



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



Submission form

Submission form: Consultation on New Zealand Grocery
Supply Code of Conduct

July 2023

Submissions process

The Ministry of Business, Innovation and Employment (**MBIE**) seeks written submissions on the New Zealand Grocery Code of Conduct consultation paper by 5pm on **5 July 2023**.

Please send your submission form to:

- competition.policy@mbie.govt.nz with the subject line “Grocery Supply Code of Conduct Consultation 2023”
- Competition Policy
Building, Resources and Markets
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington 6140
New Zealand

Release of information

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Name (first and last name)

Julian Benefield

Email

Privacy of natural persons

Is this an individual submission, or is it on behalf of a group or organisation?

On behalf of an organisation

Business name or organisation

Foodstuffs North Island Limited and Foodstuffs South Island Limited, together (**Foodstuffs**)

Is there any information you would like to be withheld? Please state which question/information you would like to be withheld? If applicable, please also provide a separate version of this form without the sensitive information.

There is no information in this submission that Foodstuffs would like to be withheld.

Transitional provisions for the Grocery Supply Code of Conduct

Questions 1 and 2 - Do you have any comments in relation to **the transitional provisions** in the Code, in particular any comments on:

- whether the transitional provisions could be improved? (see Schedule 1)
- whether there may be unintended consequences as a result of the transitional provisions?

Please type your submission below.

Question 1 – improvements on the transitional provisions

Foodstuffs comments as follows, in relation to the transitional provisions in the Draft Grocery Supply Code of Conduct (**Code**) (and the other parts of the Grocery Industry Competition (Grocery Supply Code) Regulations 2023 (**Regulations**) relevant to the transition period):

- The Australian Food and Grocery Code of Conduct (**Australian Code**) contemplated a 12-month grace period within which non-complying existing agreements would be exempt from the Australian Code's provisions.
- More specifically, it allowed a 6-month period to make offers to suppliers to rectify non-compliances and, once those offers were accepted, allowed a further 6-month period to fully amend the relevant agreement accordingly (subject to the 12-month longstop from when the relevant retailer was bound).
- Foodstuffs' view is that the timeframes contemplated by the Australian Code are appropriate and provided an effective transition to the code environment in Australia. The contents of grocery supply agreements are at the heart of the Code. Foodstuffs has more than 2,500 suppliers. Generally, agreements with suppliers are a collection of legal and commercial terms contained in various documents and correspondence. Also, Foodstuffs members have the ability to negotiate and agree particular terms with suppliers that form part of the grocery supply agreement(s) with the relevant supplier.
- Having regard to the above, the timeframes contemplated by the Australian provisions accurately reflect the significant time and resources required by all parties to:
 - o accurately identify and mutually agree the documents and terms which form the basis of the existing grocery supply agreement;
 - o engage in a genuine and collaborative negotiation process and agree appropriate amendments to those agreements; and
 - o collate and finalise the amendments to produce clear and well-considered agreements that are the foundation for compliance with the Code going forward.
- Accordingly, Foodstuffs submits that the proposed transitional provisions are amended by changing the definition of grace period to "the period ending **12** months after commencement". This still requires an offer to be made to suppliers within the 6-month period currently contemplated but provides a more realistic timeframe for orderly and mutually satisfactory discussions and negotiations.
- Foodstuffs notes that the transitional provisions only address the process of bringing existing agreements into compliance with the Code. Significant work will be required in respect of the processes and policies to ensure that new grocery supply agreements and related conduct comply with the Code.
- It is therefore important that the commencement date of the Regulations (and the Code) is at least 6-months after the Regulations are made.

Question 2 – unintended consequences of transitional provisions

With regard to unintended consequences, Foodstuffs is concerned that the proposed transitional provisions will place undue stress on relevant parties (including suppliers) and risk compromising the purpose of the Code as set out in the Grocery Industry Competition Act 2023 (in particular, promoting transparency and certainty about the terms of agreements). The transitional provisions

are particularly important in the context of the Code given the proposed penalties for non-compliance are significantly higher than those contemplated by the voluntary prescriptive Australian Code.

Part 2 - Requirement for retailers to act in good faith

QUESTION 3: Schedule 2, Part 2, clause 6 (obligation for retailers to act in good faith when dealing with suppliers).

- Are there any ways in which this clause could be improved?

Please type your submission below.

Foodstuffs supports this clause in its current form.

Part 3 - Content of Grocery Supply Agreements and variations to supply agreements

QUESTION 4: Schedule 2, Part 3, clause 7 (requirement for supply agreements to be in writing and to be retained) and **clause 8** (matters to be covered by supply agreements).

- Are there any ways in which clauses 7 and 8 could be improved to provide greater transparency and certainty to suppliers?

Please type your submission below.

Foodstuffs supports these clauses in their current form.

QUESTIONS 5 AND 6: Schedule 2, Part 3, clause 9 (unilateral variations to grocery supply agreements)

- Is this clause flexible enough to allow for reasonable unilateral variations to be made to supply agreements?
- Will this clause be effective in preventing retailers from using their negotiating power to make unreasonable unilateral variations?
- Are there any ways where you consider that the drafting could be improved?

Please type your submission below.

Question 5 – flexibility of clause

Foodstuffs believes that the clause has sufficient flexibility in its current form.

Question 6 – effectiveness of clause in preventing use of negotiating power to make unreasonable variations

Any unilateral variation must be contemplated by the grocery supply agreement, reasonable in the circumstances, and the retailer's conduct would be subject to the overarching duty of good faith. This appears to offer sufficient protection against retailers using their negotiating power to make unreasonable unilateral variations.

QUESTIONS 7 and 8: Schedule 2, Part 3, clause 10 (retrospective variations to grocery supply agreements).

- Will there be any unintended consequences as result of how these provisions are drafted?
- Are there any circumstances where retrospective variations should be permitted? If so, please explain these circumstances.

Please type your submission below.

Question 7 – unintended consequences of drafting

Foodstuffs is not aware of any unintended consequences of the current drafting of these provisions and supports the provisions in their current form.

Question 8 – circumstances where retrospective variations should be permitted

Foodstuffs is not aware of any circumstances where retrospective variations should be permitted.

Part 4 - General conduct provisions

QUESTIONS 9 and 10: In relation to Schedule 2, Part 4, clause 11 (transport or logistics services).

