



17 August 2022

Competition Policy
Building, Resources and Markets
Ministry of Business, Innovation & Employment
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Dear Sir/Madam

Attached are the comments that the New Zealand Food & Grocery Council wishes to present on the *New Zealand Grocery Code of Conduct: Consultation paper*.

Yours sincerely

Privacy of natural persons



Katherine Rich
Chief Executive



New Zealand Grocery Code of Conduct: Consultation paper

**Submission by the New Zealand Food & Grocery
Council**

10 August 2022

NEW ZEALAND FOOD & GROCERY COUNCIL

- 1 The New Zealand Food & Grocery Council (“**NZFGC**”) welcomes the opportunity to comment on the *New Zealand Grocery Code of Conduct: Consultation paper* (“**Consultation Paper**”).
- 2 NZFGC represents the major manufacturers and suppliers of food, beverage and grocery products in New Zealand. This sector generates over \$40 billion in the New Zealand domestic retail food, beverage and grocery products market, and over \$34 billion in export revenue from exports to 195 countries – representing 65% of total good and services exports. Food and beverage manufacturing is the largest manufacturing sector in New Zealand, representing 45% of total manufacturing income. Our members directly or indirectly employ more than 493,000 people – one in five of the workforce.

OVERARCHING COMMENTS

- 3 NZFGC thanks MBIE for its work in preparing the consultation paper and the opportunity to submit. We would also appreciate the chance to submit comments once the Code is drafted as the wording of the Code will be important.
- 4 NZFGC wants a New Zealand Code of Conduct (“**Code**”) to make a difference. We are wanting to see changed behaviours in the retailer and supplier relationship without recourse to litigation, well-founded fear of retaliation and with the minimum need for the Regulator to adjudicate. The Code will not, however, address the underlying causes of the imbalance of negotiating power or prevent robust commercial negotiations that arise from New Zealand’s market duopoly.
- 5 It must be appreciated that the imbalance of negotiating power in New Zealand is extreme. There is no parallel worldwide for the New Zealand concentration of supermarket retailers – 2 majors nationwide compared to Australia’s 4 signatories and the UK’s 14 designated retailers. The Australian Code and UK Code are helpful starting points but New Zealand needs a Code that works in the present entrenched duopoly market structure. Considerations of durability shouldn’t lose sight of the time it would take for any full-scale entry in the New Zealand market and the imbalance of negotiating power issues which persist in the meantime, creating inefficient allocation of risk and other inefficiencies and disincentives.
- 6 The Code needs to foster greater ‘pan-industry’ certainty and stabilise relations between retailer and supplier by calling for fair and efficient handling of all negotiations and commercial agreements, plus ruling out immediately certain unfair behaviours no longer allowed in other markets. The Code must also cover all grocery suppliers, including those who supply services to supermarkets e.g. merchandising and not just physical products. The key outcome is:

The Code of Conduct should create an environment for transparent and constructive relationships between all suppliers (large, Māori, small and medium sized, products or grocery services) and retailers that encourages innovation, choice and value for New Zealand consumers.

Simplifying the trading structure through greater transparency of commercial arrangements so that each party knows where they stand will be critical. A constructive relationship is vital. This will require:

- ✓ a powerful and active regulator that can impose strong sanctions
- ✓ minimum standards for supplier contracts (in line with Australia)

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| <ul style="list-style-type: none">✓ a simplified, standardised and transparent base trading term structure across the industry✓ standardised process for category/range reviews including retailer justification for margin changes✓ clear and robust dispute resolution process✓ a confidential complaints process enabling suppliers to bring issues to the regulator's attention without retaliation✓ fair and even access to data✓ cessation of inefficient transfer of retailers' operating costs onto suppliers. |
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- 7 In NZFGC's view, the options proposed have the prospect of codifying behaviour that should have been expected in business-to-business arrangements as a matter of course. They do not go far enough to change outcomes for suppliers or consumers. Increasingly we have seen the "off-shoring" of the New Zealand manufacturing sector to the detriment of consumer choice and food and grocery security for New Zealand. NZFGC does not consider the current options will stop that trend. It will just put more formality into current practice.
- 8 It is important to recognise the UK market investigation leading to the current form of the UK Code found competition in many important respects was still effective yet still found that "*the transfer of excessive risk and unexpected costs by grocery retailers to their suppliers through various supply chain practices if unchecked will have an adverse effect on investment and innovation in the supply chain, and ultimately on consumers*".¹ Given in New Zealand the Commerce Commission found competition is not working well and the entrenched duopsony structure as mentioned above, the adverse transfer of excessive risk and unexpected costs is only more extreme here.
- 9 We also note the Code can only go so far in setting minimum standards of normal commercial conduct. A **powerful and active regulator** is needed that can speak with authority and bring early resolution of issues to ensure there is a culture of compliance. The Grocery Commissioner's role will be critical to the success of the Code.
- 10 Given the New Zealand context, our submission sets out further recommendations for the Code. Of these, we consider the most important is that the Code has:
- a. **An overarching principle of fair dealing:** The grocery sector is dynamic and there will be an array of different issues that may arise in the future. It is critical the Code has a strong overarching principle of fair dealing which can be applied flexibly as the needs of the sector change and evolve. The meaning of fair dealing should be easily understood and based on the plain English every-day meaning of the word "fair". The scope of fair dealing, which encompasses good faith as set out in the UK Code, more appropriately captures the spirit of the Code than good faith alone. We appreciate that this is a small divergence from the approach in Australia, but warranted and an additional protection given the more extreme market concentration in New Zealand.
 - b. **Justification for margin requests:** It is not productive to transfer supplier margins to the major grocery retailers just so the retailer can make a larger margin, leaving consumers no better off on price, less choice or with an inferior product when suppliers need to cut costs to survive. Major grocery retailers should be required to

¹ The supply of groceries in the UK market investigation (30 April 2008): https://webarchive.nationalarchives.gov.uk/ukgwa/20140402235418mp_/http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2008/fulltext/538.pdf at [2]-[3].

justify margin requests and additional fee demands to suppliers, particularly when they are often higher than other markets.

- c. **Consumer pass through:** Promotions funded by suppliers are designed to pass savings on to consumers or to encourage consumers to try new products and facilitate innovation. Supplier funded discounts should be paid on scanned consumer purchases as intended, not kept or used to enhance retailer margins. When a promotion is agreed with the intention of passing on savings to consumers, it is unconscionable for the retailer to make a further arbitrary decision to withhold and keep the discount from consumers.
- d. **A collaborative and active approach:** The Grocery Commissioner should be encouraged to follow the UK Groceries Code Adjudicator's (**GCA**) model and actively engage in training and education of the industry to ensure the Code is properly understood. Retailers should engage with the Code pro-actively and suppliers and retailers should be looking to work with each other constructively to deliver better outcomes for consumers. The Grocery Commissioner should also engage retailers on themes or issues which are of general concern to suppliers, but which may not have resulted in individual complaints.
- e. **UK dispute resolution model:** NZFGC considers the UK's negotiate-arbitrate dispute resolution model is the "golden standard" for dispute resolution. It first provides an opportunity for suppliers to try resolve disputes with retailers through a clear escalation process within the retailer. If the dispute is still not resolved, it then provides an arbitration pathway managed by the Grocery Commissioner that results in a final decision with limited appeal rights. Litigation is simply not feasible for most suppliers, particularly SMEs, in terms of both time and cost.
- f. The Code should protect grocery suppliers who supply products and those who supply services e.g. merchandising. In order to improve the grocery culture in stores it must be clear that merchandisers who work in stores on behalf of product suppliers are also treated fairly, with courtesy and positively treated. The clear intention of the Code could play a key role in reducing reports of poor treatment of these vulnerable workers.

DETAILED COMMENTS

Summary of NZFGC's recommendations

- 11 In addition to areas of support to proposals covered in the balance of this submission and included in **Appendix A**, specific additional recommendations made by NZFGC are:
 - a. There is an overarching provision that if a retailer relies on an exception in the Code, it has the burden of proving the exception applies (consistent with the approach in the Australian Code and the approach in s80(2C) in the Commerce Act).
 - b. The Code provides that grocery supply agreements be written in clear and concise language, as recommended by the Commerce Commission
 - c. Support grocery supply agreements containing a minimum content as set out in this submission
 - d. The Grocery Commissioner prepare a reference grocery supply agreement that retailers and suppliers may use as a starting point. We also recommend that part of this reference agreement is a standard and simple pricing structure with guidelines for specific categories.

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- e. The Code adds that in determining whether the variation is reasonable in the circumstances, regard must be had to whether it was an option for the retailer to seek the supplier's consent to the variation.
 - f. The Code have a general provision that if a retailer seeks to rely on an exception, it has the burden of proving the exception applies.
 - g. The Code refers to reasonable notice as 'reasonable notice to allow the supplier to make adjustments'.
 - h. That in determining whether the variation is reasonable in the circumstances, regard must be had to whether it was an option for the retailer to seek the supplier's consent to the variation.
 - i. The Code specifies that reasonable notice means reasonable notice to allow the supplier to make adjustments and includes clearly setting out any relevant costs and other relevant information to the supplier.
 - j. The Code also includes that retailers must clearly notify suppliers about ranging decisions made and provide the supplier enough time to make reasonably necessary adjustments. Retailers should clearly inform suppliers which of their products are ranged at which stores.
 - k. In agreeing there should be whistle-blower protections, there is also a need for anti-retaliation measures.
 - l. The addition that the maximum payment term in a grocery supply agreement is the 20th of the following month.
 - m. The period of the sunset clause which prohibits designated retailers requesting payments for wastage older than six months is reduced to 30 days.
 - n. If a supplier agrees to make a payment in support of the promotion of a product, the retailer may hold the promotion only after giving the supplier reasonable written notice, as is provided in the UK Code and Australian Code.
 - o. Suppliers may refer disputes to arbitration after 14 days, rather than 21 days.
 - p. the Grocery Commissioner is the decision-making body for both avenues (for enforcing breach of the Code, either (1) through dispute resolution or (2) complaint to / investigation by the Grocery Commissioner (or self-reporting)) for efficiency and consistency of decisions.
 - q. The Code contains anti-retaliation measures including allowing the Grocery Commissioner to monitor whether a retailer retaliates against a supplier after a supplier raises a dispute or brings a complaint, or the Grocery Commissioner makes a determination in the supplier's favour.
 - r. There is an anonymous and confidential way for suppliers to bring complaints.

Chapter 1 Background and context

- 12 NZFGC is familiar with the background and context for this consultation and has been seeking a Grocery Code of Conduct for the sector for over a decade. We strongly supported the provision of a mandatory Code in the consultation on the Grocery Market Study conducted by the Commerce Commission. We concurred with the Commission's recommendations in relation to a Code, that the negotiating power imbalance between the major grocery retailers and their suppliers was significant. This not only impacts on suppliers' ability and incentives to invest and innovate, including developing new products but also on conditions of entry and expansion of others into the retailer grocery market and ultimately the grocery offering to consumers. Further, an ambition is to create

a trading environment that reduces 'off-shoring' and so doing, builds a strong local supply base across as many grocers as is feasible.

