of your submission.
- 1.9 When including commercially sensitive or confidential information in your submission, we offer the following guidance:

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<sup>33</sup> Section 20 of the Act.

- 1.9.1 please provide a clearly labelled confidential version and public version;
  - 1.9.2 please provide reasons alongside any information in the confidential version as to why it is commercially sensitive or confidential information; and
  - 1.9.3 the responsibility for ensuring confidential information is not included in a public version of a submission rests entirely with the party making the submission.
- 1.10 We intend to publish all public versions of submissions received on our website.
  - 1.11 If you would like to meet to provide feedback, which we can summarise and publish without disclosing your identity, please contact [grocery.regulation@comcom.govt.nz](mailto:grocery.regulation@comcom.govt.nz).
  - 1.12 If you would like to put forward views anonymously you can do this through the Anonymous Reporting Tool (**ART**) at this web address <https://report.whistleb.com/en/comcom-grocery> . These views will be summarised and considered as part of the review report. Please include the words “grocery supply code review” within your anonymous report and “for final report”. If you include these words (or similar) we will summarise your views (with no identifying features) in the final report.
  - 1.13 If we consider disclosure of information for which confidentiality is claimed to be in the public interest, we will consult with the party that provided the information before any decision on the public disclosure of that information is made.
  - 1.14 A two-week cross-submission period will occur shortly after submissions close.

## Next steps

- 1.15 Following the submission and cross-submission periods we will develop a final report on the review which will be submitted to the Minister no later than 28 September 2025 and published as soon as practicable.
- 1.16 Subject to feedback in submissions, we plan to incorporate our final Decisions and Reasons within that report and publish a new Code. We propose a transition period of six months for the changes to the Code to take effect. Decisions on penalties are not within the scope of the Commission’s powers and will be determined by way of regulations by Order in Council. We will work closely with MBIE and provide updates to stakeholders regarding timeframes for the regulations.
- 1.17 We have also signalled areas where we intend to develop guidance. We seek feedback on the desire to have input into this process, for example through a workshop and/or other forms of engagement.
- 1.18 Other actions identified as part of the review will be considered over a longer term.

## Chapter 2: Context for the Code Review

### Background

- 2.1 The Code is secondary legislation provided for by Part 2 of the Act and was developed in response to recommendation six of the Market Study into the Grocery Retail Sector.<sup>34</sup>
- 2.2 The purpose of the Code is to promote the purpose of the Act, which is to promote competition and efficiency in the grocery industry for the long-term benefit of consumers in New Zealand (the overall purpose of the Act).<sup>35</sup>
- 2.3 The purpose statement at section 16 of the Act sets out that the Code will do this by:
  - 2.3.1 contributing to a trading environment-;
    - 2.3.1.1 that includes a diverse range of suppliers;
    - 2.3.1.2 where businesses compete effectively; and
    - 2.3.1.3 in which consumers and businesses participate confidently;
  - 2.3.2 prohibiting unfair conduct between regulated grocery retailers (RGRs) and suppliers; and
  - 2.3.3 promoting;
    - 2.3.3.1 fair conduct between RGRs and suppliers; and
    - 2.3.3.2 transparency and certainty about the terms of agreements between RGRs and suppliers.
- 2.4 The Act defines the RGRs that have supply code obligations and includes provisions for the Minister to recommend designating other RGRs. The grocery retailers that currently have obligations under the Code are Foodstuffs North Island, Foodstuffs South Island, Woolworths New Zealand and their respective related parties<sup>36</sup>.

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<sup>34</sup> Commerce Commission “Market Study into the retail grocery sector – final report” (8 March 2022) at p. 413, [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf). Market Study into the retail grocery sector, Commerce Commission March 2022

<sup>35</sup> Section 16 of the Act

<sup>36</sup> Section 8 of the Act

- 2.5 The Act also sets out that the Code may contain any provisions that are necessary or desirable to promote its purpose in connection with the supply of groceries. This includes regulating or prohibiting any conduct in connection with a RGR and specifying any requirements about the content or form of a supply agreement.<sup>37</sup> A full description of the permitted content of the Code is provided in Appendix A.
- 2.6 The first Code was developed by MBIE. Parallel to the development of the Act an initial consultation was held in July 2022 seeking feedback on the design of a grocery supply code of conduct.<sup>38</sup> In June 2023 when the content of the Act was largely confirmed (prior to its assent) a further consultation sought views on a draft code largely modelled on the Australian equivalent that was in place at that time.<sup>39 40</sup>
- 2.7 The Code, which is set out in Schedule 2 of the Grocery Industry Competition Regulations 2023 and made by an Order in Council, came into force on 28 September 2023.<sup>41</sup>
- 2.8 The Code is divided into four parts:
- 2.8.1 Preliminary;
  - 2.8.2 Good faith;
  - 2.8.3 Grocery supply agreements; and
  - 2.8.4 Conduct generally.
- 2.9 A feature of the Code is that it requires grocery supply agreements (**GSA**s) to be made in writing, covering certain matters. This is a significant change in some instances, for example where agreements were only verbal.
- 2.10 The Commission has multiple responsibilities in relation to the Code including enforcement powers, the requirement to review the Code and the ability to amend, revoke and replace the Code via a determination.<sup>42</sup> Given the initial Code was made by Order in Council any changes to the status quo by the Commission will require the making of a new code.

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<sup>37</sup>Section 17 of the Act.

<sup>38</sup> Ministry of Business Innovation and Employment “New Zealand Grocery Code of Conduct Consultation” (August 2022) <https://www.mbie.govt.nz/dmsdocument/22647-new-zealand-grocery-code-of-conduct-consultation-paper>

<sup>39</sup> Ministry of Business Innovation and Employment “Exposure draft - New Zealand Grocery Supply Code of Conduct” (June 2023) <https://www.mbie.govt.nz/dmsdocument/26803-consultation-paper-exposure-draft-grocery-supply-code-of-conduct>.

<sup>40</sup> Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015 <https://www.legislation.gov.au/F2015L00242/latest/text> , the Australian Code has recently been re-made, which we will discuss later in this report.

<sup>41</sup> [Schedule 2 of the Act, Grocery Supply Code](#)

<sup>42</sup> Under clause 5 of Schedule 1 of the Act the first Code is revoked as soon as the Commission makes a determination under s12(1)(a) of the Act to replace the first Code.

## Process of the review

- 2.11 As noted in the introduction of this report, the Act requires the Commission to review the Code within two years after coming into force and to report to the Minister as soon as practicable after completing the review.<sup>43</sup>
- 2.12 The purpose of the review, as set out in Section 20(4) of the Act is to:
  - 2.12.1 Assess the operation and effectiveness of the Code; and
  - 2.12.2 Assess whether the Code should be amended, revoked or replaced .

## Request for views

- 2.13 On 1 August 2024 the review was launched and the Commission published a Request for Views paper.<sup>44</sup>
- 2.14 The request for views sought feedback on whether the Code is effective in relation to its purpose, issues that are impacting the Code’s operation and effectiveness and opportunities to improve.
- 2.15 To guide feedback the purpose was separated into the following series of objectives:
  - 2.15.1 Promote the purpose of the Act;<sup>45</sup>
  - 2.15.2 Promote fair conduct between RGRs and suppliers;
  - 2.15.3 Prohibit unfair conduct between RGRs and suppliers;<sup>46</sup>
  - 2.15.4 Promote transparency about the terms of agreement between RGRs and suppliers;<sup>47</sup>
  - 2.15.5 Promote certainty about the terms of agreement between RGRs and suppliers;<sup>48</sup>
  - 2.15.6 Contribute to a trading environment in which businesses compete effectively;<sup>49</sup>

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<sup>43</sup> Section 20 of GICA

<sup>44</sup> Commerce Commission “Request for views on issues and opportunities to consider within the review” (August 2024) [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0021/360282/Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-1-August-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0021/360282/Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-1-August-2024.pdf)

<sup>45</sup> The purpose of the Act under section 3 is to promote competition and efficiency in the grocery industry for the long-term benefit of consumers in New Zealand.

<sup>46</sup> Section 16(a) of the Act

<sup>47</sup> Section 16(b) of the Act

<sup>48</sup> Section 16(b) of the Act

<sup>49</sup> Section 16(c) of the Act

- 2.15.7 Contribute to a trading environment where consumers and businesses participate confidently;<sup>50</sup> and
- 2.15.8 Contribute to a trading environment that includes a diverse range of suppliers.<sup>51</sup>
- 2.16 The request for views process sought stakeholder submissions between 1 August and 16 September 2024. Submissions were published on the Commission’s website on 18 September and cross-submissions were requested by 11 October 2024 (this period included an extension from an original deadline of 30 September).<sup>52</sup>
- 2.17 Submissions were received from 17 parties. Two of these were received through the ART, five of the other submissions have been published anonymously. Goulter’s Vinegar Products Limited, Brewers Association of New Zealand, New Zealand Specialist Cheesemakers Association, New Zealand Winegrowers and Retail New Zealand provided submissions. Edgecumbe Supermarket Ltd provided a cross-submission only. Foodstuffs North Island and Foodstuffs South Island (**Foodstuffs**), Horticulture New Zealand (**Hort NZ**), NZFGC and WWNZ provided both submissions and cross-submissions.
- 2.18 Submissions are available at [this link](#) and discussed further within this report.

## TRA x Commerce Commission Grocery Supplier Survey

- 2.19 The review of the Code was one of the drivers for the online supplier survey undertaken between 14 November and 2 December 2024 (**Grocery Supplier Survey**). While the survey also sought to inform other grocery-related projects, its objectives included to:
- 2.19.1 Understand suppliers' recent interactions with RGRs;
- 2.19.2 Evaluate suppliers' awareness of the Code, the Grocery Industry Dispute Resolution Scheme, and the Commission's ART; and
- 2.19.3 Gather feedback on the GSAs issued over the past year.
- 2.20 An email with a link to the survey was sent to over 4000 grocery supplier contacts obtained from RGRs via a statutory notice.
- 2.21 562 participants completed the survey. Results from the survey are available here <https://comcom.govt.nz/regulated-industries/grocery/information-for-suppliers> and discussed further within this report.

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<sup>50</sup> Section 16(c)(i) of the Act

<sup>51</sup> Section 16(c)(ii) of the Act

<sup>52</sup> Commerce Commission “Review of the Grocery Supply Code” <https://comcom.govt.nz/regulated-industries/grocery/review-of-the-grocery-supply-code#projecttab>

## Developments in Australia

- 2.22 Issues central to the content of the New Zealand Code have also been considered in Australia within the Independent Review of the Food and Grocery Code of Conduct (2024), the Australian Treasury’s subsequent development of a mandatory code as set out in the Competition and Consumer (Industry Codes—Food and Grocery) Regulations 2024 (**Australian mandatory Code**) and the Australian Competition and Consumer Commission (**ACCC**) Supermarket Inquiry (2025).<sup>53 54 55.</sup>
- 2.23 These developments are relevant as the New Zealand Code was modelled on the Australian Food and Grocery Code of Conduct that was in place at that time.<sup>56.</sup>
- 2.24 We note that in its response to the Request for Views, Foodstuffs submitted that it was important to maintain alignment with the Australian Code.<sup>57</sup> We note this submission was made before changes to the Australian Code were confirmed.
- 2.25 Changes and recommendations from the Australian processes are discussed later in this report.

## Other information considered

- 2.26 In addition to the inputs described above, insights from the following information sources were considered in this review:
- 2.26.1 The 2022 Market Study into the Grocery Retail Sector;<sup>58</sup>
- 2.26.2 Material related to the development of the Act and the Code;
- 2.26.3 Relevant information obtained as part of the current Wholesale Supply Inquiry under s55 of the Act;<sup>59</sup>

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<sup>53</sup>The Australian Treasury "Independent Review of the Food and Grocery Code of Conduct Final Report" (June 2024)

<https://treasury.gov.au/sites/default/files/2024-06/p2024-534717-final-report.pdf>

<sup>54</sup> Competition and Consumer (Industry Codes—Food and Grocery) Regulations 2024

<https://www.legislation.gov.au/F2024L01651/latest/text>

<sup>55</sup> ACCC “Supermarkets Inquiry Final Report” (February 2025)

[https://www.accc.gov.au/system/files/supermarkets-inquiry\\_1.pdf](https://www.accc.gov.au/system/files/supermarkets-inquiry_1.pdf)

<sup>56</sup> Competition and Consumer (Industry Codes—Food and Grocery) Regulations 2024

<https://www.legislation.gov.au/F2024L01651/latest/text>

<sup>57</sup> Foodstuffs North & South Island submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at para 9

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf)

<sup>58</sup> Commerce Commission “Market study into the retail grocery sector” (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](https://comcom.govt.nz/_data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf)

<sup>59</sup> Refer s55 of the Act

- 2.26.4 Information provided during the merger clearance process for the proposed Foodstuffs North Island/ South Island Merger;
- 2.26.5 Other enquiries received from suppliers, including through the ART;
- 2.26.6 Questions/ feedback received during engagements with suppliers in 2024 including webinars;
- 2.26.7 Discussions with the RGRs; and
- 2.26.8 Commission compliance activities and investigations related to the Code.

## Chapter 3: Assessment of the operation and effectiveness of the Code and draft decisions

### Context

#### Expectations for RGRs

- 3.1 When the Code was first implemented in September 2023 the Commission published an open letter setting out expectations for the RGRs in relation to it, including:
  - 3.1.1 Publicly committing to the Code and its objectives;
  - 3.1.2 Ensuring that all relevant staff and associated parties are aware of the Code and are properly trained on it;
  - 3.1.3 Communicating the Code to suppliers, including what changes they can expect and how to raise issues;
  - 3.1.4 Setting up systems and processes to capture supplier feedback, including potential breaches of the Code;
  - 3.1.5 Ensuring that the RGR has appropriate accountability and resourcing within the business to implement the Code successfully;
  - 3.1.6 Publicly reporting on compliance with the Code on a regular basis; and
  - 3.1.7 Engaging constructively with the disputes resolution service once it is established.<sup>60</sup>

#### Commission Activities

- 3.2 The Commission sought to support implementation by:
  - 3.2.1 releasing a factsheet about the Code in September 2023 and a checklist for suppliers in February 2024;<sup>61 62</sup>

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<sup>60</sup> Commerce Commission “Open letter to the grocery sector, introduction to the Grocery Supply Code” (28 September 2024) at para 14-14.7

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0026/328355/Open-letter-to-the-grocery-sector-Introduction-of-the-Grocery-Supply-Code-14-September-2023.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0026/328355/Open-letter-to-the-grocery-sector-Introduction-of-the-Grocery-Supply-Code-14-September-2023.pdf)

<sup>61</sup> Commerce Commission “Fact Sheet: The Grocery Supply Code” (28 September 2024)

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0022/329710/Commerce-Commission-Grocery-supply-code-factsheet-28-September-2023.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0022/329710/Commerce-Commission-Grocery-supply-code-factsheet-28-September-2023.pdf)

<sup>62</sup> Commerce Commission “Grocery Supply Code Checklist for Suppliers” (29 February 2024)

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0025/344950/Grocery-Supply-Code-Checklist-for-Suppliers-29-Feb-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0025/344950/Grocery-Supply-Code-Checklist-for-Suppliers-29-Feb-2024.pdf)

- 3.2.2 presenting at webinars hosted by NZFGC and HortNZ;<sup>63 64</sup>
  - 3.2.3 engaging with each of the RGRs to understand their approach to the new obligations;
  - 3.2.4 providing feedback on template GSAs developed by each RGR;<sup>65</sup>
  - 3.2.5 undertaking a compliance monitoring project to assess RGR compliance against their obligations surrounding range reviews, including an assessment of the end-to-end process for a completed review of a category;
  - 3.2.6 establishing the ART to encourage reporting of concerns about conduct;
  - 3.2.7 undertaking the grocery supplier survey described in Chapter 2; and
  - 3.2.8 responding to concerns reported through the ART or reported directly to the Commission, with investigations currently underway.
- 3.3 The Commission has encouraged suppliers to consider the new GSAs issued by RGRs carefully before agreeing to terms. There is no obligation on suppliers to sign agreements.
- 3.4 The Commission has also sought to establish connections with Māori businesses that supply grocery products and will be seeking their further input in relation to the draft Code and our ongoing stewardship role.
- 3.5 The Commission acknowledges that during this review several submitters identified the need for more guidance, more feedback or more visible enforcement of the Code to support its implementation.<sup>66 67 68</sup>

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<sup>63</sup> “Webinar – Grocery Commissioner update on the Grocery Supply Code” 19 September 2023.

<https://www.fgc.org.nz/event/webinar/>

<sup>64</sup> “Grocery Code of Conduct” 18 February 2024, Horticulture New Zealand News.

<https://www.hortnz.co.nz/news-events-and-media/media-releases/grocery-code-of-conduct>

<sup>65</sup> [Correspondence between the Commission and RGRs on grocery supply agreements 16 April 2024](#)

<sup>66</sup> New Zealand Food & Grocery Council submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at para 1.4

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

<sup>67</sup> Woolworths New Zealand submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at para 3.4

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0023/362507/Woolworths-New-Zealand-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0023/362507/Woolworths-New-Zealand-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

<sup>68</sup> Foodstuffs North & South Island submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at paras 43

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf)

- 3.6 The Grocery Supplier Survey indicated that while half of the respondents who used the information developed by the Commission to date found it very useful, approximately 40% had further questions.<sup>69</sup> The survey also indicated a low level of awareness of the Grocery Industry Dispute Resolution Scheme: approximately half indicated they had never heard of it.<sup>70</sup>
- 3.7 We have considered whether changes to the Code are necessary or desirable, or whether issues could be addressed through other activities to support more effective implementation of the Code.

### **Length of time the Code has been in operation**

- 3.8 A key theme in the submissions of both WWNZ and Foodstuffs is that it is too early in the Code's implementation to properly evaluate its impact or contemplate significant changes.<sup>71 72</sup>
- 3.9 The Act required us to complete a review within two years.<sup>73</sup> We commenced this process in August 2024.
- 3.10 With the Code only in its second year of operation we agree that the time that it has been in place is important context when making an assessment.
- 3.11 Generally, given longer time in force there will be more opportunities to test the clauses of the Code, develop associated guidance to enhance its use and undertake other activities related to its stewardship.
- 3.12 Additional time will also allow us to gather more information, and to consider issues in greater depth.
- 3.13 However, the review has identified issues with the Code's design, operation and effectiveness that support more immediate action.

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<sup>69</sup> TRA x Commerce Commission "Grocery Supplier Survey Report" (January 2025) at p43

<sup>70</sup> TRA x Commerce Commission "Grocery Supplier Survey Report" (January 2025) at p44

<sup>71</sup> Woolworths New Zealand submission "Request for views on issues and opportunities to consider within the review" (16 September 2024) at para 3.2

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0023/362507/Woolworths-New-Zealand-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0023/362507/Woolworths-New-Zealand-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

<sup>72</sup> Foodstuffs North & South Island cross-submission "Request for views on issues and opportunities to consider within the review" (11 October 2024) at para 8

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0022/362740/Foodstuffs-North-Island-26-South-Island-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0022/362740/Foodstuffs-North-Island-26-South-Island-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf)

<sup>73</sup> Refer s20(1)(a) of the Act.

## Assessment of the current Code

- 3.14 The remainder of this chapter provides the Commission’s assessment of the operation and effectiveness of the Code to date and our draft conclusions that some provisions of the Code should be amended. We seek views on whether these changes are necessary and desirable to support the purpose of the Code. Your views will help to inform the final report to the Minister and decisions to amend the Code.

### Summary

- 3.15 We have not received any feedback suggesting that the Code in its entirety needs to be reconsidered.
- 3.16 Rather, submissions identified conduct of concern that is still occurring despite the Code being in place and/or concerns or opportunities related to the design of the Code. The grocery supplier survey provided more feedback on areas of concern for suppliers when dealing with RGRs.
- 3.17 In Tables 1 (clauses 1 – 5) and 2 (clauses 6 – 29) we consider each clause in the Code and our draft decisions. This is followed by more detailed discussion.
- 3.18 Our draft decision is that some parts of the Code should be amended. In other areas addressed by the Code, we consider further information should be gathered to determine whether and what action (e.g., Code amendments, enforcement action or development of guidance) is required.
- 3.19 In relation to the penalties that should be applied to contraventions of the Code, the Act allows for Tiers 1, 2 or 4 penalties to apply to contraventions of the Code., We consider that this status quo should be retained. We have not received feedback on this to date but encourage submissions on this point. For the additional provisions that we intend to add to the Code regarding retaliation and record-keeping, we recommend that a Tier 2 penalty should apply.
- 3.20 We have also taken the opportunity to propose minor changes to the Code to improve overall readability. These changes do not affect any substantive rights or obligations. These changes are summarised in Attachment B and are not discussed further in this report.

### Part 1 – Preliminary

- 3.21 Table 1 summarises the feedback received in relation to Part 1 of the Code and the Commission’s draft decisions in relation to each clause. While we refer to these as amendments, in practice this will be actioned by revoking and replacing the original Code.<sup>74</sup>

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<sup>74</sup> In accordance with clause 5(1) of Schedule 1 of the Act the existing Code is automatically revoked as soon as the determination made by the Commission under section 12(1)(a) comes into force.