- Are there any ways in which this clause could be improved to support transport and logistics arrangements which suit both parties?
- Will there be any unintended consequences as result of how these provisions are drafted?

Please type your submission below.

Question 9 – ways to improve the clause

Foodstuffs has no particular objection to this clause. For absolute clarity, Foodstuffs submits that the words "to deliver goods to the retailer" should be added at the end of clause 11(1). This just puts beyond doubt that a retailer can specify to a supplier where the goods are to be delivered to, which may be the retailer's distribution centre (and such distribution centre should not be part of a logistics service for the purpose of this clause).

Question 10 – unintended consequences of drafting

Subject to our suggested clarification, Foodstuffs is not aware of any unintended consequences as a result of how these provisions are drafted.

QUESTIONS 11, 12 and 13: Schedule 2, Part 4, clause 12 (payments to suppliers).

- Are there any ways in which this clause could be improved to help ensure timely payments and give appropriate clarity over payments terms for suppliers?
- Do you think a maximum payment period should be set by the Code?
- If a maximum payment time is set, do you think 20 calendar days from receipt of invoice is appropriate?

Please type your submission below.

Question 11 – ways to improve the clause

Foodstuffs is committed to paying its suppliers on time in accordance with agreed terms (including the provision of accurate invoices by the supplier), and supports this clause in its current form (including in respect of set-off).

Question 12 – maximum payment period

Foodstuffs believes that the requirement for payments to be made within a reasonable time is the appropriate balance between allowing flexibility and prescription. For example, different timeframes may apply across different categories and as noted by MBIE, setting a maximum payment period risks that period becoming the industry norm.

Question 13 – 20 calendar days as a maximum payment time

As noted above, Foodstuffs is of the strong view that it is not appropriate for the Code to set a maximum payment time (including the suggested 20 calendar days). Current systems are well understood by suppliers and reflect a standard maximum due date of month end following the month in which the invoice is received (noting that shorter payment times can apply, generally with agreed settlement discounts).

This is consistent with the approach taken in respect of the Business Payment Practices Bill. Before that Bill, MBIE consulted on a proposal to introduce legislation that defined specific requirements for maximum payment periods, after which suppliers could enforce a right to charge interest or a penalty fee. During the consultation process Foodstuffs submitted it was strongly opposed to a legal maximum payment term in circumstances where this term would be shorter than current (and what would be considered reasonable) industry practice.

As MBIE has recognised, the Business Payment Practices Bill and regulations do not make judgements on payment practices or regulate maximum payment times. Foodstuffs supports this new direction and submits that the Code should similarly refrain from regulating maximum payment times, to ensure consistency across the other parts of the grocery industry, and the wider economy.

Foodstuffs repeats the submissions that it made in April 2020 on a one-size-fits-all 20-day maximum payment period, in particular noting that such maximum would:

- result, in some instances, in Foodstuffs settling invoices prior to being paid for goods by member stores (so, still bearing the inventory holding costs and risks); and
- have an immediate and detrimental impact on the capital structure of Foodstuffs and indeed any retailer that is or becomes subject to the Code.

QUESTIONS 14 and 15: Schedule 2, Part 4, clauses 13 and 14 (payments for shrinkage and wastage)

- Are there any ways in which this clause could be improved to ensure more efficient and fairer allocation of costs due to shrinkage and wastage?
- Is the six-month timeframe set out in clause 14(2)(g) appropriate? Do you consider that this timeframe should be shorter (for example, 30 days) or longer (for example, 12 months)?

Please type your submission below.

Question 14 – improvements to ensure more efficient and fairer allocation of costs

Foodstuffs supports the position in clause 13 relating to shrinkage payments.

With regard to wastage payments in clause 14, Foodstuffs understands that in Australia a mutually agreeable trading term dealing with wastage is market practice within their code environment. The focus of the equivalent to clause 14 in the Australian Code is to prevent *additional* charges for wastage. Accordingly, MBIE may wish to clarify that clause 14 does not prevent retailers and suppliers from agreeing to a minor damage allowance (**MDA**) or similar as an alternative to the higher cost model involving seeking credits for specified low value wastage on a case-by-case basis (with resulting inefficiency and transaction costs). The intent of an MDA is to reduce industry costs as a whole, and be principled and efficient in terms of risk allocation (given the volume of products involved and potential administrative burden associated with alternative options). The terms of an MDA can also reflect particular features of the New Zealand environment (such as the role of suppliers in merchandising in-store).

Question 15 – 6-month timeframe

Foodstuffs has no particular concerns or objections to the 6-month deadline for wastage claims.

QUESTIONS 16-20: Schedule 2, Part 4, clauses 15, 16 and 17 (payments as a condition of being a supplier, payments for a retailer's business activities and funding of promotions).

- Are there any ways in which these clauses could be improved to ensure more efficient and equitable sharing of costs?
- Should payments as a condition of supply be allowed in cases other than for new products?
- Is the description of what constitutes a new product, set out in clause 15(2)(ii), appropriate?
- Should clause 17 include an additional restriction which prohibits retailers from requiring suppliers to fully fund the cost of promotions?
- Do you have any other comments on these clauses?

Please type your submission below.

Question 16 – improvements to ensure more efficient and equitable sharing of costs

Clause 15 – Foodstuffs supports this clause in its current form.

Clause 16 – Foodstuffs supports this clause in its current form, noting that responsibility for merchandising in New Zealand and associated costs is a matter which will need to be addressed on a supplier-by-supplier basis (traditionally in New Zealand, suppliers have been responsible for merchandising albeit it is an area of ongoing commercial evolution). Accordingly, it is important for the retailer to be able to run its store in the most efficient and effective manner across its

significant supplier base, and for the parties to retain the flexibility to reasonably allocate merchandising costs (and the costs of other retailer business activities listed in clause 16) in the grocery supply agreement.

Clause 17 – Foodstuffs supports this clause in its current form.

Question 17 – payments as condition of supply other than for new products

Foodstuffs is comfortable with relevant payments being limited to promotions, or in relation to new products, as set out in clause 15. This is on the basis that other payments linked to particular activities (such as media) would be dealt with under clause 16 as a payment in respect of a business activity, which would need to be reasonable.

Question 18 – definition of new product

Generally, Foodstuffs supports this definition on the basis that it mirrors the Australian Code.