- 13 As noted in the Consultation Paper, the Commission made a number of recommendations aimed at rebalancing the major grocery retailers' dominant negotiating power in supply agreement terms and conditions. Introducing a mandatory grocery code of conduct to govern relationships between the major grocery retailers and their suppliers was key to such rebalancing.
- 14 NZFGC wants a Code to make a difference. We are wanting to see changed behaviours in the retailer and supplier relationship without recourse to litigation and with the minimum need for the Regulator to adjudicate. We believe a strong Code can do this.
- 15 We note that the Consultation Paper hopes that a Code might improve the conditions for suppliers to invest and innovate to bring new products to market and produce existing products more efficiently. In NZFGC's view, the options proposed do not go far enough for this to be the outcome. There is no parallel worldwide for the New Zealand concentration of supermarket retailers (2 majors nationwide). The imbalance of negotiating power which the Code needs to address is far greater than those in comparison jurisdictions of Australia (4 signatories) and the UK (14 designated retailers). The small size of New Zealand also means it has many local SME and Māori suppliers which face a greater level of negotiating power imbalance.
- 16 The Code must go further than the UK and Australian Codes because the imbalance of negotiating power that needs to be addressed in New Zealand is significantly greater. In particular, it must be stronger than the Australian Code which was negotiated with retailers, as retailers had to voluntarily sign up to their code, and it is also currently undergoing its own review processes on how to strengthen it.
- 17 The options currently suggested by the consultation paper will only codify behaviour that should have been expected in business-to-business arrangements as a matter of course. A Code of Conduct needs to go further in order to change outcomes for suppliers or consumers. Suggestions to improve the Code are set out throughout our responses to the questions below.
- 18 A strong Code is vital to maintaining manufacturing capability and knowledge in New Zealand. Increasingly we have seen the "off-shoring" of the New Zealand manufacturing sector to the detriment of consumer choice and food and grocery security for New Zealand. The impact of this loss of local production was particularly noticeable during the height of the COVID pandemic when some firms that had closed local manufacture faced out of stocks. There is no single factor that can arrest this trend but every step that can be taken, should be taken and more explicit measures in the Grocery Code of Conduct is one of these.
- 19 We do not believe that a Code could at all limit the ability of the major grocery retailers to negotiate fairly and firmly with suppliers, particularly when the current imbalance of power is so extraordinary in the New Zealand context. Even with the Code, the current duopoly will retain and enjoy a dominant negotiating position. Any impact on major grocery retailer costs (likely to be minor) should be absorbed from profits and not used as an excuse for limiting products at competitive prices. We concur with the Commerce Commission's view that the downside to broad protections in the Code is likely to be relatively limited.

Chapter 2. Approach to developing a Code of Conduct

- 20 The policy options for the Code comprise.
- Option 1: Principle-based Code** (similar to the UK Code)
 - Option 2: Prescriptive Code** (using the Australian Code as a starting point and using provisions from the UK Code when there is good reason to do so)
 - Option 3: Alternative Code** (builds on Option 2 with a focus on prioritising strong protections for suppliers).

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)?

- 21 In NZFGC's view, the options proposed have the prospect of codifying behaviour that should have been expected in business-to-business arrangements as a matter of course. They do not go far enough to change outcomes for suppliers or consumers, including not going far enough to improve the conditions for suppliers to invest and innovate to bring new products to market and produce existing products more efficiently. NZFGC suggests improvements to strengthen options in its submission below.
- 22 We agree with the evaluation criteria of effective, efficient, and durable. The effectiveness of the Code must have regard to the ability of provisions to 'make a difference' and achieve better outcomes, and also on its practical application and ability to be applied and enforced in practice, including retailer incentives for compliance. The Code must have "teeth" to achieve its objectives.
- 23 Efficiency is promoted by certainty, clarity and transparency which reduces transaction costs. It is also promoted by stopping the inefficient and unfair allocation of risk (i.e. genuine retail costs) to those who are not well placed to manage it or indeed no control whatsoever. In particular the shifting of retailer costs onto suppliers means retailers have less incentive to try reduce that cost – store theft (and other shrinkage) is a prime example of this. NZFGC considers there is a large scope for efficiency benefits from the Code. Efficiency of enforcement and application must be considered too. It is much more efficient for retailers to pro-actively comply with the Code than for suppliers to bring complaints or the Grocery Commissioner to issue fines. An educative function of the Grocery Commissioner could also play a role in the efficient roll out of the Code throughout the supermarket networks, particularly to ensure education as store level.
- 24 Durability supports having a strong overarching principle of fair dealing that retailers and suppliers can apply which also has the benefit of retaining commercial flexibility. Durability should also take into account new technologies and how the grocery industry may change in the future (without losing sight of the existing entrenched market structure issues). NZFGC notes the Code should be applicable in the online context too and should encourage taking full advantage of more efficient technology. We repeat the importance of ensuring the Code covers grocery suppliers who supply services e.g. merchandising instore, not just products.
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Chapter 3 Which retailers should be bound by the Code?

Method of designating grocery retailers

25 The Consultation Paper proposes immediate designation (all major grocery retailers) and, for future designation, identifies three possible triggers for identifying retailers to be bound by the Code. It proposes a threshold in annual grocery revenue with one of three levels:

Option A \$500m

Option B \$750m

Option C \$1.5bn

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

26 The Consultation Paper then explores how grocery retailers should be regulated by the Code – at head office only or at head office with some direct obligations on stores or the latter with exclusion for small stores.

2

In relation to **section 3.3**, which of the three **Designation Options** do you think is best, and why?

27 NZFGC strongly supports immediate designation of all major grocery retailers and, for future designation, the threshold in annual grocery revenue of **Option A** \$500m.

28 New Zealand has two major grocery retailers and operates a duopoly as confirmed by the Commerce Commission. For the future, New Zealand is a small, tightly held market and therefore the threshold should be low (\$500m) but the designation should also provide for voluntary agreement to the Code.

3

In relation to **section 3.4**, which of the three **Options** do you think is best, and why?

29 All obligations in the Code should apply to both the 'head office' of the major grocery retailer, and each individual supermarket store. We see no reason to depart from the approach used in section 28A(4) of the Commerce Act, which defines the designated entity to include the head office entity as well as successors, franchisees, transacting shareholders, interconnected bodies corporate and associated persons. The Code needs to be lived and understood not just in the Head Office, but by each store manager and owner/operator.

30 For a company structure where individual stores and head office are in the same legal entity, no distinction between individual store and head office needs to be made. Where individual stores and the head office are different legal entities, they should not be able to disclaim liability just because of the corporate structure chosen.

31 There should not be gaps that leave a supplier without recourse because the relevant store or head office is unwilling to engage or take responsibility. Supplier experience to date is head offices have been unable or unwilling to manage or rein in the behaviour of individual stores, however egregious. Compliance at just the head office level and not by individual stores, or just individual stores and not the head office, clearly would not be effective. Both the head office and individual stores must comply. The objective must be that both understand and comply with the spirit and intent of the Code.

32 To the extent they are different legal entities, the head office should also be liable for the behaviour of individual stores on a joint and several basis for the centralisation benefits

recognised in the consultation paper. This includes incentivising the head office to ensure and manage individual store compliance which should be more efficient.

- 33 It is inappropriate for small stores of the major grocery retailers to be exempted because those small stores still enjoy the benefits of, and can leverage, the major grocery retailer's substantial market power. Codes are generally written in plain language so are not that difficult to understand in terms of implementation and expectation. A Code covers appropriate business conduct and general behaviour principles to be expected regardless of the size of the store footprint.
- 34 NZFGC does not agree that that the need to comply with the Code (i.e. behave fairly in business) could potentially discourage individual stores from ranging suppliers. This is nonsense.
- 35 NZFGC has had regard to this risk in making the recommendations in this submission and considers the risk is low as the Code merely sets minimum standards of normal commercial conduct. An individual store dealing with suppliers fairly should be able to easily comply with the Code so that the Code does not become a barrier to individual store ranging. In our view, stores could still tailor their range to local preferences and facilitate entry of suppliers, particularly SMEs who may be unable to enter on a nation-wide basis. Fostering an environment that is encouraging to SME/Māori is paramount. Head offices should provide appropriate training and systems so it is easy for individual stores to comply with the Code.

4

Do you have any comments on the preliminary assessment of the options against the criteria in **Chapter 3**?

- 36 Regarding the method of designation, we query whether the two-year requirement in **Option B** makes it less effective, because a new major grocery retailer who does not voluntarily sign up to the Code would not be bound by the Code for 2 years unless there is an investigation, and therefore also be less efficient.
- 37 **Option A** also has a greater level of durability than presented because the regulator has discretion in deciding whether to designate a retailer who meets the revenue threshold – “may designate” rather than “must designate”. Though as mentioned above, this could be further improved by also providing for voluntary agreement to the Code.
- 38 Regarding how obligations apply, as noted above we consider the current options will not be effective and that all obligations need to apply at both the head office and store level (in other words, that all relevant legal entities are captured and therefore required to implement the intent of the Code). Only in this way will behaviours change and improve across the board. We consider this would be an improvement on **Option C**.

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

Purpose of the Code

- 39 The Consultation Paper provides three possible purpose statements for the Code.
- Purpose Statement Option 1** – a purpose to improve the balance of negotiating power between suppliers and designated retailers
- Purpose Statement Option 2** – a purpose that promotes competition in the market for the long-term consumer benefit by (a) improving good faith in trading relationships (b) improving transparency of supply agreements (c) prohibiting or limiting a range of conduct that may transfer costs or risks (d) providing a dispute resolution mechanism

Purpose Statement Option 3 – same as option 2 with the addition of (d) supporting economic development in the grocery industry including the entry and expansion of retail grocery activity and any wholesale grocery activity (e) Māori economic development/tikanga Māori provisions

Overarching obligations

40 The Consultation Paper then discusses three options for the overarching obligation of the Code.

Overarching Obligation Option 1 – A more limited good faith obligation

Overarching Obligation Option 2 – Good faith

Overarching Obligation Option 3 – A combination of good faith and fair dealing

5

In relation to **4.2 purpose of the Code**, which of the three options do you agree with, and why?

41 NZFGC supports **Purpose Statement Option 1** or a variation of **Purpose Statement Option 3**. The purpose statement should be reflective of change in behaviour and fair dealing.

42 On the variation of **Purpose Statement Option 3**, NZFGC considers it is more appropriate for the purpose of the Code to achieve workably competitive outcomes in the grocery sector for the long-term benefit of consumers and the New Zealand economy by addressing imbalances in negotiating power between the major grocery retailers and suppliers, including through the processes listed in a-f of **Purpose Statement Option 3**.

43 NZFGC supports the purpose of the Code to link back to competition but recognises the Code itself will have limited ability to promote competition given it cannot materially address the underlying issues leading to the lack of competition at the retail level identified in the Commerce Commission's final report. In particular, the Code itself will have limited ability to materially lead to effective entry. While that would be a positive and welcome outcome of the Code, that cannot be said to be its purpose. The Code is first and foremost about retailer behaviour and treatment of suppliers.

44 The purpose of the Code is to attempt to manifest normal trading relationships that would exist in a workably competitive market, or at least prevent unacceptable outcomes/behaviour which would not occur if competition was working, in a context where there is an absence of workable competition at the retail level.

45 It is more appropriate for the purpose of the Code to refer directly to workably competitive outcomes for the long-term benefit of consumers, which competition is desired to achieve, rather than to promote competition when it is not intended the Code can address the underlying causes of the lack of retail competition or the underlying causes of the major grocery retailers' advantage in negotiating power, as recognised in paragraph 6 of the Consultation Paper.

46 **Purpose Statement Options 2 and 3** noticeably fail to mention the imbalance of negotiating power between suppliers and designated retailers, which the Code was expressly recommended to address. The suggested purpose above to achieve workably competitive outcomes in the grocery sector for the long-term benefit of consumers better aligns with the Commerce Commission's recommendation, the proposed content of the Code and direct outcomes of the Code, than **Purpose Statement Options 2 and 3**.

