



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



# Submission form

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

June 2023

## Submissions process

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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](mailto: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

MBIE intends to upload copies of submissions received to MBIE’s website at [www.mbie.govt.nz](http://www.mbie.govt.nz). MBIE will consider you to have consented to uploading by making a submission, unless you clearly specify otherwise in your submission.

If your submission contains any information that is confidential or you otherwise wish us not to publish, please send a separate version of this form excluding the relevant information for publication on our website.

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### Name (first and last name)

Nicholas Hogendijk

### Email

Privacy of natural persons

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

Individual submission

### Business name or organisation

Hexis Quadrant Pty Ltd

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.

Nil

## 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.**

The following is our feedback on the transitional provisions:

1. **Power imbalances:** Suppliers may face challenges in negotiating variations to existing agreements during the grace period. The supermarket duopoly has (as previously demonstrated) more bargaining power under the current market structure, potentially resulting in agreements that favour retailers rather than ensuring fair and equal treatment for suppliers. The power imbalance could further exacerbate the challenges faced by suppliers during the transitional period.

## 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.**

The definition Good Faith could be further strengthened with a greater level of specificity including:

1. **Provide a clear definition of "good faith"** within the code itself, specifying that it includes acting honestly, fairly, and reasonably in the dealings between retailers and suppliers. This will provide more certainty and a common understanding of the expected behaviour.
2. **Safeguard against duress:** Specify that retailers should not exert undue pressure or leverage on suppliers to accept unfavourable terms or conditions, protecting suppliers from trading relationships conducted under duress.
3. **Anti-competitive practices:** The clause could explicitly mention the avoidance of anti-competitive practices, such as unfair discrimination or abuse of market power, as part of the definition of good faith.
4. **Specific obligations:** The clause could explicitly state the specific obligations retailers have towards suppliers, such as prompt payment, fair treatment, and reasonable notice for any changes to agreements.
5. **Timeliness and responsiveness:** The definition could highlight the importance of timely and responsive communication between retailers and suppliers to facilitate effective collaboration and problem-solving.



## 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.**

Clause 7: Grocery supply agreement must be in writing and retained.

1. **Timely provision of the agreement:** Add a requirement for retailers to provide the written grocery supply agreement to the supplier within a specified timeframe after it is finalised or signed. This will avoid delays in suppliers accessing the agreement and allow them to understand their rights and obligations from the beginning of the agreement.
2. **Accessibility and format:** Consider including provisions to ensure that suppliers have convenient access to the agreement, such as requiring the retailer to provide a digital copy of the agreement or making it available through a secure online platform. This will enhance transparency and make it easier for suppliers to refer to the agreement when needed.
3. **Clarify document retention requirements:** Specify whether the retailer should retain the original or a copy of the agreement and any subsequent documents. Providing clear instructions on how to retain and manage the agreement, including any amendments or related documents, will promote consistency and avoid potential loss or confusion over time.
4. **A minimum standard should be set for all Grocery Supply Agreements** including mandatory clauses that must be adhered to by both parties.
5. **Required signatories:** Add a requirement for formal agreement of a Grocery Supply Agreement to be made by both parties in writing. Only on this date can the agreement come into effect.

Clause 8: Matters to be covered by agreement.

1. **Explicit payment terms:** Include specific provisions regarding payment terms, such as the due date for payment, frequency of payments, and any conditions under which payment may be withheld or delayed. This will provide greater clarity and transparency to suppliers regarding when and how they can expect to be paid.

**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?

**Please type your submission below.**

The clause provides some measures to prevent retailers from making unreasonable unilateral variations by imposing certain conditions and requiring reasonableness in the circumstances. However, the effectiveness of the clause in preventing such situations depends on various factors, including the specific language used, the bargaining power dynamics between retailers and suppliers, and the ability to enforce the provisions.

Factors that require further consideration to ensure the effectiveness of the clause are:

1. **Ambiguity of reasonableness:** The term "reasonableness" is inherently subjective and open to interpretation. Disputes may arise regarding what constitutes a reasonable variation, and different parties may have varying perspectives on reasonableness. This ambiguity could potentially be exploited by retailers to justify unilateral variations that suppliers may consider unreasonable.
2. **Imbalance of bargaining power:** Under the current market dynamics (I.e., the duopoly) there is a significant power imbalance between retailers and suppliers. The retailers hold greater leverage to impose unilateral variations, even if they are not objectively reasonable as has been evidenced historically. Suppliers with limited alternatives or resources are likely to continue to feel compelled to accept the variations rather than risk losing the business. In these cases, the clause alone does not provide sufficient protection for suppliers against unfair treatment.
3. **Enforcement and remedies:** The effectiveness of the clause relies on the enforcement mechanisms available to suppliers in case of non-compliance. Given the ambiguity that surrounds a dispute of this nature there is an inherent risk of any such dispute becoming diluted or a "he said, she said" dispute.
4. This highlights the importance of effective enforcement mechanisms, as the clause may be less effective in deterring retailers from using their negotiating power to impose unfair variations otherwise.
5. **Clarity and specificity:** The clause would benefit from clear and specific language that defines what constitutes an unreasonable variation and provides more guidance on assessing reasonableness. Clear criteria can further reduce ambiguity and provide clearer boundaries for retailers when making unilateral variations.

To enhance the effectiveness of the clause in preventing retailers from using their negotiating power to make unreasonable unilateral variations, additional measures could be considered.

These may include:

1. Strengthening guidelines on what constitutes reasonableness, considering factors such as commercial impact, market practices, and proportionality.
2. Implementing monitoring and reporting mechanisms to identify patterns of unfair variations and address potential abuses of power.
3. Reporting on all variations made by the retailer to enable the commissioner's office to look for patterns in retailer behaviour.

