



**MINISTRY OF BUSINESS,  
INNOVATION & EMPLOYMENT**  
HIKINA WHAKATUTUKI



# Consultation paper

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## New Zealand Grocery Code of Conduct

July 2022

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## List of Acronyms and Terms

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<b>Adjudication</b>	Adjudication is a dispute resolution process in which the parties present arguments and evidence to a dispute resolution practitioner (the adjudicator) who is empowered by contract or statute to make binding decisions on disputes.
<b>Arbitration</b>	Arbitration is a dispute resolution process in which the parties present arguments and evidence to one or more dispute resolution practitioners (the arbitral tribunal) who then deciding the matter in dispute. Arbitrations are governed by the Arbitration Act 1996.
<b>Australian Code</b>	The Australian <i>Food and Grocery Code of Conduct</i> prescribed under the Competition and Consumer Act 2010. <a href="https://www.legislation.gov.au/Details/F2021C00201/Html/Text">https://www.legislation.gov.au/Details/F2021C00201/Html/Text</a>
<b>Commission</b>	The New Zealand Commerce Commission.
<b>Commission's Final Report</b>	The Commission's final report on the market study into New Zealand's retail grocery sector, published on 8 March 2022.
<b>Designated retailers</b>	Grocery retailers that will be designated under the Code. As per Chapter 3, it is proposed that all major grocery retailers will be designated when the Code is created and a future designation mechanism will be created.
<b>Dispute resolution</b>	A generic term for any form of dispute resolution other than proceedings in a court or a tribunal, and usually involves an independent third party.
<b>GCDR</b>	Government Centre for Dispute Resolution <a href="https://www.mbie.govt.nz/cross-government-functions/government-centre-for-dispute-resolution/">https://www.mbie.govt.nz/cross-government-functions/government-centre-for-dispute-resolution/</a>
<b>Forward buying</b>	When a retailer buys more stock than it expects to sell in the immediate future.
<b>Foodstuffs North Island</b>	Foodstuffs North Island operates the retail banners New World, PAK'nSAVE and Four Square across the North Island. It is a cooperative with owner operated stores that have a franchisee agreement with Foodstuffs North Island
<b>Foodstuffs South Island</b>	Foodstuffs South Island operates the retail banners New World, PAK'nSAVE, Four Square, Raeward Fresh and On the Spot across the South Island. It is a cooperative with owner operated stores that have a franchisee agreement with Foodstuffs South Island.
<b>Forward buying</b>	See Investment buying.
<b>Groceries / Grocery products</b>	The Commissions' market study considered groceries or grocery products to be meat, fruit and vegetables, canned goods, dairy products, and a range of other household products like toilet paper, cleaning products and pet food, and alcohol and tobacco where sold by grocery retailers.

<b>Grocery supply agreement</b>	Refers to the relevant grocery supply agreement and all other details that may sit under the agreement, such as settlement terms, delivery arrangements and any discounts or rebates off the 'list price'. Also called 'supply agreement'.
<b>Investment buying</b>	Retailers stockpiling products purchased from a supplier at a reduced price during a buy-in period to a promotion. Also referred to as Forward buying.
<b>Major grocery retailers</b>	Includes Foodstuffs North Island, Foodstuffs South Island and Woolworths NZ, together with their cooperative members and franchisee retail grocery stores, as at June 2022
<b>MBIE</b>	Ministry of Business, Innovation and Employment.
<b>Merchandising work</b>	Also called retailers business activities. Typically includes a buyer's visit to the supplier, artwork or packaging design, consumer or market research, the opening or refurbishing of a store, and hospitality for the retailer's staff.
<b>Other grocery retailers</b>	Non-major grocery retailers. This includes online-only retailers, convenience stores, corner dairies, and specialist grocery stores (eg Supie, Night 'n Day, dairies, convenience stores, etc).
<b>Promotional buying</b>	Buying of stock from a supplier at a negotiated promotional price.
<b>Retrospective variation</b>	A retrospective variation to a grocery supply agreement is a subset of unilateral variation that modifies something from the past.
<b>Set-offs</b>	In the context of this paper, set-offs are when the major grocery retailer deducts any amount it is owed by a supplier when paying the supplier's invoice.
<b>Shrinkage</b>	Shrinkage is a loss of grocery products due to theft, other loss or accounting error.
<b>UK Code</b>	The United Kingdom <i>Groceries Supply Code of Practice</i> which is schedule 1 of the Groceries (Supply Chain Practices) Market Investigation Order 2009. The UK Code is supported by the Groceries Code Adjudicator Act 2013. <a href="https://www.gov.uk/government/publications/groceries-supply-code-of-practice/groceries-supply-code-of-practice">https://www.gov.uk/government/publications/groceries-supply-code-of-practice/groceries-supply-code-of-practice</a>
<b>UK Order</b>	The United Kingdom Groceries (Supply Chain Practices) Market Investigation Order 2009 which contains the <i>Groceries Supply Code of Practice</i> . <a href="https://webarchive.nationalarchives.gov.uk/ukgwa/20111108202701/http://competition-commission.org.uk/inquiries/ref2006/grocery/pdf/revised_gscop_order.pdf">https://webarchive.nationalarchives.gov.uk/ukgwa/20111108202701/http://competition-commission.org.uk/inquiries/ref2006/grocery/pdf/revised_gscop_order.pdf</a>
<b>Unilateral variation</b>	A unilateral variation to a grocery supply agreement is a change made by one party without requiring the agreement of the other party.
<b>Wastage</b>	Wastage refers to grocery products that are unfit for sale (for example due to damage).
<b>Woolworths NZ</b>	Woolworths NZ owns the Countdown retail banner and is franchisor to the Fresh Choice and SuperValue stores, which are locally owned and operated.



## 1 Background and context

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### 1.1 The market study into the retail grocery sector in New Zealand

1. On 8 March 2022, the Commerce Commission (the **Commission**) published its final report on the market study into the retail grocery sector in New Zealand.<sup>1</sup> It found that competition in the retail grocery sector was not working well for consumers and recommended changes to increase competition and help improve the price, quality and range of groceries and services available to New Zealanders.
2. One of the problems identified by the Commission is the negotiating power imbalance between the major grocery retailers and their suppliers.<sup>2</sup> This impacts on suppliers' ability and incentives to invest and innovate, including developing new products. In turn, it impacts the conditions of entry and expansion into the retailer grocery market and ultimately the grocery offering to consumers.
3. The Commission made three recommendations aimed at constraining the major grocery retailers' ability to use their strong negotiating power to secure suppliers' agreement to unfavourable supply terms and conditions. One was to introduce a mandatory grocery code of conduct to govern relationships between the major grocery retailers and their suppliers. The other two were to consider ways to enable collective bargaining, and to strengthen the business-to-business unfair contract terms regime.<sup>3</sup>
4. On 30 May 2022, the Government announced that it would establish a mandatory grocery Code of Conduct for New Zealand (**Code**) as part of its response to the market study and noted it would soon consult publicly on the content of the Code.

### 1.2 What a Code of Conduct could do

5. A Code should improve the conditions for suppliers to invest and innovate to bring new products to market and produce existing products more efficiently. This will generate long-term benefits for consumers in the form of the prices, quality, and range of products available.
6. A Code will not, however, address the underlying causes of the major grocery retailers' advantage in negotiating power. The imbalance is due to the major grocery retailers:

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<sup>1</sup> Commerce Commission, *Market study into the retail grocery sector: Final report*, 8 March 2022 (the **Commission's Final Report**). Accessed at <https://comcom.govt.nz/about-us/our-role/competition-studies/market-study-into-retail-grocery-sector#projecttab>.

<sup>2</sup> Commission's Final Report, para 8.50-8.56.

<sup>3</sup> Commission's Final Report, para 9.148-9.155. Other recommendations aimed at improving competition in the retail grocery market may also impact the relative balance of negotiating power between the major grocery retailers and their suppliers. However, it is expected that there will still be a significant imbalance between large retailers and suppliers (on average) even if there was another large scale grocery retailer in the market.

- a. relatively high levels of market share<sup>4</sup> which means they provide a major sales channel for many grocery suppliers. Aside from export markets, most suppliers have few alternative buyers of their products at the scale of the major grocery retailers.
  - b. ability to change supplier for a particular product, generally with little overall impact on business. The major grocery retailers each have a large number of suppliers and often have multiple suppliers in one product category.
  - c. high bargaining power, compared to most of their suppliers. Only a few suppliers have much bargaining power which arises from high brand recognition, few substitute products and less reliance on domestic retail grocery sales channels.
7. Constraining the negotiating positions of the major grocery retailers should reduce the likelihood that suppliers will be pressured to accept unfavourable supply terms and conditions – involving:
- a. accepting costs and risks that major grocery retailers were better placed to manage. This may reduce efficiency, resulting in higher costs of production.
  - b. reduced transparency and certainty regarding terms and conditions of supply. This harms suppliers’ ability to innovate and invest in new and better grocery products.
  - c. limits on their ability to provide competitive supply terms to other grocery retailers. This may make it harder for other grocery retailers to enter or expand in the grocery market (although best price clauses and exclusive supply arrangements are uncommon).<sup>5</sup>
8. There is a risk that the Code could limit the ability of the major grocery retailers to negotiate fairly and firmly with suppliers. This could contribute to higher costs for the major grocery retailers, which would make it harder for them to provide consumers with the range of products at competitive prices.
9. The likelihood of this risk occurring depends on the design of the Code and the impact of the Government’s response to the market study over time. However, the Commission thought the downside to broad protections in the Code is likely to be relatively limited, and any risks can likely be managed by focusing a Code on procedural matters – how the businesses in the market for the acquisition of grocery products ‘behave’ – rather than substantial matters.<sup>6</sup>
10. Finally, a Code may be able to contribute to other aspects of the Government response and could reduce any barriers to suppliers dealing with other grocery retailers or ensure there are not barriers to suppliers having their products included in any wholesale supply offering.

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<sup>4</sup> Most annual estimates of the major grocery retailers’ combined market share range from 80-90%. The lowest combined market share estimates are between 70-80%. See the Commission’s Final Report, para 5.79.

<sup>5</sup> Commission’s Final Report, paras 6.193-6.199 and 8.150.

<sup>6</sup> Commission’s Final Report, paras 9.178.

## 2 The approach to developing a Code of Conduct

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### 2.1 What is in this consultation paper

11. This consultation paper seeks feedback on the options for content of a Code. The paper provides a preliminary analysis of different options, including an assessment of each option against relevant criteria. The criteria, which are discussed below, will be used to identify the preferred options that are most likely to achieve the desired objective. Feedback from submitters will help MBIE to improve and finalise the preliminary analysis in this paper. The paper functions as an interim Regulatory Impact Analysis by weighing up the different policy options.

#### **The structure of the paper**

12. This paper follows the possible structure for the contents of a Code, to provide readers – particularly industry participants – with insight into what a Code might look like. The content is as follows:
  - a. Which grocery retailers should be bound by the Code (**Chapter 3**).
  - b. Including a purpose statement within the Code and the overarching obligations of good faith or fair dealing (**Chapter 4**).
  - c. Requirements for grocery supply agreements (**Chapter 5**).
  - d. Obligations regarding the conduct of designated grocery retailers in relation to product supply and placement, payment terms and promotions (**Chapters 6 and 7**).
  - e. Dispute resolution (**Chapter 8**).
  - f. Monitoring, compliance and enforcement matters (**Chapter 9**).

#### **The timing of consultation**

13. Consultation is open from 6 July 2022 until 10 August 2022. We welcome any submissions, comments, or questions that you may have on any issue raised in the paper.
14. After submissions on the consultation paper have closed, MBIE will undertake further analysis to inform the policy decisions considered by Cabinet. These decisions are expected in around October.

### 2.2 What is the objective of the Code of Conduct?

15. The objective of the Code is aligned with the Government's response to the groceries market study. In addition to the broader objective, the Code is intended to improve the dealings between the major grocery retailers and suppliers and competition in the market for the

acquisition of groceries. This will be done by addressing issues caused by the imbalance of negotiating power between the major grocery retailers and their suppliers.

16. The Code should help suppliers to innovate and invest in new grocery products and reduce the likelihood of suppliers being forced to exit the market due to conduct of grocery retailers.

### 2.3 What criteria will be used to evaluate the options?

17. The following criteria will be used to evaluate options for the content of the Code:
  - a. **Effective:** How would the option contribute to the Code's objective and to the grocery market working well for all participants (grocery retailers and their suppliers)? Consideration of this criterion includes distributional impacts (between retailers, suppliers and possibly consumers) and dynamic impacts (such as increases in output or productivity).
  - b. **Efficient:** How much extra cost (eg compliance costs) would the option impose on grocery retailers and their suppliers, after accounting for any expected efficiency gains?
  - c. **Durable:** Is the option 'up-to-date' in terms of best regulatory practice, and will it be flexible enough over time to adapt to changes in the grocery market?
18. For the purpose of this paper, the criteria are weighted equally. There are some overlaps across the criteria. For example, the effectiveness and efficiency criteria both have a strong economic component. This is considered appropriate to reflect the economic considerations connected to the Code.
19. The criteria are relatively broad meaning there are some internal consistencies to be managed. For example efficiency captures the costs for both retailers and suppliers. There may be some instances where an option imposes inefficiencies on both retailers and suppliers, but there may be other instances where an option may trade-off inefficiencies between retailers and suppliers.
20. For the analysis in this paper, each criterion is given a rating from "-3" to "+3". The rating compares what is expected to happen against the Commission's findings (refer to paragraphs 2 and 7, above).
21. A different criteria are used for the options in relation to dispute resolution, which is outlined in Chapter 8.

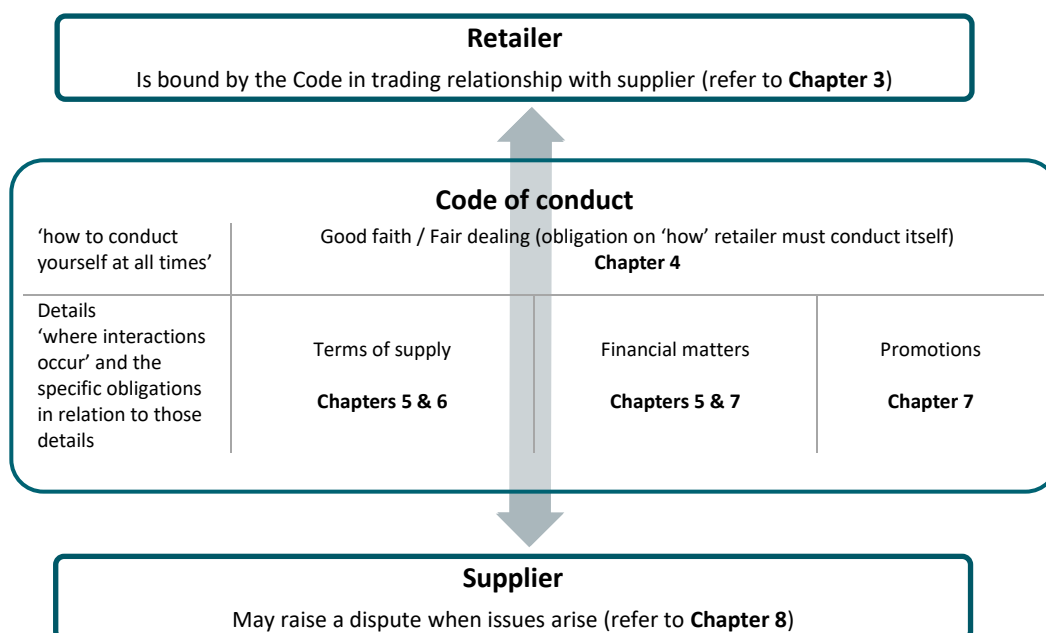
### 2.4 What are the policy options?

22. The policy options for the Code are outlined below and developed in detail throughout the paper. All three options (below) will give effect to the Commission's recommendation to develop a mandatory code.
  - a. **Option 1: Principle-based Code.** This option is a high-level principle-based Code, which may be relatively similar to the UK Code.

- b. **Option 2: Prescriptive Code.** This option is most consistent with the detail of the Commission’s recommendation in relation to developing a Code using the Australian Code as a starting point and using provisions from the UK Code when there is good reason to do so.
  - c. **Option 3: Alternative Code.** This option both builds on Option 2 (with a focus on prioritising strong protections for suppliers) and also removes some components that may not be necessary for New Zealand.
23. The policy options have been developed with reference to the UK Code and the Australian Code:
- a. The UK Code was developed by Government following a market study and is mandatory for retailers above a £1 billion revenue threshold.
  - b. The Australian Code is more recent than the UK Code and considered the UK Code in its development. It is voluntary and was initially co-designed by industry, although it has been through a review and the Government made changes to it in 2020.

**How the policy options (in the different chapters) fit together**

24. How the Chapters fit together to form the Code is as follows:



25. Options 1, 2, and 3 are generally designed to be mutually exclusive and to present a single whole option covering the content in chapters 4 – 7, which deal with the main components of the Code (refer to the diagram above to see how the different parts fit together). However, minor tweaks can be made to the options – adjusting what conduct they limit and how – to cater to the grocery industry in New Zealand
26. The options presented in Chapters 3 and 8 are somewhat separate from the rest of the paper. Chapter 3 relates to which retailers are bound by the Code and Chapter 8 relates to the

dispute resolution mechanism that is provided for any issues arising in relation to the Code. To reflect this difference, the options in Chapters 3 and 8 are named differently (Options A-C).