47 As expanded on below, it is critical that the Code provides for improving **fair dealing** in trading relationships, which encompasses good faith, not just good faith alone. This

features either implicitly in **Purpose Statement Option 1** or explicitly in **Purpose Statement Option 3**.

- 48 **Purpose Statement Option 3** is also more appropriate than **Purpose Statement Option 2** by recognising Māori economic development and tikanga Māori provisions, which NZFGC supports is important to promote in the New Zealand grocery industry. NZFGC also supports the Code supporting economic development in the grocery industry including the entry and expansion of retail grocery activity. As mentioned above, while NZFGC considers it unlikely the Code itself can create new entry, it obviously would welcome new entry and the Code is a positive step towards improving conditions of entry.

6

Do you see any risks if the purpose of the Code was to:

- address any impacts of the major grocery retailers' trading relationships with their suppliers on other grocery retailers, or
- support any wholesale supply arrangements?

If yes, please explain the risks.

- 49 The risk of such purposes is it shifts the focus away from the imbalance of negotiating power that the Code was intended to address. The way the Code can address impacts of the major grocery retailers' trading relationships on other grocery retailers and supporting wholesale supply arrangements would be by addressing that imbalance of negotiating power, through transparency and fair dealing.
- 50 For example, in addressing the imbalance of negotiating power by supporting supplier options and addressing threats of delisting, the Code allows suppliers to choose to supply to other grocery retailers or wholesalers without the fear of retaliation.

7

In relation to **4.3 overarching obligations**, which of the three options do you agree with, and why?

- 51 NZFGC strongly supports **Overarching Obligation Option C**, and in particular having an overarching obligation of **fair dealing** which encompasses both fair process and outcomes achieved through good faith and is based on the plain English every-day meaning of "fair".
- 52 NZFGC agrees with how the Consultation Paper adds more detail as to what each of good faith and fair dealing includes. However, it is important that good faith and fair dealing are not confined only to the specific obligations that can be written in the Code today and are flexible enough to apply to future scenarios, without being vague. An approach like the UK Code should be taken where the core obligation is fair and lawful dealing and there is an attempt at an overarching definition to increase understanding:

A Retailer must at all times deal with its Suppliers fairly and lawfully.

Fair and lawful dealing will be understood as requiring the Retailer to conduct its trading relationships with Suppliers in good faith, without distinction between formal or informal arrangements, without duress and in recognition of the Suppliers' need for certainty as regards the risks and costs of trading, particularly in relation to production, delivery and payment issues.

53 We note the Merriam-Webster legal definition of fair dealing is also consistent with the concept of fair dealing the Code should promote:²

the transacting of business in a manner characterized by candour and full disclosure and free of self-dealing

54 NZFGC considers good faith alone would be harder to apply than fair dealing. The consultation paper notes the Australian Code uses an overarching obligation of good faith but the Australian experience is that the good faith obligation is not strong and is difficult to apply in practice. The Australian Code does not define what good faith means. The 2018 Independent Review of the Australian Code noted “*During the debate on good faith and fair dealings, it was clear that stakeholders broadly support a Grocery Code that ensures that suppliers are afforded both fairness of process (good faith) and fairness in outcomes (fair dealings)*”.

55 The overarching obligation should be an enforceable principle of appropriate scope that captures the spirit of the Code that suppliers can use because it is not possible for prescriptive obligations to be comprehensive. A “plain English” understanding is needed because it will be retailers and suppliers who need to interact with the Code on a day-to-day basis. Accordingly, the Code must be designed so it can be readily applied by retailers and suppliers, not just by lawyers. Good faith concepts are narrower than fair dealing and are more difficult to apply in practice than fair dealing.

56 As noted at the outset, fair dealing should be easily understood because the key word is “fair”. The original UK Code language is retailers “*must at all times deal with its Suppliers fairly and lawfully*” which makes clear “fair” should be an independent concept and not just a compound word of “fair dealing” like “good faith” is. While there will always be a degree of subjectivity, “fair” is a common word that people will be familiar with from their every-day use of the word. Google’s online dictionary provides a definition of fair of “*without cheating or trying to achieve unjust advantage*” which is consistent with the idea of fair dealing the Code is intended to promote. Fair, in this context, is simply trying to manifest normal commercial relationships that would occur in the New Zealand market resembled anything close to being competitive. The scope of fair dealing, which encompasses good faith as set out in the UK Code, more appropriately captures the spirit of the Code than good faith alone. In a market as concentrated as New Zealand’s, it is important that the Code covers not just the process but also outcomes in the market.

57 Examples of behaviour NZFGC expects under fair dealing include providing contact details, open, clear and transparent communication, being respectful, courteous, constructive and accountable. These are not difficult or costly requests and set a minimum standard of retail behaviour and treatment of suppliers.

58 Examples of outcomes NZFGC expects under fair dealing from a transactional perspective are provided below in Figure 1. These are no more than trying to manifest normal commercial relationships and do not result in a shift of negotiating power to suppliers which could put upward pressure on prices for consumers. Suggestions by retailers that there could be such pressure on prices to consumers are not evidenced by what has occurred in either the UK or Australian market’s post the implementation of conduct of their respective Codes.

Figure 1: Requirements for fair dealing from a transactional perspective

Fair dealing from a transactional perspective requires:

² <https://www.merriam-webster.com/legal/fair%20dealing>

- Absolute clarity on ranging decisions with appropriate timeframes for suppliers to make the necessary adjustments to their business model to accommodate changes. The timeframes may vary by category.
- clear up front definition of the performance goals for products to retain ranging, ensuring suppliers have specific measurable targets reducing the opaqueness around decisions, and giving more certainty to suppliers. These targets need to be fair and any changes need to be clearly communicated with a compelling rationale (rather than a blanket or 'catch all' request for a margin increase).
- The pricing and rebate structure should be simply understood, and payments should be associated with specific activities where there is compliance and the activity can be shown to have occurred. Promotional price discounts should be payable on scan or some suppliers may wish to pay by off-invoice discount.
 - Especially for SME's a standard format/template for the pricing structure should be developed with guidelines for specific categories. Suppliers shouldn't be required to participate in "rolled-up" terms to cover promotional activities (or penalised for not doing so), especially when the category is non-expandable.

59 Some of the above are expanded on in the proposed prescriptive provisions for the Code.

60 NZFGC also recommends there is an overarching provision that if a retailer relies on an exception in the Code, it has the burden of proving the exception applies. This is consistent with the approach in the Australian Code which specifies this in several provisions. This approach is also taken in s80(2C) in the Commerce Act, which similarly provides cartel defendants relying on an exception have the burden of proving the relevant exception applies.

8 Do you have any views on how to incorporate tikanga Māori or Te Ao Māori in the Code?

61 NZFGC supports the inclusion of Te Ao Māori in the Code as one of the supplier groups, along with SMEs, that require specific support and development.

9 How can the Code best incorporate economic development objectives, including those of Māori?

62 The Code can best incorporate economic development objectives by addressing the imbalance of negotiating power between retailers and suppliers. For example, by giving suppliers choices, stopping the transfer of margin to retailers which do not benefit consumers and allowing suppliers to invest in their products and innovate.

10 Do you have any comments on the preliminary assessment of the options against the criteria in **Chapter 4**?

63 NZFGC agrees an overarching fair dealing obligation under **Overarching Obligation Option 3**, which encompasses good faith, is the most effective and durable. NZFGC considers the modifications to **Overarching Obligation Option 3** described above make **Overarching Obligation Option 3** more efficient by narrowly defining the purpose while still retaining reference to the different mechanisms by which the Code is designed to achieve that purpose, and more durable by bringing the focus back to one core element of addressing the imbalance of negotiating power.

Chapter 5 Requirements for supply agreements

49. The Consultation Paper includes three options for content of supply agreements and unilateral and retrospective variations:

Supply Agreement Option 1 – Principle-based

Supply Agreement Option 2 – Prescriptive

Supply Agreement Option 3 – Alternative.

11

In relation to **5.2 Requirements for supply agreements to be written and contain minimum content**, 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?

64 NZFGC supports **Supply Agreement Option 2**, requiring all grocery supply agreements to be written in plain English and provided to supplier to increase transparency and certainty. NZFGC also recommends the Code provides that grocery supply agreements be written in clear and concise language, as recommended by the Commerce Commission at paragraph 9.163.2 of the grocery market study final report.

65 We support grocery supply agreements being held by the designated retailer for the duration of the agreement and 7 years afterwards, which aligns with New Zealand tax requirements.

66 We support grocery supply agreements containing a minimum content as recommended by the Commerce Commission (any quantity standards, any quality standards, any delivery requirements, when groceries may be rejected, maximum period for payment, circumstances when payment may be withheld, or deductions made) as well as details of the duration of the agreement and termination processes. In addition, NZFGC recommends the following minimum content:

- a. List of products ranged, including retailer code, supplier barcode and description
- b. The number of stores the products are ranged in
- c. Grading of stores being ranged in
- d. Price, including details and costs of all potential discounts, rebates, fees or charges by the retailer
- e. Promotional depth and frequency, including scan and how many weeks per year
- f. Notice period for increased ranging
- g. Notice period for delisting
- h. Cost of clearing delisted stock and who pays the promotional discount to clear deleted stock
- i. Performance goals for products to retain ranging (if any) with up front clear definitions

67 These are basic terms which commonly feature in grocery supply relationships that would benefit from being clearly and transparently set out in writing. This provides both parties with certainty about what the supply relationship entails allowing parties to make better informed and efficient decisions.

68 NZFGC recommends the Grocery Commissioner prepare a reference grocery supply agreement that retailers and suppliers may use as a starting point. We also recommend that part of this reference agreement is a standard and simple pricing structure with guidelines for specific categories. To illustrate the type of reference agreement NZFGC would like to see, NZFGC has prepared its own in **Appendix B**.

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- 69 NZFGC also supports the obligation in Option 1 that designated retailers must not enter into grocery supply agreements that are inconsistent with the Code or seek to circumvent the Code. If this is not explicitly set out in the Code, it should be implicit that such conduct would breach the overarching obligation of fair dealing. Suppliers should be able to rely on their grocery supply agreements.

12

In relation to **5.3 limiting unilateral and retrospective variations**, which of the options do you agree with, and why?

- 70 NZFGC supports **Variations Option 2** (prescriptive) on the basis that it provides the further detail in the Australian Code as copied below:

9 Unilateral variation of agreement

(1) The retailer or wholesaler must not vary a grocery supply agreement without the consent of the supplier concerned.

(2) Subclause (1) does not apply if:

a. The agreement:

i. Provides expressly for the retailer or wholesaler to make the variation; and

ii. Sets out clearly the changed circumstances in which the variation can be made; and

iii. If the variation involves a quantitative adjustment to the terms of supply—sets out the basis or methodology for calculating the adjustment; and

b. the variation is made in accordance with the agreement; and

c. the variation is reasonable in the circumstances; and

d. the supplier is given reasonable notice, in writing, of:

i. the variation; and

ii. the terms of the variation; and

iii. the retailer or wholesaler's reasons for making the variation.

(3) In determining whether the variation is reasonable in the circumstances, regard must be had to the benefits, costs and risks (if any) for the supplier and retailer or wholesaler.

(4) Subclause (3) does not limit paragraph (2)(c).

(5) In any dispute, the retailer or wholesaler has the onus of establishing the matters in subclause (2).

- 71 NZFGC also recommends the Code adds that in determining whether the variation is reasonable in the circumstances, regard must be had to whether it was an option for the retailer to seek the supplier's consent to the variation. If it were an option, there would need to be compelling reasons for it to be reasonable for the retailer to vary the agreement unilaterally rather than with consent.

