

**RESPONSE TO
MBIE CONSULTATION PAPER
EXPOSURE DRAFT – NEW ZEALAND GROCERY
SUPPLY CODE OF CONDUCT**

Submitted by:



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Introduction

United Fresh is the only pan-produce industry body in New Zealand. Our membership includes seed merchants, growers, grower organisations, packhouses, wholesalers, importers, and service and logistics providers, as well as retailers. Our industry aims to provide New Zealand with a healthy and safe supply of quality produce. Our vision is to create a sustainable fresh fruit and vegetable industry for New Zealand.

United Fresh adopted the United Nations Sustainable Development Goals in 2017.

United Fresh represents an industry that almost every New Zealander interacts with on a daily basis. The fresh produce industry represents a key segment of New Zealand's retail grocery offer, amounting to an average of 10-12% of store sales within the to-be-regulated major grocery retailers' revenue portfolio.

On behalf of the New Zealand Produce Industry, United Fresh therefore wishes to make a submission on "*MBIE Consultation Paper Exposure Draft – New Zealand Grocery Supply Code Of Conduct*".

United Fresh also welcomes the opportunity to comment on the proposed changes by way of this submission, as it provides us, as the pan-produce industry body, with the opportunity to enhance our membership's understanding of the issues that have led to these regulations being proposed.

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Situation Overview

The process that has resulted in these draft regulations being released for public consultation has been more than two and a half years in the making. It began with the Commerce Commission (ComCom) launching its “Market Study Into The Retail Grocery Sector” at the end of 2020, which then progressed through to initial public submissions in March 2021, a Draft Report and the related submissions in August 2021, the October 2021 Conference, and the Final Report being released in March 2022.

Once the Final Report was released, the Ministry of Business, Innovation and Employment (MBIE) then opened consultations on selected aspects of the Final Report, for consideration, as new sets of regulations, e.g., a Grocery Code of Conduct, were being proposed.

This culminated in these Grocery Code of Conduct regulations being developed.

MBIE is now seeking consultation on the proposed draft Grocery Code of Conduct regulations, which United Fresh wishes to comment on.

This will significantly impact the fresh produce value chain, and may lead to negative effects, including price distortions, in the fresh produce category.

There are three rationales for our response:

1. The produce industry is working to understand the impact of the proposed changes. This is why we have been actively participating in the consultation process from the beginning.
2. We want to make sure that MBIE is aware of the fresh produce intricacies where these differ from other grocery products, in order to prevent regulations from being inappropriately applied to fresh produce, due to the way in which fresh produce supply chains and retail activities differ to many other products.
3. Our industry is increasingly concerned about the currently working supply chain processes in the fresh produce industry, acknowledged throughout the consultation process by various Government agencies, being potentially severely impacted by unintended consequences, leading to a situation of a reduction in availability of fresh produce at retail, and higher pricing.

Question and Response Section

1. Question: Are there any ways the transitional provisions could be improved?

United Fresh does not believe any changes are necessary.

2. Question: Will there be any unintended consequences as result of the transitional provisions as drafted?

United Fresh is of the opinion that an unintended consequence may exist with regards to the transitional period. While newer suppliers will have compliant supply agreements signed after the implementation of the new provisions, old suppliers may still be on old supply agreements. These old supply agreements may be updated at different times throughout the grace period, or afterwards.

Therefore, a potential exists for a three-tier agreement system to occur during the grace period: those who have fully compliant supply agreements, those who can arrange supply agreements that become compliant prior to the end of the grace period, and those who do not get compliant supply agreements until the end of the transition period.

This aspect suggests that the potential for unequal treatment may continue to exist into the transition period, on the status of the supply agreement, this being related to its age.

3. Question: Are there any ways that clause 6 could be improved to be more effective in supporting fair conduct between suppliers and retailers?

United Fresh suggests that a definition of good faith must be considered, for example: "Good faith means dealing with each other honestly, openly, and without misleading each other". United Fresh also suggests the addition of subclauses related to good faith and payment periods.

4. Question: Are there any ways in which clause 7 and 8 could be improved to provide greater transparency and certainty to suppliers?

United Fresh queries what "plain English" means? United Fresh notes that elsewhere in this document the statement "clear, concise, and unambiguous" is used. Is this what "plain English" is? If not, United Fresh suggests the addition of a definition for clarity.

5. Question: Is clause 9 flexible enough to allow for reasonable unilateral variations to be made to supply agreements?

United Fresh is of the opinion that more clarity might be needed on what is reasonable for the quantitative adjustments discussed in 9(2)(a)(iii). Is this quantitative metric related to volume, pricing, delivery timings, something else, or all of the above?

6. Question: Will clause 9 be effective in preventing retailers from using their negotiating power to make unreasonable unilateral variations?

Clause 9 should prevent the majority of unreasonable unilateral variations if good faith is defined and practiced appropriately.

7. Are there any circumstances where retrospective variations should be permitted?

Clause 10 is, in United Fresh's view, fit for purpose. There may be circumstances where retrospective variations could result in beneficial outcomes, but, these outcomes could just as easily be achieved with future variations on current supply agreements.

8. Question: Will there be any unintended consequences as a result of how these provisions are drafted?

Clause 6: As indicated in our answer to question 3, United Fresh believes that a definition of “good faith” is required, beyond the statement that “retailers must at all times deal with suppliers in good faith”, and beyond just listing what retailer activities should be assessed, to determine whether a retailer has acted in good faith, e.g., “acting honestly”.