27. In creating a complete Code of Conduct, the options from Chapters 3, 4-7, and 8 can be paired together in several different ways. For example, Option A (in Chapter 3) could be paired with Option 2 (from Chapters 4-7) and Option C (in Chapter 8). Alternatively, Option C (Chapter 3) could be paired with Option 1 (Chapters 4-7) and Option B (Chapter 8).<sup>7</sup>
28. Reading the preliminary analysis throughout the paper may appear to provide an initial preferred option for the Code. MBIE has not undertaken holistic analysis to determine a preferred option for the Code at this time. The preliminary analysis is provided so that it can be improved by feedback.
29. Additionally, we note that the options developed in this paper may change depending on the feedback that is received through consultation.

## 2.5 Consultation questions

1

Do you have any comments in relation to **Chapter 2**, in particular any comments on:

- the objectives (section 2.2)?
- evaluation criteria for the Code (section 2.3)?

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<sup>7</sup> These are provided as an illustration. No decisions have been made on the options presented in this paper.

### 3 Which retailers should be bound by the Code?

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#### 3.1 Approach to this issue

30. This chapter considers which grocery retailers should be bound by the Code. It starts with the Commission's recommendation that the Code be mandatory for the major grocery retailers then also considers the method of 'designating' retailers under the Code (now and in the future), it ends by considering how designated retailers will be regulated by the Code.
31. The major grocery retailers have a combined market share of around 80-90% of the retail grocery market:
  - a. Foodstuffs North Island and Foodstuffs South Island are cooperatives. Their retail stores – PAK'nSAVE, New World, Four Square, Raeward Fresh, and On the Spot – are all owner-operated members of one or the other cooperative (with franchisee agreements), depending on their geographical location.
  - b. Woolworths NZ, which owns the Countdown retail brand, and through its subsidiary, Wholesale Distributors, is the franchisor of SuperValue and FreshChoice.
32. Other grocery retailers make up the remainder of the market. This category includes online-only retailers, convenience stores, corner dairies, and specialist grocery stores (eg Supie, Night 'n Day, dairies, convenience stores, etc). As indicated by the combined market share of the major grocery retailers, these retailers make up a relatively small proportion of the retail grocery market.

#### 3.2 Who will be required to comply with the Code?

33. In its report, the Commission recommended creating a mandatory Code to govern relationships between the major grocery retailers and their suppliers. This is because it is the major grocery retailers who are most likely to have an advantage over their suppliers in terms of their bargaining power (refer to paragraph 6).
34. The Commission did not recommend that other grocery retailers or other retailers that provide some grocery items (eg Chemist Warehouse, The Warehouse, pet food stores, etc) should be required to comply with a Code at this time. The Commission did, however, recommend that the Code should apply to other grocery retailers at the time they develop substantial bargaining power over their suppliers.<sup>8</sup>
35. The Commission also recommended that the Code should apply to the major grocery retailers in their interactions with all of their suppliers (domestic and international). Any retailers designated under the Code will not be exempt from the Code in their dealings with any

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<sup>8</sup> Commission, Final report, at 9.175-9.179.

particular suppliers – for example when a major grocery retailer has dealings with a large multi-national supplier that may not be disadvantaged in terms of its negotiating or bargaining power. The Commission noted there is little downside to providing protections under a Code to some relatively large suppliers that may not require the protections.

36. By regulating the conduct of the major grocery retailers, the Code provides protection to all suppliers in their dealings with the major grocery retailers – where the Commission heard suppliers were experiencing pressure to accept unfavourable supply terms and conditions.
37. Suppliers will not be directly regulated by the Code (ie they will not be designated by the Code), but the Code could incentivise suppliers to conduct themselves in good faith in their dealings with retailers. This is discussed further in **Chapter 4** (see section 4.3).
38. This approach is consistent with that of Australia and the UK, which both regulate the conduct of large grocery retailers (not suppliers), using Codes of Conduct, in their trading relationship with all suppliers. Fourteen grocery retailers are designated under the UK Code, while four retailers are voluntary signatories of the Australian Code.

### 3.3 The method of designating grocery retailers

39. It is proposed to designate the major grocery retailers when the Code is created to require them to comply with the Code.
40. Additionally, a future-proof mechanism is proposed to designate any new grocery retailers that may reach an equivalent-size in the future. Any future designation process needs to have clear triggers that will result in a grocery retailer being designated.
41. Three possible triggers are being considered:
  - a. A threshold (in annual grocery revenue), where any retailers that cross the threshold will be designated. A revenue threshold is likely to be simpler and less costly to administer than a share of total retail sales because it does not require complex estimations. Any revenue threshold would be limited to revenue from grocery products to ensure the Code targeted retailers with a large presence in the grocery market. Finally, any threshold needs to be limited to sales in New Zealand, which may prove challenging in the future if there are overseas businesses selling groceries in New Zealand via online platforms.
  - b. An investigation-type trigger, where a retailer may be designated if the regulator confirms that the retailer is exerting negotiating power over suppliers to such an extent that it should be regulated under the Code (complaints by suppliers could be a contributing factor to initiating an investigation, along with a request of Government).
  - c. A voluntary request for designation by the grocery retailer.



- 42. Looking to international examples, the mandatory UK Code uses a revenue threshold of £1 billion in a financial year, and the UK Competition and Markets Authority has some discretion when determining whether to designate a retailer.<sup>9</sup>
- 43. Unlike the UK Code, the Australian Code is voluntary, meaning it has no designation process and a retailer must sign up. However, the Australian Government has indicated that retailers with an annual revenue of \$5 billion or more, or a share of total retail grocery sales in Australia of 5% or more, should voluntarily sign up to the Code.<sup>10</sup>
- 44. Three options for designation are being considered:

Designation Option A	Designation Option B	Designation Option C
<p><u>Current designation:</u> Major grocery retailers.</p> <p><u>Future mechanism:</u> Regulator may designate if grocery revenue is more than \$500 million, on a single-year basis.</p>	<p><u>Current designation:</u> Major grocery retailers.</p> <p><u>Future mechanism:</u> Regulator must designate if grocery revenue is more than \$750 million annually, for two sequential financial years.  Regulator may designate a retailer following an investigation or if requested by the retailer.</p>	<p><u>Current designation:</u> Major grocery retailers.</p> <p><u>Future mechanism:</u> Regulator must designate if grocery revenue is more than \$1.5 billion, on a single-year basis.  Regulator may designate a retailer following an investigation or if requested by the retailer.</p>

- 45. Considering future designations, **Option A** has the lowest threshold and is more likely to result in another grocery retailer being designated under the Code in the future than **Options B or C**. As a result, **Option A** provides the most protection to suppliers, but may impose some compliance costs on the newly-designated retailer.
- 46. In terms of the value of the threshold, we note that an equivalent to the 5% suggested in Australia would be approximately \$1.1 billion in New Zealand.<sup>11</sup> Therefore, **Options A and B** would be comparatively ‘lower’ thresholds than suggested in Australia, while **Option C** is higher.
- 47. All the major grocery retailers have revenue well above the threshold in **Options A-C**. Foodstuffs South Island has an annual revenue of between \$3-\$3.5 billion. Foodstuffs North Island has an annual revenue of around \$8.5-\$9.5 billion, and Woolworths New Zealand has an

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<sup>9</sup> Refer to UK Order, article 4. When the UK Grocery Sector Code of Practice came into force, the designated retailers were Asda, Co-operative Group Limited, Marks & Spencer, Wm Morrison Supermarkets, J Sainsbury, Tesco, Waitrose, Aldi, Icelands, and Lidl.

<sup>10</sup> Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015, Section 4, accessible here: <https://www.legislation.gov.au/Details/F2021C00201>. Currently four have signed: Woolworths, Coles, Aldi, and Metcash.

<sup>11</sup> On the basis of a retail grocery industry of approximately \$22 billion per annum, refer to the Commission’s Final Report, para 2.4.

annual revenue of around \$7-\$7.5 billion. Collectively, petrol convenience stores, dairies, and convenience stores (some of which will be within the major grocery retailers) likely have an annual turnover of around \$3.5 billion<sup>12</sup>).

48. The inclusion of discretion for the regulator in the designation process adds potential administrative costs, but improves the overall effectiveness and durability of **Options B and C** with their slightly higher mandatory thresholds.

### 3.4 How should the major grocery retailers be regulated by the Code?

49. There are a number of aspects to consider in relation to how the major grocery retailers will be regulated by the Code. These include which entity is technically designated under the Code and therefore required to comply with the Code, and where the obligations established in the Code fit within the business operations of the major grocery retailers ('head office' versus store-level).
50. Generally, any liability for a breach of the Code should be aligned to the obligations under the Code, to encourage efficient compliance.
51. Three options for how the Code could apply to major grocery retailers are being considered:

<b>Option A:</b> Obligations on head office and some direct obligations on stores	<b>Option B:</b> Obligations on head office and some direct obligations on stores excluding smaller stores	<b>Option C:</b> All obligations on head office
Code obligations apply to all buying functions associated with the major grocery retailer (including buying done at the store-level by owner-operated and franchisee stores). Other obligations apply to the major grocery retailer 'head office' (eg dispute resolution).	Option A plus a threshold to exempt buying done at the store-level by smaller retail stores (under 250 square metres store floor size).  These smaller stores would not be required to comply with the Code in any direct buying from suppliers.	All obligations in the Code apply to the 'head office' of the major grocery retailer, which is required to ensure all activity associated with its business (including that of owner-operated and franchisee stores) complies with the Code, as appropriate.

52. In terms of coverage, **Options A and C** would ensure that all trading relationships between suppliers and the major grocery retailers – whether centralised 'head office' or retail store – are covered. **Option B** has reduced coverage because some smaller stores would be exempt in relation to store-level buying.

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<sup>12</sup> The Dairy and Business Owners Group submitted to the Commerce Commission that it considered the relative size of (select) other grocery retailers, in annual turnover, to be: \$1.3 billion for petrol convenience stores, \$1.2 billion for dairies and convenience stores (with an expected 4,000 dairies, convenience stores, and service stations), and \$0.9 billion for banner convenience stores (eg Four Square). Accessed here: [https://comcom.govt.nz/data/assets/pdf\\_file/0032/265766/Dairy-and-Business-Owners-Group-Submission-on-Market-study-into-grocery-sector-draft-report-25-August-2021.pdf](https://comcom.govt.nz/data/assets/pdf_file/0032/265766/Dairy-and-Business-Owners-Group-Submission-on-Market-study-into-grocery-sector-draft-report-25-August-2021.pdf).

53. A key difference is between **Options A and B** on the one hand and **Option C** on the other. Both **Options A and B** apply some obligations to individual stores as well as to the head office, whereas **Option C** centralises the obligations at the head office. **Options A and B** should be most effective because they directly place obligations on individual stores, but they could be less efficient because they may duplicate compliance obligations under the Code, resulting in higher costs. By comparison, **Option C** allows for the head office to achieve efficiencies across the entire business.
54. All options are similarly durable and should not allow the major grocery retailers to avoid compliance with the Code via any novel commercial arrangements.

### 3.5 Preliminary options analysis

	<b>Designation Option A</b> Designate major grocery retailers. <u>Future mechanism:</u> \$500m revenue	<b>Designation Option B</b> Designate major grocery retailers. <u>Future mechanism:</u> \$750m revenue annually for two sequential years plus discretion to designate following investigation	<b>Designation Option C</b> Designate major grocery retailers. <u>Future mechanism:</u> \$1.5b revenue plus discretion to designate following investigation
<b>Effective</b>	+2 Relatively low threshold means a new entrant will be required to comply with the Code sooner. This benefits suppliers and helps to ensure the market is working well. The lack of an investigation reduces effectiveness of the approach to deal with 'smaller' retailers that develop power over suppliers.	+2 Threshold means a new entrant will have to comply with the code when they reach and sustain a more moderate size (compared to <b>Option A</b> ).  Discretion (investigation and self-designation) improves effectiveness and protections for suppliers.	+1 Relatively high threshold means a new entrant will be required to comply with the Code later.  Discretion (investigation and self-designation) improves effectiveness and protections for suppliers.
<b>Efficient</b>	-2.5 New entrants will face compliance costs sooner.	-2 Higher administrative costs for government with investigation process.	-2 Higher administrative costs with investigation process.  New entrants face compliance costs later.
<b>Durable</b>	+1 Designation method is fit for purpose. Could be more flexible if the regulator had powers to designate on other grounds.	+1.5 Designation method is flexible into future, especially with investigation power.	+1.5 Designation method is flexible into future, especially with investigation power.
<b>Overall</b>	+0.5	+1.5	+0.5

	<b>Option A:</b> Obligations on head-office and some direct obligations on stores	<b>Option B:</b> Obligations on head office and some direct obligations on stores but with exemption	<b>Option C:</b> All obligations on head office to ensure business complies with the Code
<b>Effective</b>	+2 Effective at regulating designated retailers by providing robust coverage of all interactions with suppliers.	+1.5 Reduced effectiveness because of exemption for smaller retail stores.	+2 Effective at regulating designated retailers by providing robust coverage of all interactions with suppliers.
<b>Efficient</b>	-2 Possible duplication of costs at head office and retail store levels.	-1.5 Some extra costs for retail stores but less than under Option A.	-1 Least costs because head-office can manage compliance efficiently.
<b>Durable</b>	+1 Could have unforeseen consequences if the content of the Code changes over time.	+0.5 Could have unforeseen consequences if the content of the Code changes over time. Store exemption may need to be adjusted into future.	+2 Centralised focus should allow for better improvement and changes over time.
<b>Overall</b>	+1	+0.5	+3

### 3.6 Consultation questions

2	In relation to <b>section 3.3</b> , which of the three <b>Designation Options</b> do you think is best, and why?
3	In relation to <b>section 3.4</b> , which of the three <b>Options</b> do you think is best, and why?
4	Do you have any comments on the preliminary assessment of the options against the criteria in <b>Chapter 3</b> ?

## 4 Including a purpose statement within the Code and overarching obligations

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### 4.1 Approach to this issue

55. This chapter discusses two initial issues in the design of the Code:
- a. What should be included in the purpose statement within the Code, and
  - b. Any overarching obligations on designated retailers – including issues such as good faith or fair dealing, and the Treaty of Waitangi.

### 4.2 Purpose of the Code

56. Including a purpose statement in the Code would explain ‘why’ the Code exists and is good regulatory practice. The purpose of a Code should link to the purpose of the legislation it will sit under (likely to be some form of Grocery Industry Competition Act), which may well have a purpose similar to the Commerce Act 1986: *to promote competition in markets for the long-term benefit of consumers within New Zealand*<sup>13</sup> or the Fair Trading Act 1986: *to contribute to a trading environment in which— (a) the interests of consumers are protected; and (b) businesses compete effectively; and (c) consumers and businesses participate confidently.*
57. The purpose statement could set some boundaries around what the Code will or will not do. For example allowing the Code to:
- a. apply to all grocery supply agreements of the designated retailer, including the commercial arrangements with any private label suppliers.
  - b. include Māori economic development, or considerations for respecting tikanga Māori in the trading relationship between the designated retailer and supplier.
  - c. consider the impacts that the designated retailer’s trading relationship with a supplier may have on other retailers. This would allow for consideration of best price guarantee clauses or exclusivity clauses in the future.
  - d. support (or at the least not hinder) supplier participation in any wholesale supply arrangements by the designated retailer.
58. Looking to international examples, the UK Code does not include a purpose statement. The Australian Code has a purpose statement that is detailed and similar to that of the Fair Trading Act. The purpose statement clearly establishes that the scope of the Australian Code is to promote good faith in business dealings between suppliers and retailers, to improve

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<sup>13</sup> See section 1A of the Commerce Act. This purpose statement is similar to the ones in the Fuel Industry Act 2020 and Retail Payment System Act 2022.

transparency and certainty in the transactions and to provide a dispute resolution process (see Section 2 of the Australian Code).

59. We have developed three options for purpose statements:

<b>Option 1 (Principle-based Code):</b>	<b>Option 2 (Prescriptive Code):</b>	<b>Option 3 (Alternative Code):</b>
<p>A purpose to improve the balance of negotiating power between suppliers and designated retailers.</p>	<p>A purpose that promotes competition in the market for the long-term consumer benefit by:</p> <ul style="list-style-type: none"> <li>a) improving good faith in trading relationships</li> <li>b) improving transparency of supply agreements</li> <li>c) prohibiting or limiting a range of conduct that may transfer costs or risks</li> <li>d) providing a dispute resolution mechanism.</li> </ul>	<p>A purpose that promotes competition in the market for the long-term consumer benefit by:</p> <ul style="list-style-type: none"> <li>a) improving good faith and fair dealing in trading relationships</li> <li>b) improving transparency of supply agreements</li> <li>c) prohibiting or limiting a range of conduct that may transfer costs or risks</li> <li>d) supporting economic development in the grocery industry including the entry and expansion of retail grocery activity and any wholesale grocery activity</li> <li>e) Māori economic development / tikanga Māori provisions</li> <li>f) providing a dispute resolution mechanism.</li> </ul>

60. **Option 1** does not set long-term consumer benefit as the focus of the Code, but instead targets the retailer-supplier relationship. This allows for a simpler Code that seeks to constrain the designated retailer’s ability to use their strong negotiating position to their advantage over suppliers.