**Table 1: Draft Decisions Part 1 of the Code**

Part of Code	What rules currently contain	Summary of feedback received	Draft Decision	Summary of draft reasons
<b>Part 1 Preliminary</b>				
<b>Title</b> Clause 1	Grocery Supply Code 2023	-	Amend to Grocery Supply Code 2025	To amend the Code, the existing code made by Order in Council would be replaced with the new “Grocery Supply Code 2025” made by determination.
<b>Purpose of Code</b> Clause 2	Refers to section 16 of the Act	-	No change	The purpose of the Code is set in the Act
<b>Interpretation</b> Clause 3	Provides definitions for 13 terms within the Act	NZFGC seeks an alternative, inclusive definition of groceries. <sup>75</sup>	No change	As the definition of groceries comes from the Act, this is a matter for primary legislation decision-makers. We discuss this further at the end of this chapter in the section “matters outside the permitted scope of the Code”.
<b>When this Code applies</b> Clause 4		Foodstuffs seeks exemption for “On the Spot” stores and clarity for non-retail subsidiaries. <sup>76</sup>	No change	We are cautious about removing requirements to comply with the Code and seek to allow more time and gather further information to determine a response to concerns. Refer discussion at para X

<sup>75</sup> New Zealand Food & Grocery Council submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at para 4.36 [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

<sup>76</sup> Foodstuffs North & South Island submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at paras 36 [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf)

Part of Code	What rules currently contain	Summary of feedback received	Draft Decision	Summary of draft reasons
		<p>Hort NZ highlights that many fresh produce suppliers deal with fresh produce wholesalers rather than directly with grocery retailers.<sup>77</sup></p>		<p>As the Code has been designed specifically to apply to grocery retailers, application of the Code to fresh produce wholesalers is a matter for primary legislation decision-makers. We discuss this further at the end of this chapter in the section “matters outside the permitted scope of the Code”.</p>
		<p>WWNZ submitted that the Code should be applied to all substantial retailers of grocery products including Costco, The Warehouse and Chemist Warehouse. Foodstuffs supported this in cross-submissions and referenced s11(3)(b)(ii) of the Act that provides for designation to promote competitive neutrality. Hort NZ supports the Code applying across all grocery retailers.<sup>78</sup></p>		<p>We have received little information to support the need for designation of other retailers. If suppliers do have concerns with the conduct of these retailers, please let us know.</p>

<sup>77</sup>Horticulture New Zealand submission, “Request for views on issues and opportunities to consider within the review” (16 September 2024) at page 11 [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0018/362502/Horticulture-New-Zealand-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0018/362502/Horticulture-New-Zealand-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

<sup>78</sup> Woolworths New Zealand submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at para 4.4(d) [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0023/362507/Woolworths-New-Zealand-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0023/362507/Woolworths-New-Zealand-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

Part of Code	What rules currently contain	Summary of feedback received	Draft Decision	Summary of draft reasons
<b>Obligation to offer to vary existing agreements so that they are consistent with the Code</b> Clause 5	Provides obligations to offer to vary existing agreements to ensure consistency with the Code	<p>NZFGC raised uncertainty about how the Code applies where the offers made by retailers have not been accepted. We discuss this further in the GSA part of this chapter.<sup>79</sup></p> <p>In considering the timeframe for implementation we have also noted that the Commission received feedback from RGRs during the initial implementation of the Code that the grace period of six months to offer grocery supply agreements was challenging This was because of the time needed to develop offers and the large number of existing suppliers to contact.</p>	<p>Amend to:</p> <p>Provide a one-month period for suppliers to offer changes to existing agreements to make them consistent with any new Code requirements.</p> <p>Provide that RGRs will not be in breach after the one-month period if they act in accordance with the Code and certain other criteria are met.</p>	<p>This clause is required to ensure that retailers are proactive in reviewing the content of GSAs for consistency with the requirements in the Code and in the case of inconsistency offering to vary the GSAs whenever the Code is amended. We are proposing a one-month period for suppliers to offer changes to inconsistent existing agreements from the time the clause takes effect. This one-month period and the proposed six-month transition period before the changes to the Code take effect will effectively allow the RGRs seven months to ensure their existing agreements are not in breach of the new Code requirements. We further note that the proposed Code changes only relate to selected clauses and the RGRs will gain efficiencies from the previous process such as having up to date contact details for suppliers. Any party that complies with the updated Code requirements in circumstances where their compliance is inconsistent with the GSAs will receive the protections under clause 1(2) of Schedule 1 to the Act. We intend to utilise s181 in relation to this clause as an efficient method of incentivising compliance.</p>

<sup>79</sup> New Zealand Food & Grocery Council submission "Request for views on issues and opportunities to consider within the review" (16 September 2024) at para 4.20 [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

## Foodstuffs seeks exemption for “On the Spot” stores and clarity for non-retail subsidiaries

- 3.22 One of the key areas of feedback related to this part of the Code was the suggestion that “On the Spot” stores should be exempt from the Code.<sup>80</sup>

### What Clause 4 currently requires

- 3.23 This clause sets out that the Code applies to RGRs (as defined by the Act) and any person that is a franchisee or transacting shareholder of an interconnected body corporate of a regulated grocery retailer. For example, the Code applies to SuperValue as WWNZ franchisees and it applies to each Pak n Save, New World and Four Square store.

### Issues/opportunities raised

- 3.24 Foodstuffs submitted, “as the Commission is aware, the “On the Spot” branded stores are franchisees of FSSI and as such the Code applies to them. These members are individually owned and operated small convenience stores (as opposed to full service grocery retailers) and accordingly do not have the same influence with suppliers as a larger retail store. In addition, due to their small size, the Code places an unreasonable administrative burden on them when it comes to grocery supply agreements direct with suppliers. As such, we believe these convenience stores should be excluded from the Code’s requirements. This would not have a material effect on suppliers, noting that FSSI would still have Code obligations for purchases made by it on behalf of an On the Spot store”.<sup>81</sup>

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<sup>80</sup> Foodstuffs North & South Island submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at paras 36

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf)

<sup>81</sup> Foodstuffs North & South Island submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at paras 36

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf)

- 3.25 NZFGC cross-submitted that NZFGC agrees with Foodstuffs that “On the Spot” branded stores should not be required to negotiate grocery supply agreements with suppliers at an individual store level. They consider individual store level agreements impractical and unnecessarily increase the cost of compliance. This is an issue that is also raised in relation to individual stores of other Foodstuffs banners. However, NZFGC does not agree that “On the Spot” branded stores should be exempt from the Code in its entirety. While NZFGC acknowledges that “On the Spot” stores have a more limited range of groceries, they submit that they comprise a significant proportion of the RGR’s stores and therefore collectively account for wide national coverage of grocery products sold. They note that the Commission’s Annual Grocery Report stated that “On The Spot” accounts for 73 retail stores out of 192 retail stores in the FSSI network (as at December 2023). NZFGC considers that removing the requirement for store level agreements would reduce compliance costs for these stores, while ensuring that suppliers are protected in their dealings with a significant proportion of the RGRs stores.”<sup>82</sup>
- 3.26 Foodstuffs also submits that as part of the Code review the Commission considers both the extent to which each provision of the Code should apply to non-retailing subsidiaries of the major supermarkets and to agreements with suppliers that do not involve the supply of groceries (such as transport agreements).<sup>83</sup>

#### Draft decision

- 3.27 No exemption to the code for On the Spot or changes to Clause 4 are proposed at this time.

#### Reasons

- 3.28 Section 15 of the Act sets out the requirements for disapplication of the Code. These include that the Commission is satisfied that doing so is necessary and desirable to promote the purpose of the Act.

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<sup>82</sup> New Zealand Food & Grocery Council cross-submission "Request for views on issues and opportunities to consider within the review" (11 October 2024) at para 2.6  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0023/362741/New-Zealand-Food-and-Grocery-Council-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0023/362741/New-Zealand-Food-and-Grocery-Council-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf)

<sup>83</sup> Foodstuffs North & South Island submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at paras 37-38  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf)

- 3.29 We expect FSNI and FSSI central support centres to be playing a role in supporting stores to comply with the Code and where possible minimising the administrative burden/ compliance costs of the stores and subsidiaries . For example, we expect that each store would not have a separate grocery supply agreement. We require further information to understand the details of how the Code is currently being administered at a store level and within non-retailing subsidiaries and the share of the additional burden the stores may face. This understanding is also relevant in the context of other draft decisions to introduce record-keeping requirements and how this would operate at the store level.

## **Clause 5 - Obligation to offer to vary existing agreements so that they are consistent with the Code**

### **What Clause 5 currently requires**

- 3.30 The clause sets out obligations for retailers to offer to vary existing agreements so that they are consistent with the Code. It provided a grace period of six months for the initial code. Issues/ opportunities raised

### **Issues/ opportunities raised**

- 3.31 The Commission received feedback from RGRs during the initial implementation of the Code that the grace period of six months to offer grocery supply agreements was challenging This was because of the time needed to develop offers and the large number of existing suppliers to contact.

### **Draft decision**

- 3.32 Amend the Code to provide a one-month period for suppliers to offer changes to inconsistent existing agreements from the time the clause takes effect. The amendment to the Code will provide that it is not a Code breach where Code consistent variations are offered but rejected and RGRs' operations are consistent with Code.

**5 Obligation to offer to vary existing agreements so that they are consistent with code**

(1) This clause applies to—

(a) an existing agreement within the meaning of clause 1(3)(a) of Schedule 1 of the Act;  
or

(b) a grocery supply agreement,

to the extent that it is inconsistent with the requirements of this code.

(2) Within ~~6-1~~ months after this ~~clause-code~~ comes into force, the retailer must offer in writing variations to the agreement that would, if accepted by the supplier, make the agreement consistent with the requirements of this code.

~~(3) During the period within 1 month after this code comes into force, the retailer will not be in breach of this code as a result of having an agreement that is inconsistent with the requirements of this code, provided the retailer is otherwise acting in accordance with the requirements of this code.~~

~~(4) From 1 month after this code comes into force, the retailer will not be in breach of this code as a result of having an agreement that is inconsistent with the requirements of this code where—~~

~~(a) the text of an agreement is inconsistent with the requirements of this code; and~~

~~(b) the retailer complied with subclause (2); and~~

~~(c) the offer required by subclause (2) was a reasonable offer; and~~

~~(d) the supplier has not accepted that offer; and~~

~~(e) the retailer is otherwise acting in accordance with the requirements of this code.~~

~~(3) See also Schedule 1 of these regulations (which apply the code after 6 months irrespective of whether the existing agreement is varied).~~

**Reasons**

3.33 This clause is required to ensure that retailers are proactive in reviewing the content of GSAs for consistency with the requirements in the Code and in the case of inconsistency offering to vary the GSAs whenever the Code is amended. We are proposing a one-month period for suppliers to offer changes to inconsistent existing agreements from the time the clause takes effect. This one-month period and the proposed six-month transition period before the changes to the Code take effect will effectively allow the RGRs seven months to ensure their existing agreements are not in breach of the new Code requirements. We further note that the proposed Code changes only relate to selected clauses and the RGRs will gain efficiencies from the previous process such as having up to date contact details for suppliers. Any party that complies with the updated Code requirements in circumstances where their compliance is inconsistent with the GSAs will receive the protections under clause 1(2) of Schedule 1 to the Act. We intend to utilise s181 in relation to this clause as an efficient method of incentivising compliance.

## Parts 2 – 4 of the Code

- 3.34 Table 2 summarises draft decisions in relation to the remainder of the Code and is followed by further discussion of the clauses that received the most feedback.
- 3.35 The table includes references to development of guidance or further information gathering. The Commission has an ongoing stewardship role of this Code and will undertake ongoing work to support understanding of it. We seek feedback to support this work including views on processes to provide input into the development of guidance.
- 3.36 When making our decisions we have been aware of the burden and cost this may impose on RGRs and we have taken this into account when making our decisions.

**Table 2: Draft Decisions Part 2 – 4 of the Code**

Part of Code	What rules currently require	Draft decision	Summary of draft reasons
<b>Obligation to deal with suppliers in good faith</b> clause 6	Retailers are required to act in good faith when dealing with their suppliers.	No change, support stakeholders by issuing guidance as the Code is tested	The key issues raised in relation to good faith are the need for more guidance (ART submitter two), and the suggestion from WWNZ (supported by Foodstuffs) that suppliers should also be subject to good faith provisions of the Code and that this is an area in which to test and develop guidance for stakeholders. <sup>84 85 86</sup> As cross-submitted by NZFGC, the Commission does not have the power to introduce obligations for suppliers under the Code and the actions of the supplier are already considered in determining whether the RGR is operating in good faith under clause 6(3)(i) of the Code. <sup>87</sup> We consider the good faith provision as a key part of the Code and a priority area for additional guidance.

<sup>84</sup> Anonymous Reporting Tool submissions, "Request for views on issues and opportunities to consider within the review" at para 2.1

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0032/362498/Anonymous-Reporting-Tool-summary-Submissions-on-the-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-17-August-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0032/362498/Anonymous-Reporting-Tool-summary-Submissions-on-the-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-17-August-2024.pdf)

<sup>85</sup> Woolworths New Zealand submission "Request for views on issues and opportunities to consider within the review" (16 September 2024) at para 4.4(a)

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0023/362507/Woolworths-New-Zealand-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0023/362507/Woolworths-New-Zealand-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

<sup>86</sup> Foodstuffs North & South Island cross-submission "Request for views on issues and opportunities to consider within the review" (11 October 2024) at p.7

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0022/362740/Foodstuffs-North-Island-26-South-Island-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0022/362740/Foodstuffs-North-Island-26-South-Island-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf)

<sup>87</sup> New Zealand Food & Grocery Council cross-submission "Request for views on issues and opportunities to consider within the review" (11 October 2024) at para 3.1

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0023/362741/New-Zealand-Food-and-Grocery-Council-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0023/362741/New-Zealand-Food-and-Grocery-Council-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf)

<b>Part of Code</b>	<b>What rules currently require</b>	<b>Draft decision</b>	<b>Summary of draft reasons</b>
<b>Grocery supply agreement must be in writing and retained clause 7 &amp; Matters to be covered by agreement clause 8</b>	A GSA must be in writing, in plain language, provided to the supplier and kept by the RGR for seven years after the agreement ends. There is mandatory content that a grocery supply agreement should cover, such as the payment period, term of the agreement and any quantity or quality requirements.	No change. Gather further information about the state of agreements currently in place.	Where an agreement pre-dates the Code and is inconsistent with it, the Code provisions still apply. We are aware many suppliers have not signed a new agreement following the introduction of the Code, but we have limited information to characterise the impact of this (e.g., how inconsistent with the Code the existing agreements are and the level of uncertainty/ risk of non-compliance with the Code this is creating). We will seek to further understand issues.
<b>Unilateral variation of agreement clause 9</b>	Retailers cannot vary an agreement without the consent of the supplier (unilateral variation) unless this has been provided for in the supply agreement and is reasonable in the circumstances. RGRs must give suppliers a clear and full explanation as to why the activity is reasonable in the circumstances	Add requirements to the Code for retailers to keep records in relation to the use of this provision and provide those records to the Commission on request.	The obligation to keep records in relation to each instance of a unilateral variation increases the incentives on RGRs to ensure that the conduct is fair in the circumstances and helps to promote transparency and certainty about the terms of agreements for suppliers.  The requirement to provide the records to the Commission on request would make the process of monitoring compliance with this clause more efficient and increase the RGRs' incentives to comply.
<b>Retrospective variation of agreement clause 10</b>	Retailers cannot vary their supplier agreements with retrospective effect.	No change	Not raised in our review to date.

Part of Code	What rules currently require	Draft decision	Summary of draft reasons
<b>Transport or logistics services</b> clause 11	RGRs cannot require suppliers to use specific transport or logistics services, nor impose unreasonable service standards for transport or logistics.	Prioritise development of guidance in relation to requirements for crates	Hort NZ has raised issues with RGRs requiring growers to use specified support service companies, such as crate suppliers. <sup>88</sup> This will be considered further in guidance in respect of the existing clause.
<b>Payments to suppliers</b> clause 12(1)	Payment is to be made within the timeframe set out in the agreement and within a reasonable time from receiving an invoice.	No change	Not a common theme in feedback received,
<b>Payments to suppliers</b> clauses 12(2) to 12(4)	Set-offs (deductions against payments to a supplier) are prohibited unless the supplier has consented to the set-off in writing, or the set-off has been provided for in the supply agreement and is reasonable in the circumstances. A written explanation of why the set-off is reasonable in the circumstances and how it was calculated must be provided by the RGR if requested by the supplier.	Prioritise development of guidance for this clause and  Add requirements for suppliers to be able to obtain an itemised summary of payments and set-offs for the financial quarter.	Guidance will be prioritised to promote the fair use of set-offs.  The ability to request a summary of payments will help to increase transparency for suppliers about what payments and deductions have occurred and the reasons for them. This will increase suppliers' ability to detect incorrect charges and improve overall understanding of the range of payments they are making.

<sup>88</sup> Horticulture New Zealand submission, "Request for views on issues and opportunities to consider within the review" (16 September 2024) at page 8 [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0018/362502/Horticulture-New-Zealand-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0018/362502/Horticulture-New-Zealand-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

Part of Code	What rules currently require	Draft decision	Summary of draft reasons
<b>Payments for shrinkage</b> clause 13	Retailers cannot require suppliers to pay for shrinkage (the loss of grocery products due to theft, other loss or accounting error that occurs when the product is in the retailer's possession).	No change.	Concerns with this provision were not a common theme in feedback received. However, we note 22% of respondents of the Grocery Supplier Survey selected “disputes over delivery despite proof of delivery” as an issue faced with a RGR in the past year. <sup>89</sup> This clause prohibits suppliers being charged for lost stock when the groceries have previously been accepted as delivered. We seek views on whether guidance is needed.
<b>Payments for wastage</b> clause 14	Requiring payment to cover wastage of groceries that was incurred while the groceries were in the RGRs’ effective control is prohibited unless unambiguously provided for in the supply agreement (including a method for calculating payment), the payment amount is reasonable, the claim is made within six months of receiving the goods and the wastage was mainly caused by the acts or omissions of the supplier. RGRs must give suppliers a clear and full explanation as to why the payment is reasonable in the circumstances	Change this provision, no longer allowing for payments for wastage while groceries are in the RGRs effective control.	We are concerned that the provision may be used unfairly given the inherent pressure on suppliers to agree to terms to obtain/maintain ranging with retailers. We also consider RGRs are best placed to manage the risks related to wastage costs while groceries are in their effective control. The example provided by Foodstuffs of suppliers’ merchandisers causing damage seems a limited circumstance to support the need for the clause as currently written. <sup>90</sup> We consider the purposes of the Code, including prohibiting unfair conduct by RGRs and promoting certainty for suppliers, would be better met with a simpler prohibition on wastage payments. We do not consider products that are recalled for food safety reasons to be included and this could be recovered by the retailer.

<sup>89</sup> TRA x Commerce Commission “Grocery Supplier Survey Report” (January 2025), p33

<sup>90</sup> Foodstuffs North & South Island submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at Schedule One [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf)

Part of Code	What rules currently require	Draft decision	Summary of draft reasons
<b>Payments as condition of being a supplier</b> clause 15	Requiring payment or payment in kind as a condition of stocking or listing groceries is prohibited except in the case of an agreed promotion (see clause 17), or for new items (not stocked in the last year) if provided for in the supply agreement and reasonable in the circumstances. RGRs must give suppliers a clear and full explanation as to why the payment is reasonable in the circumstances	Add requirements to the Code for retailers to keep records in relation to the use of this provision and provide those records to the Commission on request.	The obligation to keep records in relation to any payments as a condition of being a supplier increases the incentives on RGRs to ensure that the conduct is fair in the circumstances and helps to promote transparency and certainty about the terms of agreements for suppliers.  The requirement to provide the records to the Commission on request would make the process of monitoring compliance with this clause more efficient and increase the RGRs' incentives to comply.
<b>Payments for retailer's business activities (including merchandising)</b> clause 16	Requiring payment or payment in kind for retailer business activities such as merchandising and transporting goods between distribution centres and retail stores is prohibited unless provided for in a supply agreement and reasonable in the circumstances. RGRs must give suppliers a clear and full explanation as to why the payment is reasonable in the circumstances	Change this provision, no longer allowing for payments for the activities covered by this clause, which include: (a) a buyer's visit to the supplier: (b) artwork or packaging design: (c) consumer or market research: (d) the opening or refurbishing of a store: (e) hospitality for the retailer's staff: (f) merchandising (for example, stocking shelves and setting up displays):	By definition, this clause is intended to cover activities undertaken by a retailer in the ordinary course of carrying on their business. Currently payments are only allowed in specific circumstances. While it provides for a range of activities the main area where we are aware this clause is being used is for payments for merchandising. Based on what we have heard, we consider that this provision may be used unfairly given the inherent pressure on suppliers to agree to terms to obtain/maintain ranging. RGRs are also best placed to manage these costs and allocating them to the RGRs promotes efficient behaviour. We consider the purposes of the Code, including prohibiting unfair conduct by RGRs and promoting certainty for suppliers, would be better met with a prohibition on such payments.