**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.**

1. No
2. We do not see any reason for any retrospective variations to 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.**

1. Clear guidelines on service standards: The clause should include clear guidelines or provisions specifying the permissible service standards that retailers can impose. This will help suppliers understand the expectations and requirements for transport or logistics services, ensuring transparency and reducing potential disputes.
  - a. There could easily be a set of standard delivery service levels by department or category for suppliers to abide by for consistency.
2. Consultation with suppliers: Retailers should be encouraged to consult with suppliers when establishing service standards. This allows for input from suppliers who have expertise and insights into their specific transportation and logistics needs. Collaboration between retailers and suppliers can lead to mutually beneficial arrangements that suit both parties.
3. Flexibility in service provider selection: While the clause states that retailers must not require suppliers to use a specific transport or logistics service, it could be further enhanced by explicitly stating that suppliers have the freedom to select a service provider that best meets their needs. This would help ensure fair competition among transport and logistics service providers and give suppliers the flexibility to choose the most suitable options.
4. Prohibition of unfair requirements: The clause could explicitly prohibit retailers from imposing unfair requirements or conditions on suppliers regarding transport or logistics services. This could include preventing retailers from mandating unreasonable costs, unnecessary certifications, or exclusive partnerships that may restrict suppliers' choices and increase their costs.
5. Monitoring and reporting: Implementing monitoring and reporting mechanisms to ensure compliance with the clause and identify any patterns of unfair treatment or non-compliance regarding transport or logistics services. This can help identify issues early on and address them appropriately.

Potential unintended consequences include:

1. Lack of clarity on service standards: If the clause does not provide clear guidelines on the permissible service standards that retailers can impose, it may lead to ambiguity and disputes between retailers and suppliers. This lack of clarity may result in unintended consequences, such as disagreements over the expectations and requirements for transport or logistics services.
2. Inadequate consideration of specific supplier needs: While the clause aims to prevent retailers from requiring suppliers to use a particular transport or logistics service, it may inadvertently overlook the specific needs and preferences of suppliers. This could result in suppliers having to navigate service standards that may not be optimal for their operations, potentially leading to inefficiencies or increased costs.
3. Imbalance in bargaining power: If there is a significant power imbalance between retailers and suppliers, retailers may still indirectly influence or pressure suppliers to use specific transport or logistics services despite the clause. This could occur through various means, such as imposing service standards that heavily favour or align with a particular provider, creating a de facto requirement. Such an imbalance could result in unintended consequences, including limited competition and reduced choice for suppliers.
4. Potential limitations on innovation and efficiency: By restricting retailers from directly or indirectly requiring a particular transport or logistics service, there is a possibility that innovative and efficient service providers may face challenges in gaining traction or being considered as viable options. This could limit the opportunities for suppliers to benefit from advancements in transport and logistics practices.
5. Increased complexity in dispute resolution: Disputes related to transport or logistics services may arise due to disagreements over service standards or the interpretation of the clause. This could result in increased administrative burden and costs for both retailers and suppliers as they navigate dispute resolution processes to address conflicts arising from the clause.

**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.**

1. Clear payment terms and timeframes: The clause should require retailers to clearly specify payment terms and timeframes in the grocery supply agreement. This includes setting out the agreed-upon timeframe for payment after the supplier's invoice is received.
2. Reasonableness of payment timeframes: The clause should explicitly require retailers to ensure that the agreed-upon payment timeframes are reasonable. This would prevent retailers from unreasonably delaying payments to suppliers and provide a fair and consistent approach to timely payments. We would recommend that a maximum payment term duration should be imposed to ensure no suppliers are pushed out to unrealistic payment terms.
3. Prohibition of unauthorised set-offs: The clause correctly prohibits retailers from setting off amounts against a supplier's invoice or remittance without the supplier's written consent. This protection should be maintained to prevent unauthorized deductions from supplier payments.
4. Non-compliance of payment terms: A specific reference should be made prohibiting set-off of settlement terms being deducted for payment settlement when payments are made outside of the agreed period.
  - a. For example, if an agreement states payment within or prior to 28 days from date of invoice and the retailer then pays the supplier on the 30<sup>th</sup> day, the retailer cannot automatically deduct the early settlement discount. If the retailer does deduct the settlement discount after the maximum number of days agreed to (in this example 28 days) the retailer must refund the discount value plus a penalty value to the supplier.
  - b. Comment from one blue chip FMCG supplier in New Zealand dealing with both retailers daily was *"the retailers treat this as a given without regard to why the discount term was granted and frequently outside of the agreed payment terms"*.
  - c. This commentary was reflective of several other vendors ranging from other multinationals through to small family-owned vendors who supply the retailers.

Should a minimum payment term be implemented through the code?

1. Consideration of different sectors and sizes: It is crucial to consider the diverse range of suppliers, including small and medium-sized businesses, who may have varying financial capabilities and resources. The maximum payment period should consider the potential impact on suppliers of different sizes and sectors to ensure fairness and sustainability.
  - a. A useful example can be seen through Woolworths Australia's small business payment process where smaller vendors are paid within 14 days.
2. Compliance and enforcement: Establishing a maximum payment period in the code should be accompanied by effective compliance mechanisms and enforcement measures. This may include monitoring, reporting, and penalties for non-compliance to encourage adherence to the payment terms.
3. Periodic review and adaptability: The maximum payment period should be periodically reviewed and adjusted, if necessary, to account for changes in industry practices, market conditions, and regulatory requirements. Regular reviews will ensure that the maximum payment period remains relevant and aligned with the evolving needs of suppliers and retailers.

Is 20 calendar days from receipt of invoice appropriate?

1. While 20 calendar days from receipt of invoice may be considered reasonable in certain contexts, it may not be appropriate for all situations.