61. **Option 2** is likely to be the broadest purpose that is appropriate for the Code. It clarifies that the Code will directly impact on the distribution of costs and benefits between suppliers and designated retailers by prohibit or limit certain types of conduct by designated retailers, or require improved transparency or certainty of the terms and conditions of supply to reduce the likelihood of confusion and disputes arising. However, it constrains the Code to promote competition in the long-term benefits of consumers.

62. **Option 3** proposes a purpose that is arguably the broadest, but is also specified towards particular areas. It would allow the Code to consider some economic development matters, and it aligns with other reforms underway at the moment (such as the wholesale access and monitoring of strategic conduct). **Option 3** also gives more alignment with potential Māori economic development ambitions and may be best able to consider tikanga Māori provisions.

### 4.3 Overarching obligations

63. An overarching obligation translates the intent of the Code into an expectation on the conduct of designated retailers.
64. The Commission recommended an overarching principles-based obligation of good faith, similar to the Australian Code. It recognised that the UK Code has a principle of fair dealing, and that the two concepts have some overlap.<sup>14</sup> We consider below how overarching obligations – of good faith, fair dealing, and in relation to the Treaty of Waitangi – could be included in the Code.

#### **Good faith and/or fair dealing obligation**

65. An overarching principle of either good faith or fair dealing has the potential to improve the conduct in the grocery acquisition market and improve adherence to the purpose of the Code.
66. Good faith and fair dealings can refer to different types of ‘fairness’, but generally have a high degree of overlap. The 2018 review of the Australian Code suggested that good faith has connotations of ‘fairness of process’ (ie the behaviour of parties in a transaction), while fair dealings may have more scope for ‘fairness in outcomes’ (including consideration of the result of the transaction).<sup>15</sup> However, this is not a firm distinction. There may be a place for either, or both, forms of ‘fairness’ in a Code – provided they are focused around process and conduct, rather than substantive matters.
67. Good faith is best known in relation to employment matters where it has and has four elements:
  - a. must not act in a misleading or deceptive way
  - b. must be responsive and communicative
  - c. must give the affected parties sufficient information when they need it and a proper opportunity to comment
  - d. most broadly, must treat others fairly using common sense.<sup>16</sup>
68. From an operational perspective, a good faith principle should be understood and easily implemented. It is used in the Australian Code as an overarching obligation (section 6A), which is relatively detailed, and indicates a range of specific conduct that is not in good faith.
69. Fair dealing has two key elements that arise from different forms of ‘fairness’:

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<sup>14</sup> Commission, Final report, para 9.158 (Recommendation 6A).

<sup>15</sup> Refer to Graeme Samuel, Independent Review of the Food and Grocery Code of Conduct, Final Report, September 2018, p.30. Accessed <https://treasury.gov.au/review/food-and-grocery-code-of-conduct-review>.

<sup>16</sup> Refer to Employment New Zealand guidance: <https://www.employment.govt.nz/resolving-problems/employer-and-employee-must-dos/good-faith/#:~:text=It%20is%20more%20than%20just,a%20fair%20and%20timely%20way>.

- a. fairness between the designated retailer and supplier, recognising the supplier’s need for certainty in relation to the risks and costs of trading
  - b. fair treatment of different suppliers by the designated retailer, where the designated retailer must avoid discrimination or distinction between different suppliers.
70. The first element of fair dealing may require the designated retailer to consider the end result of any commercial dealing on the supplier, including and the overall impact, rather than just considering its behaviour during the commercial interaction.
71. Fair dealing is a less commonly used term and may be harder to implement. Its use in copyright law is not highly transferable to the Code.
72. The Australian Code includes a fair dealing concept (section 35(9)) in disputes. The scope of this encompasses the characteristics of the supplier that were, or should have been, known.
73. The UK Code relies primarily on fair dealing, and includes the two elements of fair dealing identified above (paragraph 69). However fair dealing is defined in the UK Code to explicitly encompass good faith, highlighting the overlap between the two terms.
74. We have developed three options for good faith or fair dealing obligations. All three options manage the risk (outlined in paragraphs 8-10) that the Code may result in an excessive shift of negotiating power to suppliers which could put upward pressure on prices for consumers, and generally focus on procedural matters rather than substantive matters.

Option 1 (Principle-based Code):	Option 2 (Prescriptive Code):	Option 3 (Alternative Code):
<p>A <b>good faith</b> obligation. Designated retailers must:</p> <ul style="list-style-type: none"> <li>a) not put the supplier under duress</li> <li>b) not retaliate against the supplier</li> <li>c) be responsive and communicative</li> <li>d) provide information in time for suppliers to respond</li> <li>e) generally engage in the trading relationship in good faith.</li> </ul>	<p>A <b>good faith</b> obligation. Designated retailers must:</p> <ul style="list-style-type: none"> <li>a) not put the supplier under duress</li> <li>b) not retaliate against the supplier</li> <li>c) be responsive and communicative</li> <li>d) provide information in time for suppliers to respond</li> <li>e) generally engage in the trading relationship in good faith.</li> <li>f) avoid discrimination or distinction between suppliers,</li> <li>g) recognise the supplier’s need for certainty around the risks and costs of trading.</li> </ul>	<p>A combination of <b>good faith</b> and <b>fair dealing</b> obligation.</p> <p>The <b>good faith will focus on how the retailer must:</b></p> <ul style="list-style-type: none"> <li>a) not put the supplier under duress</li> <li>b) not retaliate against the supplier</li> <li>c) be responsive and communicative</li> <li>d) provide information with sufficient time for the supplier to respond</li> <li>e) generally engage in the trading relationship in good faith.</li> </ul> <p>The <b>fair dealing will focus on how the retailer must:</b></p> <ul style="list-style-type: none"> <li>a) avoid discrimination or distinction between suppliers</li> </ul>



		<p>b) consider the nature of the relationship between the retailer and supplier</p> <p>c) consider the individual characteristics of the supplier that were known by or should have been known by the retailer.</p>
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75. The distinguishing feature between the three options is the mix of good faith and fair dealing. **Option 1** is the most limited obligation, using only good faith. By comparison, **Option 3** has the most onerous obligation, but it would seek to clearly define the components into good faith and fair dealing.
76. **Options 1 and 2** include a good faith obligation that has the potential to drive an overall improvement in conduct. This could reduce the likelihood of costs or risks being passed onto suppliers and improve the certainty and transparency of the terms of the trading relationship.
77. The combined good faith and fair dealing obligation in **Option 3** is likely to be the most effective. It provides more protection for suppliers by requiring a designated retailer to consider the characteristics of the supplier. This could move **option 3** beyond the procedural matters into substantive matters, meaning it may challenge the ability of the designated retailer to negotiate firmly and fairly. However, this risk is considered small because **option 3** is limited to the information that a supplier should reasonably be expected to know and will not require the retailer to act in the best interest of the supplier. This should manage the risk of an overly-large distributional shift from retailers (and consumers) to suppliers.

#### Incentives on suppliers

78. The Australian Code incentivises suppliers to act in good faith, for example by making this a relevant consideration when determining whether a retailer has acted in good faith (refer to the Australian Code, section 6B(3)(h)).
79. Such a provision could be easily included in a New Zealand Code. There are minimal risks from expecting suppliers to conduct themselves in good faith if that is the obligation on retailers.

#### Treaty of Waitangi and/or the Māori economy

80. The Māori economy is estimated to be worth between \$50-60 billion. Māori own a substantial share of assets in the primary industries, including 50% of fishing quota, 30% of beef, lamb and sheep production, 10% of kiwifruit production and 10% of dairy.
81. In addition, a growing base of food and grocery businesses are run by Māori. However, Māori have limited involvement in governance and management of the food and grocery retail sector.
82. Some issues that were heard during the Commission's consultation on the market study included:

- a. that Māori suppliers experienced fewer opportunities to supply grocery retailers, including in tendering for private label contracts and competing with overseas suppliers
  - b. there is a desire for retailers to do more to support Māori suppliers' economic development such as through access to data about consumer preferences and market opportunities for their products.
83. A Code could include economic development-focused requirements to demonstrate support for indigenous food and grocery businesses as part of Treaty of Waitangi commitments, or it could require major grocery retailers to have targets and aspirations to lift capacity and capability of Māori suppliers.
84. Alternatively, a Code could provide adequate recognition of tikanga Māori or Te Ao Māori where appropriate – for example in any overarching obligation (good faith or fair dealing), or in dispute resolution processes.

#### 4.4 Preliminary options analysis<sup>17</sup>

	<b>Option 1 Principle-based Code</b> Purpose is to improve the balance of negotiating power. Good faith obligation.	<b>Option 2 Prescriptive Code</b> Purpose links competition in market and long-term consumer benefits with detailed areas that will be regulated by the Code. Good faith obligation with some consideration of the supplier's circumstances.	<b>Option 3 Alternative Code</b> Option 2 plus allows for Māori economic development, and broader matters relating to the trading relationship. Good faith and fair dealing obligations.
<b>Effective</b>	+1 Clear purpose of Code will limit content to only matters related to balance of negotiating power. Good faith provision will improve ability of suppliers to negotiate with retailers.	+2 Purpose of the Code should be effective and focused on consumer benefit over long-term. Strong good faith obligation will adjust negotiating power between major grocery retailer and supplier to promote competition in the long term.	+3 Purpose of Code is detailed and provides clear scope to consider related matters and grounds for economic development. Good faith and fair dealing obligations will be most effective at improving negotiating power of suppliers to promote competition in the long term. Some risk that retailers may be constrained by fair dealing obligation.

<sup>17</sup> For the purposes of this consultation paper, impact analysis has been conducted on a by-chapter basis to manage the level of detail provided. The analysis at the end of Chapter 4 is on the sum of options presented in the chapter – as indicated with the table above.

In subsequent chapters – particularly Chapters 6 and 7 – where the options are more detailed, a table showing what each of the three options contain has been included prior to the impact table. This is intended to recap the options that have been discussed before they are analysed. Further analysis of options may be at a more granular level.

<b>Efficient</b>	-1 Purpose is narrowly defined to reduce any uncertainty or costs.  Good faith is clear and easy to implement	-1.5 Purpose targets supplier-retailer issues through competition and consumer long-term benefit, which may create additional costs.	-2 Broader purpose and some complexity means Code could add more costs to designated retailers.  More detailed provisions may add extra costs to some retailers but should deliver more protection (and gains) for suppliers.
<b>Durable</b>	+2.5 Clear, but flexible purpose should be highly durable.  Specific good faith provision targets conduct of designated retailer and should be adaptable over time.	+1.5 Clear, targeted, purpose is relatively durable over time. Small risk of new issues arising that are out of scope of purpose  Good faith provision is relatively durable because it stops discrimination between different suppliers.	+2 Broader scope (of purpose) is both positive and negative. It should be durable but may raise demands for Code to address broader economic development considerations.  Stronger good faith and fair dealing obligations should be durable, and any risks of considering substantive matters are managed.
<b>Overall</b>	+2.5	+2	+3

#### 4.5 Consultation questions

5	In relation to <b>4.2 purpose of the Code</b> , which of the three options do you agree with, and why?
6	Do you see any risks if the purpose of the Code was to: <ul style="list-style-type: none"> <li>- address any impacts of the major grocery retailers' trading relationships with their suppliers on other grocery retailers, or</li> <li>- support any wholesale supply arrangements?</li> </ul> If yes, please explain the risks.
7	In relation to <b>4.3 overarching obligations</b> , which of the three options do you agree with, and why?
8	Do you have any views on how to incorporate tikanga Māori or Te Ao Māori in the Code?
9	How can the Code best incorporate economic development objectives, including those of Māori?
10	Do you have any comments on the preliminary assessment of the options against the criteria in <b>Chapter 4</b> ?

## 5 Requirements for supply agreements

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### 5.1 Approach to this issue

85. Grocery supply agreements set out the terms and conditions of the trading relationships between retailers and their suppliers. The negotiating power that the designated retailers have over suppliers may influence the terms and conditions in supply agreements. In relation to supply agreements, the Code should:
- a. provide certainty and transparency in relation to the terms and conditions of supply by establishing a range of minimum expectations on designated retailers
  - b. reduce the likelihood that suppliers will face unexpected costs or risks, including by prohibiting or limiting some conduct by designated retailer.
86. This chapter focuses on minimum requirements for grocery supply agreements and any limits to retrospective or unilateral variations of supply agreements.

### 5.2 Requirement for supply agreements to be written and contain certain content

87. Grocery supply agreements<sup>18</sup> are effectively the commercial arrangements and terms and conditions of supply between a supplier and retailer. This section discusses the requirement that supply agreements be written and contain certain minimum content required for the trading relationship between the supplier and designated retailer, particularly on matters of common dispute.
88. The Commission recommended that all grocery supply agreements should be written in clear and concise language, provided to the supplier, and kept by the retailer for as long as the agreement is active and a time afterwards. The Commission also recommended that the following matters must be covered in all supply agreements:
- a. any quantity standards (such as minimum supply volumes)
  - b. any quality standards
  - c. any delivery requirements set by the retailer
  - d. when groceries may be rejected
  - e. the maximum period for payment
  - f. circumstances when payment may be withheld, or deductions made.

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<sup>18</sup> Grocery supply agreements may be relatively long-lasting and sometimes complex due to the nature of the supply arrangements and the grocery industry.

89. This recommendation is close to the requirements in Australia, and somewhat aligned with the UK, as shown in the table.

	<b>UK Order</b>	<b>Australian Code</b>
Written agreements	Required (Order, article 6)	Required (section 7)
Any changes to be in writing	Required (Order, article 6)	Not specifically, but a range of provisions are required to be in writing (section 42)
Clear language	N/A	Only quantity and quality requirements must be in clear terms (section 8(e))
Hold copy of agreement	Required, must be held for 12 months after the agreement ends (Order, article 6)	Required, must be held for 6 years after the agreement ends <sup>19</sup> (section 42(1))
Provide to supplier	Required (Order, article 6)	N/A
Minimum content	Duty to incorporate the Code in supply agreements. Must not enter an agreement that is inconsistent with the Code (Order, article 5)	All matters recommended by the Commission (above) plus the duration of the agreement and termination processes (Section 8)

90. There are two major benefits from increasing the use of written grocery supply agreements. Firstly, it shifts suppliers off informal, unwritten supply agreements, which leaves them more vulnerable to pressure to accept unfavourable supply terms and conditions. We are aware that there are some suppliers providing groceries to major grocery retailers are in this situation. Secondly, it improves transparency across the industry and makes the other components of the Code (refer to Chapters 6 and 7) more effective. This occurs through not just increasing the use of written supply agreements but ensuring they have the minimum content and ensuring any changes are made in writing.

91. We have developed two options for the minimum content of written supply agreements:

<b>Option 1 (Principle-based Code):</b>	<b>Option 2 (Prescriptive Code) &amp; Option 3 (Alternative Code):</b>
<p>All grocery supply agreements must be written in plain English and provided to supplier.</p> <p>Grocery supply agreements must be held by designated retailer for 1 year after they expire.</p> <p>Designated retailer must not enter into any grocery supply agreement that is inconsistent with the Code.</p>	<p>All grocery supply agreements must be written in plain English and provided to supplier.</p> <p>Grocery supply agreements must be held by designated retailer for 7 years (aligns with NZ tax requirements).</p> <p>Grocery supply agreements must contain minimum content (per Commission’s recommendation plus details of the duration of the agreement and termination processes).</p>

92. Both **Options 1 and 2** will add administrative costs (both temporary and ongoing) for all parties as written grocery supply agreements become the standard.

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<sup>19</sup> The Australian Code stipulates that records are to be retained for 6 years, which corresponds with Australian tax requirements.

- 93. **Option 1** may be slightly less effective from an implementation perspective because it may result in variable content of grocery supply agreements. It is also expected to be less efficient because of extra work for each designated retailer to determine what complies with the Code.
- 94. By comparison, **Options 2 and 3** may be more effective and efficient because they have less scope for interpretation and require the minimum necessary content to be in every supply agreement. However, this is less flexible and may be less durable if it cannot adapt to changing practices over time.

5.3 Limiting unilateral variation and retrospective variation to grocery supply agreements

- 95. A unilateral variation to a grocery supply agreement is a change made by one party without requiring the agreement of the other party. A retrospective variation to a grocery supply agreement is a unilateral change made by one party that modifies something from the past. To be clear, because the Code is binding on designated retailers, this section is primarily limiting the ability of designated retailers to make unilateral variations or retrospective changes to supply agreements.
- 96. Unilateral variations or retrospective variations to grocery supply agreements can be used by one party to a supply arrangement to the detriment of the other party. For example, a retailer changing a supply agreement to modify the payments a supplier must make for merchandising services that have already been provided to a higher rate than was agreed (a retrospective variation). However, not all unilateral variations are detrimental. There may be some instances where they are efficient and beneficial to both parties such as paying promotional costs via remittance rather than invoicing which is simpler and more cost-effective.
- 97. Prohibiting a designated retailer from making a retrospective variation does not stop a retailer and supplier from jointly agreeing to make such a change to a grocery supply agreement.
- 98. The Commission recommended that – if they were to be permitted at all – unilateral variations should only be permitted to occur in limited circumstances.<sup>20</sup> The Commission also recommended that retrospective variations, including requests for additional payments outside of the original terms, were unlikely to be justifiable.
- 99. The UK Code and the Australian Code both limit the use of unilateral variations and retrospective variations in their own way.