Part of Code	What rules currently require	Draft decision	Summary of draft reasons
		(g) the transport of goods within a retailer's business, which may include transport between distribution centres and retail stores.	
<b>Funding promotions</b> clause 17	Requiring payment or payment in kind for a promotion is prohibited unless provided for in the supply agreement and reasonable in the circumstances. A clear and full written explanation of why the retailer considers the funding is reasonable in the circumstances must be provided by the RGR if requested by the supplier.	Add requirements to the Code for retailers to keep records in relation to the use of this provision and provide those records to the Commission on request. Prioritise development of guidance for this clause.	<p>The obligation to keep records in relation to each instance of promotional funding increases the incentives on RGRs to ensure that the conduct is fair in the circumstances and helps to promote transparency and certainty about the terms of agreements for suppliers.</p> <p>The requirement to provide the records to the Commission on request would make the process of monitoring compliance with this clause more efficient and increase the RGRs' incentives to comply.</p> <p>The prioritisation of guidance seeks to enhance certainty regarding what conduct is allowed.</p>
<b>Delisting products</b> clause 18 & <b>Process relating to delisting</b> 19  <b>Product ranging, shelf space allocation, and range reviews</b> clause 26	A retailer can only delist a product under the terms agreed in the relevant grocery supply agreement. They must also provide reasonable written notice and genuine commercial reasons for delisting a supplier's product. Delisting as a punishment for a complaint, concern or dispute is prohibited.	<p>No change, focus on compliance and enforcement with development of guidance as needed.</p> <p>We are proposing new provisions explicitly prohibiting retaliation (discussed at the end of this table).</p>	<p>The potential for delisting is a substantial concern for suppliers, who often rely on supermarkets as their route to market. We have undertaken an initial monitoring project on the range review process and will continue work in this area as well as consider the need for guidance. We strongly encourage suppliers to report conduct either directly or through the Anonymous Reporting Tool.</p> <p>We are also proposing new provisions explicitly prohibiting retaliation, which seeks to further protect against any delisting in retaliation to suppliers exercising rights under the Code.</p>

Part of Code	What rules currently require	Draft decision	Summary of draft reasons
	Retailers must publish or provide suppliers with their product ranging and shelf space allocation principles and follow those principles		
<b>Funded promotions</b> clause 20(1)	Retailers must provide suppliers with reasonable notice that they are holding a promotion when suppliers have agreed to provide funding towards the promotion.	No change. Guidance to be included as part of any wider guidance on funding promotions.	Not a common theme in feedback received and insufficient evidence to make a change.
<b>Funded promotions</b> clauses 20(2) to (3)	When ordering stock from a supplier under a funded promotion, a retailer must be transparent about how they calculated the amount of stock to order and agree with the supplier in writing on what happens to unsold stock at the end of the promotion. These types of orders can only be cancelled or reduced by more than 10% with a supplier's written consent or reasonable notice or compensation for losses or expenses incurred by the supplier.	Clause to be amended to require retailers to pay suppliers the difference in price between the normal and promotional price for any products bought from suppliers at a promotional price but not sold to consumers at a promotional price.	We consider that the current approach of requiring an agreement between retailers and suppliers on what happens to additional stock not sold during a promotional period is likely ineffective given the inherent pressure on suppliers to agree to terms to obtain/maintain ranging with retailers.
<b>Fresh produce standards and quality specifications</b> clause 21	Standards for fresh produce (fruit and vegetables) need to be set out clearly in writing and a retailer's decision to accept or reject the produce must be made within 24 hours of delivery, with the rejection reasons documented.	No change, further work is needed to consider the Code's rules generally as they apply to fresh produce.	Fresh produce suppliers face specific challenges in their supply relationships. This was a significant focus of the Independent Review of the Australian Code and the Australian Supermarket Inquiry. Further work is required to understand the New Zealand context and assess whether there are issues that could be better addressed by the Code.

Part of Code	What rules currently require	Draft decision	Summary of draft reasons
<b>Unduly hindering or obstructing supply to competitors</b> clause 22	Retailers must not engage in any conduct that has the purpose, effect, or likely effect of unduly hindering or obstructing a supplier from supplying groceries to any other party.	Remove “to competitors” from the title of this clause	We do not consider that the words “to competitors” properly reflects the intended and appropriate application of the clause. The clause was introduced to ensure that suppliers are free to make decisions that are in their commercial interest, as well as to ensure that RGRs are not using market power to weaken the wholesale supply of groceries. While there is a particular risk that RGRs may engage in conduct with the purpose, effect, or likely effect of unduly hindering or obstructing a supplier from supplying groceries to their competitors, there is a broader risk that RGRs may engage in conduct that unduly hinders or obstructs suppliers supplying parties other than their competitors. Consistent with the existing text of the clause, which refers to “unduly hindering or obstructing a supplier from supplying to any other party”, we consider the prohibition in clause 22 is intended to cover such conduct.
<b>Business disruption</b> clause 23	Retailers must not threaten suppliers with business disruption or termination of grocery supply agreements without reasonable grounds.	No change	No need for change identified.
<b>Intellectual property rights</b> clause 24	Retailers must respect their suppliers’ intellectual property rights and not infringe on these in developing or producing private label products.	No change	Not a common theme in feedback and no need for changes identified.

<b>Part of Code</b>	<b>What rules currently require</b>	<b>Draft decision</b>	<b>Summary of draft reasons</b>
<b>Confidential information</b> clause 25	Retailers should only use suppliers' confidential information (e.g. product development, proposed promotions, pricing) for the purpose that it is provided, and have systems in place to manage access to that information.	No change	Not a common theme in feedback received and no need for changes identified.
<b>Transfer of intellectual property rights</b> clause 27	Retailers must not require suppliers to transfer or exclusively license their intellectual property to them as a condition of supplying an equivalent private label product.	No change	Not a common theme in feedback received and no need for changes identified.
<b>Price increases</b> clause 28	Retailers must respond to being informed of price increase requests from suppliers within 30 days, except when a product has been subject to the same request within the last six months, or if the retailer (in good faith) requires further information from the supplier. Special rules apply in relation to fresh produce.	No change, gather further information	The processes surrounding price increases are a concern for suppliers. We will continue to gather information to support monitoring of conduct in this area.
<b>Freedom of association</b> clause 29	Retailers must not discriminate, or take any action, against suppliers for forming an association or lawfully associating. They also must not provide an inducement to prevent suppliers from forming an association or associating with other suppliers.	No change	Not a common theme in feedback received and no need for changes identified.

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<b>Part of Code</b>	<b>What rules currently require</b>	<b>Draft decision</b>	<b>Summary of draft reasons</b>
<b>New provision - Retaliation</b> (clause 30)		Add new clauses similar to those included in the recently made Australian code explicitly prohibiting retaliation in response to suppliers exercising rights under the Code.	To expressly prohibit retaliatory behaviour that would discourage use of the Code

## Grocery Supply Agreements (Clause 7 and 8)

### What these clauses require

- 3.37 A GSA must be in writing, in plain language, provided to the supplier and kept by the RGR for seven years after the agreement ends. There is mandatory content that a grocery supply agreement should cover, such as the payment period, term of the agreement and any quantity or quality requirements.

### Context

- 3.38 The requirement to document grocery supply agreements is a key feature of the Code and has required substantial changes in industry practices.<sup>91</sup>
- 3.39 While the requirements of the Code became effective immediately when the Code came into force on 28 September 2023, a six month grace period was provided to address any inconsistencies between the thousands of existing agreements with suppliers and the provisions of the new Code.<sup>92</sup>
- 3.40 RGRs were required to offer in writing to vary the existing agreements to make them comply with the Code, but suppliers were not required to accept an offer. The protections for suppliers in the Code apply even if a supplier has not signed a new agreement, from the end of the grace period (i.e., an existing agreement will continue but where there is an inconsistency between the existing agreement and the Code, the rules of the Code apply).<sup>93</sup>
- 3.41 As noted in Chapter 2, to support the introduction of the Code, the Commission released a factsheet<sup>94</sup> and later released a checklist for suppliers.<sup>95</sup> The Commission also presented at webinars hosted by NZFGC and Horticulture New Zealand and engaged with each of the RGRs to understand their approach to the new obligations. The Commission reviewed the RGR's new GSA templates and provided feedback which we published.
- 3.42 All Commission engagement with suppliers sought to encourage suppliers to carefully consider the new grocery supply agreements issued by the RGRs before agreeing to terms.

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<sup>92</sup> Refer cl 2 of Schedule 1 of the Grocery Industry Competition Regulations 2023.

<sup>93</sup> Refer Part 2 of Schedule 1 of the Grocery Industry Competition Regulations 2023.

<sup>94</sup> Commerce Commission "Fact Sheet: The Grocery Supply Code" (28 September 2024)

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0022/329710/Commerce-Commission-Grocery-supply-code-factsheet-28-September-2023.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0022/329710/Commerce-Commission-Grocery-supply-code-factsheet-28-September-2023.pdf)

<sup>95</sup> Commerce Commission "Grocery Supply Code Checklist for Suppliers" (29 February 2024)

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0025/344950/Grocery-Supply-Code-Checklist-for-Suppliers-29-Feb-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0025/344950/Grocery-Supply-Code-Checklist-for-Suppliers-29-Feb-2024.pdf)

## Issues/opportunities raised – signing of agreements

- 3.43 As part of the Grocery Supplier Survey, we asked grocery suppliers if they had been offered a new supply agreement in the last year and if they answered yes, they were asked “what are your thoughts on the supply agreement offer made to you?”.
- 3.44 The Grocery Supplier Survey Report summarised the responses as having common themes across all three regulated grocery retailers, including:
- 3.44.1 Perceived unfairness: many felt the terms favoured the retailer, with limited negotiation space and unfavourable clauses such as chargebacks, high rebates and insufficient supplier protections, creating an unequal partnership; and
  - 3.44.2 Complexity: Respondents noted the agreements’ complexity and legal jargon, often requiring legal advice to understand, with many feeling the process overwhelming and the agreements offering little value.<sup>96</sup>
- 3.45 NZFGC submits that it is unclear how Code protections apply where a supplier has not agreed the GSA and emphasises that suppliers should be entitled to the Code's protections regardless.<sup>97</sup>
- 3.46 Foodstuffs cross-submits that the existing Code adequately makes clear that the protections of the Code apply to all suppliers and how the provisions of the Code apply to existing GSAs.<sup>98</sup> They further submit that RGRs and suppliers should be entitled to rely on agreements entered into prior to the Code to the extent those agreements remain consistent with the Code.<sup>99</sup>
- 3.47 Woolworths New Zealand also suggested there should be some form of duty or incentive on suppliers to agree to written supply terms to support the process of updating agreements to align with the Code.<sup>100</sup>

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<sup>96</sup> TRA x Commerce Commission “Grocery Supplier Survey Report” (January 2025), p24

<sup>97</sup> New Zealand Food & Grocery Council cross-submission “Request for views on issues and opportunities to consider within the review” (11 October 2024) at para 4.25

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0023/362741/New-Zealand-Food-and-Grocery-Council-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0023/362741/New-Zealand-Food-and-Grocery-Council-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf)

<sup>98</sup> Foodstuffs North & South Island cross-submission “Request for views on issues and opportunities to consider within the review” (11 October 2024) at p.10

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0022/362740/Foodstuffs-North-Island-26-South-Island-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0022/362740/Foodstuffs-North-Island-26-South-Island-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf)

<sup>99</sup> Foodstuffs North & South Island cross-submission “Request for views on issues and opportunities to consider within the review” (11 October 2024) at p.11

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0022/362740/Foodstuffs-North-Island-26-South-Island-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0022/362740/Foodstuffs-North-Island-26-South-Island-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf)

<sup>100</sup> Woolworths New Zealand submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at para 4.4(b)

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0023/362507/Woolworths-New-Zealand-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0023/362507/Woolworths-New-Zealand-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

### **Draft Decision**

- 3.48 No changes are proposed to the Code to incentivise suppliers to reach a written agreement.

### **Reasons**

- 3.49 The Commission agrees that the concept of written agreements is central to the Code and how it is intended to operate. Therefore, it would be desirable that all agreements are aligned with requirements of the Code.
- 3.50 We have encouraged suppliers to reach a written agreement to support the purposes of the Code but only in the circumstances where they are comfortable with the content of the agreement.
- 3.51 We are not proposing measures that would require suppliers to reach a written agreement. The Act does not empower the Commission to impose obligations on suppliers in the Code and it does not have sufficient information to assess the extent that the current status of agreements is impacting the effectiveness of the Code.
- 3.52 To the extent there are benefits to RGRs from having a higher proportion of their suppliers on consistent, code-compliant GSAs, they can vary the offered terms of their draft GSAs to encourage more suppliers to sign. We also note the potential harm that could result from putting pressure on suppliers to reach agreements.
- 3.53 The Commission will continue to build our understanding of the issues including any common and underlying themes and we encourage feedback on this.

### **Issues/ Opportunities Raised - Store level agreements**

- 3.54 As noted in relation to “On the Spot” stores, there is concern from suppliers in regard to being offered multiple agreements at the store level and the associated administrative burden.
- 3.55 FSNI and FSSI both operate retailer store owner-operator franchises. Retail stores are owner-operated franchises which are supplied by the Foodstuffs co-operatives. Owner-operators own shares in, and provide funding to, their co-operative. Models for this funding differ across the two Foodstuffs co-operatives.
- 3.56 Woolworths New Zealand Group Ltd is the franchisor of Super Value and Fresh Choice.

- 3.57 A concern that has been raised through the review is the “administrative burden” costs associated with applying the Code in this context.<sup>101</sup> NZFGC submits that requiring individual store level agreements is impractical and unnecessarily increases the cost of compliance.<sup>102</sup>
- 3.58 Foodstuffs has suggested it may be useful for the Code (or the Commission) to clarify that, in the case of a franchise, there is no general requirement for every franchisee to enter into its own store specific agreement.<sup>103</sup> Rather, it is sufficient for stores to issue purchase orders under the terms of a centrally agreed grocery supply contract. It is only where stores have their own specific commercial terms that an additional agreement or document is required.
- 3.59 In addition, Foodstuffs has suggested a concept of a simple “commercial framework agreement” to help reduce administrative burden.<sup>104</sup> It proposes that this agreement “would be entered into between a franchisee of a RGR and a supplier, setting out high-level commercial terms but agreeing different ways for the details of each individual promotional or buying deal to be agreed other than in writing. This commercial framework agreement could be for a 12-month period and able to be terminated on reasonable notice by either party, in which case the default provisions of the Code would apply.”<sup>105</sup>

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<sup>101</sup> New Zealand Food & Grocery Council submission "Request for views on issues and opportunities to consider within the review" (16 September 2024) at para 4.62

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

Foodstuffs North & South Island submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at para 36-38

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf)

<sup>102</sup> New Zealand Food & Grocery Council submission "Request for views on issues and opportunities to consider within the review" (16 September 2024) at para 4.47

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

<sup>103</sup> Foodstuffs North & South Island submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at para 21

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf)

<sup>104</sup> Foodstuffs North & South Island submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at para 20-22

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf)

<sup>105</sup> Foodstuffs North & South Island submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at para 22

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf)

3.60 “At the heart of this proposal is a mutually agreed "contracting-in" regime which allows suppliers to provide products in an administratively efficient manner while meeting their commercial objectives.”<sup>106</sup>

3.61 While NZFGC states it would need more information about the commercial framework agreement before it can comment specifically on this proposal, it agrees that the Commission needs to explore options to reduce the administrative burden on both suppliers and RGRs given the complexity of the commercial arrangements.<sup>107</sup>

#### Draft Decision

3.62 No changes are proposed to the Code in relation to store level agreements.

#### Reasons

3.63 The Commission confirms that there is no general requirement for every franchisee to enter into its own store specific agreement.

3.64 Regarding the concept of a commercial framework, the Commission is cautious about reducing requirements for written documentation. As noted in our reasons for not changing clause 4, we seek to further understand how the Code is being implemented at the store level and the associated administrative burden before considering any changes.

### Part 4 – Conduct generally

#### Issues/ opportunities raised

3.65 Through the Request for Views and the Grocery Supplier Survey we have received valuable information about the experiences of suppliers and their areas of concern. Through the Grocery Supplier Survey we have also received positive feedback about each retailer with a number of comments noting satisfaction with the level of communication and collaboration experienced.

3.66 WWNZ leads in experience ratings, with the highest positive rating across the survey’s questions on overall experience, ease of dealings and fairness, followed closely by FSSI. FSNI **has the lowest experience ratings**, with negative ratings outweighing positive across all measures in the survey.<sup>108</sup>

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<sup>106</sup> Foodstuffs North & South Island submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at para 23

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf)

<sup>107</sup> New Zealand Food & Grocery Council cross-submission "Request for views on issues and opportunities to consider within the review" (11 October 2024) at para 4.2

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0023/362741/New-Zealand-Food-and-Grocery-Council-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0023/362741/New-Zealand-Food-and-Grocery-Council-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf)

<sup>108</sup> TRA x Commerce Commission “Grocery Supplier Survey Report” (January 2025), p21

**Table 3: Responses to Grocery Supplier Survey on experience with RGRs in the past year** <sup>109</sup>

	Overall experience with [retailer]			Ease of dealing with [retailer]			Fairness in how [retailer] treats me		
	FSNI	FSSI	WWNZ	FSNI	FSSI	WWNZ	FSNI	FSSI	WWNZ
Very positive	8%	12%	9%	9%	11%	11%	9%	10%	11%
Quite positive	22%	27%	30%	19%	27%	32%	18%	26%	28%
Neutral	25%	33%	29%	24%	31%	26%	28%	36%	25%
Negative	21%	13%	13%	22%	15%	13%	19%	13%	16%
Very negative	14%	4%	6%	15%	6%	7%	16%	4%	8%
Don't know	2%	1%	2%	2%	1%	2%	2%	2%	3%
Did not answer	8%	9%	10%	9%	8%	9%	9%	9%	9%

3.67 Suppliers' feedback is important when considering the objectives of the Code. This contributes to a trading environment that includes a diverse range of grocery suppliers competing effectively and confidently. However, we do note that it is an environment that includes regular negotiations and as such there will be challenges. The type of feedback that we would hope to hear (in line with the recommendations of the Market Study into the Retail Grocery Sector) is that negotiations can be firm, but they are fair.<sup>110</sup> In contrast we have heard that in many cases there is limited ability for suppliers to push back on retailer demands or behaviour for fear of damaging relationships and/or losing access to consumers (and sales).

3.68 The Grocery Supplier Survey suggests fewer than half of the respondents feel confident negotiating with each retailer. However, results indicate that confidence in negotiating with RGRs increases as business size grows, with larger businesses reporting feeling significantly more confident when negotiating than smaller businesses that responded.<sup>111</sup>

<sup>109</sup> Data from TRA analysis in association with TRA x Commerce Commission "Grocery Supplier Survey Report" (January 2025).

<sup>110</sup> Commerce Commission "Market study into the retail grocery sector" (8 March 2022) at para 9.179 [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf)

<sup>111</sup> TRA x Commerce Commission "Grocery Supplier Survey Report" (January 2025), p26.

- 3.69 Overall, we are concerned that in areas where the Code allows for flexibility to negotiate, the suppliers that are most in need of the protection of a code are likely to end up agreeing to what is asked of them. In addition, we have received feedback about the complex range of payments that RGRs require and supplier confusion about what those payments are for.

### **Clauses with flexibility for negotiation/ carve-outs (Clause 9,12,14,15,16,17)**

#### **Context**

- 3.70 Although they cover different types of conduct, these clauses are often referred to collectively due to their common structure of setting out that certain conduct must not occur and then providing an exception for when it could occur.
- 3.71 Equivalent clauses have been criticised by the ACCC in the Australian context including within the Australian Supermarket Inquiry.<sup>112</sup> While the scope of the “exceptions” was one of the key areas considered within the 2024 independent review of the Australian code, the review recommended retention of the clauses. They were subsequently included within the new mandatory Australian Code.<sup>113</sup>
- 3.72 In this context the clauses in the Code that allow for exceptions or “carve-outs” to the Code’s protections are of particular significance. The clauses generally referred to in this sense are clauses 9 (Unilateral Variations), 12 (Payments to Suppliers), 14 (Payments for Wastage), 15 (Payments as condition of being a supplier), 16 (Payments for retailers’ business activities) and 17 (Funding promotions). These clauses prohibit certain activities unless they have been provided for in a GSA and meet other conditions.
- 3.73 One such condition is that RGRs provide a written explanation to suppliers setting out how the conditions of the clause have been met.

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<sup>112</sup> ACCC “Supermarkets Inquiry Final Report” (February 2025) recommendation 10  
[https://www.accc.gov.au/system/files/supermarkets-inquiry\\_1.pdf](https://www.accc.gov.au/system/files/supermarkets-inquiry_1.pdf)

<sup>113</sup> The Australian Treasury "Independent Review of the Food and Grocery Code of Conduct Final Report" (June 2024) Chapter 7  
<https://treasury.gov.au/sites/default/files/2024-06/p2024-534717-final-report.pdf>

3.74 Differing views about the written explanations were provided in submissions.<sup>114 115</sup>  
116 117

3.75 NZFGC submission submitted “The Code should also make it clear that the requirement under the Code to provide reasons would not be met by issuing generic standard reasons to all suppliers; reasons should be tailored to the specific conduct, circumstances and supplier in question.”<sup>118</sup>

3.76 In response to NZFGC’s suggestion on written statements Woolworths cross-submitted:

“[WWNZ] disagrees with the NZFGC's submission that any written explanations provided to suppliers should be written afresh in a bespoke manner each and every time they are required. Given WWNZ deals with over 1,500 suppliers, they stated it would be impractical and unreasonable to require a bespoke explanation, rather than an explanation that applies at a general level to such situations. They stated that a requirement to draft bespoke explanations would also, therefore, result in higher compliance costs for RGRs (which the NZFGC itself recognised risks higher grocery prices for consumers).”<sup>119</sup>

3.77 Foodstuffs also cross-submitted “Requiring written explanations in all cases would impose significant administrative burden for little or no benefit to suppliers”.<sup>120</sup>

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<sup>114</sup> Foodstuffs North & South Island submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at p. 9

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf)

<sup>115</sup> Foodstuffs North & South Island cross-submission “Request for views on issues and opportunities to consider within the review” (11 October 2024) at p.9

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0022/362740/Foodstuffs-North-Island-26-South-Island-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0022/362740/Foodstuffs-North-Island-26-South-Island-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf)

<sup>116</sup> Woolworths New Zealand cross-submission “Request for views on issues and opportunities to consider within the review” (11 October 2024) at para 3.13( c)

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/362742/Woolworth-New-Zealand-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/362742/Woolworth-New-Zealand-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf)

<sup>117</sup> Horticulture New Zealand cross-submission, “Request for views on issues and opportunities to consider within the review” (4 October 2024) at p.9

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0028/362782/1b46c00338ec10c26c6a27e5dc126c0c0054f185.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0028/362782/1b46c00338ec10c26c6a27e5dc126c0c0054f185.pdf)

<sup>118</sup> New Zealand Food & Grocery Council submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at para 4.17

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

<sup>119</sup> Woolworths New Zealand cross-submission “Request for views on issues and opportunities to consider within the review” (11 October 2024) at para 3.13( c)

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/362742/Woolworth-New-Zealand-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/362742/Woolworth-New-Zealand-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf)

<sup>120</sup> Foodstuffs North & South Island submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at p. 9

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf)

3.78 FSNI provides an area for “grocery supply code written explanations” on their supplier community website.<sup>121</sup> This currently has a linked document “[Payments for Wastage and Towards Business Activities – Explainer](#)” that includes descriptions of wastage and business activity payments and why they are reasonable.<sup>122</sup> For example, the explanation of why payments for merchandising services are reasonable states:

3.78.1 - Charges are agreed in good faith and can be reviewed.