- 72 As indicated in response to question 7, rather than subclause (5), NZFGC recommends the Code have a general provision that if a retailer seeks to rely on an exception, it has the burden of proving the exception applies. This is simpler drafting and provides a consistent principle.

- 73 NZFGC also recommends the Code refers to reasonable notice as 'reasonable notice to allow the supplier to make adjustments'.

- 74 NZFGC notes the Commerce Commission's recommendation in the grocery market study final report regarding unilateral variations was prefaced with "if these are to be permitted at all". It is important that the exception allowing unilateral variations does not

permit retailers to leverage the imbalance of negotiating power to make unjustified demands that would not occur in a workably competitive market.

13

Do you have any comments on the preliminary assessment of the options against the criteria in **Chapter 5**?

- 75 NZFGC considers its suggested variations to **Option 2** above makes it more effective, and does not reduce efficiency because it reduces possible disputes over what is 'sufficient detail and reasonable in the circumstances' and because standard terms can be reviewed to reduce the administrative overhead.

Chapter 6 Obligations in relation to product supply and placement

- 76 NZFGC is firmly of the view that without locking down this area, for SMEs at a minimum, this will be business as usual for retailers.
- 77 The consultation Paper explores options around unilateral change in supply chain processes and pressure to use particular logistics services. It covers fresh produce and quality specifications, product ranging, shelf space allocation and range reviews, confidential information, intellectual property, business disruption, exclusive supply clauses and 'most favoured nation' ("MFN") price clauses.
- 78 **Unilateral changes in supply chain processes:** This should be treated as a unilateral variation and be prohibited unless retailers can clearly prove the exception.
- 79 **Pressure to use particular logistics services:** There should be a prohibition on 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 while still meeting explicit written service standards. Even then, the 'go to market' strategy for suppliers is their choice and needs to be respected, in the same way that the retailers distribution model is central to their operational strategy.
- 80 **Fresh produce (and short shelf life packaged goods):** NZFGC supports specific provisions on fresh produce are required, and notes that similar provisions may be required for packaged short shelf life products for similar reasons.
- 81 **Product ranging & shelf allocation:** The aim is to have effective and efficient ranging. The rules of engagement need to be clear. Criteria for ranging needs to be clear, consistent and communicated in advance. At the same time, the Code should not create a barrier for individual stores to range products from SMEs. Not only will SME have a desire to supply only a few stores (maybe influenced by operational scale) but specific stores will likely wish to reflect local consumer preferences. Retailers should be required to justify margin requests. Genuine commercial reasons are needed as to why more margin is needed, especially if it causes the price to the consumer to go up. It is not acceptable for retailers to demand the "average margin" of a category as raising margins to an average will raise the average leading to margin creep with no commercial basis.
- 82 **Delisting:** There needs to be transparency around delisting. There is always the threat of de-listing and the comment that "your brand is substitutable" is made on all suppliers irrespective of size.
- 83 **Confidential information & intellectual property:** Grocery supply relationships should not involve suppliers providing confidential information, for example recipes, sources of

supply, new product development and product design, to a *competitor*, which is what occurs when a retailer also has private label operations. Confidential supplier information should be ringfenced and not be accessible by staff involved with private label operations.

- 84 **Whistleblower protections:** NZFGC agrees that targeted whistle-blower protections in the Code could be useful, ideally with oversight or managed by the Grocery Commissioner. This should include anti-retaliation measures such as monitoring after the fact.
- 85 **Pressure to opt out of wholesale supply arrangements:** NZFGC notes that unless the wholesale price is transparent, pressure to opt out will remain
- 86 **Exclusive supply clauses and MFNs:** Specific provisions in the Code are not required at this stage.

14 In relation to **6.2 Changes in supply chain processes**, 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?

- 87 The use of logistics services was covered in the Grocery Market Study, that suppliers were being pressured to use a retailer's own logistics services. The issue is choice and transparency of price. Only **Supply Chain Processes Option 3** sets out any provisions.
- 88 Regarding material unilateral changes to supply chain procedures, NZFGC supports **Supply Chain Processes Options 2 and 3** that these are prohibited except where provided in the supply agreement and reasonable in the circumstances, and reasonable notice is provided. This is on the basis that **Supply Chain Processes Options 2 and 3** follow the same structure as the Australian Code prohibition on unilateral variations as set out in Question 12 above, including that the retailer has the onus of establishing the relevant matters if they rely on the exception. NZFGC supports that compensation is required if reasonable notice is not provided.
- 89 As above, NZFGC recommends that in determining whether the variation is reasonable in the circumstances, regard must be had to whether it was an option for the retailer to seek the supplier's consent to the variation.
- 90 NZFGC also recommends the Code specifies that reasonable notice means reasonable notice to allow the supplier to make adjustments and includes clearly setting out any relevant costs and other relevant information to the supplier.
- 91 Regarding pressure or requiring a supplier to use a retailer's preferred service provider, NZFGC supports a variation to **Logistics Services Option 3** that this is prohibited unless:
- a. Either:
 - i. the retailer's preferred service is lower cost than the supplier's preferred service and is of equivalent or better quality, or
 - ii. the supplier's preferred service does not meet reasonable objective service standards laid down for that supplier by the retailer for the supply of such services, and the retailer's preferred service provider does meet such standards, AND
 - b. the retailer provides the supplier with relevant details about the retailer's preferred service including costs and service standards to allow the supplier to make an informed judgment.

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- 92 As indicated earlier, there should be an overarching provision that retailers must prove the relevant matters of an exception applies if they wish to rely on an exception. NZFGC considers the added detail to the exceptions above are consistent with the UK Code and are justified. The quality of a service is an important component of price and should not be disregarded. The retailer's preferred service provider should be held to the same standard as the supplier's preferred service provider.
- 93 Adding provision of information is more effective, durable and efficient in that it increases certainty and makes sure parties have the relevant facts if any disputes arise so such disputes can be resolved efficiently.
- 94 There may also be a question of whether there should be an exception at all. The 'go to market' strategy for suppliers is their choice and needs to be respected, in the same way that the retailers' distribution model is central to their operational strategy.

15 In relation to **6.3 fresh produce standards and quality specifications**, do you think the Code should include specific provisions about fresh produce and if yes, please explain what you think it should include?

- 95 Fresh produce suppliers should have the benefit of all provisions of the Code but NZFGC considers there are characteristics of fresh produce that warrant specific provisions. There are risks and uncertainties associated with the supply of fresh fruit and vegetables related to 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 and because suppliers may be vulnerable to last-minute renegotiation on terms that could expose them to additional risks or costs. In particular, there should be provisions concerning the time after delivery to check quality eg within 6-8 hours. Direct to store produce should be time-limited in relation to the retailer getting back to the supplier.
- 96 The Australian Code that outlines acceptance (and rejection) processes in relation to fresh produce standards or quality specifications 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). **Fresh Produce Option 2** (Require designated retailer to have fresh produce standards or quality specifications and to use them without discrimination etc) improves transparency for suppliers and this is supported.

16 In relation to **6.4 Obligations in relation to ranging, shelf allocation, and delisting**, which option do you think is best, and why?

- 97 NZFGC considers none of the **Ranging etc Options** deliver on the outcome of a constructive relationship between suppliers and retailers that encourages innovation and value for New Zealand consumers because they are too general.
- 98 The Code requires more than non-discrimination principles for range reviews. The issue here is not just in relation to private label, but also in relation to demands made during the range review process because this is a time where the retailer's already high level of negotiating power is heightened. In addition to **Ranging etc Option 3** (alternative), the Code needs to require the retailer to develop, publish and follow a clear and transparent range review process which includes the criteria the retailer considers in the process, which needs to be provided to the Grocery Commissioner.

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- 99 Range reviews often feature margin requests from the retailer. This is just a shifting of margins from supplier to retailer with no consumer benefit, and possible detriment if this requires suppliers to cut costs and produce an inferior product, that the retailer can demand because of its market power. In addition to **Ranging etc Option 3**, we recommend retailers must have genuine commercial reasons for margin requests, and that the retailer provides these reasons to the supplier. Retailers should be required to justify any margin requests, including explaining why that level of margin is needed and how that is linked to the ranging of that product. Such best practice behaviour would be consistent with suppliers being expected to justify cost price increases and seem only equitable.
- 100 There is also an issue about opaque decision making. NZFGC supports the **Ranging etc Options 2** (prescriptive) **and 3** requirement that retailers must provide advance notice of range reviews (or equivalent) and necessary information to suppliers. NZFGC recommends the Code also includes that retailers must clearly notify suppliers about ranging decisions made and provide the supplier enough time to make reasonably necessary adjustments. Retailers should clearly inform suppliers which of their products are ranged at which stores. Currently some suppliers can only know when their product is ranged by physically going to stores and checking the shelves.
- 101 NZFGC supports consistent criteria, principles and treatment regarding shelf allocation for both independent products and private label products.
- 102 There needs to be transparency around delisting. There is always the threat of delisting and the comment that “your brand is substitutable” is made on all suppliers irrespective of size. NZFGC agrees adopting the measures set out in **Ranging etc Option 3** in relation to delisting (may only occur in accordance with the grocery supply agreement and for genuine commercial reasons, with reasonable written notice, including reasons for the decision, and prohibiting advancing a supplier towards delisting prior to, or as part of, a range review).
- 103 Further, in addition the Code should provide, as is provided in the UK Code:
- a. Retailers will inform the suppliers of its right to have the decision to delist to be reviewed by a senior buyer, and to provide contact details of the relevant senior buyer.
 - b. Retailers will allow suppliers to attend an interview with the retailer’s code compliance officer to discuss the decision to de-list the supplier.
 - c. Reasonable notice will include providing the supplier with sufficient time to have the decision to delist be reviewed under the above processes.
- 104 NZFGC considers the New Zealand Code would benefit from adopting these measures provided for in the UK Code. They provide an escalation process within the retailer before dispute resolution needs to be engaged with and promotes communication and self-resolution between retailers and suppliers. This improves effectivity while still being efficient and is durable.

17

In relation to **6.5 Other obligations**, 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.

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- 105 The protection of confidential information is not strong enough where retailers produce private label products. There need to be specific confidentiality protections preventing use of confidential supplier information for private label operations in addition to “requiring the designated retailer to hold any information provided by the supplier in confidence and for the purpose it was provided”.
- 106 Confidential supplier information should be ringfenced to retail operations and should not be accessible by staff involved with private label operations. Ideally private label operations would be a separate business unit with separate staff that operates at arms’ length from the business unit that conducts retailing activities (with evidence of separation rather than claims of separation. Otherwise, or in any case, at the very least, the Code should provide, in addition to option 3 (that the retailer must hold information provided by the supplier in confidence and for the purpose it was provided):
- a. **only staff who reasonably need to access the confidential supplier information for the purposes the information was provided** may access the information. There should not be further disclosure of the information internally than is reasonably necessary.
 - b. **staff who have access to confidential supplier information cannot be involved in private label operations.** It is not credible to expect staff involved in private label operations to disregard confidential supplier information they already have knowledge of.
 - c. **the confidential supplier information must be kept in a separate system** or if other staff have access to that system, then the information must be password protected to ensure only authorised staff have access.
 - d. **both corporate and individual liability** for breach of confidentiality. A strong incentive for retailers to maintain confidentiality is needed because retailers already will naturally have competing incentives to advance their private label operations.
 - e. **retailers and individuals who access the confidential supplier information make an annual declaration** about whether they are aware of any breaches of confidentiality. This is a monitoring measure to recognise that suppliers are unlikely to have visibility of whether retailers are complying with their confidentiality obligations and are relying on the retailer to only use confidential information for the purpose it was provided.
 - f. **the retailer must establish and monitor systems** to ensure and show compliance with the above.
- 107 These confidentiality protections are reasonable in circumstances where the retailer has conflicting interests as both customer and competitor of the supplier and should be normal commercial practice. They are more effective and durable than the current option, which would likely be difficult to monitor and enforce in practice, particularly by the supplier, and are more efficient by being clear and easy to follow – retailer staff are not put in the uncomfortable position of having knowledge of a supplier’s confidential information when it is also their job to act in the interests of the private label operation.
- 108 NZFGC agrees there should be whistle-blower protections and also recommends anti-retaliation measures. Anti-retaliation measures should include that for a period, for example 6 months, after a supplier raises a dispute or brings a complaint, or the Grocery Commissioner makes a determination in the supplier’s favour, the Grocery

Commissioner may monitor whether a retailer retaliates against that supplier. NZFGC expects retaliation against a supplier for bringing a dispute or complaint to be a breach of fair dealing.