However, Foodstuffs' stores operate under a number of banners with different product range offerings and scale. So, a product may be stocked by stores operating under the Four Square banner but a decision needs to be made as to whether to expand the product into stores operating under the New World or PAK'nSAVE banner or vice versa. Such a decision is likely to involve significant risk and investment that is analogous to a decision to stock or list the product more generally.

Accordingly, Foodstuffs submits that the reference to "25% or more of its stores" should rather be to "25% or more of its stores within the banner that is to stock or list the relevant grocery product".

Question 19 – prohibition on requiring suppliers to fully fund promotions

Foodstuffs does not believe a prohibition of this type is necessary or appropriate in the New Zealand market. As is the case in Australia, retailers and suppliers should be permitted to agree a reasonable allocation of costs for promotions (which ultimately must be reached having regard to the retailer's obligation to act in good faith). Further restrictions are not required.

Question 20 – further comments

Foodstuffs has no further comments on these clauses.

QUESTIONS 21-25: Schedule 2, Part 4, clauses 18 and 19 (delisting of products and process requirements relating to delisting).

- Are there any ways in which these clauses could be improved to provide greater certainty and transparency regarding delisting decisions?
- Will requiring a range review, ahead of any delisting decisions, be an effective way of ensuring fair and transparent delisting decisions?
- Does providing six-month notice of delisting fresh fruit and vegetables provide sufficient warning for such suppliers?
- Will there be any issues in complying with the process requirements set out in clause 19?
- Are there any aspects of these clauses which may have unintended consequences?

Please type your submission below.

Question 21 – improving clauses for greater certainty and transparency

Foodstuffs supports these clauses in their current form to the extent that they mirror the Australian Code. In addition to the issues raised below, clause 18 departs from the Australian Code by imposing a reasonableness standard in the list of examples that are considered genuine commercial reasons, which Foodstuffs does not support for the reasons set out below.

Clause 8(e) of the Code requires quantity and quality requirements to be set out "in clear terms" in grocery supply agreements. Retailers are required to reach such agreements in good faith, including without duress. Imposing an additional reasonableness requirement that only applies in the context of delisting (clause 18) creates uncertainty and increases the prospect for dispute between retailers and suppliers. Parties may have legitimate, yet differing, views on what is reasonable. The position is the same in respect of sales and profitability targets and also delivery requirements in clause 18(3). Accordingly, the additional requirement of reasonableness should be removed, and the clause aligned with the Australian Code.

Question 22 - effectiveness of range review prior to delisting decision

Delisting may be an outcome of a range review. However, it is very important that retailers retain the ability to also delist a product for genuine commercial reasons independent of any range review process. For example, there may well be particular concerns regarding a supplier that are legitimate but are unrelated to the supplier's products or the range of products currently stocked by the retailer (e.g., a modern slavery, solvency, or a supplier's ethics or governance processes). These concerns are of a type that are unlikely to be addressed by a range review being undertaken in accordance with the retailer's product ranging principles (which should focus on the commercial performance and variety of products on a retailer's shelves to meet consumer demand).

The narrow carve-outs in clause 19(2) do not address the above issue. The carve-outs are appropriate in the context of determining whether the retailer must provide notice of delisting. However, for the reasons discussed above, the carve-outs are not fit for purpose in the context of determining whether a range review is required before delisting can occur.

In Foodstuffs' view, it is appropriate to take the approach in the Australian Code which separately addresses range reviews and delisting processes, but requires principled decision-making and transparency in both.

The approach taken in the Code is also problematic in the context of fresh produce, where the concepts of delisting and range reviews are not appropriate. This is discussed further below.

Question 23 – notice of delisting fresh fruit and vegetables

Foodstuffs submits that the 6-month notice period in respect of delisting fresh fruit and vegetables is not appropriate. Unlike dry groceries, fresh fruit and vegetables are not "listed" in the manner which is contemplated by the Code. In summary:

- The concepts of listing and range reviews assume manufactured products with a consistent available supply. This is not the case for fresh produce which has a range of attributes which are different from other grocery categories.
- For example:
 - o Fresh produce generally is not branded (the majority is sold "loose") and products are substitutable.
 - o Product lines number in the hundreds and the extent to which a particular supplier/grower is on-shelf is generally determined by a multitude of supply factors including weather, transport challenges, seasonality, and disease etc.
 - o Geography matters in produce and there is a need for geographic flexibility based on availability of produce in particular regions. Produce is also procured directly by

stores to support local growers in the region where a store is located.

- To address these issues Foodstuffs deals with a range of primary and secondary suppliers. For example, Foodstuffs North Island has approximately 50 leafy crop suppliers.
- Supply chains are complex with products being procured at both co-operative and store level either directly from one or more growers (which can result in better prices for consumers) or from a wholesaler.
- The New Zealand market is very volatile and dynamic with growers making regular decisions around who they sell to based on returns available on a particular day or week.
- Pricing is also a key part of the supply and demand equation (with lower prices reflecting excess supply and higher prices due to limited supply in the market). Many of these factors are outside the control of the retailer and will require dynamic decision making. For example, one factor that might stimulate demand is where food kit suppliers are looking for products in respect of particular recipes or promotions.
- Having regard to the above, Foodstuffs submits that the Code's 6-month (or any one size fits all) notice period of "delisting" fresh produce appears unworkable. It would also be inconsistent with the objective of maximising freshness and value for consumers and reducing food waste in the supply chain.

Question 24 – compliance with process requirements

Provided that the Code is amended to address the issues identified above, Foodstuffs does not believe there are any material issues arising from compliance with the proposed process requirements at a co-operative level.

With regard to its members, individual stores regularly make what might technically be regarded as "delisting" decisions. This may include deciding to order a product from the co-operative's distribution centre or directly from the supplier to "give it a go" and then choosing not to stock that product again. Where the product is ordered from the co-operative's distribution centre, the supplier may be completely unaware that this process had occurred and in many cases it would have no material impact on a suppliers' business. Treating such decisions by members as delisting for the purpose of the Code appears to create unnecessary administrative steps without the corresponding protection related benefits to suppliers.

For this reason, Foodstuffs recommends that the delisting provisions apply only at a co-operative level unless any reduction by a store has or is likely to have a material effect on the supplier. As well as addressing the logistical issues discussed above, this will ensure that the Code operates consistently between Foodstuffs and Woolworths. This is because under the Code, Woolworths is free to select which stores stock particular products without triggering a delisting (provided that there is no overall reduction in demand which materially impacts demand).