3.78.2 Benefits to you from our provision of the merchandising activity include avoiding the direct financial and environmental costs of you providing merchandising services in each store.

3.78.3 We have also had regard to the benefits to us from the centrally agreed merchandising charge (which include a consistent standard of merchandising for the benefit of customers), and the costs borne by us.

3.79 Given the views provided by RGRs on explanatory statements, and the relatively generic examples on the FSNI website, the Commission is concerned that the current implementation of the requirements may not be effective in helping to deliver mutual benefits associated with allowing flexibility for negotiation. While we acknowledge the potential administrative burden and related costs for RGRs, we see explanatory statements as a key control associated with these clauses. NZFGC’s submission describes the burden on suppliers to raise concerns and emphasises the fears that suppliers experience.<sup>123</sup> We are concerned that suppliers may be unwilling to dispute the explanations provided for fear of damaging relationships or losing access to shelf space. We propose requirements for RGRs to hold records about their use of the ‘carve-out’ clauses and for the Commission to request these records. This provides an additional mechanism to incentivise fair conduct by ensuring the RGRs have properly considered whether they have a reasonable basis for their carve-outs to the Code’s protections.

3.80 We consider each clause that provides for carve-outs below.

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<sup>121</sup> <https://www.foodstuffs.co.nz/partnering-with-us/Working-together-with-suppliers>

<sup>122</sup> <https://www.foodstuffs-exchange.co.nz/assets/documents/FSNI-docs/FSNI-Reasonableness-of-charges-table.pdf>

<sup>123</sup> New Zealand Food & Grocery Council submission "Request for views on issues and opportunities to consider within the review" (16 September 2024) at para 4.15  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

## Unilateral variations (Clause 9)

### What this clause currently requires

- 3.81 Clause 9 sets out the circumstances when a RGR can make a variation to a GSA without specific consent of the supplier in specific circumstances. The parameters include that the GSA provides for unilateral variations, sets out the methodology to be used for quantitative adjustments and that the variation is reasonable in the circumstances Issues/ opportunities raised
- 3.82 Limited feedback was received about this clause specifically. However, NZFGC has raised this in the context of being a “carve out clause” and is concerned that in practice the RGRs have sought in their template GSAs to “contract out” of, or provide for the ability to contract out of, most of the protections under the Code where the clause allows for this. NZFGC states this has created the unfortunate situation for suppliers where if they wish to have the protections intended by the Code, they need to negotiate with the RGRs to reinstate them.<sup>124</sup>
- 3.83 Foodstuffs submits that there is a range of circumstances where it is reasonable for a GSA to be varied without the supplier's agreement. Foodstuffs suggested one example is legislative change. It notes that if every variation needed to be agreed in writing, this would impose very significant time and administrative burdens on both RGRs and suppliers.<sup>125</sup>

### Draft decision

- 3.84 Amend the Code to include record-keeping requirements for the RGR and for the RGR to provide the records to the Commission on request.

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<sup>124</sup> New Zealand Food & Grocery Council submission "Request for views on issues and opportunities to consider within the review" (16 September 2024) at para 4.7

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

<sup>125</sup> Foodstuffs North and South Island “Submission on Review of the Grocery Supply Code Request for Views Paper” (16 September 2024) at p.10

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf)

## **9 Unilateral variation of agreement**

- (1) The retailer must not vary a grocery supply agreement without the consent of the supplier concerned
- (2) Subclause (1) does not apply if—
  - (a) the agreement—
    - (i) provides expressly for the retailer to make the variation; and
    - (ii) sets out clearly the changed circumstances in which the variation can be made; and
    - (iii) sets out the basis or methodology for calculating the adjustment, when the variation involves a quantitative adjustment to the terms of supply; and
  - (b) the variation is made in accordance with the agreement; and
  - (c) the variation is reasonable in the circumstances; and
  - (d) the supplier is given reasonable notice, in writing, of—
    - (i) the variation; and
    - (ii) the terms of the variation; and
    - (iii) the retailer's reasons for making the variation.
- (3) In determining whether the variation is reasonable in the circumstances, regard must be had to the benefits, costs, and risks (if any) for the supplier and retailer.
- (4) Subclause (3) does not limit subclause (2)(c).
- (5) The retailer's notice under subclause (2)(d)(iii) must include a clear and full written explanation as to why the retailer considers that—
  - (a) the variation is reasonable in the circumstances; and
  - (b) the other matters in subclause (2) are satisfied.
- (6) A retailer that relies on subclause (2) must do all of the following:
  - (a) keep records for each variation setting out how the matters in that subclause are satisfied:
  - (b) make the records available to the Commission on request:
  - (c) keep such records for at least 7 years.
- (7) The Commission does not need to use its powers under section 98 of the Commerce Act 1986 or section 182(c) and (d) of the Act to make a request under subclause (6)(b).

## Reasons

- 3.85 Record-keeping on how the clause is used will provide RGRs with a further incentive to use the provision fairly. It will also better enable the Commission to monitor conduct. This seeks to minimise the risk that suppliers are subject to variations that are unfair in the circumstances or that they do not realise have occurred.

## Payments to suppliers (Clause 12)

### What this clause currently requires

- 3.86 Clause 12 sets out that a RGR must pay a supplier for all groceries in the timeframe set out in the GSA and within a reasonable time after receiving the supplier's invoice for the products. It also sets out the circumstances where a retailer can set off (deduct) amounts from the payment. Those circumstances include where it is provided for in the GSA and reasonable in the circumstances .

### Issues/ opportunities raised

- 3.87 Feedback on this clause was focused on the circumstances that allow a set-off, as one of the "carve-out clauses". This includes NZFGC's concerns that in practice the RGRs have sought in their template GSAs to "contract out" of, or provide for the ability to contract out of, most of the protections under the Code where the clause allows it.<sup>126</sup>
- 3.88 NZFGC submits that RGRs should not be permitted to automatically set-off any amount against a supplier's invoice or remittance if there is a dispute regarding the reasonableness of that set-off. NZFGC submits that the RGRs' template GSAs allow them to set off charges or other amounts against any amounts they owe suppliers. They submit that this defeats the purpose of requiring RGRs to demonstrate the reasonableness of a set-off as it places the burden on suppliers to demonstrate why a set-off is unreasonable after it has already been applied.<sup>127</sup>

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<sup>126</sup> New Zealand Food & Grocery Council submission "Request for views on issues and opportunities to consider within the review" (16 September 2024) at para 4.7

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

<sup>127</sup> New Zealand Food & Grocery Council submission "Request for views on issues and opportunities to consider within the review" (16 September 2024) at para 4.18

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

3.89 Foodstuffs submitted that allowing a grocery supply agreement to provide for a right of set-off (without the need for additional written consent) reduces transaction costs. Mandating that suppliers must in every case give written consent to a set-off would, given the volume of transactions Foodstuffs enters into, impose an unreasonable administrative burden on all parties.<sup>128</sup> We have however heard that it is difficult to keep track of payments to retailers and the related deductions, and seek further feedback on this.

#### Draft decision

3.90 Prioritise development of guidance to support the fair use of set-offs. In addition, introduce requirements that allow for the supplier to be able to request an itemised account of all payments and deductions for financial quarters and reasons for those payments and deductions.

### 12 Payment to suppliers

- (1) The retailer must pay a supplier for all ~~grocery products~~ ~~groceries~~ delivered and accepted in accordance with a grocery supply agreement—
  - (a) within the time frame set out in the agreement; and
  - (b) in any case, within a reasonable time after receiving the supplier’s invoice for the products.
- (2) The retailer 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) the set-off is reasonable in the circumstances.
- (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) A retailer that relies on subclause (3) must ~~—, after receiving a written request from the supplier,~~
  - (a) ~~on the written request of the supplier,~~ give a clear and full written explanation to the supplier as to—
    - (i) how the set-off was calculated; and
    - (ii) why the retailer considers that the set-off is reasonable in the circumstances; and
    - (iii) why the retailer considers that the other matters in subclause (3) are satisfied; ~~and~~

<sup>128</sup>Foodstuffs North & South Island submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at p. 10  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf)

- (b) on the written request of the supplier made no later than 20 working days after the end of the retailer’s financial quarter, provide an itemised account of all payments and deductions off invoices in the retailer’s preceding financial quarter.
- (5) For each item listed in the account, its reason or purpose and method of calculation must be described.
- (6) In relation to requests referred to in subclause (4)(b), a retailer must respond no later than 30 working days after the request.

### Reasons

- 3.91 While the Code currently provides for a supplier to make a request for a written explanation for any transactions, we consider that the ability to request a summary for the financial quarter or year will increase certainty and transparency for suppliers who would only need to make one request rather than multiple to gain better information about how the clause has been applied and any patterns in how set-offs were calculated.
- 3.92 This increased transparency should be considered against the administrative burden of producing itemised accounts. We have sought to limit this by specifying a limited window in which an account can be requested.

### Payments for wastage (Clause 14)

#### What this clause currently requires

- 3.93 Clause 14 sets out the circumstances where an RGR can require a payment from a supplier for wastage of products (the products become unfit for sale) that have occurred while the groceries are in the effective control of the RGR. Those circumstances include where it is provided for in the GSA and reasonable in the circumstances.

#### Issues/ opportunities raised

- 3.94 Information provided by RGRs to the Commission suggests that payments for wastage are low relative to the total payments received from suppliers to RGRs.
- 3.95 Limited feedback was received about this clause specifically. The Commission has heard directly from a supplier that chose to stock shelves themselves to avoid wastage charges,

- 3.96 This clause has been raised in the context of being a “carve out clause” including NZFGC’s concerns that in practice the RGRs have sought in their template GSAs to “contract out” of, or provide for the ability to contract out of, most of the protections under the Code where the clause allows it. NZFGC states this has created the unfortunate situation where if they wish to have the protections intended by the Code, they need to negotiate with the RGRs to reinstate them.<sup>129</sup>
- 3.97 Foodstuffs submits that there are circumstances where suppliers are best placed to manage the risk of wastage, even where groceries are under the effective control of an RGR. For example, where suppliers are merchandising at stores or where suppliers are responsible for inventory management.
- 3.98 FSNI provides an explainer of wastage payments on their supplier community website.<sup>130</sup> This sets out that there can be payments for “actual wastage” which covers specific instances of damage above the threshold covered by their “minor damage allowance.” The current threshold is a full case/shipper.<sup>131</sup> Where a minor damage allowance is in place, claims are not made for wastage less than the threshold as an agreed level of payment is paid instead.

#### Draft decision

- 3.99 Amend the Code to no longer provide for payments by the supplier for wastage while groceries are in the effective control of the RGR.

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<sup>129</sup> New Zealand Food & Grocery Council submission "Request for views on issues and opportunities to consider within the review" (16 September 2024) at para 4.7

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

<sup>130</sup> <https://www.foodstuffs-exchange.co.nz/assets/documents/FSNI-docs/FSNI-Reasonableness-of-charges-table.pdf>

<sup>131</sup> <https://www.foodstuffs-exchange.co.nz/assets/documents/FSNI-docs/Minor-Damage-Allowance-Supplier-Overview.pdf>

## 14 Payments for wastage

(1) The retailer must not directly or indirectly require a supplier to make any payment to cover any wastage of groceries incurred while the groceries are under the effective control of—

- (a) the retailer; or
- (b) a contractor or agent of the retailer; or
- (c) any other entity that is a retailer.

~~(2) Subclause (1) does not apply if—~~

~~(a) the relevant grocery supply agreement sets out expressly and unambiguously the circumstances, which could include negligence by the supplier, in which the supplier will be required to make payments to cover wastage of the supplier's groceries incurred while the groceries are under the effective control of a person or entity referred to in subclause (1); and~~

~~(b) the wastage occurs in such circumstances; and~~

~~(c) the wastage was mainly the result of actions or omissions by the supplier; and~~

~~(d) the basis of the payment is set out in the grocery supply agreement; and~~

~~(e) the payment is reasonable having regard to the retailer's costs incurred by the wastage; and~~

~~(f) the retailer takes reasonable steps to mitigate those costs; and~~

~~(g) the retailer's claim for payment by the supplier is made no later than 6 months after the goods were received by the person or entity referred to in subclause (1).~~

~~(3) A retailer that relies on subclause (2) must give a clear and full written explanation to the supplier as to why the retailer considers that—~~

~~(a) the payment is reasonable in the circumstances; and~~

~~(b) the other matters in subclause (2) are satisfied.~~

~~(4) Subclause (5) applies if—~~

~~(a) the relevant grocery supply agreement provides for the supplier to make payments to cover wastage of the supplier's groceries; and~~

~~(b) the supplier seeks to negotiate a variation of the agreement relating to payments of that kind.~~

~~(5) The retailer must not, in the course of the negotiations or as a precondition to entering into the negotiations, seek to negotiate other variations of the agreement unrelated to payments of that kind.~~

~~(6)~~(2) In this clause, **payment** includes payment in kind.

## Reasons

- 3.100 We consider the circumstances where it would be fair to charge a supplier for wastage that occurs while groceries are in the effective control of an RGR would be limited (such as the examples provided by Foodstuffs). In this context we do not see a sufficient rationale for allowing these payments to be negotiated, given the risks that these payments will not be fair.
- 3.101 We consider that this provision may be used unfairly given the inherent pressure on suppliers to agree to terms to obtain/maintain ranging with retailers. Currently the clause is written to limit the circumstances where it can be used, but ensuring compliance with those provisions is complex. RGRs are also best placed to manage the risks related to these costs and allocating them to the RGRs promotes efficient behaviour. We consider the purposes of the Code, including prohibiting unfair conduct by RGRs and promoting certainty for suppliers, would be better met with a prohibition on such payments. We seek feedback on a prohibition on these wastage payments, including potential impacts or further examples of where such a payment would be reasonable. We note that clause 14 does not apply where the wastage is incurred before the groceries are under the effective control of an RGR. For example, the ban on requiring payments from the supplier would not apply where groceries are recalled for food safety reasons due to contamination during their manufacture.
- 3.102 We note there is a risk that the RGR could seek to transfer any costs that would have been recovered through a wastage payment to the price that they pay for the product. While this is not the intended outcome of our decisions, we consider there could still be benefits from simplifying the number of payments that the supplier is making.

## Payments as a condition of being supplier (Clause 15)

### What this clause currently requires

- 3.103 This clause sets out circumstances where an RGR can require a payment from a supplier as a condition of being a supplier. It limits the circumstances to payments made in relation to a promotion (subject to clause 17) and new products (those not stocked in the previous year in more than 25% of the RGRs' stores). Other conditions that must be met include that the payment must be provided for in the GSA) and reasonable having regard to the costs and risks to the retailer

### Issues/ opportunities raised

- 3.104 Limited feedback was received about this clause specifically. This clause has been raised in the context of being a “carve out clause” by NZFGC for the reasons previously discussed”.<sup>132</sup>
- 3.105 Foodstuffs submits that the exception to the rule is narrow (i.e., a promotion or new product) and that this appears to strike the appropriate balance between certainty for suppliers and fostering competition and innovation.<sup>133</sup>

### Draft decision

- 3.106 Amend the Code to include record-keeping requirements for the RGR and for the RGR to provide the records to the Commission on request.

#### 15 Payments as condition of being supplier

- (1) The retailer must not require a supplier to make any payment as a condition of stocking or listing ~~grocery products~~ groceries.
- (2) Subclause (1) does not apply in relation to the retailer if—
- (a) the payment is made in relation to a promotion; or
  - (b) the payment—
    - (i) is required under the relevant grocery supply agreement; and
    - (ii) is made in respect of groceries that have not been stocked, displayed, or listed by the retailer during the preceding 365 days in 25% or more of its stores; and
    - (iii) is reasonable, having regard to the costs and risks to the retailer in stocking, displaying, or listing the ~~grocery products~~ groceries.
- (3) Subclause (2)(a) has effect subject to clause 17 (funding promotions).
- (4) A retailer that relies on subclause (2) must do all of the following:
- (a) keep records for each required payment setting out how the matters in subclause (2) are satisfied:
  - (b) make the records available to the Commission on request:
  - (c) keep the records for at least 7 years:
  - (d) give a clear and full written explanation to the supplier as to why the retailer considers that the matters in subclause (2) are satisfied.

<sup>132</sup> New Zealand Food & Grocery Council submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at para 4.7

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

<sup>133</sup> Foodstuffs North & South Island submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at p. 11

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf)

(5) The Commission does not need to use its powers under section 98 of the Commerce Act 1986 or section 182(c) and (d) of the Act to make a request under subclause (4)(b).

~~(5)~~(6) In this clause, unless the context otherwise requires,—

**25% or more of its stores**, in the case of a retailer that is part of a group, means 25% or more of the retail stores owned or operated by the group

**payment** includes payment in kind.

## Reasons

- 3.107 Record-keeping on how the clause is used will provide RGRs a further incentive to use the provision fairly and better enable the Commission to monitor conduct. This seeks to minimise the risk that suppliers are subject to payments that are unfair..

## Payments for retailer's business activities (Clause 16)

### What this clause currently requires

- 3.108 This clause sets out that a retailer can only require payments from a supplier for retailer's business activities in limited circumstances. It notes that a retailer's business activities include:
- 3.108.1 a buyer's visit to the supplier:
  - 3.108.2 artwork or packaging design:
  - 3.108.3 consumer or market research:
  - 3.108.4 the opening or refurbishing of a store:
  - 3.108.5 hospitality for the retailer's staff:
  - 3.108.6 merchandising (for example, stocking shelves and setting up displays):
  - 3.108.7 the transport of goods within a retailer's business, which may include transport between distribution centres and retail stores;

## Issues/ opportunities raised

- 3.109 This clause has been raised in the context of being a “carve out clause” by NZFGC for the reasons previously discussed.<sup>134</sup>
- 3.110 In addition, multiple comments have been received in relation to payments to for merchandising.
- 3.111 ART Submitter One noted when dealing with FSNI the onus is on the supplier to reject merchandising terms rather than it being an exception, and favour is given to those that accept.<sup>135</sup>
- 3.112 Anonymous Submitter B says “despite merchandising services being ruled out by the Code as suppliers' responsibility, many stores still think it is their right to demand merchandising from us or charge for it. If we remove or reduce merchandising services, we face the threat of deletion.”<sup>136</sup>
- 3.113 Anonymous Submitter C submits “we are still bullied paying ..... merchandising and promotion fees but stores still expecting us to also merchandise with threats of deleting if don't comply”.<sup>137</sup>
- 3.114 Anonymous Submitter A says “with agreements to terms such as the .... merchandising term - it is clear that the concessions made are not translating at store level - additional staff not being employed or inability of store staff to know which suppliers have conceded to the term or not. This is validated in conversations with store buyers and owners. Suppliers are regretting their decision but despite this it would be almost impossible to reverse this term once agreed”.<sup>138</sup>

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<sup>134</sup> New Zealand Food & Grocery Council submission "Request for views on issues and opportunities to consider within the review" (16 September 2024) at para 4.7

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

<sup>135</sup> Anonymous Reporting Tool submissions, "Request for views on issues and opportunities to consider within the review" at para 4.4 [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0032/362498/Anonymous-Reporting-Tool-summary-Submissions-on-the-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-17-August-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0032/362498/Anonymous-Reporting-Tool-summary-Submissions-on-the-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-17-August-2024.pdf)

<sup>136</sup> Anonymous B submission. "Request for views on issues and opportunities to consider within the review" (11 September 2024) at para 9 [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0029/362495/Anonymous-B-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-12-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0029/362495/Anonymous-B-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-12-September-2024.pdf)

<sup>137</sup> Anonymous C submission, "Request for views on issues and opportunities to consider within the review" (16 August 2024) at p.6 [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0030/362496/Anonymous-C-Submission-on-the-Review-of-the-Grocery-Review-Code-Request-for-Views-paper-16-August-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0030/362496/Anonymous-C-Submission-on-the-Review-of-the-Grocery-Review-Code-Request-for-Views-paper-16-August-2024.pdf)

<sup>138</sup> Anonymous A submission, "Request for views on issues and opportunities to consider within the review" (5 August 2024) at p.8 [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0028/362494/Anonymous-A-Submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-5-August-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0028/362494/Anonymous-A-Submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-5-August-2024.pdf)

- 3.115 Approximately 19% of respondents to the Grocery Supplier Survey selected merchandising as an issue they had faced when dealing with an RGR in that year.<sup>139</sup>
- 3.116 Foodstuffs submitted “All grocery codes that we are aware of recognise that supermarkets and suppliers should be free to agree, in good faith, allocation of payments for activities such as those contemplated by clause 16 of the Code. .... various payments along the lines of those contemplated by clause 16 of the New Zealand Code are considered "grey practices" under the European Union Directive. These are allowed provided they are, among other things, "agreed in clear and unambiguous terms at the conclusion of the supply agreement or in a subsequent agreement between the buyer and the supplier".<sup>140</sup>
- 3.117 In cross-submissions Foodstuffs responded “as was canvassed over the course of the retail market study, responsibility for merchandising is a matter for commercial negotiation between RGRs and suppliers. There are clear efficiency gains when merchandising is undertaken by stores. Where merchandising is undertaken by stores, merchandising terms are agreed in good faith. Effective merchandising is important to both RGRs and suppliers and support for merchandising (whether by way of a term or in-store support by a supplier which meets FSNI's standards) is one way in which suppliers can differentiate their offering.”<sup>141</sup>
- 3.118 In relation to the concerns over services delivered Foodstuffs also responded “it is not in Foodstuffs' interests to keep products off shelves. FSNI’s successful merchandising program has been well-received by suppliers. At store level, members continue to increase team numbers to undertake in-store merchandising. Stores are made aware of suppliers who have agreed to the term. If requested by a supplier, FSNI will meet and discuss in good faith any merchandising term,”.<sup>142</sup>

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<sup>139</sup> TRA x Commerce Commission “Grocery Supplier Survey Report” (January 2025), page 33

<sup>140</sup> Foodstuffs North & South Island cross-submission “Request for views on issues and opportunities to consider within the review” (11 October 2024) at p.12-13

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0022/362740/Foodstuffs-North-Island-26-South-Island-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0022/362740/Foodstuffs-North-Island-26-South-Island-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf)

<sup>141</sup> Foodstuffs North & South Island cross-submission “Request for views on issues and opportunities to consider within the review” (11 October 2024) at p.115

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0022/362740/Foodstuffs-North-Island-26-South-Island-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0022/362740/Foodstuffs-North-Island-26-South-Island-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf)

<sup>142</sup> Foodstuffs North & South Island cross-submission “Request for views on issues and opportunities to consider within the review” (11 October 2024) at p.17

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0022/362740/Foodstuffs-North-Island-26-South-Island-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0022/362740/Foodstuffs-North-Island-26-South-Island-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf)

## Draft decision

- 3.119 Amend the Code to no longer provide for payments for retailer's business activities.