By implementing a tiered payment structure, smaller suppliers can benefit from shorter payment times that support their cash flow needs. This approach acknowledges the varying capabilities and requirements of different suppliers, allowing them to be treated more equitably within the supply chain. We recommend a tiered structure for payment terms as follows:

1. Categorize suppliers based on size: Establish criteria to categorize suppliers based on their size, such as annual revenue or order volume. This categorization will determine the payment tier to which each supplier belongs.
2. Define payment tiers: Create different payment tiers with varying payment terms based on the supplier categorization. For example:
  - a. Tier 1 (Smallest suppliers): Offer the most favourable payment terms, such as a shorter payment period, e.g., 14 calendar days from receipt of invoice.
  - b. Tier 2 (Medium-sized suppliers): Provide moderately favourable payment terms, e.g., 21 calendar days from receipt of invoice.
  - c. Tier 3 (Larger suppliers): Set standard payment terms, e.g., 28 calendar days from receipt of invoice.
3. Eligibility and criteria: Clearly define the eligibility criteria for each payment tier and communicate them to suppliers. This can include factors such as annual revenue, order volume, or other relevant metrics that determine a supplier's placement in a particular tier.
4. Supplier onboarding and assessment: Establish a process to assess and assign suppliers to the appropriate payment tier during the onboarding stage. Regular reviews can also be conducted to reassess supplier categorization based on updated information or changes in their business size.
5. Transparency and communication: Maintain open and transparent communication with suppliers regarding the tiered payment structure. Clearly outline the payment terms associated with each tier and provide suppliers with the appropriate information related to the tiered payment structure.
6. Flexibility and negotiation: While the tiered payment structure sets baseline payment terms, there should be room for negotiation and flexibility. Suppliers can engage in discussions with retailers to potentially adjust the payment terms based on their individual circumstances, business needs, and mutual agreement.
  - a. In this instance the supplier can elect to return to the standard payment terms at any time with written notification to the retailer 30 days in advance of any payment terms reset
  - b. The retailer would have 7 business days to acknowledge receipt of payment terms changes for implementation 30 days from the date formal communication is received from the supplier (i.e., the date the notification was received, NOT, the date the notification was acknowledged by the retailer).
7. Monitoring and enforcement: Implement robust monitoring mechanisms to ensure compliance with the tiered payment structure. Regularly assess payment practices and conduct audits to verify adherence to the agreed-upon terms. Establish consequences or penalties for non-compliance to incentivise retailers to meet their payment obligations.

**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.**



#### Clause 13: Payments for Shrinkage

1. Prohibition of indirect requirements: In addition to the prohibition on direct requirements for suppliers to make payments for shrinkage, the clause should explicitly prohibit indirect methods or practices used by the retailer to shift the financial burden of shrinkage onto the supplier. This will ensure that suppliers are not unfairly pressured or coerced into accepting responsibility for shrinkage costs.
2. Mitigation measures: The clause should encourage the retailer and supplier to collaborate on proposals and procedures to mitigate the risk and occurrence of shrinkage. By working together, they can identify and implement strategies to minimise shrinkage, which benefits both parties.
3. Cost of mitigation: The retailer cannot pressure or coerce the supplier to bear the cost of any mitigation steps. It is solely the supplier's prerogative to become involved in any shrinkage related issues and the solution for shrinkage rests solely at the responsibility of the retailer.

#### Clause 14: Payments for Wastage

1. This clause provides the retailer with an immediate waiver of any responsibility through clause 14.2.
  - a. During the renegotiation from existing terms to a new grocery supply agreement it is extremely likely that the retailers will automatically seek to exercise the suppliers waiving their protection under the code. This opinion is equally supported by several retailers we have spoken with and is also evidenced through many Australian supply agreements with Coles and Woolworths.
2. Clear and unambiguous terms: The clause should clearly define the circumstances under which a supplier may be required to make payments for wastage. The language should be precise and leave no room for ambiguity to prevent potential abuse or misinterpretation.
3. Fair allocation of responsibility: The clause should ensure that the supplier is only responsible for wastage that directly results from their own actions or omissions. It should not impose liability on the supplier for wastage that occurs under the effective control of the retailer or other entities beyond the supplier's direct influence.
  - a. Any allocation of responsibility on a supplier must be provided in writing with supporting evidence of the wastage.
  - b. For example, a delivery of strawberries arrives and is already seeing blooms of mould appear. The retailer would need to provide supporting documentation such as order number, delivery receipt, inspection conducted within 24 hours and supporting image of mouldy strawberries. By supporting imagery this means not just one photo of a punnet but the entire allocation of product being addressed as wastage.
4. Reasonableness and proportionality: The payment requested from the supplier for wastage should be reasonable and proportionate to the costs incurred by the retailer. The clause should provide guidelines or factors to consider when determining the reasonableness of the payment, such as the extent of the supplier's liability and the retailer's efforts to mitigate costs.
5. Timely notification: The retailer should be required to notify the supplier of the claim for payment within a reasonable, fixed timeframe after the occurrence of the wastage. This will provide the supplier with sufficient information and an opportunity to respond or address the issue promptly.
6. Dispute resolution process: A clear and fair dispute resolution process should be outlined in case the supplier disagrees with the retailer's claim for payment. This process should

allow for an independent review of the circumstances and evidence related to the wastage.

Clause 14.2(g)

1. The appropriateness of the six-month timeframe set out in clause 14.2(g) for the retailer's claim for payment by the supplier will depend on several factors, including the nature of the grocery products, the typical shelf life of the products, and the ability to accurately assess and quantify the wastage within a reasonable timeframe.
2. A shorter timeframe, such as 7 days, may be more suitable for perishable goods with a shorter shelf life, where the impact of wastage can be observed and assessed quickly. This would ensure that claims for payment are made promptly and allow for timely resolution of any disputes or issues related to the wastage.

**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.**

#### Clause 15: Payments as Condition of Being Supplier

1. This clause lacks little value due to subclause 2 which negates in full subclause 1 by providing multiple “get out of jail free” cards.
2. Subclause 2(iii) outlines that the retailer incurs risk by stocking, displaying or listing grocery products. We are confused by this as the purpose of a grocery retailer is to list, stock and display grocery products for consumers. By that very nature they assume this risk when they decide to retail grocery products in the first instance.
3. Transparency and justification: If subclause 2 remains as is the retailer should mandatorily provide a clear and comprehensive written explanation to the supplier regarding any payments requested as a condition of stocking or listing grocery products. The explanation should detail the costs and risks associated with stocking, displaying, or listing the products and justify the reasonableness of the payment.
4. Non-discriminatory treatment: The clause should explicitly state that the retailer will not discriminate against suppliers in terms of the payment requirements or conditions imposed. All suppliers should be treated fairly and equally without undue preferential treatment or unfair burdens.
5. Prohibition of unrelated negotiations: The clause should prohibit the retailer from seeking unrelated variations to the agreement during negotiations regarding payments as a condition of stocking or listing. This provision ensures that negotiations remain focused on the specific issue at hand and prevent retailers from using their leverage to extract unrelated concessions from suppliers.