- 109 NZFGC agrees there should be recognition of respect for taonga.
- 110 NZFGC agrees that provisions are needed against “threatening suppliers with disruption, hindering any lawful association of suppliers, or any conduct to encourage suppliers to opt out of any wholesale access regime”.
- 111 NZFGC supports retaining flexibility regarding exclusive supply clauses and best price clauses because there are circumstances where they may be pro-competitive and are the product of genuine commercial negotiations. At this stage, NZFGC believes the general application of the Commerce Act, monitoring by the Grocery Commissioner, and the general fair dealing obligation should be able to deal with anti-competitive clauses.

18 Do you have any other comments about issues relating to product supply and placement?

- 112 As mentioned above, a separate and additional issue to self-preferencing concerns is the ability to control product supply and placement allows retailers to leverage their extremely high degree of negotiating power to demand margins which just line the retailer’s margin and do not benefit consumers in any way.

19 Do you have any comments on the preliminary assessment of the options against the criteria in Chapter 6?

- 113 The current options are lacking in some respects. We set out suggested improvements to the Options above which we consider to be more effective, efficient and durable.

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

- 114 This is similarly an important area that currently is not working well. There is a critical need for change. Clarity, transparency and simplicity in price terms is key. Suppliers need certainty about costs, to have confidence that promotional pricing is for the consumers’ benefit (i.e. will be passed onto consumers) not the retailers’ margin. Some price terms have multiple discount elements. These should be simplified and reduced or removed.
- 115 The trading structure needs to be one of opt-in. There should be no mandatory obligation on suppliers to invest in displays. If a supplier prefers to offer a promotional off invoice discount, this decision should be made solely by the supplier.
- 116 The “prompt payment” or “settlement” discount should be reconsidered as they relate to historic market conditions long before electronic transactions and high interest rates. If retained, as mentioned below, it should only be taken for genuine early payment and not as of right and many months later as happens currently.
- 117 A base trading structure can be as simple as Table 1:

Table 1: Base trading structure

Invoice Price	Price on invoice when goods are purchased
Promotional Price	A promotion has a start and end date and discounts are passed on to consumers. Promotional pricing should reflect the discount to the retailer for the promotional period and only apply to the product volume that has been purchased by end consumers at a discount.
Display fee	There should be no obligation to invest in displays. Each brand owner should determine if a display investment is warranted for a product.
Settlement Discount	Standard Discount for early payment of invoices.

- 118 **Payment terms:** The Code should have a positive obligation to make prompt payments. Payment promptness is variable and regularising expectations is the goal. With the level of computerisation available there needs to be a requirement for payment by the 20th of the following month. More frequent payments for short shelf-life products is expected.
- 119 **Set offs:** Set offs should be prohibited unless agreed by the supplier and clearly itemised not bundled. Set offs can benefit both retailer and supplier, for example if a supplier requests early payment for a percentage set off, but only if clearly communicated and with consent. Fixed set offs should be prohibited.
- 120 **Price increases:** There should be specific provisions improving transparency of process for price increases that the “retailer must respond (accept, decline, or partially accept) to a request for a price increase within 30 working days of receiving the request. If the supplier is not satisfied, they may enter negotiations to be undertaken in good faith and without delay.”
- 121 **Payments for shrinkage and wastage:** These should be prohibited except for wastage that is the responsibility of the supplier and the designated retailer has taken reasonable steps to mitigate wastage. The sunset clause needs to be significantly reduced from 6 months. 30 days is easily achievable with computerisation, electronic delivery sign-offs and authorisations, vehicle tracking etc. Some retailers operate “minimum discounts allowed” (“MDA”) and work to raise all suppliers to the MDA but do nothing to reduce the discounts that exceed the minimum. Ullage and related activities such as MDA should be similarly prohibited as they are no longer related to physical damage, but are simply yet another discount.
- 122 **Payments for retailer’s business activities etc:** Payments not linked to specific activities should be prohibited and refunds should be required for activities not undertaken or not completed.
- 123 **Payments for promotions:** The cost of promotions should be shared between retailer and supplier. Verification of display should be required through the provision of shelf off-take data. This would be the most efficient confirmation that a promotion had taken place. Display funding should be optional not mandatory and across the board. Some products get no benefit from displays (no lift) making the system unnecessarily inefficient for both supplier and retailer which ultimately makes products more costly for the consumer. Off-location displays work for around half of products particularly highly elastic products (eg those with expandable consumption or high impulse). Few products have expandable consumption. Forcing all suppliers to fund displays that do not work is resource wasteful and yet another compulsory payment by suppliers. If a supplier pays for displays, they should expect and receive displays.

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- 124 **Promotional buying:** Suppliers might find retailers buying 80-100% of goods at the lower discounted promotional price and selling 40-50% on special and the balance at full price. Often the customer will not fully benefit from the brand owners intended promotional investment. NZFGC proposes promotional buying only be permitted where consumer scan data accounts for volume sold and payment to supplier made by the retailer for residual product not sold on promotion. This removes 'investment buying'. We disagree with the reasoning that this may negatively impact consumer prices. This would positively impact consumer prices because it incentivises the retailer to pass on the promotion and provides transparency for the consumer about the real price. The consumer should get the benefit of promotions not the retailer margin.
- 125 **Payments for retailers' data services:** Ideally suppliers favour democratisation of data so that all have equal access. The data in Australia is available in a raw form from a platform called Quantum (not through a third party such as IRI). For those who opt to purchase, this is at a far reduced cost to the third party provided data in New Zealand. Without purchasing the New Zealand Dunhumby data, New Zealand suppliers have difficulty arguing against 'substitutability' claims by the retailer. Suppliers should be able to buy the scan data directly from the retailer. Suppliers would get more data and granularity this way.
- 126 **Payments for consumer complaints:** Charging for customer complaints should be prohibited to prevent any potential for retailers to profit from food safety events.

20 In relation to **7.2 Payment terms and set-offs**, which option do you think is best, and why?

- 127 Payment Term and Set-offs options are:
Payment Term and Set-offs Option 1 – Payment terms only within a reasonable time
Payment Term and Set-offs Option 2 – Option 1 payment terms plus set-offs prohibited except with written approval of supplier
Payment Term and Set-offs Option 3 – Retailers to make prompt payments no later than specified in the supply agreement plus set-offs described in Option 2
- 128 NZFGC supports **Payment Term and Set-offs Option 3**, a positive obligation to make prompt payments and recommends the addition that the maximum payment term in a grocery supply agreement is the 20th of the following month. Supplier payment terms to their suppliers are also unlikely to exceed the 20th of the following month. Where the payment term to retailers is longer than that which the supplier must meet, suppliers may need to borrow from banks to cover the difference. That is inefficient and not productive.
- 129 The level of computerisation available makes it exceptional that a retailer would not be able to make the payment by the 20th of the following month. The 20th of the following month is only the bare minimum for added certainty. It is expected payments would be made more frequently for short shelf-life products. As recognised in paragraph 150 of the Consultation Paper, "*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*". Payment promptness is variable and regularising expectations is the goal.
- 130 NZFGC supports **Payment Term and Set-offs Option 3** such that set-offs should be prohibited unless agreed by the supplier with the addition that set-offs should be clearly itemised, not bundled.

21 In relation to **7.3 Responses to price increases**, which option do you think is best, and why?

- 131 Price increase options are:
Price Increase Option 1 – Rely on good faith
Price Increase Options 2 and 3 – The retailer must respond (accept, decline, or partially accept) to a request for a price increase within 30 working days of receiving the request. If the supplier is not satisfied, they may enter negotiations to be undertaken in good faith and without delay. This would be commercially sensitive information for the purposes of the Code.
- 132 NZFGC supports **Price Increase Option 2**. Price increases are an important and common process that should be specifically provided for in the Code.

22 In relation to **7.4 Payments for shrinkage and wastage**, which option do you think is best, and why?

- 133 Shrinkage and wastage options are:
Shrinkage and Wastage Payments Option 1 – payments for shrinkage prohibited and payments for wastage prohibited except where set out in supplier supply agreement
Shrinkage and Wastage Payments Option 2 – Option 1 for shrinkage plus designated retailer may discuss ways to mitigate risk of shrinkage. No payments for wastage except if wastage is the responsibility of the supplier and the designated retailer has taken reasonable steps to mitigate wastage. Any payments must also be as set out in the supply agreement etc.
Shrinkage and Wastage Payments Option 3 – Option 2 plus a sunset clause which prohibits designated retailers requesting payments for wastage older than six months.
- 134 NZFGC supports **Shrinkage and Wastage Payments Option 3** that includes that any payments must 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.
- 135 We recommend the period of the sunset clause which prohibits designated retailers requesting payments for wastage older than six months is reduced to 30 days. Retailers should be incentivised to make wastage payment requests as soon as possible so these can be dealt with efficiently. The longer the issues take to resolve, the harder it becomes to resolve.
- 136 Thirty days is more than enough time for retailers to inform suppliers about instances of wastage in the modern context where retailers should have efficient systems e.g. computerisation, electronic delivery sign-offs and authorisations, facility delivery proof in near real time etc. Fresh produce is checked within 4-6 hours of arrival at the retailers and short shelf-life products such as bread and milk delivered daily need speedier terms of payment.
- 137 Retailers may have different terms for shrinkage and wastage, for example ullage or MDA. NZFGC expects these to be captured under the definition of shrinkage (loss of grocery products due to theft, other loss or accounting error) and wastage (grocery products that are unfit for sale, for example due to damage) and to be treated the same way. NZFGC agrees the options should be able to accommodate waste provisions that operate on an individual case-by-case basis or a more systemised 'standard damage allowance' basis. NZFGC agrees 'short supply' where a delivery from a supplier is less than what was ordered is distinct from shrinkage and wastage.

- 138 Payments for retailer's business activities etc options are:
Payments for Retailer's Business Activities etc Option 1 – Payments for marketing and merchandising costs prohibited except where provided for in the relevant supply agreement. Payments for product placement prohibited except in relation to promotion. Payments as a condition of supply prohibited except in relation to a promotion or a new product and the retailer runs a risk stocking the product.
Payments for Retailer's Business Activities etc Option 2 – Payments for marketing and merchandising costs and for product placement prohibited except where provided in the relevant supply agreement and reasonable in the circumstances (having regard to the benefits, costs and risks to the retailer and supplier). Payments as a condition of supply prohibited except in relation to a new product. Must be reasonable in the circumstances (having regard to the benefits, costs and risks to the retailer and supplier).
Payments for Retailer's Business Activities etc Option 3 – Option 2 plus prohibit payments not linked to specific activities. Require refunds from retailers where they have not completed the relevant activity that payment was provided for.
- 139 NZFGC supports **Payments for Retailer's Business Activities etc Option 3** which adds to Option 2 and agrees it is the most effective of the Options while being equally durable.
- 140 NZFGC's support for **Payments for Retailer's Business Activities etc Option 3** is on the basis that these prohibitions will be modelled after the relevant provisions in the Australian Code. For example, we copy section 17 of the Australian Code below for reference. We assume the NZ Code prohibition of marketing and merchandising costs fits under a prohibition of payments for retailer business activities and there will be similar provisions that the retailer has the onus of establishing relevant matters if they rely on an exception.