### 16 Payments for retailer's business activities

- (1) The retailer must not directly or indirectly require a supplier to make any payment towards the costs of any activity (the **retailer's business activity**) that is undertaken by the retailer in the ordinary course of carrying on a business as a retailer.
- (2) The retailer's business activity includes the following:
- (a) a buyer's visit to the supplier:
  - (b) artwork or packaging design:
  - (c) consumer or market research:
  - (d) the opening or refurbishing of a store:
  - (e) hospitality for the retailer's staff:
  - (f) merchandising (for example, stocking shelves and setting up displays):
  - (g) the transport of goods within a retailer's business, which may include transport between distribution centres and retail stores.
- ~~(3) Subclause (1) does not apply if—~~
- ~~(a) the relevant grocery supply agreement provides for the payment; and~~
  - ~~(b) the payment is reasonable in the circumstances.~~
- ~~(4) In determining whether the payment is reasonable in the circumstances, regard must be had to the following:~~
- ~~(a) the likely benefits to the supplier from the retailer's business activity;~~
  - ~~(b) the likely benefits to the retailer from the retailer's business activity;~~
  - ~~(c) the costs borne, or contributions made, by the retailer for the retailer's business activity.~~
- ~~(5) Subclause (2) does not limit subclause (1).~~
- ~~(6) Subclause (4) does not limit subclause (3)(b).~~
- ~~(7) A retailer that relies on subclause (3) must give a clear and full written explanation to the supplier as to why the retailer considers that—~~
- ~~(a) the payment is reasonable in the circumstances; and~~
  - ~~(b) the other matter in subclause (3) is satisfied.~~
- ~~(8)(3)~~ In this clause, **payment** includes payment in kind.

## Reasons

- 3.120 We consider that this provision may be used unfairly given the inherent pressure on suppliers to agree to terms to obtain/maintain ranging with retailers. RGRs are also best placed to manage these costs and allocating them to the RGRs promotes efficient behaviour. We consider the purposes of the Code, including prohibiting unfair conduct by RGRs and promoting certainty for suppliers, would be better met with a prohibition on such payments. We seek any examples of activities where payments under this clause would be fair. We do not consider it fair and reasonable for a supplier to pay a retailer to keep shelves stocked with their products.
- 3.121 We note there is a risk that the RGR could seek to transfer any costs that would have been recovered through one of these payments to the price that they pay for the product. While this is not the intended outcome, we consider there could still be benefits from simplifying the number of payments that the supplier is making.

## Funding promotions (Clause 17)

### What this clause currently requires

- 3.122 Clause 17 sets out that funding can only be obtained from suppliers in connection with a promotion in limited circumstances. These include that the GSA provides for the funding and the funding is reasonable in the circumstances.

### Issues/ opportunities raised

- 3.123 Both WWNZ and Foodstuffs submit that suppliers are drivers of promotional funding activity.<sup>143 144</sup>
- 3.124 WWNZ submits the practice of supplier promotional funding involves suppliers charging higher upfront invoice prices to retailers, with discounts to achieve an overall lower “net price” provided to retailers through promotional funding on a periodic basis. WWNZ submits that it is not a matter of the RGR requiring suppliers to provide promotional funding, but rather it is a practice that benefits and is primarily driven by suppliers (not by WWNZ) which is common across the world. It notes this is because it is a practice that allows suppliers to control the timing of a retailer’s promotional programme in relation to their products.

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<sup>143</sup> Foodstuffs North & South Island submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at p12

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf)

<sup>144</sup> Woolworths New Zealand submission "Request for views on issues and opportunities to consider within the review" (16 September 2024) at para 3.6

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0023/362507/Woolworths-New-Zealand-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0023/362507/Woolworths-New-Zealand-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

- 3.125 WWNZ states its role as a retailer (and NZGW's role as a wholesaler) would be significantly simplified if suppliers were instead willing to agree to lower upfront (everyday) cost prices to WWNZ (as it would simplify WWNZ's ability to offer everyday low prices to consumers, simplify pricing integrity and clarity to consumers and smooth demand profiles, which would provide supply chain efficiencies) as well as enhancing NZGW's ability to offer competitive everyday wholesale prices to other retailers)<sup>145</sup>.
- 3.126 Foodstuffs submits that it is fundamentally important that RGRs retain the ability to negotiate and agree the level of supplier-funded promotional activity. Foodstuffs state that in the New Zealand environment, suppliers are a key driver of promotional activity to increase sales volumes and have the corresponding ability to negotiate a net price into store that accounts for the benefit of such promotional activity. Negotiation and agreement of promotional funding promotes competition in the retail markets for groceries, which leads to lower prices for consumers. Retaining this ability is also consistent with the grocery codes in other jurisdictions that Foodstuffs is aware of. This is unsurprising, given the critical role that retailers play in negotiating with suppliers effectively on behalf of consumers.<sup>146</sup>
- 3.127 NZFGC cross-submits that the WWNZ description is not an accurate reflection of the purpose of promotions or how prices are negotiated. It submits that promotions are not a tool used by suppliers to negotiate higher upfront prices to retailers. There are many different types of promotional activities and they are used from time to time for a range of reasons, including to encourage consumers to trial a product, increase product awareness and increase volume during a lower demand period etc. It submits that if all supplier-funded promotional activity was prohibited under the Code, this would have significant negative implications for suppliers and consumers by removing a key element of the competitive process. NZFGC put forward that the issue that the Commission should be considering as part of its review is how best to redress the imbalance of bargaining power that exists between suppliers and the RGRs in negotiations about supplier-funded promotions.<sup>147</sup>

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<sup>145</sup> Woolworths New Zealand submission "Request for views on issues and opportunities to consider within the review" (16 September 2024) at para 3.6

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0023/362507/Woolworths-New-Zealand-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0023/362507/Woolworths-New-Zealand-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

<sup>146</sup> Foodstuffs North & South Island cross-submission "Request for views on issues and opportunities to consider within the review" (11 October 2024) at page 8

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0022/362740/Foodstuffs-North-Island-26-South-Island-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0022/362740/Foodstuffs-North-Island-26-South-Island-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf)

<sup>147</sup> New Zealand Food & Grocery Council cross-submission "Request for views on issues and opportunities to consider within the review" (11 October 2024) at p.12

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0023/362741/New-Zealand-Food-and-Grocery-Council-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0023/362741/New-Zealand-Food-and-Grocery-Council-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf)

## Draft decision

- 3.128 Prioritise guidance for supplier funding of promotions.
- 3.129 Amend the Code to include record-keeping requirements for the RGR in relation to clause 17 and for the RGR to provide the records to the Commission on request.

### 17 Funding promotions

- (1) The retailer must not directly or indirectly require a supplier to fund part or all of the costs of a promotion.
- (2) Subclause (1) does not apply if—
- (a) the relevant grocery supply agreement provides for the funding; and
  - (b) the funding is reasonable in the circumstances.
- (3) In determining whether the funding is reasonable in the circumstances, regard must be had to the following:
- (a) the likely benefits to the supplier from the promotion; and
  - (b) the likely benefits to the retailer from the promotion; and
  - (c) the costs borne, or contributions made, by the retailer for the promotion.
- (4) Subclause (3) does not limit subclause (2)(b).
- (5) A retailer that relies on subclause (2) must ~~—, after receiving a written request from the supplier, give a clear and full written explanation to the supplier as to why the retailer considers that —~~
- ~~(a) the funding is reasonable in the circumstances; and~~
  - (a) keep records for each required payment setting out how the matters in that subclause are satisfied; and
  - (b) make those records available to the Commission on request; and
  - (c) keep the records for at least 7 years; and
  - (d) after receiving a written request from the supplier, give a clear and full written explanation to the supplier as to why the retailer considers that the other matters in that subclause (2) is-are satisfied.
- (6) The Commission does not need to use its powers under section 98 of the Commerce Act 1986 or section 182(c) and (d) of the Act to make a request under subclause (5)(b).
- (7) In relation to request referred to in subclause (5)(d), a retailer must provide the explanation no later than 20 working days after the request.
- ~~(6)(8)~~ In this clause, **fund** includes payment in kind.

## Reasons

- 3.130 While we recognise that at least some suppliers choose to fund promotions we are concerned that there may be pressure surrounding the details of agreements. We are also concerned that smaller suppliers may be more vulnerable to this pressure.
- 3.131 The obligation to keep records in relation to each instance of promotional funding increases the incentives on RGRs to ensure that the conduct is fair in the circumstances and helps to promote transparency and certainty about the terms of agreements for suppliers.
- 3.132 The requirement to provide the records to the Commission on request would make the process of monitoring compliance with this clause more efficient and increase the RGRs' incentives to comply.

## Funded promotions (Clause 20)

### What this clause currently requires

- 3.133 Clause 20 (1) requires reasonable written notice before holding the promotion.
- 3.134 The remainder of Clause 20 sets obligations for RGRs when ordering grocery products from a supplier at a promotional price. This includes:
- 3.134.1 ensuring the basis on which the quantity of the order is transparent;
  - 3.134.2 agreeing with the supplier (in writing) on what happens to any excess stock that remains unsold at the end of the promotional period;
  - 3.134.3 requiring the RGR to either obtain the suppliers consent or compensate the supplier when cancelling an order or reducing it by more than 10%.

### Issues/ opportunities raised

- 3.135 Feedback was not received in relation to this clause specifically. However, we consider it important to look carefully at this clause alongside Clause 17 (funding promotions). In particular we have focused on 20(2) which provides flexibility for RGRs and retailers to agree what happens to stock ordered at a promotional price and remains unsold at the end of the promotional period. In the Market Study into the Retail Grocery Sector the Commission heard from suppliers that it is common for certain retailers to stockpile products purchased from a supplier at the promotional price. This is referred to as 'investment buying' or 'forward buying'.<sup>148</sup>

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<sup>148</sup> Market study into the retail grocery sector (8 March 2022) at para 8.109  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf)

3.136 There were varying views put forward during the development of the Code in relation to whether this practice should be able to continue. The Code's current rules allow for investment buying if there is a written agreement with the supplier.

3.137 This is in contrast to the rules in Australia, which require:

(2) If the large grocery business orders a grocery product from a supplier in connection with the funded promotion at a promotional price (whether calculated by way of discount, rebate, credit, allowance or otherwise), the large grocery business must:

(a) ensure that the basis on which the quantity of the order is calculated is transparent; and

(b) not over-order; and

(c) if the large grocery business sells any over-ordered product above the promotional resale price—pay the supplier the difference between the supplier's promotional price and the supplier's full price for the product.<sup>149</sup>

#### Draft decision

3.138 Amend clause 20 (2) of the Code to adopt the position in the Australian Code that if a retailer sells any overordered product above the promotional resale price (eg after the promotional period has ended), that they pay the supplier the difference between the supplier's promotional price and the supplier's full price for the product.

3.139 We propose to utilise s181 of the Act to require RGRs to provide information about compliance with this clause as needed.

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<sup>149</sup> Clause 33(2) of the Australian Competition and Consumer (Industry Codes – Food and Grocery) Regulations 2024 - <https://www.legislation.gov.au/F2024L01651/latest/text>

## 20 Funded promotions

- (1) If a supplier agrees to make a payment in support of the promotion of a product (the **funded promotion**), the retailer must give the supplier reasonable written notice before holding the promotion.
- (2) If the retailer orders a ~~grocery product~~ **groceries** from a supplier in connection with the funded promotion at a promotional price (whether calculated by way of discount, rebate, credit, allowance, or otherwise), the retailer must—
  - (a) ensure that the basis on which the quantity of the order is calculated is transparent; and
  - (b) ~~if the retailer sells any over-ordered groceries above the promotional resale price, pay the supplier the difference between the supplier's promotional price and the supplier's full price. agree with the supplier (in writing) on what happens to stock supplied at a promotional price but which remains unsold at the end of the promotional period.~~
- (3) If the retailer has placed an order for ~~a grocery product~~ **groceries** with a supplier in connection with the funded promotion, the retailer must not do either of the following without the supplier's written consent:
  - (a) cancel the order; or
  - (b) reduce the volume of the order by more than 10%.
- (4) Subclause (3) does not apply if—
  - (a) the retailer gives the supplier reasonable written notice of the cancellation or reduction; or
  - (b) the retailer compensates the supplier for any net resulting costs, losses, or expenses incurred or suffered by the supplier as a direct result of the retailer failing to give reasonable notice of the cancellation or reduction.

### Reasons

- 3.140 We consider that the current approach of requiring an agreement between retailers and suppliers on what happens to additional stock not sold during a promotional period is likely ineffective given the inherent pressure on suppliers to agree to terms to obtain/maintain ranging with retailers.
- 3.141 Requiring RGRs to pay the difference for any over-ordered product at a promotional price seeks to address the practice of “investment buying” which can provide certainty for the supplier in relation to moving a large amount of product, but provides significant benefits to retailers in terms of price. Some of this benefit may be passed on to consumers in relation to the non-discounted price, though this is not transparent or able to be monitored.

## New provisions - retaliation

### What the Code currently contains

- 3.142 The Code currently contains three relevant sections:
- 3.142.1 Clause 6 of the Code provides a list of principles to consider when determining whether a supplier has acted in good faith. This includes Clause 6(3)(d) “whether the retailer has not acted in a way that constitutes retaliation against the supplier for past complaints and disputes”.
  - 3.142.2 Clause 18 (5) provides that delisting as a punishment for a complaint, concern, or dispute raised by a supplier is not a genuine commercial reason.
  - 3.142.3 Clause 23 of the Code (Business disruption) requires that the retailer must not threaten a supplier with business disruption or termination of a grocery supply agreement without reasonable grounds.

### Issues/ opportunities raised

- 3.143 NZFGC have raised the Code’s lack of anti-retaliation protections as an issue in their submissions, highlighting that suppliers have a genuine fear of retaliation if they raise concerns about an RGR’s conduct. NZFGC have reconfirmed their view, made when the Code was developed, that the Code should include explicit anti-retaliation protections, including that for a period after a supplier raises a dispute or brings a complaint (for example, six months), or the Grocery Commissioner makes a determination in a supplier’s favour, the Grocery Commissioner may monitor whether a retailer retaliates against that supplier.<sup>150 151</sup>
- 3.144 Foodstuffs’ view is that protection against retaliation is adequately covered by the current good faith obligation.<sup>152</sup> WWNZ submits that it does not engage in retaliation, and also references the good faith obligation.<sup>153</sup>

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<sup>151</sup> New Zealand Food & Grocery Council submission "Request for views on issues and opportunities to consider within the review" (16 September 2024) at pg 14-15

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

<sup>152</sup> Foodstuffs North & South Island cross-submission “Request for views on issues and opportunities to consider within the review” (11 October 2024) at page 11

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0022/362740/Foodstuffs-North-Island-26-South-Island-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0022/362740/Foodstuffs-North-Island-26-South-Island-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf)

<sup>153</sup> Woolworths New Zealand cross-submission "Request for views on issues and opportunities to consider within the review" (11 October 2024) at para 3.17

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/362742/Woolworth-New-Zealand-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/362742/Woolworth-New-Zealand-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf)

## Draft decision

- 3.145 To add standalone provisions to the Code prohibiting retaliation by an RGR for exercising a right under the Code.

### **30 Retaliation**

- (1) A retailer must not retaliate against a supplier.
- (2) Subject to subclause (3), a retailer retaliates if—
- (a) it takes an action, or threatens to take an action, against a supplier that—
    - (i) has exercised, or indicated that it will or may exercise, a right under this code against the retailer; or
    - (ii) is, or may be, able to exercise a right under this code against the retailer; and
  - (b) the action causes, or would cause, detriment to the supplier.
- (3) Without limiting subclause (2), an action includes any of the following:
- (a) delisting the supplier's groceries;
  - (b) requiring the supplier to make excessive contributions towards promotional or marketing costs for the supplier's groceries;
  - (c) rejecting groceries from the supplier;
  - (d) changing the location of the supplier's groceries in store or online;
  - (e) delaying restocking the supplier's groceries in store or online;
  - (f) reducing the volume of stock ordered from the supplier;
  - (g) cancelling an order to the supplier;
  - (h) varying, terminating, or electing not to renew a grocery supply agreement with the supplier.
- (4) The action is not retaliation if it—
- (a) is not taken, or threatened to be taken, as punishment or a response to a matter described in subclause (2)(a); and
  - (b) is taken, or threatened to be taken, for genuine commercial reasons.
- (5) A retailer relying on subclause (4) bears the evidential burden in relation to the matters in that subclause.

## Reasons

- 3.146 To provide an explicit provision making clear that a retailer must not retaliate against a supplier for exercising or indicating that they will exercise a right under the Code.
- 3.147 These provisions are modelled on clause 7 and 30 of the new Australian Code which relate to retribution.

- 3.148 While in practice we recognise suppliers may still be hesitant to utilise the Code for fear of affecting relationships we seek to make the Code clear and enforceable in respect to retaliation.

### **Range review/ delisting – clauses 18,19 and 26**

#### **What the Code currently contains**

- 3.149 The Code introduced new rules for RGRs regarding processes for “range reviews” (also referred to as category reviews) including requirements to provide suppliers product ranging principles and requirements that RGRs must meet in a range review process.

#### **Issues/ opportunities raised**

- 3.150 Just under half of survey respondents reported facing an issue with category/range reviews or delisting in the last year. Of those that said yes to facing an issue with range reviews or delisting, approximately 70% also said yes to specifically facing an issue with the range review process. Through the survey we received 173 comments relating to delisting or category range reviews. We also received feedback on the category range review process through the Request for Views.
- 3.151 Through all information sources, we have identified the following key themes relating to range reviews:
- 3.151.1.1 Pressure on supplier margins;
  - 3.151.1.2 Limited engagement and poor communication;
  - 3.151.1.3 Concerns about delisting; and
  - 3.151.1.4 Access to data and transparency.
- 3.152 A summary of the information we have received regarding these issues is set out below.

#### **Pressure on supplier margins**

- 3.153 We have heard from some suppliers that they feel pressure in range reviews to increase the retailer’s margin with little room to negotiate and in some cases fear delisting is being threatened if margin expectations are unmet. In the Request for Views, Anonymous B notes in its submission that

*“They [RGRs] constantly index market pricing (which we don't control) and then demand further discounts to meet their competitor pricing, with the threat of deletion the penalty for not coming to the party. Yet they are often making more margin than their competitor anyway.”<sup>154</sup>*

3.154 Anonymous A wrote in its submission

*“The retailers continue to use their dominant power in negotiations to extract further margin - by performing range reviews (and stating the expected % margin increase) where it is made clear that there will be comprehensive deletions of a "brand". Suppliers are faced with a position of either conceding to the retailer terms or deletion of their entire brand.”<sup>155</sup>*

3.155 Relevant comments received in the Grocery Supplier Survey discussed increased RGR margins with no negotiation of benefits, unsustainable margin expectations and difficult negotiations to enhance retailer margins.

#### Limited engagement and poor communication

3.156 We would expect that in a range review that there is responsive communication and a good level of engagement from the retailer in line with their good faith obligations under clause 6 of the Code. We have heard from some suppliers that there is concern about the nature of their engagement or communications with retailers during range review.

3.157 The Request for Views submission from ART Submitter Two stated that:

*“there are limited opportunities for engagement in category reviews undertaken by Foodstuffs North Island and Foodstuffs South Island – more engagement and face to face discussion would support good faith bargaining”.*<sup>156</sup>

3.158 The New Zealand Specialist Cheesemakers Association also submitted on this issue suggesting that the Code has brought unintended consequences to the category range review process, writing:

*“RGRs are using the Code to reduce supplier input in ranging and delisting decisions. Through a narrow definition of these processes, retailers are making*

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<sup>154</sup> Anonymous B submission. "Request for views on issues and opportunities to consider within the review" (11 September 2024) at para 7

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0029/362495/Anonymous-B-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-12-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0029/362495/Anonymous-B-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-12-September-2024.pdf)

<sup>155</sup> Anonymous A submission, "Request for views on issues and opportunities to consider within the review" (5 August 2024) at para 5

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0028/362494/Anonymous-A-Submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-5-August-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0028/362494/Anonymous-A-Submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-5-August-2024.pdf)

<sup>156</sup> Anonymous Reporting Tool submissions, "Request for views on issues and opportunities to consider within the review" at para 3.3 [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0032/362498/Anonymous-Reporting-Tool-summary-Submissions-on-the-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-17-August-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0032/362498/Anonymous-Reporting-Tool-summary-Submissions-on-the-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-17-August-2024.pdf)

*unilateral decisions dressed up in code language about notice periods and reasonableness. What was a more nuanced and fluid process with more supplier involvement has become a one way notification process.”<sup>157</sup>*

- 3.159 Comments received through the grocery supplier survey also indicated that responders were concerned about communication and engagement levels during range review. Themes from these comments include unresponsive or slow responses from category teams, difficulty getting meetings or inconsistent communication.
- 3.160 Our view is that there should be reliable and consistent communication from category teams with suppliers around range reviews to promote certainty of terms between retailer and supplier. We would also expect this level of communication during a range review process to contribute to a trading environment where suppliers can confidently participate.