Also, Foodstuffs assumes that where a delisting decision is made at the co-operative level, only the co-operative will be required to undertake the relevant processes (albeit the delisting itself will take effect at a store level).

These issues are discussed further in response to question 57.

Question 25 – unintended consequences of clauses

With regard to the mandatory requirement for range reviews in all delisting scenarios, Foodstuffs' concern is that this will result in both process inefficiencies and suboptimal outcomes for consumers in terms of keeping problematic suppliers on shelf longer than would be viewed as acceptable. Requiring range reviews in all circumstances also risks undermining the purpose of range reviews and risks such reviews becoming a "tick-box" exercise to address supplier issues, rather than product performance issues.

With regard to the requirement for 6-months' notice to "delist" fruit and vegetables, as discussed above, Foodstuffs has significant concerns about how this requirement would work in practice. Accordingly, Foodstuffs submits that the result would be a materially less efficient and effective supply chain.

QUESTIONS 26-30: Schedule 2, Part 4, clause 20 (funded promotions).

- Are there any ways in which this clause could be improved?
- Do you have any other concerns regarding investment buying which are not addressed by this draft section of the Code?
- What effect will clause 20 have on current practice regarding investment buying and funded promotions? Will there be flow-on impacts for retail prices?
- Instead of the requirements set out in clause 20(2)(c) – would it be better to require retailers to sell any over-ordered product, bought at the supplier's reduced price, at the price listed during the promotional period?
- Do you have any other comments on this clause or the practice of investment buying generally?

Please type your submission below.

Questions 26 and 27 – ways to improve the clause and other concerns

Investment buying, which takes place with agreement of the supplier, is a key tool in the current environment (with frequent promotions) to enable Foodstuffs' members to achieve the best cost prices and ultimately lower prices for customers. Clause 20 clearly goes beyond regulating procedural matters (i.e., how businesses in the market for the acquisition of grocery products behave). Rather, it amounts to substantive and significant regulation. Foodstuffs is very concerned that no cost-benefit or other economic analysis has been undertaken to assess the impact on the supply chain and consumers in the New Zealand environment. Further, Foodstuffs understands that due to market practice in Australia the equivalent clause in the Australian Code is essentially untested.

As discussed in Foodstuffs' submission on MBIE's July 2022 consultation paper, currently suppliers maintain high non-promotional cost prices (to retain effective control of promotional programmes) and enable promotional pricing through the application of specific discounts. Accordingly, the "discount" a supplier agrees to apply for a limited time becomes critical in terms of reducing the cost of the product, and the key mechanism for Foodstuffs' members to maintain low prices for customers is to buy forward from one promotional discount to the next promotional discount.

Investment buying is also important from a supplier perspective, as it enables suppliers to discount the cost price of product and incentivises stores to purchase high volumes of product and promote in store, and can be used by suppliers to achieve sales targets, move older stock, sell through stock in advance of a new product being launched and provide working capital.

Accordingly, in the New Zealand context, Foodstuffs submits that investment buying should be allowed as agreed between retailers and suppliers in the relevant grocery supply agreement, provided it is reasonable in the circumstances. This position was scored highest-equal by MBIE in its July 2022 consultation paper. It is also important that such agreement between the retailer and the supplier would need to be reached in good faith, e.g., without duress.

The above approach allows the parties the flexibility to undertake efficient commercial

transactions while safeguarding suppliers' interests through the requirement of reasonableness and good faith. The general principles of the Code will apply to ensure that agreements are genuinely consensual. This addresses the concerns identified by the Commerce Commission during the retail grocery market study and in relevant literature, without the risk of the significant unintended consequences discussed in this submission.

The Code is intended to be a living document, and the Commerce Commission will be well-placed to assess the above approach when it reviews and reports on the Code within the Code's first 2 years. The scale and materiality of the issues raised means that as a minimum, any decision to prohibit investment buying should only be made if justified by concerns identified as part of that review and report.

Question 28 – effects on current practice and flow-on impacts for retail prices

As discussed above, the proposal would have a very significant effect on current practice given that investment buying is a key tool in the current environment (with a significant number of promotions). Foodstuffs is concerned that effectively outlawing investment buying as proposed will restrict Foodstuffs members' ability to offer the lowest retail prices to consumers. It will also:

- result in inefficiencies due to increased administration and monitoring costs; and
- potentially increase waste, to the extent that mutually beneficial arrangements to clear product stock are curtailed due to "overordering" concerns.

Question 29 – whether it would be better to require retailers to sell over-ordered product to customers at the promotional price (rather than selling at a higher price and compensating the supplier)

For the reasons discussed above, either option raises significant concerns. If clause 20 in its current form is to be retained, Foodstuffs' initial view is that it may be preferable to require the products to be sold through at the promotional price. However, this effectively amounts to price control regulation and gives rise to very substantial costs and administrative issues for both suppliers and retailers. Further, this may also give rise to issues under the Fair Trading Act 1986, due to the uncertain and extended length of any promotion.

Question 30 – other comments

Foodstuffs would value the opportunity to engage further with MBIE on this critical issue.

As noted above, there is a lack of Australian precedent as to the application of the investment buying restriction. This means, for example, there is no precedent as to what amounts to overordering for the purposes of the clause.¹ This creates considerable uncertainty for both suppliers and retailers.

¹ The UK Code applies an "all due care" standard and only requires compensation where this standard is not met.

QUESTIONS 31-34: Schedule 2, Part 4, clause 21 (fresh produce standards and quality specifications).

- Does this clause effectively address issues faced by suppliers of fresh fruit and vegetables?
- Is the 24-hour cut off proposed for accepting or rejecting fresh produce appropriate?
- Is the 48-hour cut off for notifying suppliers when fresh produce has been rejected appropriate?
- Should the Code extend similar protections to suppliers of other perishable produce, such as seafood and meat?

Please type your submission below.

Questions 31-33 - fresh produce standards and quality specification timeframes

Foodstuffs generally supports the clauses in their current form including the proposed acceptance/rejection regime on the basis that they mirror the Australian Code. However, Foodstuffs believes MBIE should consider whether the 24-hour cut off period should commence on delivery to the retailer's store (rather than to a distribution centre). This is because defects may not be reasonably discoverable until the goods are unpacked in stores.