UK	Australia
<p><b>Unilateral variations (UK Code, article 3)</b> Must give reasonable notice.</p> <p><b>Retrospective variations (UK Code, article 3)</b> Prohibited except where specifically set out in supply agreement with sufficient detail.</p>	<p><b>Unilateral variations (Australian Code Section 9)</b> Prohibited except where specifically set out in supply agreement with sufficient detail and reasonable in the circumstances. Reasonable notice must be given.</p> <p><b>Retrospective variations (Australian Code Section 10)</b> Prohibited.</p>

<sup>20</sup> Commerce Commission, Final Report at 9.166.1.

100. Considering these matters, we identify two options:

Option 1 (Principle-based Code):	Option 2 (Prescriptive Code) & Option 3 (Alternative Code):
If designated retailer can make <b>unilateral variations</b> , it must provide reasonable notice.  Prohibit <b>retrospective variations</b> .	Prohibit <b>unilateral variations</b> except where specifically set out in the grocery supply agreement with sufficient detail and reasonable in the circumstances. Reasonable notice must be given.  Prohibit <b>retrospective variations</b> .

101. Both **Option 1** and **Option 2** prohibit retrospective variations on the basis that they are detrimental to suppliers if forced upon them.

102. Unilateral variations are not prohibited outright, reflecting that they may provide some benefits. The instances when they may occur indicate the difference between the options:

- a. **Option 1** is less effective but more efficient. It does not limit the ability of a designated retailer to make a unilateral variation, so long as it has the ability to do so (in the written grocery supply agreement) and as long as it provides reasonable notice of any such variation to the supplier to allow the supplier to adjust. This is a clear principle, and should be flexible and durable.
- b. **Option 2** is more effective but potentially less durable. It only allows unilateral variations where specifically negotiated in the grocery supply agreement with sufficient detail, and is reasonable in the circumstances (considering the benefits, costs, and risks to the supplier) to protect the suppliers from pressure to accept terms and conditions of supply that are unfavourable. Reasonable notice is also required. This option is equally efficient as **option 1**, but only because it improves potential efficiency for suppliers at the expense of designated retailers by providing the most certainty of the terms and conditions of supply and reducing the likelihood of risks and costs being passed onto suppliers.

#### 5.4 Preliminary options analysis

103. The following tables provide an overview of the options considered in the chapter. These same options are then analysed against the criteria in the table below.

Option 1 Principle-based Code	How the option regulates conduct			
	N/A	Limited	Prohibited	Exceptions or conditions
Non-written supply agreements				
Content of supply agreement				Must not be inconsistent with Code.
Unilateral variations				In supply agreement, and reasonable notice.
Retrospective variations				

Option 2 Prescriptive Code & Option 3 Alternative Code	How the option regulates conduct			
	N/A	Limited	Prohibited	Exceptions or conditions
Non-written supply agreements				
Content of supply agreement				All supply agreements must meet minimum content.
Unilateral variations				In supply agreement, and reasonable in the circumstances, with reasonable notice.
Retrospective variations				

	Option 1 Principle-based Code	Option 2 Prescriptive Code & Option 3 Alternative Code
<b>Effective</b>	+1.5 Will improve certainty of supply terms for suppliers and reduce the likelihood that suppliers face unexpected costs due to unilateral variations.	+2.5 Clear minimum content of grocery supply agreement gives certainty of supply terms for suppliers. Protects suppliers from unexpected or unreasonable unilateral variations that may impose costs or risks.
<b>Efficient</b>	-1.5 Costs to implement, some long-term, some transitional.  Possible costs working out the content of grocery supply agreements.  Restricting unilateral variations may push costs upfront.	-1 Costs to implement, some long-term, some transitional.  Restricting unilateral variations may push costs upfront.
<b>Durable</b>	+2.5 Clear provisions are able to adapt over time where mutually agreed between retailer and supplier in grocery supply agreement.	+1.5 Comparably less durable over time due to the inflexible minimum content of grocery supply agreements.
<b>Overall</b>	+2.5	+3

## 5.5 Consultation questions

11	In relation to <b>5.2 Requirements for supply agreements to be written and contain minimum content</b> , which of the options do you agree with, and why? Is there any content that you think should be required in grocery supply agreements but is not mentioned?
12	In relation to <b>5.3 limiting unilateral and retrospective variations</b> , which of the options do you agree with, and why?
13	Do you have any comments on the preliminary assessment of the options against the criteria in <b>Chapter 5</b> ?



## 6 Obligations in relation to product supply and placement

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### 6.1 Approach to this issue

104. Product supply and placement are key aspects of the trading relationship between designated retailers and suppliers. In relation to product supply and placement, the Code should provide:
- a. certainty of supply terms and conditions by establishing minimum expectations on designated retailers and by prohibiting or limiting certain conduct
  - b. transparency for suppliers by establishing processes and timeframes that designated retailers must follow for specific matters
  - c. direction to ensure that costs are consistently met by the most appropriate party.
105. In this chapter we consider options in relation to changes in supply chain processes, fresh produce specifications, product ranging, shelf allocation and delisting, as well as a selection of other obligations (including in relation to property rights, confidential information, and data).

### 6.2 Changes in supply chain processes and logistics services

106. Supply chain processes are about the delivery of products from the supplier to the designated retailer. Good processes are essential for timely and low-cost delivery with minimal damage or loss along the way. There are some details of supply chain processes that are likely to be in most supply agreements, such as:
- a. The expected delivery location. This could be a retailer's distribution centre (with the designated retailer managing distribution to retail stores) or direct to the retail store.
  - b. The provider of transportation/logistics services to move goods.
  - c. The timing of any deliveries and other detailed arrangements.

#### **Changing supply chain processes**

107. Supply chain processes must be flexible to accommodate changes in the commercial environment. Locking-down all details of the supply chain process in a grocery supply agreement may create additional costs if the agreement needs to be regularly renegotiated.
108. The Code should not prohibit or excessively limit the ability to make changes to supply chain processes, and should allow for some unilateral variations as discussed in **Chapter 5.4**. However, the Code should put processes in place to improve transparency around any changes to supply chain processes and some direction to stop suppliers from being pressured into accepting costs to the benefit of the designated retailer.
109. Both Australia and the UK have requirements in relation to supply chain procedures or delivery criteria, as summarised in the table.

<p><b>The UK Code (Code, article 4)</b> Prohibit significant changes by a retailer, except where it gives reasonable notice in writing. Require compensation otherwise.</p>	<p><b>The Australian Code (section 22 and section 9)</b> Prohibit material changes by a retailer, except where it gives reasonable notice in writing. Require compensation otherwise.</p> <p>This is a unilateral variation, so it is only permitted where specifically set out in the grocery supply agreement with sufficient detail and reasonable in the circumstances.</p>
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### Limiting pressure to use particular logistics services

110. There are two ways in which a designated retailer may profit from a supplier using a particular logistics services supplier:

- a. if the supplier uses the designated retailer’s own inhouse logistics services, or
- b. if the supplier agrees to use a third-party logistics services supplier that is providing a payment back to the designated retailer.

111. It is not clear if this is an issue in New Zealand at the moment, although we understand it may have been in the past. It appears to have been an issue in the UK – and the UK Code places some limitations around the use of third-party service providers.

112. The options we are considering are:

<b>Option 1 (Principle-based Code):</b>	<b>Option 2 (Prescriptive Code):</b>	<b>Option 3 (Alternative Code):</b>
<p>Allow significant unilateral changes to supply chain procedures if reasonable notice is provided.</p> <p>Require compensation otherwise.</p>	<p>Prohibit material unilateral changes to supply chain procedures except where provided in the supply agreement and reasonable in the circumstances,<sup>21</sup> as well as reasonable notice provided to the supplier.</p> <p>Require compensation if reasonable notice is not provided.</p>	<p>Option 2 plus prohibit a designated retailer from pressuring or requiring a supplier to use their own logistics services or a third party, unless the service is lower cost than the supplier’s preferred service provider, or the supplier’s preferred service provider does not meet reasonable service standards.</p>

113. The material difference between **Options 1 and 2** is the ability of a designated retailer to make unilateral changes in relation to supply chain procedures.

114. **Option 1** is least effective because it allows unilateral changes to supply chain procedures with reasonable notice. This would give suppliers advance warning of costs, but would not protect suppliers from costs being imposed upon them to the benefit of the designated retailer. This option is relatively efficient because it imposes less extra cost on designated retailers.

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<sup>21</sup> Reasonable in the circumstances includes consideration of the benefits, costs, and risks to the supplier, as well as the characteristics of the supplier including their business size and the type of produce they supply.

115. **Option 2** is more effective. It provides more protection for suppliers from unexpected costs by limiting when a material change to supply chain processes may be made and providing clearer direction about how the costs and benefits should be shared. However this option is less efficient because it may impose extra costs on designated retailers.
116. **Option 3** is as effective and efficient as **option 2**, but more durable because it addresses a potential issue that has arisen in the past and may arise again in the future – namely protecting suppliers from being pressured into using a service from which the designated retailer derives a benefit.
117. None of the options prohibit unilateral changes to supply chain processes, which could prevent designated retailers and suppliers from adapting to the changing commercial environment and could stifle investment in more efficient supply chain processes.

### 6.3 Fresh produce standards and quality specifications

118. The Commission noted that the perishable nature of fresh produce may need to be specifically addressed in a Code.<sup>22</sup> Fresh produce suppliers may need:
- a. certainty and transparency around the terms of supply, including the designated retailer’s expectations for fresh produce quality and processes for accepting (or rejecting) produce
  - b. protections if suppliers may be vulnerable to last-minute renegotiation on terms that could expose them to additional risks or costs.
119. The UK Code does not have any specific provisions around the supply of fresh produce. The Australian Code does, in relation to fresh fruit and vegetables. It outlines acceptance (and rejection) processes in relation to fresh produce standards or quality specifications<sup>23</sup> with timeframes of a maximum of 24 hours to reject produce and a requirement to notify the supplier within 48 hours if produce is declined. It also sets a maximum time of 30 days for any claim for damaged produce or shortfalls<sup>24</sup> (see section 21 of the Australian Code).
120. Any provisions in relation to fresh produce should fit the New Zealand market. We understand fresh produce in New Zealand is often checked when it is received and is accepted (or rejected) well within 24 hours. Requiring faster acceptance or rejection – such as 12 hours – may result in instances of non-compliance by retailers that are not a material problem to suppliers.
121. The three options we are considering are:

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<sup>22</sup> Australia also has a Horticulture Code of Conduct, which regulates conduct in transactions between growers and wholesale ‘traders’, agents, or merchants.

<sup>23</sup> We do not understand these to be a regulatory ‘standard’ or an another formal ‘standard’ (such as an ASNZS or ISO standard).

<sup>24</sup> This is different from payments for shrinkage or wastage (refer to Chapter 7).

Option 1 (Principle-based Code):	Option 2 (Prescriptive Code):	Option 3 (Alternative Code):
No provision. Rely on Good faith.	Require designated retailer to have fresh produce standards or quality specifications and to use them without discrimination.  Establish processes and timeframes to accept/reject produce: Must accept produce if it meets the standards or specifications and cannot reject produce after accepting it. Cannot reject produce after 24 hours of receiving it.  If produce is rejected, written notice must be provided within 48 hours.  Any claims for damaged grocery products, shortfalls, or any similar claim must be within 30 days of delivery.	No provision.  Rely on Good faith and fair dealing.

122. **Options 1 and 3** do not provide any additional protection to fresh produce suppliers beyond the good faith obligation. They are efficient, and relatively durable. **Option 3** is probably more effective than **option 1** because of the stronger good faith and fair dealing provision.

123. By comparison, **Option 2** is most effective but also least efficient. It provides some protections for fresh produce suppliers (including improved transparency around a designated retailer’s fresh produce standards and quality specifications) that may, or may not be required. While it does not impose onerous timeframes on retailers it has the risks of adding inefficiency and even creating the risk of regulating timeframes that become an issue or impediment in the future.

#### 6.4 Obligations in relation to product ranging, shelf allocation, and delisting

124. This section discusses conduct in relation to product ranging, shelf allocation, range reviews, and delisting:

- a. *Product ranging* refers to decisions made by designated retailers about which grocery products to stock. Different retailers will have different approaches to product ranging to provide the best competitive offering to consumers.
- b. *Shelf allocation* is specifically about where stock is placed on the shelves in a retail store. The position of a product affects turnover because some positions on the shelf are more appealing to consumers.
- c. *A range or category review* is a review of the products a designated retailer stocks in various product categories to evaluate how successful they are. This consultation paper refers to ‘range reviews’, but means any similar review undertaken by the designated retailer.
- d. *Delisting* is the decision by a designated retailer to stop stocking a certain product for sale in their stores.

125. Suppliers compete against each other for the major grocery retailers’ shelf space, and any competition should be on a level playing field. There have been concerns that some suppliers –

particularly retailer-owned 'private labels' (eg Pams, Pams Finest, Value, Countdown, Macro, and Essential) – receive preferential treatment.

126. A Code could provide suppliers with transparency by ensuring that each designated retailer has its own policies/practices (eg product ranging principles and shelf space allocation principles) that are shared openly with suppliers and adhered to in dealings with all suppliers.<sup>25</sup>

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

127. The Commission recommended non-discrimination on product ranging and shelf allocation to prevent designated retailers from using different approaches for their private label products and other suppliers.
128. The Australian Code requires retailers to have product ranging and shelf space allocation principles and to apply these without discrimination to all suppliers (see section 26 of the Australian Code). The UK Code has no provisions on this matter and relies solely on the fair dealing obligation.

#### **Delisting**

129. Delisting by a major grocery retailer in the New Zealand market is a critical issue for a supplier that can threaten the viability of their business by removing their ability to reach the consumers that shop at the major grocery retailers' stores.
130. However, delisting is also a commercial reality. Retailers have limited physical shelf space so bringing new products to market sometimes involves removing other products to create the necessary shelf space.
131. Any provisions in the Code need to provide the right balance of supporting suppliers while not preventing a designated retailer from meeting consumer demands, including by delisting products with the right justification. The best way to achieve this balance is to focus any requirements of the Code on good practice processes and non-discrimination between different suppliers.
132. The Commission recommended addressing both the circumstances in which delisting may occur and the process that should be followed when delisting. The UK and Australian Codes both cover these areas.

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<sup>25</sup> This is a version of non-discrimination, similar to part of the fair dealing obligation discussed at paragraph 69.b.

UK Code (article 16)	Australian Code (section 19)
<p><b>Circumstances in which delisting may occur</b></p> <p>A retailer may only delist a supplier for genuine commercial reasons.</p> <p>Identifies some things that are not genuine commercial reasons (eg a supplier exercising its rights).</p>	<p><b>Circumstances in which delisting may occur</b></p> <p>The retailer may only delist in accordance with the supply agreement and for genuine commercial reasons.</p> <p>Genuine commercial reasons are defined as including (but not limited to):</p> <ul style="list-style-type: none"> <li>- Failure to meet agreed quality or quantity requirements</li> <li>- Failure to meet the retailer’s commercial sales or profitability targets as agreed with the supplier</li> <li>- Persistent failure to meet the retailer’s delivery requirements.</li> </ul> <p>Delisting as a punishment for a complaint, concern or dispute raised by a supplier is not a genuine commercial reason.</p>
<p><b>Process that should be followed</b></p> <p>Prior to delisting, a retailer must provide reasonable written notice of the decision, with reasons.</p> <p>This must allow time for the supplier to engage in dispute resolution if they want to.</p>	<p><b>Process that should be followed</b></p> <p>Prior to delisting, a retailer must provide reasonable written notice of the decision to delist, outlining the reasons for delisting and the supplier’s rights (including review and dispute resolution).</p>

133. In relation to product ranging, shelf allocation and delisting, the options are:

Option 1 (Principle-based Code):	Option 2 (Prescriptive Code):	Option 3 (Alternative Code):
<p><b>Ranging, shelf allocation</b> Require consistent treatment of all suppliers against established principles.</p> <p><b>Delisting</b> Delisting may only occur for genuine commercial reasons.</p> <p>Delisting process must provide supplier with written notice of the decision, including reasons for the decision, and sufficient time to engage in dispute resolution if they want to.</p>	<p><b>Ranging, shelf allocation</b> Require consistent treatment of all suppliers against a designated retailer’s product ranging principles and shelf space allocation principles (or equivalent).</p> <p>Designated retailer must provide advance notice of range reviews (or equivalent), and necessary information to suppliers.</p> <p><b>Delisting</b> Delisting may only occur in accordance with the grocery supply agreement and for genuine commercial reasons (as per the Australian Code).</p> <p>Delisting process must provide supplier with reasonable written notice of the decision to delist, including reasons for the decision, and enable supplier to engage in dispute resolution if they want to.</p>	<p><b>Option 2 and</b> Prohibit any notice or advance warning of delisting to be provided prior to, or as part of, a range review process.</p>

134. **Options 1** is comparatively the least effective but the most durable due to its flexibility. It does require consistent treatment of suppliers (including private label suppliers), in any delisting processes.