#### Clause 16: Payments for retailer's business activities

1. As with clause 15 this clause is also undermined by subclause 3 which negates in full subclauses 1 and 2 by providing a “get out of jail free” card for the retailers.
2. Clearly define the specific business activities for which a retailer may request payment from suppliers.
3. Establish clear criteria for determining the reasonableness of payments based on the benefits to both the supplier and the retailer from the business activities.
4. Ensure that the costs borne, or contributions made by the retailer for the business activities are considered when assessing the reasonableness of payments.
5. Provide suppliers with the opportunity to negotiate or seek clarification regarding requested payments.
6. If retailers seek payment for business activities, they must provide their actual costs incurred when seeking compensation or payment from a supplier
  - Transparency is critical in many of these costs.
  - Costs should be the actual costs incurred, not “book rates” for example.
7. Supplier feedback on clause 16 is as follows:
  - *“Interesting with respect to Foodstuffs North Island’s request for contributions to be paid to cover costs of merchandising however they have an ‘out’ here if this is provided for within a relevant grocery supply agreement.”*

#### Clause 17: Funding promotions

1. Clearly define the scope and nature of promotions for which a retailer may request funding from suppliers.
2. Establish clear criteria for determining the reasonableness of funding based on the benefits to both the supplier and the retailer from the promotion.

3. Consider the costs borne or contributions made by the retailer for the promotion when assessing the reasonableness of funding.
4. Provide suppliers with a clear understanding of the expected benefits and costs associated with the promotion to make an informed decision.
5. As an addition to subclause 3 a reference to agreed promotional funding by suppliers by prior mutual agreement to prevent retailers from claiming retrospectively for any costs incurred. Noting feedback from suppliers as follows:
  - *“There should be a reference relating to prior mutual agreement to funding promotions. This would prevent the retailer from unfairly claiming retrospectively for the cost(s) of any promotion that has not been previously agreed to by the supplier in writing (I.e., Retailers often just run a promotion or discount a product at low price at their discretion and simply send the invoice to supplier). This happens with a lot of seasonal clearances where suppliers are presented with an invoice for the full scan amount and make a loss without any consultation.”*
  - *“The retailer should not place suppliers under duress about retail promotional pricing levels for the same product in a competitor (retailer) especially during the same week (promotional clash). It is the retailer’s prerogative to set promotional pricing based solely on their own profit margin expectations and should therefore be prohibited from leveraging the supplier to provide additional deals to meet the competition and preserve their margin (even send them an invoice for the difference). That is, when a competitor has elected to make a lesser margin, it is not the suppliers cost or responsibility when retail pricing is beyond the control or influence of the supplier” .*

**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.**

## Improvements to clause 18

To provide greater certainty and transparency regarding delisting decisions for suppliers, the following improvements could be made to clauses 18 and 19:

### Clause 18 - Delisting products:

1. Clearly define what constitutes "genuine commercial reasons" for delisting a product to avoid ambiguity and subjective interpretation often used by retailers.
2. Provide more specific criteria and guidelines for determining when a reduction in distribution has a "material effect" on the supplier.
3. Consider including provisions that require the retailer to engage in good faith discussions with the supplier before making a final delisting decision.
4. Specify that delisting should not be used as a punishment for complaints, concerns, or disputes raised by a supplier.
5. Clarify that the non-extension or non-renewal of a fixed-term grocery supply agreement is not considered a decision to delist a product.
6. Supplier comments on Clause 18:
  - a. *"Sub clause 3 c – would recommend that retailer must also consider including a condition to not delist for the persistent failure to meet delivery requirements if this has clearly beyond the control of the supplier. It is unfair to permanently delist a product because of (for example) international shipping delays, port strike or other similar events."*
  - b. *"18.3 (b) Failure of the supplier's product to meet the retailer's reasonable commercial sales or profitability targets as notified to the supplier in, or in accordance with, the grocery supply agreement:*
    - i. *We are extremely unlikely to meet the retailers profit targets as they are always higher than we are achieving and continue to increase annually as they have done for more than a decade as evidenced in the Commerce Commissions Market Study*
    - ii. *Illustration of this is that the category average margin is an ever moving (increasing) target set by the retailers. Foodstuffs North Island has been particularly effective at demanding extreme category margin increases for the past two years with no sign of this abating, yet failure to meet their extreme demands results in deletion without recourse. How exactly does this clause address issues such as this one?*
    - iii. *Put simply this clause refers to the retailers' profit targets and does not reflect the actual market data or real margin delivery, only the ever-increasing expectations of two highly profitable retailer with world class earnings."*
  - c. *"In Clause 18.3 (b) the term "commercial sales or profitability target" is a moving feast for the duopoly.*
    - i. *Suppliers do not control recommended retail pricing.*
    - ii. *Retailers often change their pricing up or down (capriciously) which directly affects margin delivery".*
  - d. *"How do I define the difference between a tough negotiation in a free trade market and there being no leverage on the other side of the table to not be able to hold the retailers to task?*
    - i. *We are played off against other suppliers who allegedly (and somewhat miraculously) increased their margin significantly and we have no way to verify this.*



- ii. *We are unable to clarify with other suppliers as this would be collusion, yet we are held to ransom based on zero transparency in such a negotiation process.*
  - iii. *This means we are at the discretion of the retailer who can use this (as just one example) of not achieving commercial or profitability targets.*
  - iv. *This (like many of the clauses in this draft code) are weak and heavily diluted, to the point of being even less effective than the Australian code which the retailers routinely work around with ease and no repercussion”.*
- e.