Question 34 – extension of clause to suppliers of other perishable produce (seafood and meat)

Foodstuffs understands that the additional protections offered by the Australian Code arose from particular concerns raised by fresh fruit and vegetable suppliers, noting the particular imbalance of bargaining power between individual growers and supermarkets (as well as the perishable nature of the product). Applying this reasoning, Foodstuffs' view is that it would be inappropriate and unnecessary for the protections to be extended to other perishable products such as seafood and meat. For example, beef and lamb are significantly less perishable than fresh produce. Also, for both seafood and red meat, Foodstuffs is one purchaser among many with exporters driving the New Zealand markets (noting that at least 85% of these products are exported). Foodstuffs is competing with markets overseas for the supply of these products.

QUESTIONS 35 and 36: Schedule 2, Part 4, clause 22 (no duress about supplying to competitors), **clause 23** (business disruption) and **clause 28** (freedom of association)

- Will clause 22 will be effective in preventing retailers from pressuring suppliers to desist from supplying other parties?
- Will these clauses have any unintended consequences?

Please type your submission below.

Question 35 – effect of clause 22

Foodstuffs supports clause 22 in its current form and believes it will be effective in preventing retailers from pressuring suppliers to desist from supplying other parties (together with section 36 of the Commerce Act 1986). As set out in Foodstuffs' submission on MBIE's July 2022 consultation paper, it is important that mutually agreed exclusivity arrangements which do not substantially lessen competition in any market continue to be allowed. These generally benefit both the retailer and the relevant supplier. For clarity, Foodstuffs submits that the Code should provide that steps taken to enforce a lawful exclusivity arrangement in accordance with any dispute resolution process set out in a grocery supply agreement would not breach clause 22 (on the basis such steps have effectively been pre-agreed).

Question 36 – unintended consequences of clause 22 (no duress about supplying to competitors), clause 23 (business disruption) and clause 28 (freedom of association)

Subject to our comments regarding exclusivity agreements, Foodstuffs does not believe the clauses are likely to lead to unintended consequences.

QUESTIONS 37 - 38: Schedule 2, Part 4, clause 22 (intellectual property rights and confidential information).

- Could clauses 24 and 25 be improved to adequately address issues relating to suppliers' intellectual property?
- Will clauses 24 and 25 support greater investment in product development?

Please type your submission below.

Question 37

Foodstuffs supports clauses 24 and 25 in their current form on the basis that they mirror the Australian Code.

Question 38

Suppliers will be in a position to comment on the extent to which the clauses will support greater investment in product development. Irrespective of the Code, Foodstuffs respects the intellectual property rights and confidential information of its suppliers.

QUESTION 39 (taonga and mātauranga Māori) : If you are a supplier, is there any part of your product or the production of your product which holds special cultural significance for you?

- If yes, are you aware of any issues with respect to the supply of your product which might require protection over or above those provided in clauses 24 and 25?
- Do you have any advice, feedback or recommendations about how the Code could provide these protections?

Please type your submission below.

N/A given Foodstuffs is not a supplier as contemplated by this question. Foodstuffs supports ways to protect the taonga and mātauranga Māori of our suppliers.

QUESTIONS 40 and 41: Schedule 2, Part 4, clause 26 (product ranging, shelf space allocation and range reviews).

- Are there any ways in which this clause could be improved, to help ensure greater transparency and consistency of decisions relating to range reviews and shelf allocation?
- Do you have any other comments on this clause?

Please type your submission below.

Questions 40 and 41

Foodstuffs supports clause 26 in its current form on the basis that it mirrors the Australian Code.

QUESTIONS 42-44: Schedule 2, Part 4, clause 27 (responses to price increase requests from suppliers).

- Will this clause help improve the process for seeking price increases?
- Is the timeframe for responding to a price increase appropriate?
- Are there classes of produce that may justify shorter time periods for response?
- Do you have any other comments on these clauses?

Please type your submission below.

Question 42 – Improving the price increase process

Foodstuffs expects that the increased transparency and consistency across the industry will help improve the process for seeking price increases.

Question 43 – response timeframe including for classes of produce

Foodstuffs is comfortable with the response times, noting that clause 27(1)(c) caters to an extent for the shorter timeframes and more dynamic pricing of fresh produce. Inevitably a degree of flexibility will be required when applying the regime outside products that have a list price which is updated from time to time. For example, in the case of fresh produce and other products where pricing is dynamic such as meat which is traded weekly based on schedules issued by meat processors. In this regard, the equivalent clause in the Australian Code appears to work without prescriptively catering for the multitude of different ways pricing is set across the range of products stocked by supermarkets.

Question 44 – other comments

Foodstuffs supports clause 27 in its current form on the basis that it generally mirrors the Australian Code.

Other general questions

QUESTIONS 45-48: (penalty levels).

- Do you think the maximum penalty is set at a level which will sufficiently deter non-compliance?
- Do you think the maximum penalty level is proportionate to the level of harm which may be caused by non-compliance?
- Are there any parts of the Code which should attract higher or lower tiers of penalty levels? If so, which parts, and why?
- Do you have any other comment on the maximum penalty levels which will apply to breaches of the Code?

Please type your submission below.

Question 45 – maximum penalty level

Foodstuffs anticipates that in the early stages of the Code's implementation an education-focused, rather than enforcement-focused, approach will be adopted. In this regard, the Commerce Commission extending its usual open-door policy to Code compliance will be important to both suppliers and retailers (reflecting a collaborative approach to achieve outcomes consistent with the objectives of the Code). Ultimately, Foodstuffs expects that conduct that is repetitive, systemic and/or at the more serious end of the scale will prompt enforcement action. Against this background, Foodstuffs' view is that the tier two maximum penalty level in the Code will be sufficient (and in some cases more than sufficient) to deter non-compliance. Foodstuffs notes that

in addition to the risk of pecuniary penalties, material non-compliance will likely result in significant supplier compensation through the dispute resolution process, together with adverse publicity. Any particularly egregious behaviour can also be addressed through the Fair Trading Act 1986's unconscionable conduct regime.

Question 46 – proportionality of maximum penalty

As Foodstuffs submitted to the Select Committee in respect of the Grocery Industry Competition Act 2023, the applicable maximum penalty for non-compliance with each provision of the Code is important. This is because when setting any actual pecuniary penalty the court will have regard to the applicable maximum, even if the relevant non-compliance is relatively minor. Therefore, consideration of which provisions are appropriately specified for each tier of maximum penalty must be properly considered and proportionate. This is also in the context of a Code which is largely drawn from Australia's voluntary industry code, which has a maximum penalty of AUD\$63,000.