135. **Option 2** is effective because it has more specific protections for suppliers in relation to product ranging, shelf space allocation, and range reviews. It also provides more detail around

‘genuine commercial reasons’. The extra detail may make **Option 2** easier to implement, meaning it could be more efficient than **Option 1**.

136. **Option 3** is very similar to **Option 2** in terms of efficiency and durability, but it is more effective because it provides additional transparency (and limitations) to stop a designated retailer advancing a supplier towards delisting prior to a range review.
137. As indicated above, all three options focus on the process of delisting to provide improved transparency and certainty of process for suppliers. The more prescriptive and detailed processes may slow the process of delisting, but should not stop the designated retailer from delisting a product for genuine commercial reasons. This will allow a designated retailer to continue to adjust its product offering to meet the demands of consumers.

## 6.5 Other obligations

### **Confidential information, intellectual property, business disruption and freedom of association**

138. Concerns have been raised by suppliers that designated retailers have, or may in the future, share confidential information and intellectual property with their private label brands. This could reduce the incentives for suppliers to invest and innovate.
139. For Māori suppliers, some knowledge that underpins intellectual property may be a taonga – a cultural treasure – and should be respected as such.
140. The Australian Code has provisions relating to the protection of confidential information, intellectual property rights, the transfer of intellectual property, business disruption and freedom of association (see sections 23, 24, 25, 27, and 29 of the Australian Code). Generally, these provisions require a retailer to respect the supplier’s data or information and hold it in confidence.

### **Whistle-blower protections**

141. The Commission suggested consideration be given to the whistle-blower protections, including anti-retaliation measures. These protections may assist in bringing inappropriate conduct to the attention of the dispute resolution body and the regulator. Anti-retaliation measures can be included in the overarching good faith (or fair dealing) obligation, (refer to **Chapter 4.3**).
142. Targeted whistle-blower protections in the Code could be useful to provide strong assurances that enable any person who has a complaint to come forward freely and without fear of retribution from the retailer.

### **Pressure to opt out of wholesale supply arrangements**

143. The Government’s response to the Commission’s market study includes developing a quasi-regulatory wholesale access regime to support entry and expansion of competitors in the retail grocery market.

144. Depending on the wholesale access arrangements, the major grocery retailers may have incentives to pressure suppliers into opting out of the wholesale access supply, which could reduce the effectiveness of the wholesale regime. The Code could limit such conduct, or any other conduct towards suppliers that may counteract the intentions of the wholesale access regime.<sup>26</sup>

### Exclusive supply clauses and ‘most favoured nation’ price clauses

145. The Commission’s market study did not provide a conclusive view on whether exclusive supply clauses or best price clauses are pro-competitive or not. At this time, the Code will not place any limitations around the use of these clauses in grocery supply agreements. Monitoring the use of these clauses will be one of the functions of the new regulator.

146. In relation to these other obligations, the options we are considering are:

Option 1 (Principle-based Code):	Option 2 (Prescriptive Code):	Option 3 (Alternative Code):
Protection of supplier’s confidential information, and intellectual property by requiring the designated retailer to hold any information provided by the supplier in confidence and for the purpose it was provided.	<p><b>Option 1 plus</b></p> <p>Protection for whistleblowers.</p> <p>Recognition that for Māori suppliers some taonga should be respected.</p> <p>Prohibitions on designated retailers threatening suppliers with business disruption, hindering any lawful association of suppliers, or any conduct to encourage suppliers to opt out of any wholesale access regime.</p>	<p><b>Option 2 plus</b></p> <p>Prohibit any conduct to encourage suppliers to opt out of any wholesale access regime.</p>

## 6.6 Options analysis

147. The following three tables provide an overview of the matters considered in this chapter and how they would be regulated under the Code for each option. These same options are then analysed against the criteria.

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<sup>26</sup> This is an instance where the narrower purpose of **option 1** (refer to paragraph 60), which is focused on the balance of negotiating power between retailers and suppliers, may be mutually exclusive with a broader provision to improve competition in the retail grocery market.



Option 1 Principle-based Code	How the option regulates conduct			
	N/A	Limit	Prohibit	Exceptions or conditions
Changes to supply chain processes				Reasonable notice, compensation otherwise.
Pressure re.logistics services				
Fresh produce				
Product ranging and shelf allocation				Require consistent treatment of all suppliers.
Range reviews				
Delisting				Genuine commercial reasons and written notice with time to engage dispute resolution.
Confidential information, intellectual property				Must not hold in confidence and not use beyond intended purpose.
Business disruptions and freedom of association				
Whistle-blower protections				

Option 2 Prescriptive Code	How the option regulates conduct			
	N/A	Limit	Prohibit	Exceptions or conditions
Changes to supply chain processes				In supply agreement, reasonable in circumstances with reasonable notice and compensation otherwise.
Pressure re.logistics services				
Fresh produce				Process, specifications, and timeframes to accept or reject.
Product ranging and shelf allocation				Require consistent treatment of all suppliers.
Range reviews				Provide advance notice.
Delisting				Genuine commercial reasons, and written notice with time to engage dispute resolution.
Confidential information, intellectual property				Must not hold in confidence and not use beyond intended purpose. Require recognition of intellectual property that is a taonga
Business disruptions and freedom of association				
Whistle-blower protections				

Option 3 Alternative Code	How the option regulates conduct			
	N/A	Limit	Prohibit	Exceptions or conditions
Changes to supply chain processes				In supply agreement, reasonable in circumstances with reasonable notice and compensation otherwise.
Pressure re.logistics services				Except where lower cost or supplier's service provider did not meet requirements.
Fresh produce				
Product ranging and shelf allocation				Require consistent treatment of all suppliers.
Range reviews				Provide advance notice.
Delisting				Genuine commercial reasons, and written notice with time to engage dispute resolution. Must not occur prior to range review.
Confidential information, intellectual property				Hold in confidence and not use beyond intended purpose. Require recognition of intellectual property that is a taonga.
Business disruptions and freedom of association				
Whistle-blower protections				

	<b>Option 1 Principle-based Code</b>	<b>Option 2 Prescriptive Code</b>	<b>Option 3 Alternative Code.</b>
<b>Effective</b>	+1.5 Clear provisions that will contribute to promoting competition.	+2 Clear regulation provides certainty for suppliers and protects them from possible costs from unilateral changes in supply chain processes.	+2.5 Improved protection for suppliers from more transparent processes or certainty of terms of supply.
<b>Efficient</b>	-1 Obligations around processes of product ranging, range reviews, and delisting will add some time and costs.	-1 Obligations around processes of product ranging, range reviews, and delisting will add some time and costs. Costs relatively evenly shared between designated retailers and suppliers.	-1 More detailed provisions will add extra compliance costs overall. Distributional effects with some increased costs to designated retailers offset by less costs to suppliers.
<b>Durable</b>	+2 Principles are adaptable over time and should not provide an impediment to the well-functioning market.	+2 Specific provisions are generally adaptable over time.	+1.5 More detail may prove to be less adaptable over time.
<b>Overall</b>	+2.5	+3	+3

6.7 Consultation questions

14	In relation to <b>6.2 Changes in supply chain processes</b> , which option do you think is best, and why? Are suppliers being pressured to use a retailer’s own logistics services and if so, what is the impact?
15	In relation to <b>6.3 fresh produce standards and quality specifications</b> , do you think the Code should include specific provisions about fresh produce and if yes, please explain what you think it should include?
16	In relation to <b>6.4 Obligations in relation to ranging, shelf allocation, and delisting</b> , which option do you think is best, and why?
17	In relation to <b>6.5 Other obligations</b> , which option do you think is best, and why? Please comment on the range of different areas – confidential information, intellectual property, business disruption, freedom of association, whistle-blower protections, pressure to opt out of wholesale supply arrangements, exclusive supply clauses and ‘most favoured nation’ price clauses.
18	Do you have any other comments about issues relating to product supply and placement?
19	Do you have any comments on the preliminary assessment of the options against the criteria in <b>Chapter 6</b> ?

## 7 Obligations in relation to payment, price increases, and promotions

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### 7.1 Approach to this issue

148. Payment terms and promotions are a key aspect of the trading relationship between designated retailers and suppliers. In relation to these issues, the Code should provide:
- a. certainty of supply terms and conditions by establishing expectations on designated retailers and prohibiting or limiting some conduct
  - b. transparency for suppliers by establishing processes and timeframes that designated retailers must follow for specific matters
  - c. direction to ensure that costs are met by, and benefits accrue to, the most appropriate party.
149. In this chapter we consider options in relation to payment terms and set-offs, responses to price increases, limiting payments in relation to shrinkage and wastage and retailer's business activities, and promotional pricing and promotional buying.

### 7.2 Payment terms and set-offs

150. Receiving payment is critical to the cash flow of businesses, and the timing of payments impacts the ability of a business to invest and grow. The Government encourages prompt payments to small and medium enterprises and wants 95% of invoices received from these businesses to be paid within 10 working days.<sup>27</sup>
151. The Code could improve certainty of supply terms so businesses know when they will be paid.

#### **Payment times**

152. Delays in making payments to suppliers can increase the profitability of designated retailers. However, it can create cash flow issues for suppliers and may force them to spend time chasing late payments and searching for alternative sources of cash. In some cases, late payments can cause businesses to fail.
153. The Commission heard that some suppliers wait up to 60 days to have invoices paid, and these payments would often still have an industry standard-practice 2.5% settlement discount. Some grocery supply agreements may include terms with more prompt payments, but these may involve accepting a greater settlement discount.<sup>28</sup>

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<sup>27</sup> Refer to the announcement by the Ministers of Finance, Small Business, Commerce and Consumer Affairs, here: <https://www.beehive.govt.nz/release/driving-prompt-payments-small-businesses>.

<sup>28</sup> Commission's Final Report at 8.128 – 8.129.

154. Both the Australian and UK Codes set a maximum payment time that the retailer is obliged to meet, but do not establish a practice of prompt payments (see the Australian Code, section 12 and the UK Code article 5). In both instances, the maximum payment time is the timeframe set out in the supply agreement and no later than a reasonable time after receiving either the supplier’s invoice or the date of the supplier’s invoice.

**Set-offs against payments**

155. Set-offs are when a designated retailer deducts any amount it is owed by a supplier when paying a supplier’s invoice. The Commission heard that some suppliers considered set-off practices to be unjustified or unclear, and result in them receiving smaller payments than expected.<sup>29</sup> Set-offs do, however, have some administrative efficiencies because they can reduce the number of payments required between a designated retailer and supplier.

156. The Australian Code stipulates that a retailer must not set-off any amount against the supplier’s invoice unless the supplier has consented in writing to the set-off amount. In addition, the retailer must not require a supplier to consent to such an arrangement. Set-offs must be in the supply agreement and be reasonable in the circumstances.

157. The options we are considering are:

Option 1 (Principle-based Code):	Option 2 (Prescriptive Code):	Option 3 (Alternative Code):
<p><b>Payment terms</b> Payments in accordance with grocery supply agreement, and at a minimum within a reasonable time.</p>	<p><b>Payment terms</b> Payments to be made in accordance with grocery supply agreement, and at a minimum within a reasonable time.</p> <p><b>Set offs</b> Set-offs prohibited except with the written approval of supplier and where provided for in grocery supply agreement (which must be reasonable in the circumstances).</p>	<p><b>Payment terms</b> Retailers to make prompt payments no later than as specified in grocery supply agreement.</p> <p><b>Set offs</b> Set-offs prohibited except with the written approval of supplier and where provided for in grocery supply agreement (which must be reasonable in the circumstances).</p>

158. **Option 1** is effective and durable because it provides transparent processes and timing for suppliers of designated retailers, and allows for changes over time through the grocery supply agreement.

159. **Option 2** is likely to be more effective than **option 1** because it also provides certainty to suppliers that set-offs will only be applied as agreed and be reasonable in the circumstances. This reduces the likelihood that set-offs will be for costs that should be met by a designated retailer.

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<sup>29</sup> Refer to the Commission’s Final Report at 8.144.

160. **Option 3** is the most effective because it provides a positive obligation on designated retailers to make prompt payments, with a backstop (of the grocery supply agreement) to avoid extended payment times.
161. All options are durable over time and can adapt to changing commercial environments because they allow for arrangements negotiated between the designated retailer and supplier via the grocery supply agreement. In terms of efficiency, **options 2 and 3** will have slightly higher administrative costs (on both the designated retailer and supplier) due to the requirement to agree to set-offs, and **option 3** will probably be the highest due to the need to clarify what prompt payment means.

### 7.3 Responses to price increases

162. Suppliers will, from time to time, need to request price increases. This may be part of supply agreement negotiations, or it could be independent of the supply agreement. Anecdotally, we hear that some suppliers have experienced significant delays in getting a response to a request for a price increase, sometimes waiting up to six months.
163. The Code should provide certainty and transparency of process without directing the outcome of any price increase requests.
164. The Australian Code requires a response to a price increase request within 30 days and a supplier may enter negotiations with the retailer if they are not satisfied with the response (see Australian Code, section 27A). The UK Code does not include any specific provisions relating to requests for price increases.
165. The options we are considering are:

Option 1 (Principle-based Code):	Option 2 (Prescriptive Code) & Option 3 Alternative Code:
Rely on good faith	<p>The retailer must respond (accept, decline, or partially accept) to a request for a price increase within 30 working days of receiving the request.</p> <p>If the supplier is not satisfied, they may enter negotiations to be undertaken in good faith and without delay.</p> <p>Any information relating to negotiations for price increases would be covered by the commercially sensitive information provision (<b>refer to Chapter 6.5</b>)</p>

166. **Options 2 (and 3)** are effective at improving transparency of process for suppliers, with relatively low administrative costs. Requiring payment within a shorter time period would likely prove to be challenging for designated retailers. While regulating a 30-day maximum response time should improve the promptness of responses for most suppliers, it may result in some suppliers (that currently receive prompt responses) experiencing responses closer to 30 days.
167. **Option 1** relies on good faith to address any requests for price increases via the usual commercial relationship and will likely be more efficient, but potentially less effective.

#### 7.4 Payments for shrinkage and wastage

168. Shrinkage is a loss of grocery products due to theft, other loss or accounting error. Wastage is grocery products that are unfit for sale, for example due to damage.<sup>30</sup> These are different from 'short supply' where a delivery from a supplier is less than what was ordered.
169. There are existing processes for addressing wastage, including forms of 'standard damage allowance', that are used to accommodate damage that is known to have occurred prior to the produce being received by the designated retailer, but is not visible at the time, eg a consistent percentage of manufactured goods that are likely to be damaged.<sup>31</sup>
170. Despite these processes, there appear to have been instances of suppliers being asked to meet costs that occur after a designated retailer has taken possession of products for sale. For example, the Commission heard of retailers making payment requests for stock that was not located as part of a stock count, or stock that was damaged but without evidence of the damage having resulted in the supply process.
171. Additionally, we have heard anecdotally of requests for payments for wastage for many years past, which are difficult for a supplier to address.
172. The Code should provide certainty for suppliers by limiting unacceptable conduct by designated retailers in relation to shrinkage and wastage and providing direction on where costs should appropriately lie.
173. The Commission recommended that payments for shrinkage should be prohibited outright, and payments for wastage should be prohibited except in the circumstance where the supplier is responsible for the wastage.<sup>32</sup>
174. Both the UK and Australian Codes prohibit payments for shrinkage, and do not allow for any supply agreement to include provisions relating to payments for shrinkage (see the UK Code, article 7). The only exception is that Australian retailers may discuss ways to reduce the likelihood of shrinkage occurring (see the Australian Code, section 13).
175. The UK and Australian Codes both prohibit payments for wastage except where they are set out in the supply agreement, provided the wastage is due to negligence of the supplier, and/or the payments are reasonable in the circumstances (refer to the UK Code, article 8 and the Australian Code, section 14).

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<sup>30</sup> To be clear, in relation to fresh produce, shrinkage and wastage can only occur after a retailer has accepted goods (under the fresh produce provisions in Chapter 6.3).

<sup>31</sup> For example when it is known, based on historical data, that a manufactured good has a packaging error 0.5% of the time (not due to the fault of the retailer), and this agreed between both parties, then incorporated into the supply agreement as a standard damage allowance.

<sup>32</sup> Commerce Commission, Final report, at 9.166.4.

176. The options we are considering are:

Option 1 (Principle-based Code):	Option 2 (Prescriptive Code):	Option 3 (Alternative Code):
<p><b>No payments for shrinkage</b> Prohibited.</p> <p><b>Payments for Wastage</b> No payments for wastage except where set out in grocery supply agreement and the payment is due to negligence of the supplier. Supply agreement must also outline the basis of any payment.</p>	<p><b>Payments for shrinkage</b> Prohibited. Designated retailer may discuss ways to mitigate the risk of shrinkage.</p> <p><b>Payments for wastage</b> No payments for wastage except if the wastage is the responsibility of the supplier and the designated retailer has taken reasonable steps to mitigate wastage.</p> <p>Any payments must also be as set out in the relevant grocery supply agreement, including the circumstances where the payment is required and the basis of the payment. This must be reasonable in the circumstances.</p>	<p><b>Option 2 plus</b> Sunset clause which prohibits designated retailers requesting payments for wastage older than six months.</p>

177. **Options 1 and 2** are both effective at protecting suppliers from unjustified requests for payments for shrinkage or wastage that are the responsibility of the designated retailer. They are also durable because they allow for payments for wastage in precise (and relatively appropriate) circumstances – being, in accordance with grocery supply agreements and where the wastage has occurred because of an issue on the supplier’s part.