Clause 19 - Process requirements relating to delisting:

1. Establish a reasonable notice period for delisting decisions, considering the specific nature of the product and the supplier's circumstances.
2. Ensure that the written notice provided to the supplier includes clear and detailed explanations of the genuine commercial reasons for delisting, allowing the supplier to understand the basis for the decision.
  - a. These conditions must be consistent for all suppliers in each category, though conditions for deletion may vary from one category to another (E.g., Fresh produce has different conditions to cleaning products)
3. Specify a clear process for suppliers to request a review of the delisting decision, including timelines for the review and the retailer's obligation to respond in writing.
4. Require the retailer to provide a comprehensive written explanation of the outcome of the review, including the basis for the decision, to ensure transparency and accountability.
  - a. Per our point 2a above the basis for any such decision should be consistent, fair and in good faith for all suppliers.
5. Encourage open and timely communication between the retailer and the supplier throughout the delisting process, including the provision of requested information and additional details relating to the delisting.
6. Supplier commentary on Clause 19
  - a. *“Clause 19.1 (c) Consideration should also be given to the retailers providing extended reasonable notice to delist other products (not just fresh fruit & vegetables) so the supplier is not financially penalised in the following cases:*
    - i. *Retailer has provided a forecast to the supplier to have the products available for the extended period yet delists the product straight away.*
    - ii. *The product is supplied exclusively to the retailer and there is no other market to sell the redundant stock.*
    - iii. *There is a limited shelf life of the product where the supplier has relied upon the retailer to purchase this in accordance with their forecast”.*

**Will a range review ahead of any delisting decision be an effective way of ensuring fair and transparent delisting decisions?**

Requiring a range review ahead of any delisting decisions can be an effective way to promote fair and transparent delisting decisions. A range review provides an opportunity for the retailer to assess the overall product assortment, performance, and alignment with their business objectives. It allows for a comprehensive evaluation of various factors that may influence delisting decisions, such as sales performance, market trends, consumer demand, and supplier capabilities.

By conducting a range review, the retailer can gather relevant data and insights to support their decision-making process. This approach helps ensure that delisting decisions are based on objective criteria and strategic considerations rather than arbitrary or unfair practices.

However, it is crucial to establish clear guidelines and criteria for the range review process and in turn set clear criteria and guidelines for each individual review that all suppliers are judged against equally to ensure transparency and fairness. The review should involve open communication and collaboration between the retailer and the supplier, allowing the supplier to provide relevant information and address any concerns. Additionally, it's important to provide reasonable notice to the supplier and allow them the opportunity to participate in the review process.

A minimum notice period of 8 weeks prior to a range review should be included in the Supply Code. This will prevent the recent behaviour of allowing as little as two weeks' notice to suppliers which is insufficient time to prepare for a major category review.

While a range review can contribute to fair and transparent delisting decisions, it should be complemented by other provisions, such as clear definitions of "genuine commercial reasons" for delisting, timely notifications, and opportunities for the supplier to seek review and explanation of the decision. This comprehensive approach helps minimize the risk of arbitrary or unfair delisting practices and promotes more equitable outcomes for suppliers.

The criteria should be publicised on internal retailer portals for relevant suppliers and be able to be scrutinised by the grocery commissioner at any time based on the agreed criteria, supplier inputs, all communications between suppliers and retailers, and the records of the final outcomes as well as correspondence relating to product deletions to ensure reviews are held fairly for all suppliers.

#### **Will there be any issues in complying with the process requirements set out in clause 19?**

Complying with the process requirements set out in clause 19 may present some challenges, depending on the specific circumstances and the efficiency of communication between retailers and suppliers. Here are some potential issues that could arise:

1. **Timeliness:** Providing reasonable written notice to the supplier and allowing for a 6-month notice period for delisting fresh fruit and vegetables may require careful planning and coordination to ensure sufficient time for both parties to prepare and adjust their operations accordingly. Meeting these timeframes may be challenging if there are urgent circumstances such as product recalls, safety issues, or persistent supply issues.
2. **Review process:** Promptly reviewing delisting decisions and providing the supplier with written notice of the outcome can be time-consuming, especially if there are multiple delisting decisions or if the review process involves complex evaluations. Retailers will need to allocate resources to handle review requests promptly and provide clear explanations for their decisions.
3. **Information exchange:** Responding to written requests from suppliers for statements of genuine commercial reasons or additional information regarding delisting requires effective communication channels and efficient information sharing. Both retailers and suppliers must ensure timely and accurate responses to facilitate a transparent and constructive review process.
4. **Disputes and resolution:** In cases where disagreements or disputes arise regarding delisting decisions, resolving these issues promptly and amicably can be a challenge. It may require mediation or arbitration processes to reach a mutually acceptable resolution.

To mitigate these challenges, it is important for retailers and suppliers to establish clear lines of communication, maintain open dialogue, and strive for transparency throughout the delisting process. Regular communication, collaboration, and a commitment to resolving issues in good faith can help ensure compliance with the process requirements and foster a more equitable business relationship between retailers and suppliers.

**Are there any aspects of these clauses which may have unintended consequences?**

Disputes and delays: The dispute resolution process outlined in clause 19 may lead to disagreements and delays in decision-making. If disagreements arise between retailers and suppliers regarding delisting decisions or the outcomes of the review process, it could result in prolonged disputes that hinder efficient business operations and strain relationships.

**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.**

**Are there any ways in which this clause could be improved for suppliers?**

1. **Transparency and communication:** The clause could explicitly require the retailer to provide clear and detailed information about the funded promotion to the supplier. This includes previous promotional sales history (Scan data), providing information about the promotion's objectives, duration, expected sales volumes, and any changes to the supplier's obligations resulting from the promotion. Improved communication can help suppliers make informed decisions and better align their resources with the promotion.
2. **Protection against order cancellations or reductions:** While the clause mentions the need for written consent from the supplier for order cancellations or significant reductions, it could be strengthened by explicitly stating that such consent should not be unreasonably withheld. This would provide suppliers with more protection against arbitrary cancellations or reductions and ensure that retailers honour their commitments.
3. **Fair compensation for unforeseen costs:** The clause should include provisions to ensure that suppliers are fairly compensated for any net costs, losses, or expenses incurred as a direct result of the retailer's failure to provide reasonable notice of order cancellations or reductions. This would protect suppliers from bearing unnecessary financial burdens resulting from sudden changes in the retailer's plans.