Foodstuffs is absolutely committed to compliance with the Code. However, Foodstuffs supports the principle of matching effect with penalty and there are some examples where Foodstuffs believes that the maximum penalty is currently disproportionate to the level of harm caused by non-compliance with the Code. These are discussed below.

Question 47 – higher or lower penalty tiers

Foodstuffs has analysed relevant Code obligations and considered the extent to which non-compliance with those obligations should attract higher or lower tiers of penalty. This analysis is set out in schedule 1 of this submission. The analysis has been undertaken on the basis that Foodstuffs' submissions on the relevant Code provisions are accepted by MBIE.

Question 48 – other comments on maximum penalties

Foodstuffs has no additional comments on maximum penalties. Foodstuffs notes that in addition to civil pecuniary penalties, the Grocery Industry Competition Act 2023 contains a suite of remedies available to address non-compliance.

QUESTIONS 49 and 50: requirements to provide written statements when relying on the 'reasonableness' exemptions in the Code.

- Will requirements to provide written statements when relying on exceptions improve compliance and transparency in relation to the use of such exceptions?
- Will there will be significant costs or issues involved with complying with these requirements?

Please type your submission below.

Question 49 – written statements

Foodstuffs is concerned that requiring written statements will increase the administrative burden on retailers without any tangible increase in compliance and transparency in relation to reasonableness exceptions. Foodstuffs notes that the requirement for such written statements is not in the Australian Code and the suppliers have the option of proceeding by way of dispute resolution if they believe the retailer has acted unreasonably.

Question 50 – compliance costs

As noted above, Foodstuffs does have concerns regarding compliance costs (in particular, if Foodstuffs members are required to give notices for example, as discussed in relation to question 57).

Other proposals we are consulting on

QUESTIONS 51 and 52: payments for better positioning of groceries.

- Do you agree with the decision not to include restrictions from the Australian Code relating to payments for shelf allocation?
- Are you aware of any issues relating to payments for shelf positioning, or allocation, which may require specific protections in the Code, over and above those provided at clause 26?

Please type your submission below.

Foodstuffs has no particular views on whether the Code should include restrictions from the Australian Code relating to payments for better positioning of groceries or shelf allocation. In the case of Foodstuffs, its approach is that any better positioning of groceries is determined by customer insights and data rather than being linked to any additional payment by the supplier.

QUESTIONS 53 and 54: Changes to supply chain procedures.

- Do you agree with the decision not to include protections from the Australian Code relating to changes in supply chain procedures?
- Are you aware of any issues relating to changes to supply chain procedures which may require specific protections in the Code, beyond those included at clauses 8 and 9?

Please type your submission below.

Foodstuffs has no particular views on the decision regarding changes in supply chain procedures. If it is considered necessary to include additional protections, Foodstuffs supports the approach in the Australian Code regarding reasonable notice. Ultimately, this is likely to be a matter which is covered in the grocery supply agreement and within the general obligation to act in good faith.

QUESTIONS 55 and 56: Transfer of intellectual property rights.

- Do you agree with the decisions not to include protections from the Australian Code relating to the transfer of intellectual property rights?
- Are you aware of any issues relating to the transfer of intellectual property, beyond those dealt with at clauses 24 and 25?

Please type your submission below.

Question 55

As set out in its submission on MBIE's July 2022 consultation paper, Foodstuffs was generally supportive of the intellectual property related provisions in the Australian Code. Beyond this, Foodstuffs sees any decision to include, or not include, protections relating to intellectual property rights as a matter for MBIE.

Question 56

Foodstuffs is not aware of any particular issues relating to the transfer of intellectual property.

Final Questions

QUESTIONS 57 to 59: Final questions.

- Do you have any further feedback on the consultation draft of the Code, in addition to the points you have already raised?
- Are there any other provisions which are included in the Australian Code which may be beneficial in New Zealand?
- Are there any issues connected with supply of groceries to major retailers which are not addressed by the Code? If so, do you have any suggestions for how they should be addressed?

Please type your submission below.

Question 57 – Further feedback

Foodstuffs co-operative structure

As drafted, the entire Code will apply equally to all independently owned and operated members of the co-operative as well as the "head office" or support centre functions performed by the Foodstuffs co-operatives. Generally, Foodstuffs' view is that the current drafting of the Code (including the use of "retailer") is flexible enough to cater for the "retailer" being the co-operative or the Foodstuffs member where that member is independently performing a function covered by the Code.

The issue does not arise in Australia because while Metcash is party to the Australian Code, individual IGA stores are not. To address the particular features associated with a franchise model, Foodstuffs submits that the following clauses be considered:

"3 Interpretation

[...]

For the purposes of this code, a reference to a retailer's grocery supply agreement includes a supply agreement entered into by or on behalf of that retailer's franchisor."

This reflects that from a legal perspective, Foodstuffs members may not be party to a grocery supply agreement.

In the context of delisting, as discussed in response to question 24, Foodstuffs submits that its members should be excluded from the delisting process unless any reduction by an individual store has or is likely to have a material effect on the supplier. Also, it is important that the Code reflects the ranging functions that are performed by each co-operative. In this regard, Foodstuffs submits the following addition to clause 18:

"18 Delisting products

[...]

(7) A retailer that removes grocery products from that retailer's range solely in accordance with an instruction from that retailer's franchisor is not delisting those products for the purpose of this clause 18."

This addition makes clear that where a co-operative makes a delisting decision, each Foodstuffs member is not required to separately comply with the delisting process set out in the Code (for example, the supplier would otherwise potentially receive notices from every Foodstuffs member, numbering in the hundreds). Of course, the co-operative in this scenario would be bound to comply with the delisting process in the Code. In circumstances where a Foodstuffs member makes an independent decision to remove a product from its range, the delisting process in the

Code would apply to that Foodstuffs member where the removal has or is likely to have a material effect on the supplier.

Opportunity for additional consultation/cross submissions

MBIE has a number of key decisions to make following consultation on the exposure draft of the regulations and Code. Given the potential impact of these decisions on the industry and ultimately consumers, Foodstuffs would value the opportunity to provide further submissions and commentary on any additional matters including those raised by submitters in the course of the consultation.