178. All options are flexible and should be able to accommodate wastage provisions that operate on an individual case-by-case basis, or a more systematised ‘standard damage allowance’ basis.

179. **Option 3** is more effective and should be more durable than **options 1 and 2** because it also provides the additional protection of a sunset clause which prohibits any payments for wastage older than six months.

## 7.5 Payments for retailer’s business activities, product placement, and as a condition of being a supplier

180. Another area of potential payments by suppliers is in relation to a retailer’s business activities (also called merchandising work),<sup>33</sup> product placement, and as a condition of being a supplier. All these activities have potential benefits to both the retailer and supplier by generating sales of products through supporting a competitive retail offering that caters to consumer preferences.

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<sup>33</sup> These generally include a buyer’s visit to the supplier, artwork or packaging design, consumer or market research, the opening or refurbishing of a store, hospitality for the retailer’s staff.

181. In New Zealand retail grocery, the merchandising work is shared between the supplier and retailer. It appears that some suppliers do not want to be involved in merchandising, while others prefer to have control over the stocking and display of their products. Regardless of who does the merchandising, it appears that most of the cost is met by suppliers.
182. Product placement or shelf space allocation (excluding any promotional arrangements which are considered later in **chapter 7.6**) relate to where a product is placed in a store generally, and the height or position on the shelves. Where a product is placed impacts on sales due to consumer buying habits – some positions on the shelf are simply more likely to sell than others. Fundamentally, shelf space is limited and designated retailers must make decisions on where to place products.
183. Additionally, we have heard anecdotally of suppliers receiving relatively generic requests for payments for a designated retailer’s business activities (without clarity about what activities are being paid for), and that sometimes activities that are paid for by a supplier are not provided by the designated retailer without any refund back to the supplier.
184. The Australian and UK Codes limit payments for business activities and product placement, and as a condition of being a supplier (articles 6, 9, and 12 of the UK Code, and sections 15, 16, and 17 of the Australian Code). Both Codes:
- a. Prohibit payments for the retailer’s marketing costs, except where set out in the grocery supply agreement. The Australian Code also requires any payments to be reasonable in the circumstances (factoring in the costs, risks and benefits to the supplier and retailer).
  - b. Prohibit payments for better positioning of goods with exceptions. The UK Code exception is to allow promotions, while the Australian Code exception is broader and can be for any reason provided the payment is set out in the supply agreement and is reasonable in the circumstances (factoring in the costs, risks and benefits to the supplier and retailer).
  - c. Prohibit payments as a condition of being a supplier, with exceptions. The UK Code exception is in relation to promotions or a new supplier. The Australian Code exception requires any payment to be in the supply agreement and reasonable having regard to the costs or risks to the retailer of stocking the product.
185. The three options we are considering are:

Option 1 (Principle-based Code):	Option 2 (Prescriptive Code):	Option 3 (Alternative Code):
<p><b>Marketing and merchandising costs</b> Prohibit payments except where provided for in the relevant grocery supply agreement.</p> <p><b>Payments for product placement</b> Prohibit except in relation to a promotion.</p>	<p><b>Marketing and merchandising costs (designated retailer’s business activities) and product placement costs</b> Prohibit except where provided in the relevant grocery supply agreement and reasonable in the circumstances (having regard to</p>	<p><b>Option 2 plus</b> Prohibit payments that are not linked to specific activities.</p> <p>Require refunds by retailers where they have not completed the relevant activity that payment was provided for.</p>



<p><b>Payments as a condition of supply</b> Prohibit except in relation to a promotion or a new product and the retailer runs a risk stocking the product.</p>	<p>the likely benefits, costs, and risks to the retailer and supplier).</p> <p><b>Payments as a condition of supply</b> Prohibit except in relation to a promotion or a new product.<sup>34</sup> Must be reasonable in the circumstances (having regard to the likely benefits, costs, and risks to the retailer and supplier).</p>	
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186. **Options 1 and 2** are relatively similar in terms of effectiveness because they seek to ensure any payments (for marketing costs, business activities, and product placement) reflect the relative costs and benefits to designated retailers and suppliers.
187. However, **Option 2** is expected to be slightly more effective and more durable because it has additional ability for a supplier and designated retailer to negotiate payments outside of a promotion, provided any payments are reasonable in the circumstances. It is also expected to be less efficient (or more onerous to implement) and may risk either creating additional compliance costs for designated retailers or re-allocating costs from suppliers to designated retailers – this does have some possible risk of passing costs onto consumers.
188. Overall, **Option 3** is likely to be most effective (and equally durable as **option 2**) because it prohibits payments that are not directly linked to services and to requires refunds (or even compensation) where the relevant services are paid for but not provided.
189. All three options allow payments as a condition of being a supplier when designated retailers are stocking new products (or in relation to promotions) and the designated retailer may face some risks. This could seem harsh to new suppliers, but may be necessary for retailers to take the risk of allocating scarce product space to new products.

## 7.6 Payments for promotions and promotional buying

190. New Zealand consumers appear to be particularly likely to purchase products that are on promotions. This makes promotions a key part of a retailer's offering and vital for suppliers to sell their products. However, the muted competition in the retail grocery market means that much of the push for promotions (and promotional prices) comes from suppliers who are competing against each other for market share.<sup>35</sup>
191. The issue with this approach to promotions is that while both designated retailers and suppliers benefit (in terms of sales volumes) the promotional costs are disproportionately met by the supplier. Any limitations on supplier funding of promotions must be carefully framed to manage any impact consumers if it reduces the frequency of promotions, or the price

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<sup>34</sup> New products could be ones that are not stocked by the retailer in the prior year in more than 25% of its retail stores.

<sup>35</sup> Commission, Final Report, paragraphs 2.43-2.45 and Figure 2.5, and paragraphs 8.105-8.112.

reductions offered by promotions. Prohibiting such payments entirely would likely result in suppliers being paid a lower list price for their products.

192. We are aware of at least two models of promotional buying in the grocery sector:
  - a. a relatively long-term partnership approach where a designated retailer and supplier agree to a number of promotions and promotional discounts over a period of time (this may involve a buy-in period where the retailer purchases stock at a reduced price before the retailer drops its price during the promotion).
  - b. a case-by-case approach to promotions as a one-off event where a designated retailer and supplier agree to the terms and funding for each promotion (this may involve promotions running on scanned volumes where the supplier compensates the retailer for the cost of the promotion based on actual sales volumes).
193. Investment buying (where designated retailers stockpile products purchased from a supplier at a reduced price during a buy-in period to a promotion) and other forms of promotional discount aimed at providing consistently low retail prices are intended to enable retailers offer lower prices outside of promotions – apparently with the consent of suppliers. Investment buying can cause production issues for suppliers, and may contribute to a lack of transparency over prices. However, stopping this practice may result in higher prices for consumers.
194. The Commission recommended that payments for promotions should only be permitted where they are reasonable in the circumstances, having regard to the benefits and costs to suppliers and retailers. The Commission did not suggest any limits around any form of promotional buying (including investment buying and forward buying).
195. The UK and Australian Codes have similar provisions relating to payments for promotions and promotional buying (refer to articles 13 and 14 of the UK Code, and to sections 18 and 20 of the Australian Code):
  - a. Both prohibit the retailer requiring a supplier to fully fund the costs of a promotion, with exceptions. The UK Code exception is that reasonable notice must be provided in writing. The Australian Code exception is that the promotion must be in the supply agreement and must be reasonable in the circumstances.
  - b. In relation to promotional buying, retailers must take due care when ordering groceries and compensate a supplier for over-ordered products sold at the full retail price. The Australian Code also prohibits a retailer from reducing an order by more than 10% without providing reasonable notice to suppliers (and compensation for net costs).

196. The options we are considering are:

<b>Option 1 (Principle-based Code):</b>	<b>Option 2 (Prescriptive Code):</b>	<b>Option 3 (Alternative Code):</b>
<p><b>Payments for promotions</b> Prohibit payments for promotions except where reasonable notice is provided.</p> <p><b>Promotional buying</b> Care to be taken when buying for a promotion and compensation paid if goods purchased at a promotional price are sold to consumers at a non-promotional price.</p>	<p><b>Payments for promotions</b> Prohibit payments for promotions except where the payment is provided for in the grocery supply agreement and is reasonable in the circumstances.</p> <p><b>Promotional buying</b> Care to be taken when buying for a promotion. Compensation only to be paid if goods purchased at a promotional price are sold at a price other than what is agreed with the supplier.</p>	<p><b>Payments for promotions</b> Prohibit payments for promotions except where the payment is provided for in the grocery supply agreement and is reasonable in the circumstances considering the relative benefits of the promotion to the supplier and the designated retailer.</p> <p>Require the cost of promotions to be shared between designated retailer and supplier in a manner that reflects relative benefits?</p> <p><b>Promotional buying</b> Care to be taken when buying for a promotion. Promotional buying allowed as agreed between retailers and suppliers in grocery supply agreement, provided it is reasonable in the circumstances</p>

197. In relation to payments for promotions, the options are very similar. **Option 3** is the most effective and efficient by a slight margin because it provides a little more transparency and clarity around what a reasonable split of cost might be, while prohibiting a supplier fully funding the promotion. **Option 1** is the least effective because it lacks a ‘reasonableness’ provision.

198. The key difference between the three options is around promotional buying and investment buying.

- a. The compensation requirement in **Options 1 and 2** may have the effect of prohibiting investment buying – which could impact on prices for consumers.
- b. **Option 3** does not require compensation and should therefore allow any investment buying provided it is agreed between the designated retailer and supplier and is reasonable in the circumstances.

199. Overall, **Option 3** appears to be more durable and effective because it will allow the designated retailer and supplier to reach any promotional buying/investment buying agreement that is reasonable in the circumstances. It may be more efficient for designated retailers and suppliers because it will not encourage innovation to circumvent the Code, but may require additional guidance from the regulator on what is reasonable.

200. We note that **options 1 or 2** could be modified to allow investment buying (or an equivalent) as agreed in grocery supply agreements if feedback from consultation indicates this is considered positive.

## 7.7 Other payments

### Forcing suppliers to purchase or use designated retailers' data services

201. The Commission heard some concerns that suppliers were being forced to purchase data from designated retailers' data services as part of the supply agreement. Similarly, we have heard suggestions that suppliers do not have access to the same data that is used by designated retailers when conducting range reviews.

### Consumer complaints

202. The UK Code has a provision limiting the ability of a retailer to pass on the costs of a consumer complaint unless the complaint is justifiable and attributable to negligence or default or breach of the supply agreement by the supplier (see article 15). As a principle, such a provision may be a useful backstop protection for suppliers. However, we are not aware of consumer complaints being an issue between suppliers and retailers.

## 7.8 Preliminary options analysis

203. The following tables provide an overview of the matters considered in this chapter and how they are regulated by the Code. These same options are then analysed against the criteria.

Option 1 Principle-based Code	How the option regulates conduct			
	N/A	Limit	Prohibit	Exceptions or conditions
Payment terms				In supply agreement and within reasonable time.
Set offs				
Price increases				
Shrinkage				
Wastage				In supply agreement (detailed).
Marketing costs				In supply agreement.
Product placement				For promotions.
Payments as condition of supply				For promotions or new product.
Promotional payments				Reasonable notice.
Promotional buying				Care to be taken and compensation provisions.

Option 2 Prescriptive Code	How the option regulates conduct			
	N/A	Limit	Prohibit	Exceptions or conditions
Payment terms				In supply agreement and within reasonable time.
Set offs				Written approval and in supply agreement, and reasonable in the circumstances.
Price increases				Maximum response times and processes.
Shrinkage				
Wastage				In supply agreement and reasonable in the circumstances.
Marketing costs				
Product placement				
Payments as condition of supply				
Promotional payments				
Promotional buying				Care to be taken and compensation provisions.

Option 3 Alternative Code	How the option regulates conduct			
	N/A	Limit	Prohibit	Exceptions or conditions
Payment terms				Prompt payments and no later than supply agreement.
Set offs				Written approval and in supply agreement, and reasonable in the circumstances.
Price increases				Maximum response times and processes.
Shrinkage				
Wastage				In supply agreement, and reasonable in the circumstances with six-month sunset clause.
Marketing costs				In supply agreement and reasonable in the circumstances.
Product placement				
Payments as condition of supply				Prohibit payments not linked to specific activity and require a refund if activity not carried out. Prohibit supplier fully funding promotion.
Promotional payments				
Promotional buying				Care to be taken, but investment buying allowed as provided in grocery supply agreement.

	Option 1 Principle-based Code	Option 2 Prescriptive Code	Option 3 Alternative Code
<b>Effective</b>	+1.5 Clear principles addressing most areas. Exceptions to principles are not the best alignment with industry needs, eg provisions relating to promotional payments, set-offs, and retailer's business activities.	+2 Prohibition of set-offs, and clear direction on where costs should lie, including in relation to promotions – while allowing for contracting out as reasonable in the circumstances – make this an effective option for promoting competition.	+3 Highly effective and targeted to New Zealand requirements, such as allowing for investment buying while also clearly directing where costs/benefits (eg wastage) should lie makes this option fit the current market best.
<b>Efficient</b>	-1 Imposes the smallest additional cost of the three options.	-1.5 Stronger obligations in relation to set-offs, shrinkage and wastage will impose costs on retailers.	-2 More detailed provisions will add extra costs, including in relation to prohibiting payments that are not for specific activities.
<b>Durable</b>	+1.5 Some of the exceptions are more limited and only provide for promotions, suppliers may benefit from more flexibility.	+2 The use of contracting out (via supply agreement which must be reasonable in the circumstances) adds flexibility and longevity to the regulations.	+1.5 Some use of contracting out (via supply agreement which must be reasonable in the circumstances) adds flexibility.
<b>Overall</b>	<b>+2</b>	<b>+2.5</b>	<b>+2.5</b>

## 7.9 Consultation questions

20	In relation to <b>7.2 Payment terms and set-offs</b> , which option do you think is best, and why?
21	In relation to <b>7.3 Responses to price increases</b> , which option do you think is best, and why?
22	In relation to <b>7.4 Payments for shrinkage and wastage</b> , which option do you think is best, and why?
23	In relation to <b>7.5 Payments for retailer’s business activities, product placement, and as a condition of being a supplier</b> , which option do you think is best, and why?
24	In relation to <b>7.6 Payments for promotions and promotional buying</b> , which option do you think is best, and why? What are your views on promotional buying and investment buying?
25	Do you think requests from retailers for payments for data services is an issue and if so, why?
26	Are there any other instances where requests for payments should be limited? If so, what are the issues and how should they be addressed in a Code?
27	Do you have any comments on the preliminary assessment of the options against the criteria in <b>Chapter 7</b> ?

## 8 Dispute Resolution

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### 8.1 Approach to this issue

204. Unresolved disputes can be damaging, expensive and time consuming. A dispute is an unresolved issue or disagreement between a designated retailer and its supplier that has arisen and not been remedied to the satisfaction of the supplier or retailer through the standard processes for addressing issues.
205. The Commission recommended that a dispute resolution mechanism should provide access to an independent decision maker for disputes that are not able to be resolved directly between a retailer and a supplier.<sup>36</sup> Preventing disputes arising where possible, and resolving them earlier and more effectively, will benefit retailers, suppliers and the whole sector.
206. This chapter discusses the context of the proposed dispute resolution processes, provides analysis on the key international examples of the UK and Australia, explains the criteria that may be used to evaluate dispute resolution options, and outlines possible options for New Zealand.

### 8.2 Context of the grocery industry

207. Any disputes that arise will be between the designated retailer and supplier, where both parties have a vested interest to resolve minor issues promptly and to their joint satisfaction, while preserving the ability to work together in the longer term.
208. Due to the fast moving nature of the retail grocery sector, and the hundreds of suppliers for each retailer, it is likely that there are many instances of issues being promptly resolved between the parties. Where issues are not promptly resolved, there are some existing dispute resolution processes. For example, both major grocery retailers have some form of escalation process in their respective supplier charters.<sup>37</sup>
209. However, there are indications that the existing mechanisms are not used very often by suppliers. This may suggest that there are barriers to suppliers raising a dispute, for example concern about their relationship with the retailer or the financial costs (and time) of any action.

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<sup>36</sup> Commission, Final Report, 9.182.

<sup>37</sup> Foodstuffs supplier charter is accessible here: [https://www.foodstuffs-exchange.co.nz/assets/documents/Supplier\\_relationship\\_charter.pdf](https://www.foodstuffs-exchange.co.nz/assets/documents/Supplier_relationship_charter.pdf). The Woolworths supplier charter is accessible here: <https://www.countdown.co.nz/media/9959/wnnz-supplier-charter-180618.pdf>.

### 8.3 Dispute resolution for the Code

#### The jurisdiction of a dispute resolution process – what is a dispute?

210. The dispute resolution process would be to settle any issues that may arise regarding conduct regulated by the Code. There will be a mixed and varied range of potential disputes that could arise under the Code. Some disputes will relate to contractual matters, and others will not. A light touch eligibility assessment process may be needed to determine whether an issue is a dispute under the Code or not.