**Do you have any other concerns regarding investment buying and its impact on suppliers which are not addressed by this draft section of the Code?**

Regarding concerns about investment buying and its impact on suppliers, the draft section of the Code does not specifically address this issue. Investment buying, which involves retailers seeking deep discounts or favourable terms from suppliers by leveraging their buying power, can put suppliers at a disadvantage and lead to unfair pricing and terms. To address this concern, the Code should include provisions to promote fair and transparent negotiations, prevent abusive buying practices, and ensure that suppliers are not unduly pressured to provide unsustainable discounts, volumes on investment buys, or other unfavourable terms.

**What effect will the following clause have on current practice regarding investment buying and funded promotions?**

1. **Improved Communication:** The requirement for the retailer to give reasonable written notice before holding a funded promotion provides suppliers with better visibility and awareness of upcoming promotions. This allows suppliers to plan their production, inventory, and resources more effectively.
2. **Transparency in Order Quantities:** The clause's provision for transparent calculation of order quantities will allow suppliers to understand the expected demand and ensure they can fulfil the retailer's requirements accurately. This reduces the risk of overproduction or underproduction, leading to better inventory management for suppliers and retailers.
3. **Protection against Over-Ordering:** The clause's prohibition on over-ordering by the retailer helps prevent excessive stock accumulation. This can be beneficial for suppliers as it reduces the risk of having unsold inventory and potential financial losses.
4. **Pricing Integrity:** The requirement for the retailer to pay the supplier the difference between the promotional price and the full price if they sell any over-ordered product above the promotional resale price ensures that suppliers are compensated fairly for any deviations from the agreed pricing terms. This protects suppliers from potential revenue loss due to unauthorized discounting by retailers.

**Will there be flow-on impacts for retail prices?**

Regarding flow-on impacts for retail prices, it is possible that the clause could have some influence. By ensuring more transparency and control over promotions and order quantities, suppliers may have better pricing discipline and be less prone to offering excessive discounts. This could potentially contribute to maintaining stable retail prices. However, the specific impact would depend on various factors, including market dynamics, competition, and consumer demand.

**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.**

**Does this clause effectively address issues faced by suppliers of fresh fruit and vegetables?**

In addressing issues faced by suppliers of fresh fruit and vegetables, the clause appears to provide certain protections and requirements that can benefit suppliers. By mandating clear and unambiguous written fresh produce standards and quality specifications, it establishes a basis for objective evaluation and acceptance of the delivered produce.

**Is the 24-hour cut off proposed for accepting or rejecting fresh produce appropriate?**

The 24-hour cut-off proposed for accepting or rejecting fresh produce is appropriate to ensure timely assessment and decision-making by the retailer. It allows retailers to promptly identify any non-compliance with the standards or specifications and take necessary actions.

**Is the 48-hour cut off for notifying suppliers when fresh produce has been rejected appropriate?**

The 48-hour cut-off for notifying suppliers when fresh produce has been rejected is reasonable. This provides suppliers with timely information about rejections and allows them to address the issue promptly and make necessary adjustments.

**Should the Code extend similar protections to suppliers of other perishable produce, such as seafood and meat?**

It would be advisable to include other perishable products in the scope of the clause. Given the perishable nature and potential quality concerns of these products, establishing clear standards, specifications, acceptance criteria, and notification requirements can help ensure fair treatment for suppliers across various perishable categories.

It is important to note that the effectiveness of the clause in addressing suppliers' issues would also depend on the implementation and enforcement of the provisions.

Areas we believe are missing from this clause:

1. Dispute resolution mechanisms: Given the time sensitivities relating to fresh produce we recommend establishing clear procedures for resolving disputes between suppliers and retailers regarding the acceptance or rejection of fresh produce.
2. Price adjustments: Addressing mechanisms for price adjustments in situations where the quality or condition of fresh produce deviates from the agreed standards can provide suppliers with fair compensation and mitigate any potential financial losses.
3. Access to information: Ensuring transparency by requiring retailers to provide suppliers with relevant information on pricing, demand, and sales performance (historic and forecast) of their fresh produce will assist suppliers to make informed decisions and improve their planning and production processes.

**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.**

**Will the following clauses be effective in preventing retailers from pressuring suppliers to desist from supplying other parties?**

Clauses 22, 23, and 28 aim to prevent retailers from exerting undue pressure on suppliers and interfering with their freedom to associate with other parties. These clauses have the potential to be effective in safeguarding suppliers' rights and promoting fair and competitive practices. By prohibiting duress, threats, inducements, and discrimination, they establish boundaries for retailer-supplier relationships.

However, it is important to consider potential unintended consequences that may arise from these clauses:

1. **Interpretation and enforcement:** The effectiveness of these clauses may depend on their interpretation and enforcement. Clear definitions and guidelines should be provided to ensure consistent application and understanding.
2. **Subjectivity:** Determining what constitutes duress, reasonable grounds for business disruption, or discrimination can be subjective. There is a need for clarity and objective criteria to assess and evaluate these aspects to avoid potential disputes.
3. **Balance of power:** While these clauses aim to protect suppliers, the inherent power imbalance between retailers and suppliers may still impact their practical implementation. Suppliers might still feel pressure or fear potential repercussions even if such actions are explicitly prohibited.
4. **Unintended consequences on business relationships:** Strict enforcement of these clauses could strain retailer-supplier relationships and hinder effective collaboration. There is a need for a balanced approach that promotes fair practices while allowing retailers and suppliers to engage in mutually beneficial partnerships.

To ensure the effectiveness of these clauses and minimise unintended consequences, ongoing monitoring, feedback, and stakeholder engagement are crucial. Regular reviews, industry consultation, and feedback mechanisms will help identify any shortcomings and improve the clauses to better protect suppliers without unduly impacting the dynamics of the retailer-supplier relationship.