Questions 58 and 59 – Australian Code and unaddressed issues

From Foodstuffs' perspective, the Code appears to comprehensively address the issues raised during the market study and the Code consultation process to date.

Schedule 1 – Penalty Tiers

Code provision	Provision summary	Draft tier	FS' tier	Rationale
Clause 5(2)	This requires retailers to offer to vary existing agreements so that they are consistent with the Code within 6-months.	2	4	This obligation is a key step to ensure the implementation of the Code. However, Foodstuffs submits that tier 4 is sufficient to ensure compliance, and reflects the administrative nature of the obligations and the upskilling that will be required by retailers and suppliers to ensure effective implementation.
Clause 6(1) and (2)	The retailer must at all times deal with suppliers in good faith. Any provision that purports to limit good faith obligations cannot do so.	2	2	To the extent that conduct is sufficiently serious to justify enforcement action, Foodstuffs believes tier 2 is appropriate (albeit Foodstuffs expects that the maximum penalty under the relevant tier will only be sought/imposed in very serious cases)
Clause 7(1) and (2)	The grocery supply agreement is required to be written, in plain English, provided to the supplier and retained by the retailer for 7-years.	2	4	While grocery supply agreements are important to the Code, Foodstuffs submits that tier 4 is sufficient to ensure compliance, and reflects the administrative nature of the obligations and the extent of potential harm from non-compliance.
Clause 8:	The grocery supply agreement must cover delivery, rejection, payment, term, quantity and quality, cancellation, and delisting.	2	4	Foodstuffs recommends tier 4 on the basis that this is primarily a process obligation rather than one involving substantive conduct which has greater potential to harm the supplier.
Clause 9(1) and (5):	Unilateral variation of grocery supply agreement is a breach of the Code. If the retailer is making a unilateral variation under an exception in 9(2), they must provide a clear and full written explanation of the exception relied on and why the retailer	2	4	As above. We note that if a unilateral variation was not made in good faith, it would breach the good faith obligation in the Code. Accordingly, tier 4 is a sufficient penalty for non-compliance with this obligation.

Code provision	Provision summary	Draft tier	FS' tier	Rationale
	considers that the variation is reasonable in the circumstances.			
Clause 10	Retailers are not permitted to make any variation of grocery supply agreement with retrospective effect.	2	2	To the extent that conduct is sufficiently serious to justify enforcement action, Foodstuffs believes tier 2 is appropriate.
Clause 11(1)	Retailers are not permitted to directly or indirectly require suppliers to use particular transport or logistic services.	2	4	Tier 4 appears more appropriate on the basis of the extent of potential harm to the supplier.
Clause 12(1), (2), and (4)	<p>Payments to suppliers must be paid in accordance with an agreed timeframe, and nevertheless reasonable timing.</p> <p>If the retailer wishes to set-off an amount, it must be in the grocery supply agreement and with voluntary consent of the supplier in writing, or reasonable in the circumstances. The supplier can request a clear and full written explanation.</p>	2	2	To the extent that conduct is sufficiently serious to justify enforcement action, Foodstuffs believes tier 2 is appropriate.
Clause 13(1)	Payments for shrinkage are prohibited, whether they are direct or indirect, and they cannot be included as a term in a grocery supply agreement.	2	4	Given the relatively small quantum of any shrinkage payments likely to be prohibited by the Code, Foodstuffs believes that tier 4 is sufficient to ensure compliance.
Clause 14(1), (3), and (5)	<p>Retailers are prohibited from requiring payments for wastage while the groceries are under the effective control of the retailer and their associated parties.</p> <p>There are some exceptions to this in clause 14(2), and the penalty applies to clause 14(3) which requires a clear and full written explanation of why the payment is reasonable and</p>	2	4	Payments for wastage are not prohibited outright and will be permitted in a range of circumstances that will require careful analysis and judgement. Mutually acceptable agreements may be entered into in good faith but ultimately found to be unreasonable or otherwise in breach of the Code having regard to all the circumstances which may or may not be known to the parties at the time. For this

Code provision	Provision summary	Draft tier	FS' tier	Rationale
	<p>meets an exception of clause 14(2).</p> <p>Wastage payments can be included under the grocery supply agreement, but where a supplier wishes to negotiate wastage payments, there is a penalty for any retailer that attempts to negotiate variations unrelated to wastage.</p>			<p>reason, tier 4 appears more appropriate than tier 2 penalties. In Foodstuffs' view, tier 2 penalties should instead be reserved for breaches that involve some element of wrongdoing.</p>
Clause 15(1) and (4)	<p>It is prohibited to require payments as a condition of being a supplier. The exceptions to this prohibition are set out in clause 15(2). Clause 15(4) requires a clear and full written explanation of any exemption relied upon by the retailer.</p>	2	4	<p>Similar to wastage and a number of other aspects of the Code, compliance with this clause will require careful analysis and judgement and there will be scope for legitimately different views as to what amounts to, for example, a reasonable payment for the purposes of the clause. For this reason, tier 4 is appropriate.</p>
Clause 16(1) and (7):	<p>Unless set out in the grocery supply agreement and reasonable in the circumstances, retailers are prohibited from requiring payments for retailer's business activities (undertaken by the retailer in the ordinary course of carrying on a business as a retailer).</p> <p>If requiring a payment, clause 16(7) requires a clear and full written explanation by the retailer.</p>	2	4	As above.
Clause 17(1) and (5)	<p>Unless set out in the grocery supply agreement and reasonable in the circumstances, retailers are prohibited from requiring the supplier to fund part or all of a promotion.</p> <p>If requiring a payment, clause 17(5) requires a clear and full</p>	2	4	As above.