17 Payments for retailer's or wholesaler's business activities

- (1) *The retailer or wholesaler must not directly or indirectly require a supplier to make any payment towards the costs of any activity (the **retailer's or wholesaler's business activity**) that is undertaken by the retailer or wholesaler in the ordinary course of carrying on a business as a retailer or wholesaler.*
- (1A) *Without limiting subclause (1), the retailer's or wholesaler's business activity includes the following:*
- a. *a buyer's visit to the supplier;*
 - b. *artwork or packaging design;*
 - c. *consumer or market research;*
 - d. *the opening or refurbishing of a store;*
 - e. *hospitality for the retailer's or wholesaler's staff.*
- (2) *Subclause (1) does not apply if:*
- a. *the relevant grocery supply agreement provides for the payment; and*
 - b. *the payment is reasonable in the circumstances.*
- (3) *In determining whether the payment is reasonable in the circumstances, regard must be had to the following:*
- a. *the likely benefits to the supplier from the retailer's or wholesaler's business activity;*
 - b. *the likely benefits to the retailer or wholesaler from the retailer's or wholesaler's business activity;*
 - c. *the costs borne, or contributions made, by the retailer or wholesaler for the retailer's or wholesaler's business activity.*
- (4) *Subclause (3) does not limit paragraph (2)(b).*

(5) *In any dispute, the retailer or wholesaler has the onus of establishing the matters in subclause (2).*

- 141 NZFGC supports the additions in **Payments for Retailer's Business Activities etc Option 3** because the linking to a specific activity increases transparency and makes incentives clearer. It is not productive to have payments not linked to specific activities. Refunds for activities that do not take place is justified because the retailer essentially did not perform their part of the bargain, and is what would be expected in normal commercial relationships.
- 142 NZFGC notes **Payments for Retailer's Business Activities etc Option 3** still has a gap in how suppliers can verify whether the relevant activity took place if the retailers do not actively fulfil their obligations. This highlights the need for retailers to actively engage and comply with the Code. As part of being responsive and communicative under the overarching fair dealing obligation, retailers should communicate and show to suppliers that the activity has occurred.
- 143 It is inefficient for suppliers to monitor retailers. It should be against fair dealing for suppliers to need to chase retailers to comply with the Code.

24 In relation to **7.6 Payments for promotions and promotional buying**, which option do you think is best, and why?
What are your views on promotional buying and investment buying?

- 144 Payments for promotions etc options are:
Payments for promotions etc Option 1 – Payments for promotions prohibited except where reasonable notice is provided. Promotional buying – 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.
Payments for promotions etc Option 2 – Payments for promotions prohibited except where the payment is provided for in the supply agreement and is reasonable in the circumstances. Promotional buying – 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.
Payments for promotions etc Option 3 – Payments for promotions prohibited except where the payment is provided for in the supply agreement and is reasonable in the circumstances considering the relative benefits of the promotion to the supplier and the designated retailer. Require the cost of promotions to be shared between designated retailer and supplier in a manner that reflects relative benefits? Promotional buying – care to be taken when buying for a promotion. Promotional buying allowed as agreed between retailers and suppliers in supply agreement provided it is reasonable in the circumstances.
- 145 Regarding payments for promotions, NZFGC supports the approach in **Payments for promotions etc Option 3** which prohibits 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. NZFGC notes there is a need for commercial flexibility here as different suppliers will have different needs.
- 146 The main issue for some suppliers is that payments for promotions may be bundled/rolled up and compulsory. Instead of paying for a promotion, you are paying for a chance to be promoted and this payment is compulsory. Further, not all products benefit from all types of promotions. If the supplier is not actually promoted, or does not benefit from a promotion in the first place, they are just giving the retailers more money

for nothing in return. Furthermore, the only way suppliers can know whether or not their product was actually promoted is to physically go into each store to check.

- 147 Accordingly, the Code also needs to prohibit mandatory payments for promotions or “investments” in promotions. To be clear, the prohibition is aimed at the *mandatory* nature of payments. Suppliers should have the choice of whether or not they would like to opt-in to promotional programmes. There should be no obligation on suppliers to invest in displays. Each supplier should have the right to decide whether a display investment is warranted for its product. It should also be against fair dealing for a retailer to penalise a supplier for declining to participate in “rolled-up” terms to cover promotional activities.
- 148 Supplier payments for promotions should actually result in a promotion taking place for the supplier’s product. The requirement discussed in the previous question for refunds for activities that do not take place should apply to promotions as well. NZFGC also recommends that if a supplier agrees to make a payment in support of the promotion of a product, the retailer may hold the promotion only after giving the supplier reasonable written notice, as is provided in the UK Code and Australian Code. This will address the need for suppliers to monitor whether retailers are complying with their obligations, under both the Code and agreed activities, as currently suppliers may need to physically go in store to check whether their product has actually been promoted.
- 149 NZFGC supports the cost of promotions to be shared between retailers and suppliers in a manner that reflects relative benefits (ie pay for performance).
- 150 Regarding promotional buying, NZFGC supports **Payments for promotions etc Option 2** and considers **Payments for promotions etc Option 3** is inappropriate. Promotional buying should only be permitted when consumer scan data accounts for volume sold. Retailers should return supplier discounts to the supplier when that discount is not passed onto the consumer. Otherwise that is just endorsing retailers keeping the discount for themselves and not pass on the benefit to consumers.
- 151 Suppliers provide promotional discounts to retailers on the basis that this lower price is passed onto consumers, not just so retailers can pocket the margin. We disagree that ensuring goods bought on promotion are sold on promotion may negatively impact consumer prices. This would positively impact consumer prices because it requires the retailer to pass on the promotion and ensures the price consumers pay reflect the cost of the product. Consumers should get the benefit of promotions not the retailer margin. If they did, this could have a dramatic impact on better prices for shoppers.
- 152 We are not aware of any factual basis for the Consultation Paper’s suggestion that the compensation requirement could negatively impact prices for consumers. A scan-based system would also be more streamlined for retailers and suppliers, thereby removing unnecessary operational costs which in turn could improve promotional pricing.
- 153 NZFGC considers ‘care to be taken when buying for a promotion’ to be vague and is confused as to how that could be applied or enforced in practice. NZFGC supports use of the UK Code wording to “take all due care to ensure that when ordering groceries from a supplier at a promotional wholesale price, not to over-order”.
- 154 The options as described also miss an important element that features in both the Australian Code and UK Code, that retailers must ensure that the basis on which the quantity of any order for a promotion is calculated is transparent. This should be included in the New Zealand Code.

155 The Australian Code and UK Code are relatively consistent in regard to promotional buying and at a minimum the New Zealand Code should follow their approach to promotional buying.

25

Do you think requests from retailers for payments for data services is an issue and if so, why?

156 There is an information asymmetry issue because retailers gather scan data from retail sales while suppliers need to acquire this data from the data service providers the retailers sell the data to. Retailers make decisions based on their data. A supplier that does not purchase that data cannot fully engage with retailers on decisions that affect their products. This is because suppliers do not have visibility of that data and so cannot fully understand the basis on which the retailer's decision is made.

157 For example, a retailer may delist or threaten to delist a product and tell the supplier their data shows the product is highly substitutable by other products. The supplier has no way to verify this or understand why this is unless they buy the retailer's data. This is true even if the supplier has already bought data from other sources because the retailer can just deny what the other data set shows in favour of their own (and this may be justified because the retailer's data may be more specific, assuming the retailer is genuinely basing their decision off that data – which again, suppliers cannot verify without buying the data). Greater transparency and the requirement to share such data could have a significant positive impact on competition.

158 Retailers, from NZFGC's understanding, do not make purchase of their data compulsory. But in practical terms it is necessary to purchase the retailer's data from their specified data service provider to properly engage with retailers on their decision making.

159 The problem with just purchasing the data is that this is just yet another payment shifting supplier margins to retailer margins as a result of the major grocery retailers' market power. Some suppliers, particularly SMEs, won't have the excess funds to make such purchases. NZFGC has heard the cost of retail grocery data in New Zealand is significantly more expensive than equivalent data in Australia. The Code should have provisions to address this result which occurs because of the imbalance of negotiating power.

160 Suppliers favour democratisation of data so that all have equal access. Suppliers should be able to purchase raw scan data from retailers for their own product, or that is given as a reason by retailers to make decisions that affects the supplier's product, at the incremental cost to retailers of providing that raw scan data. This would ensure the price of the data reflects its true cost. Natural justice principles would suggest data used in decision making should be provided to suppliers regardless for the exact reason of allowing them to understand why the decision was made. Suppliers may also prefer to purchase raw data over data processed by a third party because the retailer may refer to data insights at a more granular level than suppliers have access to even if they purchase the data from the retailer's specified data service provider.

161 NZFGC understands a New Zealand supermarket chain might offer relevant data at a discounted rate before range reviews and supports initiatives like that if direct scan data continues to be available only through third parties.

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?

- 162 NZFGC is also not aware of consumer complaints being an issue in New Zealand but sees no harm in adding a similar provision to the UK that limits the ability of a retailer to pass on the costs of a consumer complaint to a supplier unless justifiable and attributable to negligence or default or breach by the supplier.
- 163 A further issue NZFGC is aware of is the large number of different discounts, charges and rebate mechanisms that apply to the supplier's wholesale price to the retailer after the invoice price, some of which apply based on the *retail price* to the consumer (ie based on factors the supplier has no visibility of or control over). Some price terms have multiple discount elements. These can be simplified and reduced or removed. The numerous discount elements:
- prevent suppliers from understanding what their actual net price to the retailer is,
 - makes the trading structure complex and inefficient, and
 - creates uncertainty for suppliers about their cashflow.
150. This is exacerbated by the retailer automatically setting off such discounts and charges from the payment of the supplier's invoice.
- 164 Clearly written supply contracts and the prohibition against unilateral set-offs, with the addition that set offs should be clearly itemised, not bundled, should help mitigate this issue but they may not be enough. Greater transparency and simplification of the trading term structure is needed. Whether this issue persists after the introduction of the Code should be reviewed.

Do you have any comments on the preliminary assessment of the options against the criteria in **Chapter 7**?

- 165 NZFGC disagrees that allowing investment buying is a positive as it discourages consumer pass off and so should be expected to lead to worse outcomes for consumers. It is not appropriate to depart from and do *less* than the UK and Australian Code in relation to promotional buying.
- 166 Otherwise, it is difficult to comment on the preliminary assessment on a bundled basis across the different topics. NZFGC provides its views on what it considers is the most effective, efficient and durable for each topic in the questions above.