**Ways to strengthen these clauses.**

1. **Clear definition of prohibited behaviours:** Provide a more detailed and specific definition of what constitutes duress, threats, inducements, discrimination, and business disruption. Clear definitions can help minimise ambiguity and ensure consistent interpretation.
2. **Explicit prohibition of retaliation:** Include explicit language prohibiting retailers from retaliating against suppliers who exercise their rights to form associations or associate with other suppliers. This would provide additional protection against any adverse actions or consequences resulting from the exercise of these rights.
3. **Presumption of reasonableness:** Establish a presumption that any action by the retailer that limits supplier choices, imposes exclusivity requirements, or restricts competition is presumed to be unreasonable and requires justification by the retailer. This places the burden on the retailer to demonstrate the reasonableness of their actions.
4. **Whistle-blower protection:** Include provisions to protect suppliers who report violations of these clauses from retaliation or adverse actions by retailers. Whistle-blower protection can encourage suppliers to come forward with information about potential violations without fear of reprisals.

5. Transparency requirements: Introduce transparency requirements that obligate retailers to disclose their practices, policies, and agreements with suppliers. This promotes transparency and allows suppliers to make informed decisions regarding their business relationships with retailers.

**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.**

While clauses 24 and 25 provide some level of protection for suppliers' intellectual property and confidential information, there are ways to improve them to better address these issues and support greater investment in product development.

**Clause 24 - Intellectual Property Rights:**

1. **Explicit prohibition of IP infringement:** Include a clear statement explicitly prohibiting the retailer from infringing on the intellectual property rights of suppliers, not only in relation to branding, packaging, and advertising but also in other aspects such as product formulations, design features, and proprietary technologies.
2. **Definition of infringement:** Provide a comprehensive definition of what constitutes IP infringement, including examples and specific actions that would be considered a breach of this clause. This helps to clarify the boundaries and expectations regarding the protection of suppliers' IP.
3. **Remedy for IP infringement:** Specify appropriate remedies or consequences for any proven infringement of suppliers' intellectual property rights by the retailer. This may include compensation, injunctions, or other remedies available under intellectual property laws.

**Clause 25 - Confidential Information:**

1. **Clear obligations on confidentiality:** Clearly articulate the obligations of the retailer regarding the treatment of confidential information provided by suppliers. This includes ensuring that the retailer does not use the information for purposes other than those disclosed and only discloses it to authorized individuals within the retailer's organisation.
2. **Robust enforcement and monitoring mechanisms:** Establish strong enforcement mechanisms to ensure compliance with the confidentiality obligations. This may involve regular audits, training programs, and measures to safeguard against unauthorised access or disclosure of confidential information.
3. **Protection against misuse:** Specify the retailer's responsibility to prevent unauthorised use or disclosure of confidential information and outline the potential consequences for any breach, such as penalties or legal action.
4. **Duration of confidentiality obligations:** Clarify the duration of the retailer's obligation to maintain the confidentiality of the supplier's information, specifying whether it extends beyond the termination of the grocery supply agreement.

By strengthening these clauses, it will provide suppliers with greater assurance their intellectual property rights and confidential information will be respected and protected. This, in turn, can encourage suppliers to invest in product development and innovation, knowing that their proprietary assets are adequately safeguarded.

**Supplier feedback on clause 24:**

1. *“Subclause (3) should go further to include ingredients, recipes, work orders etc (in addition to branding, packaging designs or advertising)”.*

**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.**



**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.**

Clause 26 aims to ensure greater transparency and consistency in decisions relating to range reviews and shelf space allocation. Here are some suggestions for improving the clause:

1. **Clear and comprehensive principles:** The clause should require the retailer to provide suppliers with detailed and comprehensive product ranging principles and shelf space allocation principles. These principles should cover factors such as sales performance, customer demand, market trends, product quality, and other relevant criteria. This helps suppliers understand the basis on which their products are evaluated and allocated shelf space and provides a fair and even set of criteria for all suppliers.
2. **Timely and proactive communication:** Specify a specific timeframe (we recommend 8 weeks) within which the retailer must provide notice to suppliers before conducting a range review. 8 weeks is a reasonable timeframe to allow suppliers sufficient time to prepare for the review.
3. **Consistency and non-discrimination:** Strengthen the clause to explicitly require the retailer to apply the product ranging and shelf space allocation principles consistently and without discrimination. This includes avoiding favouritism towards the retailer's private label products or any unfair competitive practices that may disadvantage suppliers' branded products.
4. **Regular review and update of principles:** Require the retailer to periodically review and update its product ranging and shelf space allocation principles to ensure they remain relevant and in line with market dynamics. This promotes ongoing transparency and responsiveness to changing market conditions.
5. **Reporting and accountability:** Consider introducing reporting requirements for the retailer to provide regular reports or disclosures to suppliers on range review outcomes and shelf space allocation decisions. This enhances transparency and allows suppliers to assess the fairness and consistency of the retailer's practices.

By incorporating these suggestions, the clause can help foster greater transparency, consistency, and fairness in range reviews and shelf space allocation decisions, benefiting suppliers by providing clearer guidelines and ensuring equitable treatment in the retail environment.

Supplier comments on clause 26

1. *“Within a reasonable time before conducting a range review, the retailer must provide suppliers who might be affected by any outcome of the review with clearly expressed written notice of:*
  - a. *The purpose of the range review; and*
  - b. *The key criteria governing ranging decisions.*
2. *What is the reasonable time frame? Foodstuffs is known to only give two weeks!”*

**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.**

**Will this clause help improve the process for seeking price increases?**

1. Encouraging good faith negotiations: The clause should explicitly emphasize the importance of both parties engaging in good faith negotiations. This ensures that negotiations are conducted with genuine intent, aiming for a fair and reasonable outcome for both the retailer and the supplier.

**Is the timeframe for responding to a price increase appropriate?**

1. Shorter time periods for specific produce: Given the perishable nature of fresh fruit and vegetables, which are mentioned in subclause (1)(c), it may be worth considering shorter response timeframes for price increases related to these specific products. This recognizes the need for more rapid decision-making due to their shorter shelf life and potential impact on suppliers' profitability.