Code provision	Provision summary	Draft tier	FS' tier	Rationale
	written explanation by the retailer.			
Clause 18(1):	When delisting products, the Code requires retailers to follow the terms of the grocery supply agreement, have genuine commercial reasons and undertake a range review. Delisting without one of these elements will incur the penalty.	2	2	Given the significance of a delisting decision to a supplier, Foodstuffs believes tier 2 is appropriate (albeit Foodstuffs expects that maximum penalty under the relevant tier will only be sought/imposed in very serious cases).
Clause 19(1), (3), (4), and (5):	<p>This clause sets out process requirements relating to delisting.</p> <p>Clause 19(1) requires reasonable written notice supplying a delisting decision which includes genuine commercial reasons, a mechanism to review the decision and, for fresh fruit and vegetables, 6 months' notice. There are exceptions in clause 19(2) (time pressures or persistent issues) which require a clear and full written explanation in clause 19(5).</p> <p>Clause 19(3) requires a retailer to promptly comply, in writing, to a supplier's request for further information.</p> <p>Clause 19(4) requires a retailer to promptly review decisions and provide notice of the outcome of the review, if requested to do so by a supplier.</p>	2	4	Given these obligations are procedural in nature, Foodstuffs believes that tier 4 is appropriate.
Clause 20(1), (2), and (3):	<p>If suppliers agree to fund promotions, retailers are required to give reasonable written notice before holding a relevant promotion.</p> <p>A retailer cannot overorder in connection with a relevant promotion and quantity</p>	2	4	Similar to a number of other aspects of the Code, compliance with this clause will require careful analysis and judgement and there will be scope for legitimately different views as to key aspects, for example, what

Code provision	Provision summary	Draft tier	FS' tier	Rationale
	<p>calculations must be transparent. A retailer must pay the supplier the difference between the supplier's promotional price and the supplier's full price for any over-ordered product sold for more than the promotional price.</p> <p>Once an order is made for a funded promotion, a retailer cannot cancel or reduce the volume by more than 10% without the supplier's consent. However, this is allowed under clause 20(4) if the retailer provides reasonable written notice or compensation for costs, losses or expenses directly correlated with the cancelation or reduction.</p>			<p>amounts to "overordering". For this reason, tier 4 is appropriate.</p>
<p>Clause 21(2), (3), (4), (5), (6), (7) and (8):</p>	<p>As required by clause 21(2), any fresh produce standards or quality specifications must be provided in clear, unambiguous, and concise written terms.</p> <p>As required by clause 21(3), any fresh produce delivered in accordance with the above must be accepted by the retailer.</p> <p>As required by clause 21(4), fresh produce can only be rejected if does not meet the standards, is within 24 hours of delivery and has not already been accepted by the retailer.</p> <p>As required by clause 21(5), written notice of the above must be provided within 48 hours of the rejection.</p> <p>As required by clause 21(6), any labelling, packaging, or preparation requirements must</p>	<p>2</p>	<p>4</p>	<p>Foodstuffs recognises the importance of these types of obligations for fresh produce suppliers. However, these obligations are procedural in nature, in contrast to the obligations where breaches would involve an element of substantive wrongdoing or unethical conduct. Accordingly, tier 4 is appropriate here.</p>

Code provision	Provision summary	Draft tier	FS' tier	Rationale
	<p>be written in clear, unambiguous, and concise terms.</p> <p>Unless due to a change of law, reasonable notice for changing these requirements is required by clause 21(7). Reasonable notice is determined by existing stock held by suppliers and any stock coverage contemplated by the grocery supply agreement.</p> <p>As required by clause 21(8), any claim for damaged grocery products or shortfalls must be made within a reasonable timeframe, and no later than 30 days after delivery.</p>			
Clause 22	It is prohibited for a retailer to place a supplier under duress that has the purpose, effect or likely effect of preventing them from supplying to competitors	2	2	To the extent that conduct is sufficiently serious to justify enforcement action, Foodstuffs believes tier 2 is appropriate.
Clause 23	Unless they have reasonable grounds, it is prohibited for retailer to threaten a supplier with business disruption or termination of a grocery supply agreement.	2	2	To the extent that conduct is sufficiently serious to justify enforcement action, Foodstuffs believes tier 2 is appropriate.
Clause 24(1) and (3)	A retailer is required to respect the intellectual property rights of suppliers. This section explicitly includes private label product development and production.	2	2	To the extent that conduct is sufficiently serious to justify enforcement action, Foodstuffs believes tier 2 is appropriate.
Clause 25(2) and (3)	<p>Any confidential information disclosed in connection with the supply of grocery products must only be used for that purpose and disclosed to necessary people.</p> <p>Retailers are required to establish and monitor systems</p>	2	2	To the extent that conduct is sufficiently serious to justify enforcement action, Foodstuffs believes tier 2 is appropriate.

Code provision	Provision summary	Draft tier	FS' tier	Rationale
	to ensure confidentiality compliance.			
Clause 26(1), (2), (3), (4), and (5)	<p>As required by clause 26(1), a retailer must publish or provide all suppliers with their product ranging and shelf space allocation principles.</p> <p>As required by clause 26(2), the retailer must abide by these principles and keep them up to date.</p> <p>As required by clause 26(3), retailers must provide impacted parties with reasonable advance notice of a range review, including its purpose and key decision-making criteria.</p> <p>As required by clause 26(4), following a range review retailers must give suppliers a reasonable period to discuss the outcome.</p> <p>As required by clause 26(5), retailers must apply their product ranging and shelf space allocation principles without discrimination (including discrimination in favour of private label products).</p>	2	<p>Tier 2 for clause 26(2) and (5)</p> <p>Tier 4 for clause 26(1), (3) and (4)</p>	The relevant obligations identified as being appropriate for tier 4 are procedural in nature.
Clause 27(2), (3)(b), (5), and (6)	<p>As required by clause 27(2), retailers must respond to price increases within 30 days.</p> <p>As under clause 27(3)(a), if a retailer requests further information, the period does not start until the information is received.</p> <p>As required by clause 27(3)(b), if a retailer requests further information, it must be requested within a reasonable</p>	2	4	These obligations are procedural in nature and pricing disagreements are likely to be referred to dispute resolution. Accordingly, tier 4 is appropriate.

Code provision	Provision summary	Draft tier	FS' tier	Rationale
	<p>timeframe, in good faith, and not be requested as a tactic to delay decisions regarding price increases.</p> <p>As required by clause 27(5), any price increase negotiations must be entered good faith and take all reasonable steps to conclude negotiation without delay.</p> <p>As required by clause 27(6), in response to any price increases, the retailer cannot require a supplier to disclose commercially sensitive information.</p>			
Clause 28(1) and (2)	<p>A retailer cannot provide inducements to prevent suppliers forming an association of suppliers or associating with other suppliers for a lawful purpose. A retailer cannot discriminate or take any action against suppliers who do so.</p>	2	2	<p>To the extent that conduct is sufficiently serious to justify enforcement action, Foodstuffs believes tier 2 is appropriate.</p>