Chapter 8 Dispute resolution

- 167 The Code requires a clear, robust and timely dispute resolution process. NZFGC supports a two-level dispute resolution system that first gives parties the opportunity to negotiate and try to resolve matters between themselves. It is when disputes cannot be resolved between the parties that arbitration or adjudication is needed. There should be an overarching obligation that retailers engage in dispute resolution processes in good faith.
- 168 For the negotiation level NZFGC considers it is important:
- a. There is clear process for escalation of disputes within the retailer. There should be a standard form notice retailers can provide suppliers which informs suppliers of their

right under the code to dispute resolution and sets out in clear terms the dispute resolution process. NZFGC supports retailers having a Code Compliance Officer to be a point of contact for enquiries and issues relating to the code and to start the dispute resolution process.

- b. Retailers are willing to engage with suppliers. The UK Code has a provision requiring designated retailers to negotiate in good faith with suppliers to resolve disputes arising under the code. Similarly, the Australian Code requires retailers to take part in mediation or arbitration in good faith, if that is the dispute resolution path the supplier decided to take.
- c. Similarly, suppliers need to engage in dispute resolution in good faith.

169 For the adjudication or arbitration level, NZFGC considers it is important that:

- a. Decisions are made in a timely manner. There should be a clear process and time limits on each step of the process to ensure the adjudication or arbitration is carried out efficiently and to give parties more certainty on timeframes.
- b. The decision-making body is independent and consistent. The Grocery Commissioner would be the most appropriate decision-making body and should be adequately resourced to consider and decide disputes and complaints, along with its other functions.
- c. Costs are borne by the retailer unless the supplier's claim is vexatious or wholly without merit, in which case costs will be assigned at the decision maker's discretion. A supplier needs justifiable reasons to complain.
- d. Decisions are binding on the retailers and are legally enforceable.
- e. There are limited grounds for appeal. Litigation costs are a real and significant barrier for suppliers, particularly SMEs, but more importantly take time. Litigation prevents disputes from being resolved in a timely manner.

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)?

170 Currently most suppliers are unlikely to bring up disputes with retailers because of fear of retaliation or harming their relationship with the retailer.

171 Even if a supplier does bring up disagreement, there may be little engagement from the major grocery retailers, especially for smaller suppliers. For example, they may not respond to emails asking to meet or may unilaterally enforce their position.

29

Do you have any comments on the particular criteria in **Chapter 8.5** used to undertake the preliminary assessment of options for dispute resolution?

172 NZFGC agrees “user focused and accessible” and “independent and fair” are important criteria to assess which dispute resolution process approach is most appropriate.

- 173 The options for New Zealand are:
Dispute Resolution Option A – Negotiate-Arbitrate
Dispute Resolution Option B – Determinative Code Arbiters
Dispute Resolution Option C – Negotiate-Adjudicate.
- 174 NZFGC considers **Dispute Resolution Option A**, a UK negotiate-arbitrate approach with New Zealand specific improvements, would work best with added standard notice requirements. While NZFGC supports the intent of **Dispute Resolution Option C**, a faster but less final negotiate-adjudicate approach, it considers there is a real risk the major grocery retailers could just appeal decisions they disagree with, resulting in a longer and less certain dispute resolution process. Arbitration is more formal but is more final with limited grounds of appeal. The arbitrator would be the Grocery Commissioner.
- 175 NZFGC supports a two-level dispute resolution system that first gives parties the opportunity to negotiate and try to resolve matters between themselves. It is when disputes cannot be resolved between the parties that arbitration or adjudication is needed. This is more efficient and durable, and can potentially be just as effective, because it allows greater commercial flexibility with the support of an independent backstop.
- 176 Compared to **Dispute Resolution Option C**, **Dispute Resolution Option A** has the benefits of arbitration being a final process with limited grounds for appeal, ensuring the process is not drawn out and providing greater certainty. With appropriate timeframes, it could also be time-efficient or at the very least provide certainty of timeframes. NZFGC recommends suppliers may refer disputes to arbitration after 14 days, rather than 21 days. This is just a right to arbitrate, suppliers may still choose to continue to negotiate with the retailer for longer before considering to start arbitration. The equivalent timeframe under **Dispute Resolution Option C** should also be 14 or 21 days, not 20 working days (roughly 4 weeks).
- 177 **Dispute Resolution Option A's** senior buyer and code compliance officer framework also facilitates a clear escalation process for the negotiation stage, making dispute resolution more accessible and user friendly.
- 178 NZFGC strongly prefers that the Grocery Commissioner is the independent arbitrator or adjudicator for consistency of decisions and efficiencies gained from the Grocery Commissioner's complementary role as the grocery industry regulator. Having a further separate dispute resolution body would unnecessarily increase costs and may lead to less consistency.
- 179 NZFGC supports that the costs of the arbitration will be borne by the retailer unless the supplier's claim is vexatious or wholly without merit, in which case costs will be assigned at the arbitrator's discretion.
- 180 NZFGC proposes standard notice requirements should be added to make the dispute resolution process as clear, transparent and certain as possible. The notice should set out step-by-step, in simple language, the supplier's options and rights, how the dispute resolution process works, the Code Compliance Officer's name and contact details, and a link to or attachment of the form used to submit an arbitration request to the Grocery Commissioner. NZFGC suggests a standard form to reduce the retailer's costs of

compliance. Retailers should be required to provide the standard notice whenever suppliers raise a dispute with them, whether through the Code Compliance Officer or other staff.

- 181 NZFGC has reservations about **Dispute Resolution Option B** because there is a lack of supplier confidence that the Code Arbiter will be independent or would be willing to suggest strong remedies as a truly independent party would. The Code Arbiter would be chosen and paid for by the retailer. It is difficult to believe the Code Arbiter will be truly independent when the role has inherent links to the retailer. Creating a Code Arbiter role also adds an unnecessary layer of bureaucracy and the associated costs with the extra role makes the option less efficient.
- 182 Having different Code Arbiters for each retailer also may lead to inconsistency of decisions and application of principles. While **Dispute Resolution Option B** allows the modification that the regulator may conduct merits-based review, it can only recommend reconsideration, so such a process would seem to much more inefficient compared to **Dispute Resolution Option A** where the second step of arbitration is binding. NZFGC considers it is more efficient for suppliers to try to negotiate with the retailers directly than to negotiate with the Code Arbiter, and that arbitration is much more efficient than an independent review which, even if successful, would only lead to reconsideration.

31

Do you have any comments on the preliminary assessment of the options against the criteria in **Chapter 8**?

- 183 Regarding the comments for **Dispute Resolution Option A** for the criteria “User focused and accessible” we disagree the use of internal Code Compliance Officers should hinder suppliers from raising a dispute. If the dispute can be resolved in the negotiation phase with the internal Code Compliance Office, then that is a positive result.
- 184 If the dispute is not resolved, the Code Compliance Officer should be required to give clear instructions to the supplier on how to start the next step of the dispute resolution process, which should help the supplier with raising disputes not hinder. The appointment of an internal Code Compliance Officer so suppliers know who to contact when they have a dispute is user focused and increases accessibility. The addition of appropriate timeframes should prevent the process from becoming drawn-out. Familiarity with the Grocery Commissioner may also increase accessibility of arbitration.
- 185 **Dispute Resolution Option B** should have a lower score for user focused and accessible. Code Arbiters are employed by the retailer which may discourage suppliers from bringing complaints.
- 186 **Dispute Resolution Option A** should have a higher score for independent and fair. There is nothing about the process that makes it not independent or less fair.
- 187 **Dispute Resolution Option B** should have a lower score for independent and fair. Code Arbiters are employed by the retailer which raises doubt about their independence. Retailers can also choose the identity of their Code Arbiter. Having different Code Arbiters for different retailers may also make decisions less fair because they may be less consistent. Different Code Arbiters may have different understandings of the standards expected by the Code.
- 188 **Dispute Resolution Option A** should have a higher score for efficient. Appropriate timeframes should be added for arbitration. Having a final determination with limited appeals should be more efficient. It is also more efficient for the Grocery Commissioner

to be the decision making body, as the Grocery Commissioner can draw from expertise and knowledge from its other functions in the grocery sector and this avoids the need of employing another party.

- 189 **Dispute Resolution Option C** should have a lower score for efficient and effective because of the risk for appeals which would make the process longer and means the result is not final.
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Chapter 9 Monitoring, compliance and enforcement

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?

- 190 **Monitoring:** NZFGC supports a legislative framework for the Grocery Commissioner to undertake monitoring functions. This means the Grocery Commissioner must have the resources to fulfil all its intended functions. The Code should have appropriate review processes which monitor whether the Code is effective and which facilitates any improvements needed, including annual reporting obligations and reviews. Reviews of the Code should take place annually, consistent with the Government's proposal that the Grocery Commissioner review the state of competition annually rather than the original 3 years recommended by the Commerce Commission, or at a minimum every 3 years.
- 191 **Educating:** NZFGC supports the Grocery Commissioner having an educative role in relation to the Code to increase compliance of the Code. NZFGC envisages the Grocery Commissioner will have an active role in the industry and can facilitate better retailer and supplier relationships as a third party who can better understand issues and raise them with retailers to give retailers an opportunity to pro-actively address issues before disputes arise. NZFGC hopes retailers pro-actively engage with the Code and in working with the Grocery Commissioner and suppliers to improve the grocery industry. There should be a culture of compliance rather than finding ways around the Code.
- 192 The previous GCA, Christine Tacon, noted in her last year as the GCA:³

"I believe my success has come from the unique way I established of working with the retailers. I have taken a collaborative approach which should also be at the heart of healthy supplier – retailer relationships. I have had more than 300 meetings with retailers' Code Compliance Officers (CCOs) over the past seven years to take up issues I was hearing from suppliers and ensure retailers were making progress in putting things right. I have also met the chairs of the retailers' audit committees (or their equivalent) every year. I have many examples of my engagement with the audit chairs transforming a retailer's approach to Code compliance.

My collaborative approach with the retailers I regulate is not a soft touch, quite the contrary. It enables tough, honest conversations and prompt remedial action. All the regulated retailers have supported my approach and have worked hard to achieve progress. In this way and by focusing on themes rather than individual cases, I have ensured retailers improve for the benefit of the widest possible supplier base."

- 193 NZFGC strongly supports the Grocery Commissioner following the collaborative and active model of the GCA of truly understanding recurring themes and prompting retailers

³ GCA Annual Report and Accounts 2020: https://www.gov.uk/government/publications/2019-to-2020-gca-annual-report-and-accounts/hc349_gca_annual_report_and_accounts_2019-2020

to pro-actively change their behaviour. NZFGC considers the role of the regulator will be a critical element of the Code's success and agrees improved adherence to the Code can be achieved by engagement through both education and enforcement activity.

- 194 **Information sharing:** NZFGC prefers the Regulator and dispute resolution scheme's decision-making body are the same entities. As mentioned above, this should be more efficient by combining the two roles, provided the Grocery Commissioner is adequately funded, lead to more consistent decisions, and be more effective as the Grocery Commissioner will have first-hand knowledge and build expertise as it carries out its functions. A pursuit of efficiency is critical otherwise cost and inefficiency from the Code will be cited as reason for retailer margin creep.
- 195 **Compliance obligations:** NZFGC supports the Code having retailer compliance obligations like those in the Australian and UK Codes.
- 196 **Enforcement:** NZFGC supports the Grocery Commissioner having powers like the GCA to make binding recommendations, require information be published, and impose financial penalties up to 1% of the retailer's turnover if it determines that a retailer has breached the Code. The Grocery Commissioner should also have information seeking powers in relation to the grocery sector. There must be meaningful consequences for retailers of breach otherwise they have no reason to take the Code seriously or engage with the Code pro-actively.
- 197 There should be two avenues for enforcing breach of the Code, either (1) through dispute resolution or (2) complaint to / investigation by the Grocery Commissioner (or self-reporting). As indicated above, NZFGC strongly recommends the Grocery Commissioner is the decision-making body for both avenues for efficiency and consistency of decisions.
- 198 It is important the Code has a robust complaints process. Suppliers may be unlikely to bring complaints to the Grocery Commissioner due to fear of retaliation from the retailer or a lack of confidence that the Grocery Commissioner can bring meaningful action. Both Australia and the UK regimes experienced difficulties in getting suppliers to speak up. In Australia the Independent Reviewer's annual report 2020-21 noted
- "It is clear that there are very few complaints from suppliers being elevated to the Code Arbiters over the reporting period"⁴ and in the UK the first GCA has noted "It has been hard work getting the information I need from suppliers"⁵.*
- 199 NZFGC expects the problem to be more acute in New Zealand, where there are only two major grocery retailers with a higher degree of negotiating power and a smaller New Zealand community of suppliers.
- 200 As indicated in response to question 17, NZFGC recommends the Code contains anti-retaliation measures including allowing the Grocery Commissioner to monitor whether a retailer retaliates against a supplier after a supplier raises a dispute or brings a complaint, or the Grocery Commissioner makes a determination in the supplier's favour.