### Concerns about delisting

- 3.161 There were 99 comments received through the survey related to delisting.
- 3.162 This is an area of ongoing focus for compliance.

### Lack of data or transparency

- 3.163 We heard from NZFGC expressing its concern relating to range reviews “specifically the lack of transparency as to the reasons for RGR decision making particularly relating to deletions and supplier access to data”, and that its view was that this has not been addressed by the Code.<sup>158</sup> It is concerned that in the category review process, suppliers have limited access to data and in some circumstances can be required to pay for data at a high cost. This could make it difficult for some suppliers to properly engage in decisions.
- 3.164 An anonymous submitter proposed that more specific detail should be provided by all RGRs on the performance metrics used for assessing performance and informing category range reviews.<sup>159</sup>
- 3.165 Foodstuffs cross-submitted that it,

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<sup>157</sup> New Zealand Specialist Cheesemakers Association submission, "Request for views on issues and opportunities to consider within the review" (16 September 2024) at paras 16 [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/362504/New-Zealand-Specialist-Cheesemakers-Association-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/362504/New-Zealand-Specialist-Cheesemakers-Association-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

<sup>158</sup> New Zealand Food & Grocery Council submission "Request for views on issues and opportunities to consider within the review" (16 September 2024) at para 4.55 [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

<sup>159</sup> Anonymous Reporting Tool submissions, "Request for views on issues and opportunities to consider within the review" at para 2.3 [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0032/362498/Anonymous-Reporting-Tool-summary-Submissions-on-the-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-17-August-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0032/362498/Anonymous-Reporting-Tool-summary-Submissions-on-the-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-17-August-2024.pdf)

*“openly shares a range of data with suppliers including anonymised customer data and margin expectations. Ranging discussions are part of commercial negotiations with decisions to delist being made for genuine commercial reasons, supported by customer and commercial data and using a range of tools to assist with robust decision-making.”*<sup>160</sup>

3.166 The New Zealand Specialist Cheesemakers Association also submitted that:

*“this range review process has become a ‘black box’ process, resulting in a blind auction amongst suppliers. Critical information such as the substitutability of products, margin expectations, relative product performance and the interpretation of dunnhumby data is not shared, yet is the basis for business critical ranging decisions. Simple questions such as a required margin rate for a category are now replied to with a requirement for ‘the best commercial outcome’. The relative performance of products is now treated as commercially sensitive, with all products, regardless of parameters such as brand, provenance forced to compete for each RGR defined ‘need state’”... “In this environment suppliers have low confidence of ongoing market access which is a barrier to further business investment. Consumers can not be confident that they are getting the best of any category’s products. What they are getting is the product best able to provide maximised margins at retailer manipulated retail price points. And the market is becoming much less diverse.”*<sup>161</sup>

3.167 22% of Grocery Supplier survey respondents reported facing an issue related to “obtaining access to data insights”.<sup>162</sup>

### Positive feedback regarding range reviews

3.168 In the grocery supplier survey, we also heard positive feedback about category range review processes, referencing realistic market data, positive working relationships with category managers and fair dealings. Comments largely were made in regard to WWNZ’s conduct and some regarding Foodstuffs North Island. We have also heard anecdotally from suppliers that since that Code’s introduction, they feel more empowered to negotiate with the RGRs.

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<sup>160</sup> Foodstuffs North & South Island cross-submission “Request for views on issues and opportunities to consider within the review” (11 October 2024) at page 8  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0022/362740/Foodstuffs-North-Island-26-South-Island-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0022/362740/Foodstuffs-North-Island-26-South-Island-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf)

<sup>161</sup> New Zealand Specialist Cheesemakers Association submission, "Request for views on issues and opportunities to consider within the review" (16 September 2024) at paras 6-9  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0020/362504/New-Zealand-Specialist-Cheesemakers-Association-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0020/362504/New-Zealand-Specialist-Cheesemakers-Association-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

<sup>162</sup> TRA x Commerce Commissioner Grocery Supplier Survey, page 33

## Retailer feedback

- 3.169 Foodstuffs uses the example of category reviews as an area where there is a balance to be struck and argues that restricting the ability of RGRs to undertake category range reviews may reduce competition between suppliers. Foodstuffs' view is that in its current form, the Code generally strikes the balance between objectives appropriately. <sup>163</sup>
- 3.170 Foodstuffs also proposes that the delisting rules in the Code be clarified to encourage the trialling of new products, such that a decision by an RGR to cease stocking a product at the end of a mutually agreed trial period is not a decision to delist under the Code. <sup>164</sup>
- 3.171 They note the Code already provides that a decision by an RGR not to extend an agreement or enter into a new GSA the expiry of a fixed term grocery supply agreement is not a decision to delist a product. <sup>165</sup> In Foodstuffs' view, it would create greater certainty if the exception also specifically addressed agreed trials for individual new product lines under an overarching existing grocery supply agreement that has no fixed term. <sup>166</sup>

## Draft decision

- 3.172 We are not proposing any changes to the Code at this time and will focus on compliance and enforcement in relation to these clauses, with the development of guidance as needed.

## Reasons

- 3.173 We recognise the high level of concern in relation to ranging decisions. Accordingly, the Commission has recently completed a proactive compliance monitoring project assessing the RGR's range review processes, including delisting. We currently have ongoing work in this area and will be seeking to maintain a close focus on these activities.

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<sup>163</sup> Foodstuffs North & South Island submission "Request for views on issues and opportunities to consider within the review" (16 September 2024) at para 16

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf)

<sup>164</sup> Foodstuffs North & South Island submission "Request for views on issues and opportunities to consider within the review" (16 September 2024) at para 26

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf)

<sup>165</sup> Foodstuffs North & South Island submission "Request for views on issues and opportunities to consider within the review" (16 September 2024) at para 27

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf)

<sup>166</sup> Foodstuffs North & South Island submission "Request for views on issues and opportunities to consider within the review" (16 September 2024) at para 13

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf)

## Grocery Supply Code’s coverage of fresh produce- related issues

### What the Code currently contains

- 3.174 The Code sets rules under clause 21 for the setting of fresh produce standards and specifications

### *Issues/ opportunities raised*

- 3.175 In addition to the point about who the Code applies to, which is discussed in the “issues out of scope of the Code” section, the following issues were raised in relation to fresh produce.
- 3.175.1 Hort NZ submits “one unintended consequence of the Code has been an approach where some stores reportedly require 80% of purchases on each fresh produce line to be through a single grower. While the intention may be to focus on supporting a supplier relationship, this is a barrier to smaller and medium size growers competing and securing supply contracts.”<sup>167</sup>
- 3.175.2 In relation to fresh produce Anonymous E submits “large powerful retailers can corner the market on products that are in high demand and/or in short supply by applying pressure on suppliers who have stock, through either paying above the market so as to dominate the available supply, or by insisting on exclusive supply from the supplier, which supplier succumb to, due to hefty buying power going forward.”<sup>168</sup>
- 3.175.3 Foodstuffs also raised the need for clarity around “ranging” noting that unlike dry groceries, the idea that fresh produce is “listed” or “ranged” does not sit neatly with the dynamic operation of the supply chain (often involving daily/weekly trading).<sup>169</sup> This has been raised as an issue in relation to when delisting requirements apply to fresh produce. Horticulture New Zealand cross-submits support for a clear definition of when a fresh produce product is “listed”.<sup>170</sup>

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<sup>167</sup> Horticulture New Zealand submission, “Request for views on issues and opportunities to consider within the review” (16 September 2024) at page 4

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0018/362502/Horticulture-New-Zealand-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0018/362502/Horticulture-New-Zealand-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

<sup>168</sup> Anonymous E cross-submission “Request for views on issues and opportunities to consider within the review” at page 2 [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0029/362738/Anonymous-E-Cross-submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0029/362738/Anonymous-E-Cross-submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf)

<sup>169</sup> Foodstuffs North & South Island submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at para 30 [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf)

<sup>170</sup> Horticulture New Zealand cross-submission, “Request for views on issues and opportunities to consider within the review” (4 October 2024) at p5

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0028/362782/1b46c00338ec10c26c6a27e5dc126c0c0054f185.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0028/362782/1b46c00338ec10c26c6a27e5dc126c0c0054f185.pdf)

3.175.4 Foodstuffs submitted that the current “24-hour rejection period for fresh produce gives rise to practical difficulties” under the Code and that 48 hours is a “more reasonable and realistic time period”.<sup>171</sup>

3.175.5 NZFGC cross-submits they support the 24-hour rejection period for fresh produce and disagrees this should be extended to 48 hours. As NZFGC previously submitted during the MBIE consultation process, a rejection period of more than 24 hours is inappropriate given the short shelf-life of fresh fruits and vegetables as, after that period, damage could occur to fresh produce while out of the supplier’s control.<sup>172</sup>

#### Draft decision

3.176 We are not proposing any changes to the Code in relation to the following fresh produce issues. Instead, we intend to focus on information gathering to support further consideration of these issues in future.

#### Reasons

3.177 We recognise that there are key differences in the supply of fresh produce that could be further recognised by the Code. We would like to work through these issues in a more targeted way after the current review.

3.178 We note that the recent independent review of the Australian Food and Grocery Code of Conduct (Australian Code) and ACCC Supermarket Inquiry both had a strong focus on fresh produce, resulting in both changes to the Australian Code and further recommendations from the Inquiry.

3.179 Some more targeted work on fresh produce could also consider whether the changes/proposals in Australia would be beneficial in the New Zealand context.

3.180 This is separate to the question of who the Code applies to, which is discussed in the “issues out of scope of the Code” section.

### Issues outside our current powers

3.181 Two key areas have been raised in relation to how the Code is applied.

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<sup>171</sup> Foodstuffs North & South Island submission “Request for views on issues and opportunities to consider within the review” (16 September 2024) at para 33

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0016/362500/Foodstuffs-North-26-South-Island-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-16-September-2024.pdf)

<sup>172</sup> New Zealand Food & Grocery Council cross-submission “Request for views on issues and opportunities to consider within the review” (11 October 2024) at para 8.1

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0023/362741/New-Zealand-Food-and-Grocery-Council-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0023/362741/New-Zealand-Food-and-Grocery-Council-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf)

- 3.182 Firstly, the NZFGC raised through the Request for Views that the definition of groceries in the context of the Code should be inclusive, covering all products sold by an RGR (and by extension protecting all suppliers to those retailers).<sup>173</sup> The current exclusion of alcoholic drinks has also been raised through this review.
- 3.183 Secondly, in relation to fresh produce, Horticulture New Zealand remains concerned that many suppliers of fresh produce are not being protected by the Code because they do not deal with RGRs directly.
- 3.184 Both these concerns relate to the Code’s purpose of contributing to a trading environment in the grocery industry in which businesses participate confidently and that includes a diverse range of suppliers.
- 3.185 We discuss the two concerns further below.

### **Definition of groceries**

- 3.186 Groceries are defined in GICA as follows:

groceries—

- (a) means goods in any of the following product categories:
  - (i) fresh produce (for example, fruit, vegetables, and mushrooms):
  - (ii) meat, seafood, or meat substitutes:
  - (iii) dairy products (for example, milk, cheese, and butter):
  - (iv) bakery products:
  - (v) chilled or frozen food:
  - (vi) pantry goods or dry goods (for example, eggs):
  - (vii) manufacturer-packaged food:
  - (viii) non-alcoholic drinks:
  - (ix) personal care products (for example, toiletries, first aid, and medicine other than prescription medicine):

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<sup>173</sup> New Zealand Food & Grocery Council submission "Request for views on issues and opportunities to consider within the review" (16 September 2024) at para 4.36  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

(x) household consumables (for example, cleaning products, laundry products, and stationery products):

(xi) pet care products (for example, pet food); but

(b) does not include, for the purposes of the Act as a whole or for a specified Part of the Act, any good or product category that is excluded from this definition by the regulations for the purposes of the Act or that Part.<sup>174</sup>

- 3.187 NZFGC submits that the definition of groceries in the Act should be inclusive and capture all products that RGRs supply. They submit it is not immediately clear whether the definition would capture household products such as scrubbing brushes, magazines and newspapers, gift wrap, socks, underwear and party decorations. They also note there are a range of products which are sold through the supermarkets that NZFGC considers ought to be captured by the definition (if they are not already), including dust pans, buckets, cookware, toys, electronic goods, drink bottles, hot water bottles, electric blankets and baby products.<sup>175</sup>
- 3.188 Foodstuffs cross-submits the focus of the Code should remain on products where there are fewer distribution channels outside supermarkets.<sup>176</sup>
- 3.189 WWNZ state the requirements of the Code do not work well for other products that have their own unique and bespoke requirements - for example, flowers and newspapers that worldwide are commonly sold on a “sale or return” basis.<sup>177</sup>
- 3.190 The submissions suggest that there is a need to test the current definition and support more common understanding, which does sit within the role of the Commission, but any change to the definition to make it more inclusive is a consideration for administrators of GICA.

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<sup>174</sup> Refer to s5 of the Act.

<sup>175</sup> New Zealand Food & Grocery Council "Request for views on issues and opportunities to consider within the review" (16 September 2024) at para 4.35  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0019/362503/New-Zealand-Food-26-Grocery-Council-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

<sup>176</sup> Foodstuffs North & South Island cross-submission "Request for views on issues and opportunities to consider within the review" (11 October 2024) at page 7  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0022/362740/Foodstuffs-North-Island-26-South-Island-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0022/362740/Foodstuffs-North-Island-26-South-Island-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf)

<sup>177</sup> Woolworths New Zealand cross-submission "Request for views on issues and opportunities to consider within the review" (11 October 2024) at para 3.21(a)  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/362742/Woolworth-New-Zealand-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/362742/Woolworth-New-Zealand-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf)

- 3.191 Related to this, New Zealand Brewers Association and New Zealand Winemakers seek the policy decision to include beer and wine from the definition of groceries and consequently the scope of the Code be revisited. We note that beer and wine products are often subject to promotions, which is one of the focuses of the Code.<sup>178 179</sup>
- 3.192 WWNZ responds that it does not oppose broadening the definition of “groceries” to other genuine grocery products. WWNZ states that since the inception of the Code, they have taken the approach of treating alcoholic drinks as if they were covered by the Code and would have no concerns at such products being formally included within the scope of the Code.<sup>180</sup>
- 3.193 Foodstuffs does not agree that beer and wine should be included and states, “the focus of the Code should remain on products where there are fewer distribution channels and options for suppliers as an alternative to RGRs. In these circumstances, transactions within the bargaining framework between suppliers and RGRs can simply be allowed to take place without the overlay of the Code product-specific rules. This reduces the risk of unintended consequences resulting from unnecessary regulation, such as creating an unlevel playing field between RGRs and competing retail suppliers of the relevant products. In any event Foodstuffs deals with all its suppliers reasonably and in good faith. Also from a practical perspective, Foodstuffs offers the same form of grocery supply agreement across all suppliers”.<sup>181</sup>
- 3.194 We note that 14% of the respondents to our Grocery Supplier Survey stated that they were suppliers of alcoholic drinks.

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<sup>178</sup> Brewers Association of New Zealand submission, "Request for views on issues and opportunities to consider within the review" at page 2

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0033/362499/Brewers-Association-of-New-Zealand-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0033/362499/Brewers-Association-of-New-Zealand-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

<sup>179</sup> New Zealand Winegrowers submission, "Request for views on issues and opportunities to consider within the review" at page 2 [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0021/362505/New-Zealand-Winegrowers-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0021/362505/New-Zealand-Winegrowers-Submission-on-Review-of-the-Grocery-Supply-Code-Request-for-Views-paper-16-September-2024.pdf)

<sup>180</sup> Woolworths New Zealand cross-submission "Request for views on issues and opportunities to consider within the review" (11 October 2024) at para 2.3( e)

[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/362742/Woolworth-New-Zealand-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/362742/Woolworth-New-Zealand-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf)

<sup>181</sup> Foodstuffs North & South Island cross-submission “Request for views on issues and opportunities to consider within the review” (11 October 2024) at page

7 [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0022/362740/Foodstuffs-North-Island-26-South-Island-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0022/362740/Foodstuffs-North-Island-26-South-Island-Cross-submission-on-Review-of-Grocery-Supply-Code-Request-for-Views-paper-11-October-2024.pdf)

- 3.195 The submissions suggest that there is a need to test the current grocery definition and support more common understanding, which does sit within the role of the Commission, but any change to the definition to make it more inclusive is a consideration for MBIE as administrators of the Act and would require an amendment to the Act, which is outside the scope of the Commission’s powers.

### **Fresh produce supply chain**

- 3.196 Hort NZ’s submission highlighted the current Code does not protect all fresh produce suppliers as many deal with fresh produce wholesalers instead of with grocery retailers directly. <sup>182</sup>
- 3.197 The Commission’s current Wholesale Supply Inquiry has further emphasised the role that fresh produce wholesalers provide in the supply of fresh produce.
- 3.198 While outside the current scope of the Code, we included a question within the Grocery Supplier Survey to support further consideration of these concerns (“please explain what issues you’ve faced with fresh produce wholesalers”). Responses discussed price discrepancies, payment terms, lack of transparency and lack of trust.
- 3.199 We will continue to consider how best to support fresh produce suppliers through the Code but note that regulation of fresh produce wholesalers is outside the scope of the current Code.

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<sup>182</sup> Horticulture New Zealand cross-submission, “Request for views on issues and opportunities to consider within the review” (4 October 2024) at p6  
[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0028/362782/1b46c00338ec10c26c6a27e5dc126c0c0054f185.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0028/362782/1b46c00338ec10c26c6a27e5dc126c0c0054f185.pdf)

# **Attachment A - Legal framework for the grocery supply code review and determination**

## **Purpose of this attachment**

- A1. The current version of the Grocery Supply Code (**Code**) was introduced by the Grocery Industry Competition (Grocery Supply Code) Amendment Regulations 2023 and came into force on 28 September 2023.
- A2. The Commission is currently reviewing the Code and considering whether to make a determination to amend the Code.
- A3. This attachment sets out the framework under the Grocery Industry Competition Act 2023 (the Act) that we have applied when carrying out the review and making the draft determination that proposes amendments to the Code.

## **The Grocery Supply Code Review**

- A4. Section 20(1) provides that the Commission must:
  - A4.1. complete a first review of the Code within two years after the date on which it came into force; and
  - A4.2. give the Minister a report on that review as soon as practicable after completing it.
- A5. The Commission must therefore complete the first Code review by 28 September 2025.
- A6. Section 20(4) sets out the purpose of the review which is to:
  - A6.1. assess the operation and effectiveness of the Code; and
  - A6.2. assess whether the Code should be amended, revoked, or replaced.

## **Making a determination to amend, revoke, or replace the Grocery Supply Code**

### *Power to make a determination*

- A7. Section 12(1)(a) empowers the Commission to make a determination setting out a Code, which may apply to and impose duties on either:

- A7.1. all regulated grocery retailers (RGRs)<sup>183</sup> or related parties<sup>184</sup> referred to in section 18; or
- A7.2. a class of RGRs or related parties.
- A8. Section 12(1)(b) also empowers the Commission to provide for disapplication (in certain circumstances and on terms and conditions (if any) that the Commission thinks fit)<sup>185</sup> of any Code set out in a determination under section 12(1)(a) by:
- A8.1. exempting a specified RGR or related party, or class of RGRs or related parties, from any provision or provisions of the Code; and/or
- A8.2. providing that the trading relationships of a specified supplier or class of supplies are not covered (in whole or in part) by any provision or provisions of the Code.
- A9. We are not proposing any disapplications in our draft determination.
- A10. The first Code was made by the Governor-General, by Order in Council made on the recommendation of the Minister, in accordance with clause 4 of Schedule 1 of the Act. Under clause 5 of Schedule 1, the first Code made under clause 4 is revoked as soon as a determination made by the Commission under section 12(1)(a) comes into force.
- A11. It follows that if the Commission makes a determination, this will involve a revocation of the first Code.

*Process to make a determination*

- A12. Section 13 provides that the Commission may use any process that it considers appropriate to develop a determination under section 12.
- A13. However, we must:
- A13.1. publish a draft determination;
- A13.2. publish a statement of our reasons for proposing to make a determination; and

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<sup>183</sup> Defined in section 8 of the Act and clause 6 of the Grocery Industry Competition Regulations 2023.

<sup>184</sup> Defined in section 18 of the Act.

<sup>185</sup> Section 15.

A13.3. consult persons, or representatives of the persons that will be substantially affected by the determination.

- A1. The consultation about a determination that sets out a Code must include consultation about a draft code and the matters referred to in section 196(1)(e) (which relates to the level of pecuniary penalty for contraventions of the grocery supply code).
- A2. These requirements apply to any determination made by the Commission under Part 2, including any amendments to the Code, other than in limited circumstances.<sup>186</sup>

### **Mandatory considerations for the review and the determination**

- A14. We must take into account the purpose of the Code in section 16 and the purpose of the Act when carrying out the review and making our determination.
- A15. The overall purpose of the Act in section 3 is to promote competition and efficiency in the grocery industry for the long-term benefit of consumers in New Zealand.
- A16. Section 16 of the Act provides that the purpose of the Code is to promote the overall purpose of the Act by:
- A16.1. promoting fair conduct, and prohibiting unfair conduct, between regulated grocery retailers, the related parties referred to in section 18, and suppliers;
  - A16.2. promoting transparency and certainty about the terms of agreements between regulated grocery retailers, the related parties referred to in section 18, and suppliers; and
  - A16.3. contributing to a trading environment in the grocery industry:
    - A16.3.1. in which businesses compete effectively, and consumers and businesses participate confidently; and
    - A16.3.2. that includes a diverse range of suppliers.

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<sup>186</sup> Section 14 lists a number of exceptions to the requirements in paragraphs A13 and 1.1.1.2A1, but they do not apply in the circumstances of this determination.