#### The possible parties to a dispute

211. The parties to a dispute will be the designated retailer and supplier. The dispute resolution process will not cater to any disputes involving consumers. The only party able to raise a dispute using the process in the Code will be the supplier. This is consistent with the UK and Australian approaches.

212. Nothing in the Code will prevent a designated retailer from including a right for it to refer a dispute to arbitration in a supply agreement, should it want to.

#### Estimated volume of disputes

213. The likely volume of disputes is unknown. The UK's Groceries Code Adjudicator only undertook nine Arbitrations between 2014 and 2021.<sup>38</sup> In Australia, during the 2020-21 reporting period, there were only four complaints raised by suppliers to the relevant retailer's Code Arbiter.<sup>39</sup>

### 8.4 Examples of dispute resolution

#### General background to dispute resolution in New Zealand

214. A full range of dispute resolution processes are available in New Zealand, ranging from self-resolution to determinative with varying degrees of formality and control over proceedings for the parties to the dispute.<sup>40</sup>

215. There are at least 55 different dispute resolution schemes in New Zealand, according to the Government Centre for Dispute Resolution (**GCDR**). These schemes cover a wide range of areas

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<sup>38</sup> Evidence presented to the Commerce Commission by former UK Groceries Code Adjudicator Christine Tacon, slides 6 and 8. Accessible here: [https://comcom.govt.nz/data/assets/pdf\\_file/0036/269847/Christine-Tacon-The-Impact-of-Groceries-Regulation-in-the-UK-New-Zealand-Briefing-GCA-2013-October-2020.pdf](https://comcom.govt.nz/data/assets/pdf_file/0036/269847/Christine-Tacon-The-Impact-of-Groceries-Regulation-in-the-UK-New-Zealand-Briefing-GCA-2013-October-2020.pdf).

<sup>39</sup> Woolworths' Code Arbiter reported one complaint by a supplier, and Coles' Code Arbiter reported three complaints. The Independent Reviewer commented on the fact that there were only four complaints, suggesting it may be due to effective systems to resolve issues before they become complaints, suppliers being unaware of the Code Arbiter complaint process, suppliers not complaining for fear of repercussions or that the Code Arbiter will not be impartial, or that there are few issues. Refer to the Food and Grocery Code Independent Reviewer Annual Report 2020-21, p. 10, accessible here:

[https://treasury.gov.au/sites/default/files/2021-11/p2021-229034\\_0.pdf](https://treasury.gov.au/sites/default/files/2021-11/p2021-229034_0.pdf).

<sup>40</sup> Refer to guidance here on the different types of dispute resolution processes:

<https://www.mbie.govt.nz/cross-government-functions/government-centre-for-dispute-resolution/why-dispute-resolution-is-important/>.



including consumer protection (disputes between consumers and retailers), property and building, and human rights.

**An example of a New Zealand dispute resolution process involving a supplier and retailer**

216. The Fuel Industry Act 2020 created a mediation-arbitration dispute resolution scheme for disputes between wholesale fuel suppliers and their wholesale customers that relate to the terminal gate pricing regime or the wholesale contract rules.<sup>41</sup> This dispute resolution process is not available to consumers.

**Considering tikanga Māori**

217. We also want to consider how to design and deliver dispute resolution processes that are culturally responsive to Māori and accessible to any Māori supplier who has a need to seek dispute resolution.

218. An example of a scheme that sought to make a strong commitment to meeting Te Tiriti obligations is the recently established Tertiary Education Learner Dispute Resolution Scheme. Some of the ways this was done include: offering tikanga-based processes (such as having regard to the appropriate tikanga Māori and upholding the mana of the parties in a dispute), providing the opportunity for te reo Māori (or New Zealand sign language) to be used, requirements for culturally competent practitioners, and reporting on outcomes for Māori.<sup>42</sup>

**United Kingdom**

219. The UK Code dispute resolution process follows a negotiation – arbitration model that is used for instances when a supplier alleges a breach of the Code by a retailer (a dispute). The UK Code provides for a relatively short negotiation phase of 21 days, within which time the dispute is to be resolved to the satisfaction of the supplier. Disputes that are not resolved by negotiation go to arbitration within four months. Arbitration is conducted by the Groceries Code Adjudicator (**GCA**), and costs are generally to be borne by the designated retailer.

<p><b>Functions relating to dispute resolution</b></p>	<p>A designated retailer must have a <b>Senior Buyer</b> within a its buying team.</p> <p>Retailers must appoint a <b>Code Compliance Officer</b> to be a point of contact for enquiries and issues. The Code Compliance Officer is an employee of the retailer, with access to the necessary documents and resources, but separate of the buying team.</p> <p>The <b>GCA</b> is an independent statutory office established by the <b>Groceries Code Adjudicator Act 2013</b>. The GCA administers any arbitration processes.</p>
<p><b>Dispute resolution processes</b></p>	<p>The Senior Buyer will review any decisions made by the retailer in relation to the UK Code.</p> <p>A dispute arises when a supplier informs the Code Compliance Officer that they believe the retailer has not fulfilled its obligations under the Code.</p>

<sup>41</sup> Refer to section 46 of the Fuel Industry Act 2020, here: <https://www.legislation.govt.nz/act/public/2020/0060/latest/whole.html#LMS321426>.

<sup>42</sup> Refer to the Tertiary Education Dispute Resolution website for more information: <https://tedr.org.nz/> This dispute resolution process is set out in primary legislation (Education and Training Act 2020) and regulations (Education (Domestic Tertiary Student Contract Dispute Resolution Scheme) Rules 2021).

	<p>The Code Compliance Officer and supplier have 21 days to resolve the dispute to the satisfaction of the supplier. If a dispute is not resolved, a supplier may request arbitration. A request for arbitration must be submitted within 4 months of the dispute arising.</p> <p>Arbitration will be administered by the GCA. The decision is binding and final, but either party may appeal on grounds in the Arbitration Act 1996.</p>
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## Australia

220. The dispute resolution process in the Australian Code was amended in 2020 following a review. It now provides a determinative process using the retailer’s Code Arbiter and does not have any self-resolution requirements.<sup>43</sup>

<b>Functions relating to dispute resolution</b>	<p>Retailers must appoint a <b>Code Arbiter</b> to deal with complaints in relation to the conduct that is regulated by the Code, and to enter into agreements to settle a dispute.</p> <p>The Code Arbiter has costs paid by the retailer and has access to the necessary documents, but is not to be unduly influenced by the retailer.</p> <p>The Minister may appoint an <b>Independent Reviewer</b>, to consider requests to review Code Arbiters’ processes in dealing with complaints and publish non-binding guidance.</p>
<b>Dispute resolution processes</b>	<p>A supplier may make a complaint in relation to matters covered by the Code to the relevant retailer’s Code Arbiter.</p> <p>A Code Arbiter must determine what action should be taken by the retailer in response to the complaint. Within 5 business days of concluding the investigation, the Code Arbiter must provide the supplier with notice of their determination and reasons for the determination, including the supplier’s options for further action.</p> <p>A supplier may request an independent review of a Code Arbiter’s process in dealing with the complaint. Any such review may make recommendations to the Code Arbiter.</p>

## Comparing the United Kingdom and Australia

221. The following table analyses the UK and Australian dispute resolution processes against some key attributes of a dispute resolution process.

	United Kingdom	Australia
<b>Process</b> <i>(self-resolution or determinative)</i>	Self-resolution processes (negotiation between supplier and Code Compliance Officer) followed by a determinative process (arbitration by the GCA) if negotiation is unsuccessful.	The Code Arbiter is a determinative process.
<b>Is there a tiered process?</b>	Yes, arbitration by the GCA is provided as a solution if negotiation is not successful.	No.
<b>Is there specific timing for the</b>	21 days for consensus resolution by parties (Supplier and Code Compliance Officer).	Code Arbiter must investigate the complaint within 20 working days (or longer if agreed with the supplier).

<sup>43</sup> Refer to Part 5, division 1 & division 2 of the Australian Code. See also: <https://www.accc.gov.au/business/industry-codes/food-and-grocery-code-of-conduct/changes-to-the-food-and-grocery-code>.

	United Kingdom	Australia
<b>dispute resolution?</b>	Retailer to submit to arbitration request by supplier for unresolved disputes, to occur within four months of dispute arising.	Code Arbiter must provide decision to supplier within five business days of concluding investigation.  The Code Arbiter's remedy lapses at the end of 20 working days, unless the supplier requests an independent review.
<b>Who covers the costs?</b>	All costs of the arbitration will be borne by the retailer, except if supplier's claim is vexatious or wholly without merit, in which case costs will be assigned at the arbitrator's discretion.	Costs of the Code Arbiter are to be covered by the retailer.
<b>Are any complaints confidential?</b>	Code Compliance Officer is employed by the retailer but is separate to the buying team.  The GCA may act as a conduit for suppliers to raise issues. If an issue falls within the scope of the Code, then the GCA will refer it to the relevant Code Compliance Officer while keeping the supplier anonymous. <sup>44</sup>	The Code Arbiter and Independent Reviewer must not disclose the identity of a supplier who has made a complaint to the retailer, except with the express consent of the supplier.
<b>Are decisions binding and/or enforceable?</b>	Any arbitration decisions of the GCA are binding and final on both the retailer and the supplier.	Code Arbiter decisions are binding on retailers.
<b>Financial awards or penalties?</b>	No specific limitations on imposing costs or financial penalties in the Code.	Code Arbiters may require retailer to pay compensation (up to \$5 million) or vary the supply agreement (subject to any provisions restricting the unilateral variation of the supply agreement).
<b>What is the appeal process?</b>	Either party may appeal an arbitration decision on the grounds set out in ss67-69 of the Arbitration Act 1996.	Supplier may request an Independent Review of the Code Arbiter's processes in dealing with the complaint.  An Independent Review can only make recommendations to the Code Arbiter.

222. Considering the table above, some of the key characteristics, strengths and limitations of the UK and Australian approaches are as follows:

- a. The UK approach involves an escalation model from early negotiation (in-house) to determinative arbitration by the independent GCA. The GCA has the ability to hear complaints and to proactively engage with retailers to improve conduct in the industry, partially because it has both dispute resolution and regulatory functions. Evidence

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<sup>44</sup> In addition to the dispute resolution process, the UK GCA has separate investigation powers, which have been used twice over the seven years of the GCA (until mid-2021). Refer to Groceries Code Adjudicator Annual Reports and Accounts 2020-2021, at p.20. Accessed here: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/995915/Groceries\\_Code\\_Adjudicator\\_Annual\\_Report\\_and\\_Accounts\\_2020-2021.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/995915/Groceries_Code_Adjudicator_Annual_Report_and_Accounts_2020-2021.pdf).

indicates the UK regime is relatively successful and suppliers are experiencing fewer Code-related issues now than they were when the Code was introduced in 2014.<sup>45</sup>

- b. The Australian approach refers disputes to a Code Arbiter, which has the ability to make binding determinations, and must follow clearly set timeframes. Objectively, the Code Arbiter is an independent and confidential decision maker. However, a Code Arbiter may not be perceived as independent by suppliers because they are employed by the retailer, regardless of the requirements in the Code. Additionally, each retailer has a separate Code Arbiter, which means there may be different interpretations of the Code for different retailers, even when they may be dealing with the same supplier.

## 8.5 Criteria that will be used to evaluate options for dispute resolution

223. We are using a variation of the GCDR's principles<sup>46</sup> as the criteria to evaluate dispute resolution options:

- a. **User focussed and accessible:** Dispute resolution is easy for potential users to find, enter and use regardless of their capabilities and resources.
- b. **Independent and fair:** All dispute resolution functions are, and are seen to be, carried out in an objective and unbiased way.
- c. **Efficient:** Dispute resolution provides value for money through appropriate, proportionate and timely responses to issues. It evolves and improves over time.
- d. **Effective:** Dispute resolution delivers sustainable results and helps minimise conflict and improve productivity.

224. At this stage we are not proposing to weight any criterion more heavily than others. However, we are aware from submissions received by the Commission that some criteria (particularly those relating to independence, timeliness, and confidentiality) are particularly important.

## 8.6 The options for New Zealand

225. We are considering dispute resolution approaches based on the UK and Australian models (**Options A and B** below), and a third approach (**Option C**) for comparison. Our thinking behind the third approach model is discussed below, and then the three options are outlined.

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<sup>45</sup> Despite this, in a GCA survey of suppliers, the major reason why UK suppliers said that they may not raise an issue with the GCA was because of a fear of consequences if the retailer found out. Refer to Groceries Code Adjudicator Annual Reports and Accounts 2020-2021, at p.11.

<sup>46</sup> Refer to the Government Centre for Dispute Resolution Principles. Accessed here: <https://www.mbie.govt.nz/cross-government-functions/government-centre-for-dispute-resolution/dispute-resolution-tools-and-resources/dispute-resolution-best-practice-principles/>. These principles will ensure that any dispute resolution process is independent, accessible and affordable, timely, informed by specialist advice, and confidential, as the Commission recommended (refer to Final Report, paragraph 9.183). Accountability is considered separately in Chapter 9.

226. Fundamentally, a third approach to dispute resolution could involve a two-step method:
- a. *Self-resolution* – where the parties work together to resolve issues before they become disputes.
  - b. *Determinative process* – adjudication using specifically designed processes that allow an independent and impartial third party to determine a solution to the dispute.

#### **Internal self-resolution processes**

227. The Code should support a designated retailer and supplier having good internal processes to resolve issues by requiring a designated retailer to employ a form of ‘Code Compliance Officer’ (relatively similar to the UK Code) for a supplier to escalate an issue to, and negotiate with, to resolve disputes quickly.
228. A maximum time to resolve a dispute (to the satisfaction of the supplier) in negotiation with the Code Compliance Officer could be set in the Code, for example 20 working days.
229. If an issue is not resolved within this time, then the supplier can take the dispute to determination.

#### **Provide a determinative process to resolve disputes**

230. The determinative process to resolve the dispute would be independent adjudication by an appropriately expert person. Adjudication would be set up to provide a binding determination in a short time period – such as is the case with the Australian Code Arbiters, or Construction Contracts in New Zealand<sup>47</sup> – which would be beneficial for all parties.
231. However, reflecting the fast nature of the decision, the adjudication determination need not be final. The determination would be binding – and the parties involved would need to abide by it – but they could be allowed to go to Court and seek a full reconsideration of the entire dispute in the near future, if one party to the dispute wanted to.

#### **Require confidentiality**

232. The designated retailer’s representatives involved in the dispute process (eg ‘Code Compliance Officer’ and any representative in adjudication) would be required to maintain confidentiality to keep information separate from the relevant part of the retailer that engaged with the supplier on a day-to-day basis. This would not, however, prevent anonymised data about the disputes being collected and analysed by the grocery regulator.

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<sup>47</sup> Adjudication can be tailored more than arbitration which is governed by the Arbitration Act 1996. The Australian Code Arbiters makes decisions within 20 working days, and appeals are limited to procedural matters. The New Zealand Construction Contracts Adjudication scheme, which makes use of the Building Disputes Tribunal to administer adjudication services. For more information see:

<https://www.buildingdisputestribunal.co.nz/adjudication/>.

### **Power to award costs in dispute resolution**

233. In order for dispute resolution to be effective there needs to be some ability to award costs, which is important to:
- a. address some of the costs and risks a supplier faces when they choose to engage in dispute resolution.
  - b. incentivise compliance with the Code by both parties.
  - c. incentivise the resolution of issues before they become disputes.
234. There also should be direction around who pays any adjudication fees. Similar to the UK and Australia, it may be appropriate to have the designated retailer pay these unless there are good reasons not to.

### **Tikanga Māori**

235. As part of its Te Tiriti commitments, the dispute resolution scheme should offer tikanga-based processes (such as having regard to the appropriate tikanga Māori and upholding the mana of the parties in a dispute), provide the opportunity for te reo Māori to be used, provide for culturally competent practitioners, and provide for reporting on outcomes for Māori.

### **Onus on retailer to establish matters in relation to contracting out**

236. In terms of dispute resolution (and more generally), we think it is appropriate as a general principle to put the onus on the designated retailer to establish the element of 'reasonableness in the circumstances' in relation to contracting out. This would apply to any instances where there is an exception to the Code via a grocery supply agreement, for example unilateral variations, payments for wastage, payments for better positioning of groceries, payments for retailers business activities and promotions.

### **Provide a separate avenue for supplier to raise concerns about conduct direct to the regulator**

237. Some suppliers will not raise an issue via dispute resolution but may be willing to raise an issues or complaint directly to the groceries regulator provided they have the right assurances of confidentiality. This information would be used by the regulator to target any education campaigns, to develop guidance to improve the conduct in the industry, or possibly for enforcement action.