⁴ Food and Grocery Code Independent Reviewer Annual Report 2020-21: https://treasury.gov.au/sites/default/files/2021-11/p2021-229034_0.pdf at p10

⁵ GCA Annual Report and Accounts 2020: https://www.gov.uk/government/publications/2019-to-2020-gca-annual-report-and-accounts/hc349_gca_annual_report_and_accounts_2019-2020

201 NZFGC also recommends there is an anonymous and confidential way for suppliers to bring complaints. In the UK the GCA launched a confidential online platform to report to the GCA behaviour believed to be in breach of the code:⁶

‘Tell the GCA’ has been designed to dispel concerns harboured by some suppliers that their identities could be revealed if they provide information. They can now report an issue via the secure third-party platform in total confidence that the information they share can remain anonymous.

202 NZFGC supports similar initiatives in NZ to support the NZ Code. As discussed above, NZFGC also strongly supports a collaborative approach from the Grocery Commissioner of aggregating complaints and supplier feedback into themes to discuss with the retailer.

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?

203 NZFGC notes suppliers will also face costs from the introduction of the Code to train its staff on the content of the Code and how to use it. These are of course justified and significantly outweighed by the benefits of the Code and intended positive changes to the industry. It would be helpful for the Grocery Commissioner to publish guidance on the Code and run compliance programmes to help make the Code more accessible to retailers and suppliers.

34 Do you have any views on how the Code should be implemented?

204 The Code should be implemented as soon as possible to start realising the benefits of the Code sooner. Retailers can act in the spirit of the Code now.

205 All provisions should take effect immediately unless there are compelling or practical necessary reasons not to, for example need for funding. NZFGC considers the provisions that require changes to grocery supply agreements to be quite narrow, being just the requirement that grocery supply agreements must contain minimum content discussed in section 5.2 of the consultation paper. All other provisions should apply immediately and the Code should have priority in applying over the relevant parts of the grocery supply agreement if there is inconsistency. Retailers should update their grocery supply agreements appropriately as soon as possible consistent with the overarching fair dealing principle.

206 NZFGC hopes retailers engage pro-actively with the Code to ensure the Code is implemented efficiently and effectively.

35 Do you have any other comments on the matters discussed in **Chapter 9**?

207 NZFGC has no further comments at this time.

⁶ ‘Tell the GCA’ launched for confidential reporting of Code issues (1 February 2021): <https://www.gov.uk/government/news/tell-the-gca-launched-for-confidential-reporting-of-code-issues>

Summary of NZFGC's recommendations

- 1 Immediate designation of the major grocery retailers.
- 2 The Grocery Commissioner may designate retailers that have grocery revenue more than \$500 million, on a single year basis. Retailers may also voluntarily agree to be designated under the Code.
- 3 Code obligations to apply to both the 'head office' of the designated retailer and each individual store (ie all relevant legal entities).
- 4 The purpose statement focuses on the imbalance of negotiating power, whether it is to improve the balance of negotiating power between suppliers and designated retailers or to achieve workably competitive outcomes in the grocery sector for the long-term benefit of consumers by addressing imbalances in negotiating power between designated retailers and suppliers.
- 5 An overarching obligation of fair dealing which encompasses both fair process and outcomes achieved through good faith, and is based on the plain English every-day meaning of "fair". Fair dealing should promote the transacting of business in a manner characterized by candour and full disclosure and free of self-dealing, and should manifest normal commercial relationships that would exist in a workably competitive market.
- 6 An overarching provision that if a retailer relies on an exception in the Code, it has the burden of proving the exception applies.
- 7 Grocery supply agreements be written in plain English and clear and concise language.
- 8 Grocery supply agreements be provided to the supplier.
- 9 Grocery supply agreements be held by the designated retailer for the duration of the agreement and 7 years afterwards.
- 10 Grocery supply agreements contain basic minimum content.
- 11 The Grocery Commissioner prepare a reference grocery supply agreement that retailers and suppliers may use as a starting point. Additionally, that the reference agreement contain a standard and simple pricing structure with guidelines for specific categories. NZFGC has prepared an example reference agreement in **Appendix B**.
- 12 Prohibit retrospective variations.
- 13 Prohibit unilateral variations, with a specific exception like the Australian Code and also having regard to whether it was an option for the retailer to seek the supplier's consent to the variation.
- 14 Material unilateral changes to supply chain procedures be treated the same as unilateral variations, ie be prohibited with a specific exception.
- 15 Compensation if reasonable notice of material unilateral changes to supply chain procedures is not provided. Reasonable notice is reasonable notice to allow the supplier

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- to make adjustments, and includes clearly setting out any relevant costs and other relevant information to the supplier.
- 16 Prohibit pressure or requiring a supplier to use a retailer's preferred service provider. If there is an exception, that this be specific similar to the UK Code and include providing relevant information.
 - 17 Specific fresh produce provisions, particularly concerning the time after delivery to check quality.
 - 18 Consistent treatment of all suppliers against a designated retailer's product ranging principles and shelf space allocation principles.
 - 19 Advance notice of range reviews with necessary information.
 - 20 Clear notification of ranging decisions to suppliers which provide the supplier enough time to make reasonably necessary adjustments to their business model to accommodate the changes. Retailers should clearly inform suppliers which of their products are ranged at which stores.
 - 21 Margin requests must be for genuine commercial reasons, which are provided to the supplier.
 - 22 Delisting may only occur in accordance with the grocery supply agreement and for genuine commercial reasons.
 - 23 Delisting process must provide supplier with reasonable written notice of the decision to delist, including reasons for the decision. Notice or advance warning of delisting be prohibited prior to, or as part of, a range review process.
 - 24 Ability for suppliers to have decision to delist be reviewed by a senior buyer within the retailer or to attend an interview with the retailer's code compliance officer to discuss the decision to de-list, as provided in the UK Code.
 - 25 Supplier information must be held in confidence and for the purpose it was provided.
 - 26 Ringfencing of confidential supplier information so it is not accessible by staff involved with private label operations with appropriate systems to ensure and prove compliance, as expanded on in paragraph 103.
 - 27 Whistle-blower protections and anti-retaliation measures, including that for a period after a supplier raises a dispute or brings a complaint, or the Grocery Commissioner makes a determination in the supplier's favour, the Grocery Commissioner may monitor whether a retailer retaliates against that supplier.
 - 28 Recognition of respect for taonga.
 - 29 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.
 - 30 Payments be made promptly and no later than as specified in the grocery supply agreement.

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- 31 Payment terms in the grocery supply agreement cannot exceed 20th of the following month from date of invoice.
 - 32 Prohibit set-offs except with the written approval of supplier and where provided for in grocery supply agreement (which must be reasonable in the circumstances).
 - 33 Set-offs must be clearly itemised, not bundled.
 - 34 Specific provisions regarding the process for responses to price increases.
 - 35 Prohibit payments for shrinkage.
 - 36 Prohibit payments for wastage except for wastage that is the responsibility of the supplier and the designated retailer has taken reasonable steps to mitigate wastage.
 - 37 Payments for wastage must be set out in the relevant grocery supply agreement, including the circumstances where the payment is required and the basis of the payment, and be reasonable in the circumstances.
 - 38 Prohibit requesting payments for wastage older than 30 days.
 - 39 Prohibit payments for retailer's business activities (eg marketing and merchandising costs) and product placement costs except where provided in the relevant grocery supply agreement and reasonable in the circumstances, similar to the Australian Code.
 - 40 Prohibits payment as a condition of supply except in relation to a promotion or new product and must be reasonable in the circumstances, similar to the Australian Code.
 - 41 Prohibit payments that are not linked to specific activities.
 - 42 Refunds for activities (including promotions) paid for that are not completed.
 - 43 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.
 - 44 Prohibit mandatory payments for promotions or investments in displays.
 - 45 If a supplier agrees to make a payment in support of the promotion of a product, the retailer may hold the promotion only after giving the supplier reasonable written notice.
 - 46 Cost of promotions be shared between designated retailer and supplier in a manner that reflects relative benefits.
 - 47 If goods purchased at a promotional price are sold other than at, or below, the promotional resale price, refund the supplier the difference between the supplier's promotional price and the supplier's full price for the product. Permit promotional buying only when consumer scan data accounts for volume sold.
 - 48 Take all due care to ensure that when ordering groceries from a supplier at a promotional wholesale price, not to over-order.
 - 49 Ensure the basis on which the quantity of any order for a promotion is calculated is transparent.

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- 50 Retailer makes available to suppliers raw scan data for the supplier's own product, or that is given as a reason to make decisions that affects the supplier's product, at the incremental cost to the retailer of providing that raw scan data.
 - 51 A provision limiting payments for consumer complaints unless justifiable and attributable to negligence or default or breach by the supplier, similar to the UK Code.
 - 52 A dispute resolution model based on the UK Code negotiate-arbitrate model and with appropriate time limits, standard notices, and the Grocery Commissioner as the decision making body.
 - 53 The Grocery Commissioner has monitoring functions.
 - 54 The Code is reviewed after a year and at minimum every 3 years.
 - 55 The Grocery Commissioner follow the collaborative and active model of the GCA.
 - 56 Compliance obligations like those in the Australian and UK Codes.
 - 57 The Grocery Commissioner have powers to make binding recommendations, require information be published, and impose financial penalties up to 1% of the retailer's turnover if it determines that a retailer has breached the Code.
 - 58 The Grocery Commissioner can determine a breach of the Code either through an arbitration decision under the dispute process, or after investigation in response to a complaint or self-reporting.
 - 59 There is a robust complaints process, including that there is an anonymous and confidential way for suppliers to bring complaints.
 - 60 The Code be implemented, and take effect, as soon as possible.

Example minimum standard reference agreement

Products	Retailer code, Supplier barcode and description
List of products ranged	
Number of stores ranged in	
Grading of stores being ranged in	
Price	This should include all potential discounts or charges by the retailer
DC fee	XX% if goods are distributed via a Retailer DC
Invoice price	Invoice price per product
Promotional depth and frequency	Scan How many weeks per year
Display fee	Must be for specific activities
Freight	Cost & details if applicable
Settlement	XX% for XX days
Ranging	
Notice period for increased ranging	
Notice period for delisting	
Cost of clearing delisted stock	Who pays the promo discount to clear deleted stock?
Performance Goals	Agreed target performance over a set period of weeks eg: 13 weeks
Sales (volume or \$)	eg Could be over \$ sales, UPSPW, linear metre sales \$
Margin achievement	XX%
DIFOT	Required delivery performance