A17. The Act implicitly recognises that the overall purpose of the Act will be promoted where the section 16 purposes are promoted. Accordingly, provided our decisions are consistent with and promote the section 16 purpose, the overall purpose of the Act will be promoted.

### **Content of the Grocery Supply Code**

A18. Section 17 sets out the matters that may be included in a Code.

A19. The Code may contain any provisions that that are necessary or desirable to promote the purpose of the Code in connection with the supply of groceries.

A20. That may include, but is not limited to, provisions to:

A20.1. regulate or prohibit any conduct in connection with a regulated grocery retailer:

A20.1.1. entering into or arriving at an agreement with a supplier;

A20.1.2. exercising a right or power, or complying with an obligation, under a supply agreement (whether the right, power, or obligation is exercised or complied with by a regulated grocery retailer or a supplier); or

A20.1.3. otherwise dealing with a supplier (or vice versa);

A20.2. specify any requirements about the content or form of a supply agreement, including:

A20.2.1. what terms or conditions must be included in the agreement, what terms or conditions must not be included and what terms or conditions may only be included if certain requirements are met; and

A20.2.2. how the terms or conditions of the agreement are expressed;

A20.3. regulate or prohibit any conduct in connection with a regulated grocery retailer supplying groceries acquired under a supply agreement to a consumer (for example, in connection with shelf-space allocation or in connection with marketing or otherwise promoting the groceries supplied under that agreement to consumers);

A20.4. regulate or prohibit any other conduct, or specify any other requirements, in connection with the supply of groceries under a supply agreement; and

A20.5. prescribe modifications or other matters for the purposes of clause 1 of Schedule 1 (which relates to the application of the Code (and other secondary legislation) to existing agreements).

A21. The Code may also contain any provisions that are necessary or desirable to promote the purpose of the Act in connection with the conduct, agreements, and relationships of a related party of an RGR in relation to suppliers and the supply of groceries to the RGR.<sup>187</sup>

Therefore the Commission has broad power to impose duties on RGRs and related parties in a Code, provided doing so is either necessary or desirable to promote the Code's purpose in connection with the supply of groceries and the purpose of the Act, and the Commission has complied with the procedural requirements in the Act.

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<sup>187</sup> Section 18(2) and (3).

## Attachment B Minor changes to improve readability of the new Code

Change #	Original clause title, if relevant	Original Clause reference or other reference	Amended clause reference (if applicable)	Proposed change	Reason
1	-	Throughout code	-	"Grocery products" amended to "groceries"	Code uses a mix of "groceries" and "grocery products" without any intended distinction. We have selected "groceries" for all instances consistent with the Act's use and definition of "groceries" and omission of "grocery products".
2	-	Part 4 subparts and subpart headings	-	Subparts omitted	Division into subparts not necessary
3	Purpose of code	2	1A		Allows new "Commencement" clause to be numbered as clause 2 without necessitating alterations to numbering of later clauses.
4	-	-	2	Insertion of "Commencement" clause	Secondary legislation needs to be clear on its face when it comes into force.
5	Interpretation	3(1)	-	Adjustment of definition of "code"	Definition needs to refer to the new version rather than the original code in a schedule to the Grocery Industry Competition Regulations 2023

Change #	Original clause title, if relevant	Original Clause reference or other reference	Amended clause reference (if applicable)	Proposed change	Reason
6				Definition of 'retaliates' inserted	Retaliation is a concept referred to in more than one clause
7				Insertion of "of groceries" into definition of "promotion"	Align scope of obligation with scope of the code.
8	When this clause applies	4	-	Clause title change to "Who this code applies to"	Plain English: "when" signifies a point or period of time whereas the clause content is focussed on the persons to whom the clause applies
9		4(3)	-	Omission of subclause (3)	Subclause (3) was a note of relevance only to the original code's coming into force for the first time
10	Obligation to deal with suppliers in good faith	6(3)(d)	-	"acted in a way that constitutes retaliation" amended to "retaliated"	Plain English
11	Payments for shrinkage	13	-	Remove clause (1)(b)	Bar on having a grocery supply agreement that includes payments for shrinkage is already covered by the bar in subclause (1)(a) that prevents this occurring "directly".
12	Funded promotions	20	18	Reordering clause to immediately follow "Funding promotions" clause	Grouping content on a similar theme

<b>Change #</b>	<b>Original clause title, if relevant</b>	<b>Original Clause reference or other reference</b>	<b>Amended clause reference (if applicable)</b>	<b>Proposed change</b>	<b>Reason</b>
13	Delisting products	18	19	Clause title change to "Delisting groceries"	For consistency with other amendments in body text of references to "grocery products" to "groceries"
14		18, Example 2	19, Example 2	Shift abbreviation "(B)" from after "beans" to after "local supplier"	(B) is used later in the example as an abbreviation for the local supplier, not the beans
15	Process requirements relating to delisting	19	20	Various changes to phrasing, punctuation and clause structure	Original drafting had several clauses with multiple requirements that read better split out into separate clauses, using consistent punctuation with rest of code.
16	Fresh produce standards and quality specifications	21	-	Adjusted references to "grocery product" to "fresh produce"	Original clause unintentionally inconsistent in its use of "fresh produce" and "grocery product". Change made throughout for clarity, consistent with limited scope of clause
17	Transfer of intellectual property rights	27	25	Reordering clause to immediately follow "Intellectual property rights" clause	Grouping content on a similar theme

<b>Change #</b>	<b>Original clause title, if relevant</b>	<b>Original Clause reference or other reference</b>	<b>Amended clause reference (if applicable)</b>	<b>Proposed change</b>	<b>Reason</b>
18		27	25	Omission of various references to "of the retailer"	Avoidance of duplication: that the product is owned by the retailer is already included in the definition of "private label product"
19	Product ranging, shelf space allocation, and range reviews	27(1)	-	Amendment of ":" to "—"	Consistent with punctuation convention of rest of code
20		27(6)	-	Amendment of "clause 19" to "clause 20"	Updating reference number to the same substantive clause consequent on change 16
21	Price increases	28	28	Various changes to phrasing	Plain English

# Attachment C All proposed changes to current grocery supply code (changes highlighted in red and moved text highlighted in green)

Note:

Reference:



This legislation is administered by the Commerce Commission. For more information please see:

Website: [<http://www.comcom.govt.nz>]

Contact phone: [agency phone number]

Contact address: [agency postal address]

## [Draft] Grocery supply code 2025

This Code is made under section 12(1)(a) of the Grocery Industry Competition Act 2023 by the Commerce Commission after considering the purpose of a code under section 16 of that Act and following the process specified in section 13 of that Act.

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## Code

### Part 1

#### Preliminary

#### 1 Title

This code is the ~~grocery supply code 2023~~ [Draft] Grocery supply code 2025.

#### 1A Purpose of code

See section 16 of the Act for the purpose of this code.

#### 2 Commencement

This code comes into force on [day month year].

#### 3 Interpretation

(1) In this code, unless the context otherwise requires,—  
**Act** means the Grocery Industry Competition Act 2023

**code** means ~~the this Grocery supply code~~ set out in this schedule 2025

**delists** has the meaning given by clause ~~18(2)~~ 19(2)

**groceries** has the same meaning as in section 5(1) of the Act

**grocery supply agreement** has the same meaning that **supply agreement** has in section 17 of the Act

**group** means a group consisting of—

- (a) a person (**A**) referred to in section 8(a) to (d) of the Act; and
- (b) each person that is any of the following:
  - (i) an interconnected body corporate of A;
  - (ii) a franchisee of A or of an interconnected body corporate of A;
  - (iii) a transacting shareholder of A or of an interconnected body corporate of A

**private label product** has the same meaning as in section 5(1) of the Act

**promotion** means—

- (a) any offer for sale **of groceries** (whether or not accompanied by some other benefit to a customer)—
  - (i) at an introductory or reduced price, or involving non-standard sales activity; and
  - (ii) as agreed between a retailer and a supplier; and
  - (iii) that is intended to last only for a specified period; or
- (b) any advertising or other in-store or online marketing activity (including a giveaway or an in-store product placement or promotional display)—
  - (i) as agreed between a retailer and a supplier; and
  - (ii) that is intended to last only for a specified period

**regulated grocery retailer** has the same meaning as in section 8 of the Act

**retailer** means a regulated grocery retailer

**retaliates** has the meaning given by clause 30(2)

**shrinkage** means a loss of ~~grocery products~~ **groceries** that—

- (a) occurs after a retailer has taken possession of them; and
- (b) arises from theft, other loss, or accounting error

**supplier** means a person carrying on (or actively seeking to carry on) a business of supplying groceries for sale by another person (whether or not that other person is the person supplied)

**wastage** means groceries that are unfit for sale.

- (2) Any term or expression that is defined in the Act and used, but not defined, in this code has the same meaning as in the Act.

#### **4 When-Who this code applies to**

- (1) This code applies to every regulated grocery retailer.
- (2) This code also applies to a person (**P**) that is a franchisee or transacting shareholder of an interconnected body corporate of a regulated grocery retailer (**A**) as if P were a franchisee or transacting shareholder of A.
- 5 Obligation to offer to vary existing agreements so that they are consistent with code
- (1) This clause applies to—
- (a) an existing agreement within the meaning of clause 1(3)(a) of Schedule 1 of the Act;  
or
- (b) a grocery supply agreement.
- to the extent that it is inconsistent with the requirements of this code.
- (2) Within ~~6-1 months~~ after this ~~clause-code~~ comes into force, the retailer must offer in writing variations to the agreement that would, if accepted by the supplier, make the agreement consistent with the requirements of this code.
- (3) Until 1 month after this code comes into force, the retailer will not be in breach of this code as a result of having an agreement that is inconsistent with the requirements of this code, provided the retailer is otherwise acting in accordance with the requirements of this code.
- ~~(4) From 1 month after this code comes into force, the retailer will not be in breach of this code as a result of having an agreement that is inconsistent with the requirements of this code where—~~
- ~~(a) the text of an agreement is inconsistent with the requirements of this code; and~~
- ~~(b) the retailer complied with subclause (2); and~~
- ~~(c) the offer required by subclause (2) was a reasonable offer; and~~
- ~~(d) the supplier has not accepted that offer; and~~
- ~~(e) the retailer is otherwise acting in accordance with the requirements of this code.~~
- ~~(3) See also Schedule 1 of these regulations (which apply the code after 6 months irrespective of whether the existing agreement is varied).~~

## Part 2

### Good faith

#### **6 Obligation to deal with suppliers in good faith**

- (1) The retailer must at all times deal with suppliers in good faith.
- (2) The retailer must ensure that their grocery supply agreements do not contain a provision that limits or excludes the obligation to act in good faith but, if it does, the provision does not limit that obligation.

- (3) In determining whether the retailer has acted in good faith in dealing with a supplier, the following may be taken into account:
- (a) whether the retailer has acted honestly:
  - (b) whether the retailer has co-operated to achieve the purposes of the relevant grocery supply agreement (including being responsive and communicative with the supplier):
  - (c) whether the retailer has not acted arbitrarily, capriciously, unreasonably, recklessly, or with ulterior motives:
  - (d) whether the retailer has not ~~acted in a way that constitutes retaliation-retaliated~~ against the supplier for past complaints and disputes:
  - (e) whether the retailer's trading relationship with the supplier has been conducted without duress:
  - (f) whether the retailer's trading relationship with the supplier has been conducted in recognition of the need for—
    - (i) certainty regarding the risks and costs of trading, particularly in relation to production, delivery and payment; and
    - (ii) provision of information to the supplier in a timely manner:
  - (g) whether the retailer has observed any confidentiality requirements relating to information disclosed or obtained in dealing with or resolving a complaint or dispute with the supplier:
  - (h) whether the retailer has avoided unreasonable discrimination or distinction between suppliers:
  - (i) whether, in dealing with the retailer, the supplier has acted in good faith.
- (4) Subclause (3) does not limit subclause (1).

### **Part 3**

#### **Grocery supply agreements**

##### **7 Grocery supply agreement must be in writing and retained**

- (1) The retailer must ensure that—
- (a) their grocery supply agreements are written in plain language; and
  - (b) a copy has been provided to the supplier.
- (2) The retailer must keep the original or a copy of each grocery supply agreement to which the retailer is a party while this code applies (including any document comprising the agreement, and any document made from time to time under the agreement that forms part of the agreement)—
- (a) during the term of the agreement; and
  - (b) for 7 years after the agreement ends.

##### **8 Matters to be covered by agreement**

The retailer must ensure that their grocery supply agreements specify all of the following:

- (a) any requirements the retailer has in respect of the delivery of groceries:
- (b) any circumstances in which the retailer may reject the groceries:
- (c) the period within which the retailer must pay the supplier for the groceries and the circumstances in which any payment, or part of a payment, may be withheld or delayed:
- (d) the term of the agreement (whether fixed or indefinite):
- (e) in clear terms, any quantity and quality requirements relating to the groceries:
- (f) if the agreement provides for cancellation by 1 or more parties to it, the circumstances in which it may be cancelled:
- (g) any terms that apply if the retailer decides to delist the groceries.

## **9 Unilateral variation of agreement**

- (8) The retailer must not vary a grocery supply agreement without the consent of the supplier concerned
- (9) Subclause (1) does not apply if—
  - (e) the agreement—
    - (iv) provides expressly for the retailer to make the variation; and
    - (v) sets out clearly the changed circumstances in which the variation can be made; and
    - (vi) sets out the basis or methodology for calculating the adjustment, when the variation involves a quantitative adjustment to the terms of supply; and
  - (f) the variation is made in accordance with the agreement; and
  - (g) the variation is reasonable in the circumstances; and
  - (h) the supplier is given reasonable notice, in writing, of—
    - (iv) the variation; and
    - (v) the terms of the variation; and
    - (vi) the retailer's reasons for making the variation.
- (10) In determining whether the variation is reasonable in the circumstances, regard must be had to the benefits, costs, and risks (if any) for the supplier and retailer.
- (11) Subclause (3) does not limit subclause (2)(c).
- (12) The retailer's notice under subclause (2)(d)(iii) must include a clear and full written explanation as to why the retailer considers that—
  - (c) the variation is reasonable in the circumstances; and
  - (d) the other matters in subclause (2) are satisfied.
- (13) **A retailer that relies on subclause (2) must do all of the following:**

- (d) keep records for each variation setting out how the matters in that subclause are satisfied:
  - (e) make the records available to the Commission on request:
  - (f) keep such records for at least 7 years.
- (14) The Commission does not need to use its powers under section 98 of the Commerce Act 1986 or section 182(c) and (d) of the Act to make a request under subclause (6)(b).

## 10 Retrospective variation of agreement

The retailer must not vary a grocery supply agreement with retrospective effect.

### Part 4

#### Conduct generally

##### ~~Subpart 1—Transport or logistics services~~

## 11 Transport or logistics services

- (1) The retailer must not directly or indirectly—
  - (a) require a supplier to use a particular transport or logistics service; or
  - (b) impose unreasonable service standards in respect of transport or logistics.
- (2) Subclause (1) does not prevent a retailer imposing reasonable service standards in respect of transport or logistics.

##### ~~Subpart 2—Paying suppliers~~

## 12 Payment to suppliers

- (7) The retailer must pay a supplier for all ~~grocery products~~ groceries delivered and accepted in accordance with a grocery supply agreement—
  - (c) within the time frame set out in the agreement; and
  - (d) in any case, within a reasonable time after receiving the supplier’s invoice for the products.
- (8) The retailer must not—
  - (c) 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
  - (d) the set-off is reasonable in the circumstances.
- (9) Subclause (2) does not apply if—
  - (c) the grocery supply agreement provides for the amount to be set off; and
  - (d) the set-off is reasonable in the circumstances.
- (10) A retailer that relies on subclause (3) must ~~—, after receiving a written request from the supplier,~~

- (c) ~~on the written request of the supplier,~~ give a clear and full written explanation to the supplier as to—
  - (iv) how the set-off was calculated; and
  - (v) why the retailer considers that the set-off is reasonable in the circumstances; and
  - (vi) why the retailer considers that the other matters in subclause (3) are satisfied; ~~and~~
- (d) ~~on the written request of the supplier made no later than 20 working days after the end of the retailer's financial quarter, provide an itemised account of all payments and deductions off invoices in the retailer's preceding financial quarter.~~
- (11) ~~For each item listed in the account, its reason or purpose and method of calculation must be described.~~
- (12) ~~In relation to requests referred to in subclause (4)(b), a retailer must respond no later than 30 working days after the request.~~

### ~~Subpart 3—Requiring payments from suppliers~~

#### **13 Payments for shrinkage**

- (1) The retailer must not ~~directly or indirectly require a supplier to make any payment as compensation for shrinkage.~~
  - ~~(a) directly or indirectly require a supplier to make any payment as compensation for shrinkage; or~~
  - ~~(b) have a grocery supply agreement under which a supplier is required to make such payments.~~
- (2) Subclause (1) does not prevent the retailer from raising, discussing, or agreeing with a supplier proposals and procedures to mitigate the risk and occurrence of shrinkage.
- (3) In this clause, **payment** includes payment in kind.

#### **14 Payments for wastage**

- (6) The retailer must not directly or indirectly require a supplier to make any payment to cover any wastage of groceries incurred while the groceries are under the effective control of—
  - (d) the retailer; or
  - (e) a contractor or agent of the retailer; or
  - (f) any other entity that is a retailer.
- ~~(7) Subclause (1) does not apply if—~~
  - ~~(h) the relevant grocery supply agreement sets out expressly and unambiguously the circumstances, which could include negligence by the supplier, in which the supplier will be required to make payments to cover wastage of the supplier's groceries incurred while the groceries are under the effective control of a person or entity referred to in subclause (1); and~~
  - ~~(i) the wastage occurs in such circumstances; and~~

- ~~(j) — the wastage was mainly the result of actions or omissions by the supplier; and~~
- ~~(k) — the basis of the payment is set out in the grocery supply agreement; and~~
- ~~(l) — the payment is reasonable having regard to the retailer’s costs incurred by the wastage; and~~
- ~~(m) — the retailer takes reasonable steps to mitigate those costs; and~~
- ~~(n) — the retailer’s claim for payment by the supplier is made no later than 6 months after the goods were received by the person or entity referred to in subclause (1).~~
- ~~(8) — A retailer that relies on subclause (2) must give a clear and full written explanation to the supplier as to why the retailer considers that—~~
  - ~~(c) — the payment is reasonable in the circumstances; and~~
  - ~~(d) — the other matters in subclause (2) are satisfied.~~
- ~~(9) — Subclause (5) applies if—~~
  - ~~(c) — the relevant grocery supply agreement provides for the supplier to make payments to cover wastage of the supplier’s groceries; and~~
  - ~~(d) — the supplier seeks to negotiate a variation of the agreement relating to payments of that kind.~~
- ~~(10) — The retailer must not, in the course of the negotiations or as a precondition to entering into the negotiations, seek to negotiate other variations of the agreement unrelated to payments of that kind.~~
- ~~(6)(2)~~ In this clause, **payment** includes payment in kind.

## 15 Payments as condition of being supplier

- (6) The retailer must not require a supplier to make any payment as a condition of stocking or listing ~~grocery products~~ groceries.
- (7) Subclause (1) does not apply in relation to the retailer if—
  - (c) the payment is made in relation to a promotion; or
  - (d) the payment—
    - (iv) is required under the relevant grocery supply agreement; and
    - (v) is made in respect of groceries that have not been stocked, displayed, or listed by the retailer during the preceding 365 days in 25% or more of its stores; and
    - (vi) is reasonable, having regard to the costs and risks to the retailer in stocking, displaying, or listing the ~~grocery products~~ groceries.
- (8) Subclause (2)(a) has effect subject to clause 17 (funding promotions).
- (9) A retailer that relies on subclause (2) must do all of the following:
  - ~~(e) keep records for each required payment setting out how the matters in subclause (2) are satisfied;~~
  - ~~(f) make the records available to the Commission on request;~~
  - ~~(g) keep the records for at least 7 years;~~

(h) give a clear and full written explanation to the supplier as to why the retailer considers that the matters in subclause (2) are satisfied.

(10) ~~The Commission does not need to use its powers under section 98 of the Commerce Act 1986 or section 182(c) and (d) of the Act to make a request under subclause (4)(b).~~

~~(5)(6)~~ In this clause, unless the context otherwise requires,—

**25% or more of its stores**, in the case of a retailer that is part of a group, means 25% or more of the retail stores owned or operated by the group

**payment** includes payment in kind.

## 16 Payments for retailer's business activities

(8) The retailer must not directly or indirectly require a supplier to make any payment towards the costs of any activity (the **retailer's business activity**) that is undertaken by the retailer in the ordinary course of carrying on a business as a retailer.

(9) The retailer's business activity includes the following:

(h) a buyer's visit to the supplier:

(i) artwork or packaging design:

(j) consumer or market research:

(k) the opening or refurbishing of a store:

(l) hospitality for the retailer's staff:

(m) merchandising (for example, stocking shelves and setting up displays):

(n) the transport of goods within a retailer's business, which may include transport between distribution centres and retail stores.

~~(10)—Subclause (1) does not apply if—~~

~~(c)—the relevant grocery supply agreement provides for the payment; and~~

~~(d)—the payment is reasonable in the circumstances.~~

~~(11)—In determining whether the payment is reasonable in the circumstances, regard must be had to the following:~~

~~(d)—the likely benefits to the supplier from the retailer's business activity:~~

~~(e)—the likely benefits to the retailer from the retailer's business activity:~~

~~(f)—the costs borne, or contributions made, by the retailer for the retailer's business activity.~~

~~(12)—Subclause (2) does not limit subclause (1).~~

~~(13)—Subclause (4) does not limit subclause (3)(b).~~

~~(14)—A retailer that relies on subclause (3) must give a clear and full written explanation to the supplier as to why the retailer considers that—~~

~~(c)—the payment is reasonable in the circumstances; and~~

~~(d)—the other matter in subclause (3) is satisfied.~~

~~(8)(3)~~ In this clause, **payment** includes payment in kind.