## The three options

238. We are considering three options for dispute resolution:

<b>Option A Negotiate-Arbitrate</b>	<b>Option B Determinative Code Arbiters</b>	<b>Option C Negotiate-Adjudicate</b>
<p><b>UK Negotiate-Arbitrate approach plus:</b></p> <p>Clarify confidentiality provisions to protect the identity of any suppliers seeking dispute resolution.</p> <p>Specify timeframes for any adjudication process.</p> <p>Provide for information sharing between regulator and dispute resolution provider (if separate).</p> <p>Costs of arbitration to be met by the designated retailer.</p> <p>Add provisions to ensure the dispute resolution reflects the values and principles of tikanga Māori.</p>	<p><b>Australian Determinative approach plus:</b></p> <p>Code Arbiters employed by designated retailers.</p> <p>Regulator may conduct merits-based review of Code Arbiters' decision, but may only recommend reconsideration.</p> <p>Regulator may issue binding guidance to Code Arbiters.</p> <p>Add provisions to ensure the dispute resolution reflects the values and principles of tikanga Māori.</p>	<p>Early self-resolution followed by adjudication to resolve disputes with clear timeframes.</p> <p>Adjudication is binding but not final (allowing a broad appeal process).</p> <p>Require confidentiality of retailer's representatives.</p> <p>Information sharing between dispute resolution providers and regulator.</p> <p>Regulator may provide binding guidance on the Code.</p> <p>Costs of adjudication to be met by the designated retailer.</p> <p>Provisions to ensure the delivery of Māori culturally responsive dispute resolution processes that are able to cater to the views/preferences of the parties involved.</p>

## 8.7 Preliminary options analysis

	<b>Option A Negotiate-Arbitrate</b> (Refer above for detail of option)	<b>Option B Determinative Code Arbiters</b> (Refer above for detail of option)	<b>Option C Negotiate-Adjudicate</b> (Refer above for detail of option)
<b>User focused and accessible</b>	+2 Moderately accessible for suppliers because costs are generally met by designated retailer but process of arbitration is relatively high-effort and can be drawn-out. Use of internal Code Compliance Officers may hinder suppliers from raising a dispute in the first place.	+2.5 Accessible for suppliers because costs generally met by designated retailer. Code Arbiters function should be easy for suppliers to access.	+2.5 Accessible for suppliers. Costs to be met by designated retailer and adjudication should be tailored to grocery industry needs and capability/resources. Use of internal negotiation may hinder suppliers from raising a dispute in the first place.
<b>Independent and fair</b>	+1.5 Determinations (by arbitration) are independent and impartial. Identity of parties to the dispute is confidential	+1.5 Code Arbiters are independent, and should be impartial, including being centrally employed to give confidence of this independence.	+2 Independent and impartial. Confidentiality of participants to the dispute is required.

		Identity of parties to the dispute is confidential.	
<b>Efficient</b>	+1 Clear timeframes for negotiation, but arbitration can be a costly and time-consuming process.	+2.5 Clear timeframes for Code Arbiter’s investigation and also for independent review.	+2 Clear timeframes for negotiation. Adjudication process should be faster and less costly than arbitration.
<b>Effective</b>	+2 Can access necessary expertise. If following UK model, then costs of arbitration are to be met by the designated retailer. This provides an incentive on designated retailers to reach early resolution.	+1.5 Can access necessary expertise. Code Arbiter’s costs will be funded by the regulator, but the costs will come from designated retailers. Depending on funding model, this should provide an incentive on designated retailers to reach early resolution.	+2 Can access necessary expertise. Adjudication process should deliver prompt and sustainable results. Rely on information sharing and regulatory functions to reduce likelihood of future conflicts.
<b>Overall</b>	+7	+8	+8.5

8.8 Consultation questions

28	Do you have any comments about the current state of dispute resolution (for example, the processes that are used or the nature of disputes)?
29	Do you have any comments on the particular criteria in <b>Chapter 8.5</b> used to undertake the preliminary assessment of options for dispute resolution?
30	In relation to <b>Chapter 8.6 The options for New Zealand</b> , which of the three options do you think will work best, and why?
31	Do you have any comments on the preliminary assessment of the options against the criteria in <b>Chapter 8</b> ?



## 9 Monitoring, compliance and enforcement

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### 9.1 Approach to this issue

239. Any mandatory Code will be a form of regulation that will need a regulator to monitor and enforce it. This chapter focuses on the regulatory functions of monitoring, compliance and enforcement, but not ‘who’ the regulator will be (this is being considered separately).
- a. Monitoring functions include collecting regular performance information.
  - b. Compliance relates to any duties/obligations to adhere to the Code as regulation, including requiring designated retailers to keep records and provide that information to the regulator (this is important for an effective monitoring function).
  - c. Enforcement functions are required to address instances where there is non-compliance with the Code, including actions that may need to be taken by the regulator. This is different to dispute resolution.
240. We are seeking feedback on the Australian and UK approaches to inform the design of these functions in a New Zealand Code.

### 9.2 Monitoring, compliance, and enforcement

#### **Monitoring and reporting functions**

241. The regulator needs a monitoring function to understand whether a Code is operating effectively and to provide the necessary information base to direct efforts to improve adherence to the Code, such as through issuing guidance or education initiatives.
242. Not all monitoring functions have to be in regulations. The UK’s GCA voluntarily undertakes regular supplier surveys to gather data on whether suppliers think retailers are complying with the Code.<sup>48</sup> By comparison, the Australian Independent Reviewer is required to conduct an annual survey of suppliers and retailers to identify issues arising with the Code and to assess ‘systemic compliance’ with the Code (section 37F of the Code). This is a relatively new obligation, and the first survey of suppliers was conducted in late 2021.<sup>49</sup>

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<sup>48</sup> Refer to the UK Groceries Code Adjudicator Annual Report and Accounts, Performance Report, pages 29 – 40. For example, in 2020-2021, the top three issues reported by suppliers related to (1) compensation for forecasting errors/not preparing forecasts with due care, (2) delay in payments, and (3) obligation to contribute to marketing costs. The report is accessible here: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/995915/Groceries\\_Code\\_Adjudicator\\_Annual\\_Report\\_and\\_Accounts\\_2020-2021.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/995915/Groceries_Code_Adjudicator_Annual_Report_and_Accounts_2020-2021.pdf).

<sup>49</sup> Refer to the Australian Food and Grocery Code Independent Reviewer: Annual Report 2020-21, pages 13-19. Accessible here: [https://treasury.gov.au/sites/default/files/2021-11/p2021-229034\\_0.pdf](https://treasury.gov.au/sites/default/files/2021-11/p2021-229034_0.pdf).

243. The UK and Australia both have annual reporting obligations, and they include a summary of the findings of surveys and other monitoring in the annual reports.<sup>50</sup>
244. When the UK Groceries Code was first implemented in 2010, 79% of suppliers indicated in annual surveys that they experienced some form of Code-related issue. In the 2021 survey, this has decreased to 29%. This indicates that improved adherence to the Code can be achieved through a combination of engagement through education and enforcement activity.

#### **Information sharing if the regulator and dispute resolution scheme provider are separate**

245. It is possible that the regulator and dispute resolution scheme will be different entities. If this is the case, there will need to be information sharing provisions to ensure the regulator is appropriately aware of any issues raised in dispute resolution. This will allow the regulator to target any education campaigns more effectively or to develop guidance to improve conduct and compliance in the industry.

#### **Compliance duty on designated retailers**

246. The Code could specify some detailed compliance requirements on retailers such as an obligation to train their staff on the requirements of the Code. Any compliance requirements would be targeted to improve adherence to the Code with benefits accruing to all parties. However, additional compliance obligations can add administrative costs, primarily to retailers.
247. The Australian and UK Codes each have very similar provisions which place some form of compliance duty on retailers.

##### **The UK Code - Compliance duties (UK Order, articles 8 & 9)**

- Requirement to appoint staff to functions for dispute resolution
- Requirement to train staff to comply with the Code
- Requirement to report on compliance with the Code (links to monitoring and enforcement chapter).

##### **The Australian Code - Compliance duties (section 40 and 42)**

- Requirement to appoint staff to functions for dispute resolution
  - Requirement to train staff to comply with the Code
- Requirement to keep records of activity in relation to the Code.

#### **Possible compliance costs**

248. The compliance costs of the UK Code were estimated as part of its development (in around 2008). It estimated that each designated retailer would incur compliance costs of

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<sup>50</sup> The Independent Reviewer is now required to prepare an Annual Report (section 37E). This obligation was added to the Code following the 2018 review. The Independent Reviewer published their first Annual Report in 2020-21, which is available here: [https://treasury.gov.au/sites/default/files/2021-11/p2021-229034\\_0.pdf](https://treasury.gov.au/sites/default/files/2021-11/p2021-229034_0.pdf). The GCA is required to prepare an Annual Report (section 14, Groceries Code Adjudicator Act 2013). The most recent report is available here: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/995915/Groceries\\_Code\\_Adjudicator\\_Annual\\_Report\\_and\\_Accounts\\_2020-2021.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/995915/Groceries_Code_Adjudicator_Annual_Report_and_Accounts_2020-2021.pdf).

approximately £290,000 a year factoring in costs associated with disputes, complaints and queries (costs of £135,000 excluding the disputes, complaints and queries).<sup>51</sup>

249. We are interested in the expected compliance costs from the proposals for the NZ Code, and would welcome any comments in response to question 33, below.

### **Enforcement functions for the regulator**

250. As set out earlier, the regulator needs enforcement powers in relation to the Code, along with appropriate safeguards in place to avoid the misuse of any such powers.

251. The benefit of this is more confidence in the Code by all parties, a deterrent to non-compliance (the threat of action), and the ability to take action for non-compliance with the Code. All parties benefit from this, for example:

- a. designated retailers benefit from consumers having confidence that they are adhering to the conduct obligations in the Code.
- b. consumers benefit from improved conduct between designated retailers and suppliers, which should deliver long-term benefits in terms of a bigger range of products at competitive prices.
- c. suppliers benefit from compliance as they are better able to negotiate with designated retailers and therefore have an improved ability to invest in productive capacity and conduct research and development to bring new, innovative products to market.

252. The UK has investigation and enforcement powers for the GCA (refer to the text box below). The GCA does not have to seek a Court ruling to seek financial penalties but may impose financial penalties after an investigation.

The UK's GCA may undertake an investigation if it has reason to suspect that a breach of the Code has occurred.<sup>52</sup> Three enforcement measures are available to the GCA if it determines that a retailer has breached the Code:

- a) Make binding recommendations
- b) Require information to be published (enforceable by civil proceedings)
- c) Impose financial penalties, which are limited to a maximum of 1% of the retailer's turnover<sup>53</sup>

Retailers may appeal against a financial penalty or the amount of the penalty to the Court.

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<sup>51</sup> Refer to "The supply of groceries in the UK market investigation" by the UK Competition Commission, on 30 April 2008. at 11.409. Accessible here: <https://www.gov.uk/cma-cases/groceries-market-investigation-cc>.

<sup>52</sup> Refer to UK's Groceries Code Adjudicator Act 2013, s4. Accessible here: <https://www.legislation.gov.uk/ukpga/2013/19/enacted>. The UK GCA investigation powers have been used twice over the seven years of the GCA (until mid-2021). Refer to Groceries Code Adjudicator Annual Reports and Accounts 2020-2021, at p.20. Accessed here: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/995915/Groceries\\_Code\\_Adjudicator\\_Annual\\_Report\\_and\\_Accounts\\_2020-2021.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/995915/Groceries_Code_Adjudicator_Annual_Report_and_Accounts_2020-2021.pdf).

<sup>53</sup> This is set by Order of the Secretary of State under section 9(7) and (8) of the Groceries Code Adjudicator Act 2013. Refer to The Groceries Code Adjudicator (Permitted Maximum Financial Penalty) Order 2015, accessible at: <https://www.legislation.gov.uk/ukdsi/2015/9780111128213>.

The GCA may seek to recover costs of an investigation from the retailer if they are satisfied that the retailer has broken the Code.

253. The Australian groceries regulator, the Australian Competition and Consumer Commission (ACCC) has general enforcement powers and may require retailers to provide information. The ACCC has suggested that pecuniary penalties and infringement notices should be available to it to address breaches of the Code.<sup>54</sup>

### 9.3 When would the Code come into force?

254. Implementing the Code involves transitioning from the status quo to the requirements set out in a Code. The process for transitioning will need to be carefully considered.
255. Implementation could be staged with some provisions coming into effect immediately and others after a period of time, for example:
- a. Provisions that do not require the modification of any existing contractual arrangements come into effect 30 days after any regulation is passed. This would include the proposed good faith and/or fair dealing obligation.
  - b. Provisions that require funding will take effect as funding is provided, for example implementation of monitoring, enforcement and dispute resolution functions.
  - c. Provisions that require changes to grocery supply agreements (which are contracts) are to take effect no later than 12 months after the Code comes into force.
256. We are seeking feedback on the timing of this implementation (refer to question 34)

### 9.4 Consultation question

32	Do you have any views on the Australian and UK approaches to monitoring, compliance obligations, and enforcement, and which might be most effective for New Zealand?
33	Do you have any comments on the potential compliance costs (for suppliers and designated retailers) from the proposed content of the Code of Conduct?
34	Do you have any views on how the Code should be implemented?
35	Do you have any other comments on the matters discussed in <b>Chapter 9</b> ?

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<sup>54</sup> For the ACCC's enforcement powers, refer to <https://www.accc.gov.au/business/industry-codes/food-and-grocery-code-of-conduct/food-and-grocery-code>. For the ACCC's comments on requiring penalties, refer to: <https://treasury.gov.au/sites/default/files/2019-03/c2018-338723-Australian-Competition-and-Consumer-Commission.pdf>.

## Annex: Recap of questions in this consultation paper

1	Do you have any comments in relation to <b>Chapter 2</b> , in particular any comments on: <ul style="list-style-type: none"> <li>- the objectives (section 2.2)?</li> <li>- evaluation criteria for the Code (section 2.3)?</li> </ul>
2	In relation to <b>section 3.3</b> , which of the three <b>Designation Options</b> do you think is best, and why?
3	In relation to <b>section 3.4</b> , which of the three <b>Options</b> do you think is best, and why?
4	Do you have any comments on the preliminary assessment of the options against the criteria in <b>Chapter 3</b> ?
5	In relation to <b>4.2 purpose of the Code</b> , which of the three options do you agree with, and why?
6	Do you see any risks if the purpose of the Code was to: <ul style="list-style-type: none"> <li>- address any impacts of the major grocery retailers' trading relationship with the supplier on other grocery retailers, or</li> <li>- support any wholesale supply arrangements?</li> </ul> If yes, please explain the risks.
7	In relation to <b>4.3 overarching obligations</b> , which of the three options do you agree with, and why?
8	Do you have any views on how to incorporate tikanga Māori or Te Ao Māori in the Code?
9	How can the Code best incorporate economic development objectives, including those of Māori?
10	Do you have any comments on the preliminary assessment of the options against the criteria in <b>Chapter 4</b> ?
11	In relation to <b>5.2 Requirements for supply agreements to be written and contain minimum content</b> , which of the options do you agree with, and why? Is there any content that you think should be required in grocery supply agreements but is not mentioned?
12	In relation to <b>5.3 limiting unilateral and retrospective variations</b> , which of the options do you agree with, and why?
13	Do you have any comments on the preliminary assessment of the options against the criteria in <b>Chapter 5</b> ?
14	In relation to <b>6.2 Changes in supply chain processes</b> , which option do you think is best, and why? Are suppliers being pressured to use a retailer's own logistics services and if so, what is the impact?
15	In relation to <b>6.3 fresh produce standards and quality specifications</b> , do you think the Code should include specific provisions about fresh produce and if yes, please explain what you think it should include?
16	In relation to <b>6.4 Obligations in relation to ranging, shelf allocation, and delisting</b> , which option do you think is best, and why?

17	In relation to <b>6.5 Other obligations</b> , which option do you think is best, and why? Please comment on the range of different areas – confidential information, intellectual property, business disruption, freedom of association, whistle-blower protections, pressure to opt out of wholesale supply arrangements, exclusive supply clauses and ‘most favoured nation’ price clauses.
18	Do you have any other comments about issues relating to product supply and placement?
19	Do you have any comments on the preliminary assessment of the options against the criteria in <b>Chapter 6</b> ?
20	In relation to <b>7.2 Payment terms and set-offs</b> , which option do you think is best, and why?
21	In relation to <b>7.3 Responses to price increases</b> , which option do you think is best, and why?
22	In relation to <b>7.4 Payments for shrinkage and wastage</b> , which option do you think is best, and why?
23	In relation to <b>7.5 Payments for retailer’s business activities, product placement, and as a condition of being a supplier</b> , which option do you think is best, and why?
24	In relation to <b>7.6 Payments for promotions and promotional buying</b> , which option do you think is best, and why? What are your views on promotional buying and investment buying?
25	Do you think requests from retailers for payments for data services is an issue and if so, why?
26	Are there any other instances where requests for payments should be limited? If so, what are the issues and how should they be addressed in a Code?
27	Do you have any comments on the preliminary assessment of the options against the criteria in <b>Chapter 7</b> ?
28	Do you have any comments about the current state of dispute resolution (for example, the processes that are used or the nature of disputes)?
29	Do you have any comments on the particular criteria in <b>Chapter 8.5</b> used to undertake the preliminary assessment of options for dispute resolution?
30	In relation to <b>Chapter 8.6 The options for New Zealand</b> , which of the three options do you think will work best, and why?
31	Do you have any comments on the preliminary assessment of the options against the criteria in <b>Chapter 8</b> ?
32	Do you have any views on the Australian and UK approaches to monitoring, compliance obligations, and enforcement, and which might be most effective for New Zealand?
33	Do you have any comments on the potential compliance costs (for suppliers and designated retailers) from the proposed content of the Code of Conduct?
34	Do you have any views on how the Code should be implemented?
35	Do you have any other comments on the matters discussed in <b>Chapter 9</b> ?