



Competition Policy

Building, Resources and Markets

Ministry of Business, Innovation & Employment

PO Box 1473

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New Zealand

17 August 2022

Via: competition.policy@mbie.govt.nz

Dear Secretariat,

The Australian Food and Grocery Council (AFGC) welcomes the opportunity to comment on the proposed NZ Grocery Code of Conduct. In our submission we reflect on the success and challenges of the Australian Food and Grocery Code of Conduct (FGCC) and subsequent versions of the Code. The Code is a necessary first step to arrest any disconcerting behaviour that may be impacting on the competitiveness of trans-Tasman suppliers. The proposed Code should not be treated as a panacea to treat the substantial market power imbalance between retailers and suppliers but as one of several tools to address the most egregious of retailer behaviours.

Prior to the implementation of the Australian FGCC in 2015, Australian suppliers operated in an environment riddled with aggressive retailer tactics that acted to significantly erode the competitiveness and profitability of Australian suppliers. Some of this has led to long-term scarring of the manufacturing footprint in Australia, particularly the presence of innovation and R&D investment by manufacturers which has stagnated to 2009-10 levels. The implementation of the Code and the subsequent revisions to it have acted to drive better outcomes for the retailer and supplier community. However, market concentration and pressure on trade spend continues to persist even with the introduction of international retailers to the Australian market.

The AFGC has run an annual Grocery Investment Benchmark survey which has tracked supplier relationships with retailers. Whilst some issues continue to persist, such as trade spend as a percentage of net sales revenue remaining stubbornly high, overall, we have observed a substantial improving of retailer-supplier relationships and fewer examples of egregious negotiating tactics that have created a less adversarial environment. This is paired with anecdotal evidence that cost pass

through has improved in an unprecedented inflationary environment. However, emerging evidence suggest that some of this may be unravelling.¹

Improvements made to the first iteration of the FGCC (2015) are detailed in *Attachment A – Government response to recommendations to improve FGCC (2015)*. In the main, improvements to the Code included:

- Enhanced good faith provisions
- Prohibition of retrospective variations to GSA
- Provisions that prevent the retailer or wholesaler from requiring the supplier to disclose commercially sensitive information
- A restructured dispute resolution framework that incorporated signatory appointed Code Arbiters with the authority to resolve supplier complaints and a Government appointed Independent Reviewer to ensure suppliers are afforded due process during the dispute resolution as well as acting to identify and address emerging and systemic issues related to compliance with the FGCC
- The term GSA to apply to all agreements between a supplier and a signatory
- The right of the supplier to request further information on the reasons for a product delist and the extension of the delisting provisions to include a material reduction of the distribution
- The right of the supplier to renegotiate a lower waste charge without jeopardising other terms and conditions and,
- Quality specification obligations applying to fresh fruit and vegetables

As further context to the initial revision of the Australian Code, we recommend reviewing *Attachment B - AFGC submission to the Food and Grocery Conduct Review* and *Attachment C - AFGC submission to the Food and Grocery Code of Conduct Draft response with recommendations*.

The next review of the latest Australian FGCC (2020) will commence in 2023 as part of a periodic process to improve and address outstanding issues. Whilst the AFGC is yet to undertake a comprehensive consultation exercise, our members have told us that the latest improvements to the Code have resulted in better behaviours overall. The strengthening of good faith provisions has benefited the supplier community where negotiations have veered off course. The criticality of

¹ [Metcash warning to keep prices low](#)

prohibitions to retrospective variations is emphasised, as is on the need to disclose commercially sensitive information. Members experience with the Independent Reviewer have been positive with the most recent appointment acting effectively and proactively to address systemic issues. The effectiveness of Code Arbiters however is less certain. Evidence from both internal and Government surveys indicate that suppliers are reluctant to take a matter to Code Arbiters out of fear of retribution despite their obligation to confidentiality.² The primary reasons for this are that Code Arbiters are appointed and paid by retailers, detracting from their perceived impartiality. And having several code arbiters rather than one has detracted from supplier's confidence that issues at hand would be dealt with consistency. As a result, only a few complaints have been escalated via Code Arbiters with all decisions favouring retailers.

Some specific recommendations on the proposed NZ Grocery Code include:

- Overarching obligations of good faith and fair dealings should be focused on process and conduct rather than substantive matters
- GSA's should be in written format
- Limiting unilateral variation and retrospective variation to GSA's is critical
- Supportive of the alternative Code proposed in relation to additional transparency and limitations to stop a designated retailer advancing a supplier towards delisting prior to a range review
- Supportive of whistle-blower protections that enable any person who has a complaint to come forward freely and without fear of retribution from the retailer
- Support the alternative code regarding setoffs against payments to include a positive obligation on designated retailers to make prompt payments, with a backstop (of the GSA) to avoid extended payment times
- Agree with option 2 on responses to price increases that binds the retailer to respond to a request for a price increase within 30 business days
- Supportive of the option 3 outline on payments for shrinkage and wastage as it builds on non-payment for shrinkage and wastage (except if this is the responsibility of the supplier) to incorporate a sunset clause which prohibits designated retailers requesting payments for wastage older than six months.

² [Food and Grocery Code Independent Reviewer Annual Report 2020-21](#)

- Agree with option 3 regarding marketing and merchandising costs that requires the enforcement of more stringent provisions that allow for refunds for non-completion of activities paid by the supplier
- The code compliance officer is necessary to negate the need for an escalation of disputes within a more informal setting as part of an early self-resolution process followed by adjudication to resolve disputes with clear timeframes. We caution on the need for consistency and impartiality of process and conduct by all code compliance officers.
- The intent of a binding but non-definitive outcome of the adjudication process is to offer a broad appeals process, however the unintended consequence of this is that it may open suppliers to costly and time-consuming court processes that suppliers are unlikely to exercise. The non-determinative nature of the adjudication process also opens the possibility that the retailer may not honour the adjudicators directives leading to slower and less effective outcomes.
- Regulator's ability to provide binding guidance on the Code is important but we caution the timeliness and effectiveness of regulator efforts in doing so in response to concerns raised within the fast-moving consumer goods (FMGC) sector.
- In relation to monitoring compliance and enforcement we suggest a periodic review be embedded into the Code (with a practical starting point being 3 to 5 years).
- The effectiveness of the Office of the Independent reviewer in Australia has improved recently as it has initiated a public facing survey of suppliers that acts to "name and shame" retailers that are non-code compliant *Attachment D - Collection of Retailer responses to the Independent Reviewer*.
- Agree that the regulator needs enforcement powers in relation to the Code, along with appropriate safeguards in place to avoid the misuse of any such powers. The UK'S GCA is the preferred model as it can make binding recommendations and act to impose financial penalties up to a maximum of 1% of the retailer's turnover.

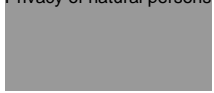
The AFGC considers the NZ Code's proposed approach to be a good starting point however we reiterate that the Code will prove more effective if its policy aims are narrow and targeted in their focus, and its effectiveness is revised as necessary through embedded periodic reviews to extend and amend Code provisions as necessary.



We thank the MBIE for consideration of our submission on the proposed Code and are open to further discussion if required. To arrange a meeting please contact **Privacy of natural persons**

Kind Regards,

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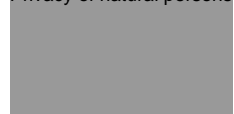


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