## 17 Funding promotions

- (8) The retailer must not directly or indirectly require a supplier to fund part or all of the costs of a promotion.
- (9) Subclause (1) does not apply if—
- (c) the relevant grocery supply agreement provides for the funding; and
  - (d) the funding is reasonable in the circumstances.
- (10) In determining whether the funding is reasonable in the circumstances, regard must be had to the following:
- (d) the likely benefits to the supplier from the promotion; and
  - (e) the likely benefits to the retailer from the promotion; and
  - (f) the costs borne, or contributions made, by the retailer for the promotion.
- (11) Subclause (3) does not limit subclause (2)(b).
- (12) A retailer that relies on subclause (2) must ~~—, after receiving a written request from the supplier, give a clear and full written explanation to the supplier as to why the retailer considers that—~~
- ~~(a) the funding is reasonable in the circumstances; and~~
  - ~~(e) keep records for each required payment setting out how the matters in that subclause are satisfied; and~~
  - ~~(f) make those records available to the Commission on request; and~~
  - ~~(g) keep the records for at least 7 years; and~~
  - ~~(h) after receiving a written request from the supplier, give a clear and full written explanation to the supplier as to why the retailer considers that the other matters in that subclause (2) is-are satisfied.~~
- (13) ~~The Commission does not need to use its powers under section 98 of the Commerce Act 1986 or section 182(c) and (d) of the Act to make a request under subclause (5)(b).~~
- (14) ~~In relation to requests referred to in subclause (5)(d), a retailer must provide the explanation no later than 20 working days after the request.~~
- ~~(6)(8)~~ In this clause, **fund** includes payment in kind.

## ~~18 Delisting products~~

- ~~(1) The retailer may only delist a supplier's grocery product—~~
- ~~(a) in accordance with the terms of the relevant grocery supply agreement (if any); and~~
  - ~~(b) for genuine commercial reasons.~~
- ~~(2) The retailer delists a supplier's grocery product if either of the following apply:~~
- ~~(a) the retailer removes the product from the range of grocery products sold by the group to which the retailer belongs; or~~

- ~~(b) the retailer makes a decision of either of the following types that has, or is likely to have, a material effect on the supplier:~~
    - ~~(i) a decision to remove the product from the range of grocery products at 1 or more retail stores:~~
    - ~~(ii) a decision to reduce the distribution of the product at 1 or more retail stores:~~
- 

### **Example 1**

The parent company (**A**) of a regulated grocery retailer group decides to stop selling a type of beans across all group stores. A is the entity that delists and that must comply with regulation 19.

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### **Example 2**

A franchisee of A (**F**) operates one retail store and has a supply agreement with a local supplier for the supply of beans (**B**). F decides to stop selling B's beans in its store. That decision is likely to have a material effect on B because B currently sells all its beans to F. F is the entity that delists and that must comply with regulation 19.

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- ~~(3) For the purpose of subclause (1), **genuine commercial reasons** for delisting a product include the following:~~
  - ~~(a) failure of the supplier to meet reasonable quality or quantity requirements as agreed with the supplier in respect to the product:~~
  - ~~(b) failure of the supplier's product to meet the retailer's reasonable commercial sales or profitability targets as notified to the supplier in, or in accordance with, the grocery supply agreement:~~
  - ~~(c) persistent failure to meet the retailer's reasonable delivery requirements as notified to the supplier from time to time in accordance with the grocery supply agreement.~~
- ~~(4) Subclause (3) does not limit subclause (1).~~
- ~~(5) Delisting as a punishment for a complaint, concern, or dispute raised by a supplier is not a genuine commercial reason.~~
- ~~(6) A decision by the retailer not to extend the agreement, or enter into a new grocery supply agreement, following the expiry of a fixed term grocery supply agreement is not a decision to delist a product.~~

## **2018** **Funded promotions**

- (5) If a supplier agrees to make a payment in support of the promotion of a product (the **funded promotion**), the retailer must give the supplier reasonable written notice before holding the promotion.
- (6) If the retailer orders a ~~grocery product-groceries~~ from a supplier in connection with the funded promotion at a promotional price (whether calculated by way of discount, rebate, credit, allowance, or otherwise), the retailer must—
  - (c) ensure that the basis on which the quantity of the order is calculated is transparent; and
  - (d) ~~if the retailer sells any over-ordered groceries above the promotional resale price, pay the supplier the difference between the supplier's promotional price and the supplier's full price. agree with the supplier (in writing) on what happens to stock supplied at a promotional price but which remains unsold at the end of the promotional period.~~
- (7) If the retailer has placed an order for ~~a grocery product-groceries~~ with a supplier in connection with the funded promotion, the retailer must not do either of the following without the supplier's written consent:
  - (c) cancel the order; or
  - (d) reduce the volume of the order by more than 10%.
- (8) Subclause (3) does not apply if—
  - (c) the retailer gives the supplier reasonable written notice of the cancellation or reduction; or
  - (d) the retailer compensates the supplier for any net resulting costs, losses, or expenses incurred or suffered by the supplier as a direct result of the retailer failing to give reasonable notice of the cancellation or reduction.

#### **1819 Delisting ~~products-groceries~~**

- (1) The retailer may only delist a supplier's ~~grocery product-groceries~~—
  - (a) in accordance with the terms of the relevant grocery supply agreement (if any); and
  - (b) for genuine commercial reasons.
- (2) The retailer **delists** a supplier's ~~grocery product-groceries~~ if ~~—~~ either of the following apply:
  - (a) the retailer removes the product from the range of ~~grocery products-groceries~~ sold by the group to which the retailer belongs; or
  - (b) the retailer makes a decision of either of the following types that has, or is likely to have, a material effect on the supplier:
    - (i) a decision to remove the product from the range of ~~grocery products-groceries~~ at 1 or more retail stores;
    - (ii) a decision to reduce the distribution of the ~~product-groceries~~ at 1 or more retail stores.

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### Example 1

The parent company (A) of a regulated grocery retailer group decides to stop selling a type of beans across all group stores. A is the entity that delists and that must comply with regulation 19.

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### Example 2

A franchisee of A (F) operates one retail store and has a supply agreement with a local supplier (B) for the supply of beans (B). F decides to stop selling B's beans in its store. That decision is likely to have a material effect on B because B currently sells all its beans to F. F is the entity that delists and that must comply with regulation 19.

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- (3) For the purpose of subclause (1), **genuine commercial reasons** for delisting a product include the following:
- (a) failure of the supplier to meet reasonable quality or quantity requirements as agreed with the supplier in respect to the product:
  - (b) failure of the supplier's product to meet the retailer's reasonable commercial sales or profitability targets as notified to the supplier in, or in accordance with, the grocery supply agreement:
  - (c) persistent failure to meet the retailer's reasonable delivery requirements as notified to the supplier from time to time in accordance with the grocery supply agreement.
- (4) Subclause (3) does not limit subclause (1).
- ~~(5) Delisting as a punishment for a complaint, concern, or dispute raised by a supplier is not a genuine commercial reason.~~
- ~~(6)(5)~~ A decision by the retailer not to extend the agreement, or enter into a new grocery supply agreement, following the expiry of a fixed term grocery supply agreement is not a decision to delist ~~a product groceries~~.

### **1920** Process requirements relating to delisting

- (1) Before delisting a supplier's ~~grocery product groceries~~, the retailer must provide reasonable written notice to the supplier of ~~the retailer's decision to delist the product~~. ~~The notice must~~
- ~~(a) the retailer's decision to delist; and~~
  - ~~(a)(b) include~~ the genuine commercial reasons for delisting ~~the product~~; and

~~(b)(c) inform the supplier of~~ the supplier's right to have the decision to delist ~~the product~~ reviewed by the retailer.

- (2) Subclause (1) does not apply if—
  - (a) time is of the essence (including for product recalls, withdrawals, or safety issues); or
  - (b) there are persistent issues with supply that have resulted in the retailer being out of stock or stocked at significantly reduced levels.
- (3) ~~Whether or not the retailer complied (or was required to comply) with subclause (1), t~~The retailer must promptly comply, in writing, with any written request from the supplier for ~~either or both of the following~~:
  - (a) a statement of the retailer's genuine commercial reasons for the delisting; ~~or~~
  - (b) information (or additional information) relating to the delisting. ~~This subclause applies whether or not the retailer complied (or was required to comply) with subclause (1).~~
- (4) The retailer must, after receiving a written request from the supplier, promptly review any decisions regarding delisting made by the retailer and provide the supplier with written notice of the outcome of that review, including the basis for the retailer's decision.
- (5) A retailer that relies on subclause (2) must give a clear and full written explanation to the supplier as to why the retailer considers that the matters in that subclause are satisfied.

## 22 — Funded promotions

- ~~(1) — If a supplier agrees to make a payment in support of the promotion of a product (the funded promotion), the retailer must give the supplier reasonable written notice before holding the promotion.~~
- ~~(2) — If the retailer orders a grocery product from a supplier in connection with the funded promotion at a promotional price (whether calculated by way of discount, rebate, credit, allowance, or otherwise), the retailer must—~~
  - ~~(a) — ensure that the basis on which the quantity of the order is calculated is transparent; and~~
  - ~~(b) — agree with the supplier (in writing) on what happens to stock supplied at a promotional price but which remains unsold at the end of the promotional period.~~
- ~~(3) — If the retailer has placed an order for a grocery product with a supplier in connection with the funded promotion, the retailer must not do either of the following without the supplier's written consent:~~
  - ~~(a) — cancel the order; or~~
  - ~~(b) — reduce the volume of the order by more than 10%.~~
- ~~(4) — Subclause (3) does not apply if—~~
  - ~~(a) — the retailer gives the supplier reasonable written notice of the cancellation or reduction; or~~

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

## **21 Fresh produce standards and quality specifications**

- (1) This clause applies only in relation to fresh produce.
- (2) The retailer must ensure that any relevant fresh produce standards or quality specifications—
  - (a) are reasonable; and
  - (b) are provided to the supplier in clear, unambiguous, and concise written terms.
- (3) The retailer must accept all fresh produce delivered in accordance with relevant fresh produce standards and quality specifications.
- (4) The retailer must not reject fresh produce unless all of the following conditions are satisfied:
  - (a) the produce fails to meet relevant fresh produce standards or quality specifications;~~and:~~
  - (b) the retailer rejects the produce within 24 hours after the produce is delivered to the retailer;~~and:~~
  - (c) the retailer does not reject the produce after the retailer has accepted the produce.
- (5) If the retailer rejects fresh produce because it does not meet relevant fresh produce standards or quality specifications, the retailer must provide written reasons for the rejection to the supplier within 48 hours.
- (6) The retailer must communicate any labelling, packaging, or preparation requirements for ~~a grocery product~~ fresh produce to a supplier in clear, unambiguous, and concise written terms.
- (7) The retailer must provide a supplier with reasonable written notice of any required changes to packaging, labelling, or preparation standards (unless the change is required immediately by law) taking into consideration existing stock held by suppliers (where known) and any agreement as to stock coverage in the relevant grocery supply agreement.
- (8) The retailer must make any claim for damaged ~~grocery products~~ fresh produce or shortfalls, or any similar claims, within a reasonable time of, and in any event no later than 30 days after, delivery of the groceries to the retailer (or the retailer's nominee).

## **22 Unduly hindering or obstructing supply ~~to competitors~~**

The retailer must not engage in any conduct that has the purpose, effect, or likely effect of unduly hindering or obstructing a supplier from supplying groceries to any other party.

## **23 Business disruption**

The retailer must not threaten a supplier with business disruption or termination of a grocery supply agreement without reasonable grounds.

## **24 Intellectual property rights**

- (1) The retailer must respect the intellectual property held by suppliers in relation to ~~grocery products~~ **groceries**, including intellectual property rights in branding, packaging, and advertising.
- (2) Subclause (1) does not create, confer, or extend any intellectual property rights in or of the supplier.
- (3) In developing or producing private label products, the retailer must not infringe the intellectual property rights held by a supplier ~~in relation to grocery products~~, including rights relating to branding, packaging designs, or advertising.
- (4) In any dispute relating to a breach of this clause, any relevant actions of the supplier in relation to the intellectual property rights of the retailer must be taken into account.

## **25 — Confidential information**

- ~~(1) This clause applies if a supplier discloses confidential information to the retailer in connection with the supply of grocery products, including confidential information relating to product development, proposed promotions, or pricing.~~
- ~~(2) The retailer must not use that information other than for a purpose for which it was disclosed and may only disclose it or make it available or accessible to employees or agents of the retailer who need to have that information in connection with that purpose.~~
- ~~(3) The retailer must establish and monitor systems to ensure compliance with subclause (2).~~
- ~~(4) Information is not confidential information for the purposes of this clause if the information—
  - ~~(a) is publicly available; or~~
  - ~~(b) comes into the possession or knowledge of the retailer—
    - ~~(i) independently of the supplier; and~~
    - ~~(ii) without any breach of subclause (2) on the part of the retailer.~~~~~~

## **26 — Product ranging, shelf space allocation, and range reviews**

- ~~(1) The retailer must publish or provide to all suppliers with whom the retailer has grocery supply agreements:
  - ~~(a) the retailer's product ranging principles; and~~
  - ~~(b) the retailer's shelf space allocation principles.~~~~
- ~~(2) The retailer must act in accordance with the retailer's principles and keep them up to date.~~
- ~~(3) Within a reasonable time before conducting a range review, the retailer must provide suppliers who might be affected by any outcome of the review with clearly expressed written notice of—
  - ~~(a) the purpose of the range review; and~~
  - ~~(b) the key criteria governing ranging decisions.~~~~
- ~~(4) Following the range review, the retailer must provide affected suppliers with a reasonable period of time to discuss the outcomes of the review, including the basis for the retailer's final decisions.~~

~~(5) The retailer must apply the retailer's produce ranging principles, and the retailer's shelf space allocation principles, without discrimination (including without discrimination in favour of the retailer's private label products).~~

~~(6) This clause does not limit clause 19.~~

### **2725 Transfer of intellectual property rights**

(1) The retailer must not directly or indirectly require a supplier to transfer or exclusively license any intellectual property right held by the supplier in relation to ~~a grocery product~~ **groceries** as a condition or term of supply of an equivalent private label product ~~of the retailer~~.

(2) Subclause (1) does not prevent the retailer from—

- (a) holding an intellectual property right in a private label product ~~of the retailer~~; or
- (b) having an exclusive right to the retail sale of a private label product ~~of the retailer~~; or
- (c) making the holding of a right referred to in paragraph (a) or (b) by the retailer a condition or term of supply by the supplier of a private label product ~~of the retailer~~, to the extent that the product, recipe, or formulation of the product—
  - (i) was developed or formulated by or for the retailer; or
  - (ii) is customised by or for the retailer.

### **2526 Confidential information**

(1) This clause applies if a supplier discloses confidential information to the retailer in connection with the supply of ~~grocery products~~ **groceries**, including confidential information relating to product development, proposed promotions, or pricing.

(2) The retailer must not use that information other than for a purpose for which it was disclosed and may only disclose it or make it available or accessible to employees or agents of the retailer who need to have that information in connection with that purpose.

(3) The retailer must establish and monitor systems to ensure compliance with subclause (2).

(4) Information is not confidential information for the purposes of this clause if the information—

- (a) is publicly available; or
- (b) comes into the possession or knowledge of the retailer—
  - (i) independently of the supplier; and
  - (ii) without any breach of subclause (2) on the part of the retailer.

### **2627 Product ranging, shelf space allocation, and range reviews**

(1) The retailer must publish or provide to all suppliers with whom the retailer has grocery supply agreements:

- (a) the retailer's product ranging principles; and
- (b) the retailer's shelf space allocation principles.

- (2) The retailer must act in accordance with the retailer's principles and keep them up to date.
- (3) Within a reasonable time before conducting a range review, the retailer must provide suppliers who might be affected by any outcome of the review with clearly expressed written notice of—
  - (a) the purpose of the range review; and
  - (b) the key criteria governing ranging decisions.
- (4) Following the range review, the retailer must provide affected suppliers with a reasonable period of time to discuss the outcomes of the review, including the basis for the retailer's final decisions.
- (5) The retailer must apply the retailer's produce ranging principles, and the retailer's shelf space allocation principles, without discrimination (including without discrimination in favour of the retailer's private label products).
- (6) This clause does not limit clause ~~19~~20.

## ~~27~~ — **Transfer of intellectual property rights**

- ~~(3) — The retailer must not directly or indirectly require a supplier to transfer or exclusively license any intellectual property right held by the supplier in relation to a grocery product as a condition or term of supply of an equivalent private label product of the retailer.~~
- ~~(4) — Subclause (1) does not prevent the retailer from—~~
  - ~~(a) — holding an intellectual property right in a private label product of the retailer; or~~
  - ~~(b) — having an exclusive right to the retail sale of a private label product of the retailer; or~~
  - ~~(c) — making the holding of a right referred to in paragraph (a) or (b) by the retailer a condition or term of supply by the supplier of a private label product of the retailer, to the extent that the product, recipe, or formulation of the product—~~
    - ~~(iii) — was developed or formulated by or for the retailer; or~~
    - ~~(iv) — is customised by or for the retailer.~~

## **28 Price increases**

- (1) This clause applies if—
  - (a) the retailer has a grocery supply agreement with a supplier for the supply of groceries; and
  - (b) the supplier informs the retailer, in writing, of an increase in the price (the **price increase**) of those groceries ~~supplied under the agreement~~; and
  - (c) if the price increase is in respect of fresh produce ~~that is supplied under the agreement~~ and the agreement includes a mechanism to negotiate its price on a regular basis ~~the price of that fresh produce~~, any negotiations ~~about the price increase~~ are not concluded within 5 working days after the supplier informs the retailer of the price increase; and
  - (d) if the price increase is in respect of a product groceries other than fresh produce, the supplier has not informed the retailer of the same price increase in respect of ~~the product~~ those groceries within the last 6 months.

- (2) Within 30 days of being informed by the supplier of the price increase, the retailer must, in writing, notify the supplier whether the retailer—
  - (a) accepts the price increase; or
  - (b) accepts an increase in the price of the groceries ~~supplied under the agreement~~ but does not accept the amount of the price increase; or
  - (c) does not accept the price increase.
- (3) If the retailer needs further information from the supplier in order for the retailer to make an informed decision under subclause (2),—
  - (a) the 30-day notice period in subclause (2) does not start running until the supplier has provided that information to the retailer; and
  - (b) the retailer must request the further information within a reasonable time frame, in good faith, and must not make the request as a tactic to delay decisions regarding price increases.
- (4) If the supplier is notified of a matter referred to in subclause (2)(b) or (c), the supplier may request the retailer to enter into negotiations about an increase in the price for the groceries.
- (5) A retailer that enters into such negotiations must engage in the negotiations in good faith and take all reasonable steps to conclude its position on the negotiations without delay.
- (6) The retailer must not require the supplier to disclose commercially sensitive information in relation to the following:
  - (a) the price increase:
  - (b) negotiations about an increase in the price for the groceries.

## **29 Freedom of association**

- (1) The retailer must not provide an inducement to prevent a supplier from—
  - (a) forming an association of suppliers; or
  - (b) associating with other suppliers for a lawful purpose.
- (2) The retailer must not discriminate, or take any other action, against a supplier for—
  - (a) forming an association of suppliers; or
  - (b) associating with other suppliers for a lawful purpose.

## **30 Retaliation**

- (6) A retailer must not retaliate against a supplier.
- (7) Subject to subclause (3), a retailer retaliates if—
  - (c) it takes an action, or threatens to take an action, against a supplier that—
    - (iii) has exercised, or indicated that it will or may exercise, a right under this code against the retailer; or
    - (iv) is, or may be, able to exercise a right under this code against the retailer; and
  - (d) the action causes, or would cause, detriment to the supplier.
- (8) Without limiting subclause (2), an action includes any of the following:

- (i) delisting the supplier's groceries:
  - (j) requiring the supplier to make excessive contributions towards promotional or marketing costs for the supplier's groceries:
  - (k) rejecting groceries from the supplier:
  - (l) changing the location of the supplier's groceries in store or online:
  - (m) delaying restocking the supplier's groceries in store or online:
  - (n) reducing the volume of stock ordered from the supplier:
  - (o) cancelling an order to the supplier:
  - (p) varying, terminating, or electing not to renew a grocery supply agreement with the supplier.
- (9) The action is not retaliation if it—
- (c) is not taken, or threatened to be taken, as punishment or a response to a matter described in subclause (2)(a); and
  - (d) is taken, or threatened to be taken, for genuine commercial reasons.
- (10) A retailer relying on subclause (4) bears the evidential burden in relation to the matters in that subclause.

Made at [location] on [day month year].

[personal name]

[role]

Commerce Commission after considering the purpose of a code under section 16 of that Act and following the process specified in section 13

### Explanatory note

*This note is not part of the code but is intended to indicate its general effect.*

This code revokes and replaces the Grocery supply code set out in schedule 2 to the Grocery Industry Competition Regulations 2023. The purpose of the code, as set out in section 16 of the Grocery Industry Competition Act 2023 (the **Act**), is to promote the purpose of the Act by—

- promoting fair conduct, and prohibiting unfair conduct, between regulated grocery retailer, certain related parties, and suppliers; and
- promoting transparency and certainty about the terms of agreements between those parties; and
- 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.

This is secondary legislation issued under the authority of the <a href="#">Legislation Act 2019</a> .	
Title	[Draft] Grocery supply code 2025
Empowering Act	Grocery Industry Competition Act 2023
Empowering provision(s)	Section 12(1)(a)
Maker name	Commerce Commission after considering the purpose of a code under section 16 of that Act and following the process specified in section 13
Administering agency	Commerce Commission
Date made	[day month year]
Publication date	[day month year]
Notification date	[day month year]

Commencement date	<i>[day month year] [if there are multiple commencement dates, give the first one. If commencement is on date of event, state event and update with specific date once event has occurred]</i>
End date (when applicable)	<i>[day month year] [insert the date the legislation is or will be revoked. If the legislation has a self-revocation clause, this date can be inserted when the legislation is first published. In other cases, enter a blank space in the box and insert the date once known]</i>