**Do you have any other comments on these clauses?**

1. Avoiding unnecessary delays: The clause should include provisions that discourage either party from engaging in tactics to unduly delay the decision-making process regarding price increases. This helps maintain transparency and efficiency in the negotiation process.
2. Confidentiality of commercially sensitive information: The clause appropriately safeguards the confidentiality of commercially sensitive information. It could be further strengthened by specifying that the retailer must handle such information with due care and use it solely for the purpose of evaluating the price increase or engaging in negotiations. This protects the supplier's confidential information while facilitating a transparent pricing process.

**Supplier comments on Clause 27:**

1. Clause 27 Price increases:
  - a. *Sub clause 2 - the 30 days notification (time allowed for a response by the retailer) is unreasonable and should be limited to 10 working days ... otherwise it is a delay tactic to stop the supplier from recovering cost increases already incurred by the supplier and financially disadvantages them.*
  - b. *Sub clause 3 – this should also be aligned to the 10 working days.*
  - c. *Sub clause 6 - needs to be expanded to specify what is commercially sensitive information i.e., a retailer's request on a supplier to justify the price increase by divulge the % of a product's inputs otherwise not published on packaging (ingredient, component) and the respective increase of each input is an infringement on the supplier's intellectual property.*
  - d. *New clause should be put in place to limit the length of the notice period to 8 weeks as the current 12 weeks (3 months) financially disadvantages the supplier trying to recover cost increases (i.e., increased costs would have already been incurred by the time the decision has been made to pass on a price increase)*
2. *A. We have the right to not provide any information to the retailer that is commercially sensitive such as ingredients, formulations, operating costs of our business, etc.*
3. *There is a risk with price increases when ingredient or commodity benchmarking is undertaken by retailers during price increases. For example, Retailers in Australia try to use benchmarking and when they don't have the right information (i.e., ingredients) they find what they deem to be a suitable replacement to compare.*
4. *Margin gouging is a common practice during price increases across Australia and New Zealand and should be addressed.*
  - a. *When retailers take price on the back of a price increase where they increase the price extra % after pressuring the supplier to reduce the value of their increase. Meaning (for example) if a supplier submits a 6% price increase and the retailer is*

*only willing to accept a 4% increase, after which they take the full 6% in the retail price, thus further increasing their margin by a full 2%*

- b. *This has caused a price increase behaviour where the supplier over states the increase to be able to negotiate the increase they need to maintain their business.*

## 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.

1. Deterrence of non-compliance: The maximum penalty levels provided in Tier 1 and Tier 2 appear to be sufficiently high to deter non-compliance, especially for larger businesses with high annual turnover. The possibility of significant financial penalties can act as a deterrent and encourage retailers to comply with the Code's provisions.
2. Proportionality to harm: It is crucial to ensure that the maximum penalty level is proportionate to the level of harm that may be caused by non-compliance. This requires careful consideration of the potential impact of breaches on competition and the interests of suppliers. The penalty levels should be set at a level that adequately reflects the seriousness of the offense and its potential consequences.

### 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.

1. We believe the provision of written statements (if properly enforced) will stimulate compliance and transparency.

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.**

1. We do not agree with the decision to exclude restrictions in the Australian Grocery Code of Conduct relating to payments for shelf allocation.
2. In the last week we have received feedback from suppliers that stores within Foodstuffs continue to seek payment for shelf and display locations in store which contravenes (in our opinion) the terms and conditions agreed to with Foodstuffs under its current commercial model.
3. Terms and rebates are agreed and paid for to prevent this type of activity and this clause should be included to ensure protection from additional payments by suppliers to retailers for shelf space.
4. It is also anti-competitive for one supplier to purchase significant portions of shelf space to block competitors and we do not believe this stimulates competition for the benefit of New Zealand consumers.

**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.**

1. Changes to supply chain procedures should be included in this code.
2. This could be included in Part 4 Conduct generally under subpart 1.
3. There have been instances where suppliers are expected to transition from direct to-store delivery to delivering to the retailer's warehouse facilities despite this not being in the suppliers' best interests.

**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.**

1. Protection of intellectual property must be included in this Grocery Supply Code
2. We have provided commentary on this point in our response to questions 37 and 38.

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.**

We have spoken with multiple retailers and suppliers in relation to this code. The supplier commentary worth sharing has been included in the relevant question responses. Additionally, we have two responses from retailers as follows.

**From Ged Futter**

**UK GSCOP expert and consultant, Former ASDA (UK) Senior Buying Manager**

When I read through the proposed Code I would say that it's alarming to see so many mentions of:

- 'Subclause (1) does not apply if' the agreement (i) provides expressly for the retailer to.....

This gives the Retailer the ability to put whatever they want in the Agreement as a way of getting round it all. This is something that we found in the UK, particularly with regards to Forecasting.

No mention of Forecasting the NZ Code at all.

Payments for Shrinkage (loss in store) ....

- Subclause (1) does not prevent the retailer from raising, discussing, or agreeing with a supplier proposals and procedures to mitigate the risk and occurrence of shrinkage.

It feels there is a subclause for everything...i.e., get out of jail free!

**From Wholesale & Retail CEO**

**Experience: Woolworths, Metcash, multinational suppliers,**

Upon reviewing the New Zealand Grocery Supply Code, I have been incredibly alarmed by the significant number of options for the retailers to erase key clauses in the code through the structure and content of their Grocery Supply Agreements. The code does not provide sufficient protection for suppliers in a duopoly market, and I have grave concerns for the verbal negotiations that will take place between suppliers and the retailers to ensure conditions stipulated in the code are waived in future GSA's.

This reflects the heavily diluted effect of the Australian Code, only I fear the New Zealand code is even weaker. As a retailer myself and being intimately familiar with the Australian Code, I would think that the two market dominant retailers in New Zealand would be rubbing their hands together at the lack of provisions and options to unwind several clauses in this draft code. If, and when there is more competition in the New Zealand market there may be the opportunity to address or relax the code, however under the current market structure I believe this code in its current form poses little change to the current trading environment between suppliers and the retailers.

The "get out of jail" card that is consistently evident throughout the code would cause me great concern as a supplier.