Clause 9: the nature of the term “agreement” suggests that two or more parties have concluded on how to execute a process, aiming towards an outcome, together. 9(1) expressed in one and a half lines, is very clear, precise, and appropriate within the spirit of, when several parties have reached an agreement, such an agreement should not be unilaterally changed.

The fact that 9(1) is then followed by subclauses 9(2)-9(5) with 9(2) breaking further down into 9(2)(a)-9(2)(d) and 9(2)(a) and 9(2)(d) respectively breaking down into 9(2)(a)(i)- 9(2)(a)(iii) and 9(2)(d)(i)-9(2)(d)(iii) does suggest at first glance to any reader that multiple ways exist to avoid compliance with 9(1), which states that “The retailer must not vary a grocery supply agreement without the consent of the supplier concerned”.

Unless the conceptual term “reasonable”, which appears to have been the driver of developing 9(2)-9(5) is defined properly, the unintended consequence of the way this section has been drafted could be that suppliers will consider the regulations to not have any teeth with regards to unilateral variations.

9. Question: Are there any ways in which clause 11 could be improved to support transport and logistic arrangements which suit both parties?

To improve clause 11, it is suggested that subclause 11(2) has the word “justifiable” in front of “service standards”. The lack of the word “justifiable” potentially allows the wording of service standards in a biased manner. This could result in only one transport and logistics supplier being able to meet these requirements, which would be an indirect method of bypassing subclause 11(1).

10. Question: Will there be any unintended consequences as result of how this provision is drafted?

United Fresh has previously raised concerns about the possibilities of unintended consequences in this regard. Domestically grown produce is by preference delivered to supermarket distribution centres in reusable plastic crates. It is not uncommon for produce suppliers to supermarkets to backload volumes of returnable plastic crates after having delivered produce to distribution centres, particularly if the suppliers are utilising their own transport fleet and thus optimising their cost structures for both delivery into the distribution centre and moving empty crates to the growing areas. An unwelcome, unexpected consequence is the disruption to services operated by suppliers who have optimised their delivery cycles in that manner.

11. Question: Are there any ways in which clause 12 could be improved, to help ensure timely payments and give appropriate clarity over payment terms for suppliers?

United Fresh suggests the addition of a subclause (4)(c) within clause 12. This clause would be that the retailer provides the supplier the written confirmation of how this set-off has been calculated.

12. Question: Do you think a maximum payment period should be set by the Code?

Yes, United Fresh is of the view that a maximum payment period is a necessity of a functioning code of conduct. This ensures that financial cashflows cannot be used in a discriminatory manner. Historically though, produce suppliers are paid fortnightly. United Fresh would not consider it reasonable for this payment system that has evolved in the produce industry to be impacted by a new maximum payment period.

13. Question: If a maximum payment time is set, do you think 20 calendar days from receipt of invoice is appropriate?

20 calendar days from receipt of invoice is a reasonably appropriate period. However, United Fresh suggests that the ability for a “20th of the month following” option also be considered as acceptable, if set out in the supply agreement. We note “20th of the month following” is a standard invoicing and payments period for many businesses outside the grocery and retail sector, which has worked successfully for many decades. United Fresh therefore sees no reason why this could not be implemented by the retailers, who would already be held to these terms by their suppliers of power, water, internet, legal services, and all other services and materials that a business requires outside of stock.

We do note, however, that the fresh produce sector works on fortnightly payments with the retailers at present. This payment schedule has developed over the many years that the retailers have been working with the fresh produce industry, designed in respect of the realities of the industry relating to variable supply and cashflow.

If a maximum period is to be specified, we suggest that there needs to be wording attached to this maximum which specifies that this maximum period should be reasonable, in order to not negatively impact healthy systems that are already in place. United Fresh further suggests that for fresh produce and other perishable products, that the maximum payment period be 14 days, unless both parties consent to either a 20 day, or “20th of the month following” period.

14. Question: Are there any ways in which clauses 13 and 14 could be improved to ensure more efficient, and fairer, allocation of costs due to shrinkage and wastage?

Clause 13(2), as written, may allow the transfer of the full costs of managing shrinkage back to the supplier. This is potentially unintended, and United Fresh suggests the wording here be updated to close this unintended loophole. United Fresh also suggests an additional subclause in clause 14 that clarifies that the actions of a retailer, or party under the authority of a retailer, that leads to waste, means this waste is a cost that should be borne by the retailer.

15. Question: 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)?

The six-month timeframe is not suitable for produce due to the realities of its supply, storage, and shelf life. A two-week timeframe at most would be more appropriate for produce, in United Fresh's view.

16. Question: Are there any ways in which clauses 15,16 and 17 could be improved to ensure more efficient and equitable sharing of costs?

United Fresh does not at this stage see any necessary improvements to these clauses.

17. Question: Should payments as a condition of supply be allowed in cases other than for new products?

United Fresh considers that payments as a condition of supply should not be allowed, with regards to fresh produce, apart from promotional payments required under the supply agreement.

18. Question: Is the description of what constitutes a new product, set out in clause 15(2)(ii), appropriate?

United Fresh considers the wording of 15(2)(ii) inappropriate. Nowhere in Clause 15 is the word “new” mentioned, or defined. Therefore, if 15(2) was developed with the intent of covering “new” products, this will not occur as a result of the current wording.

If “new” is defined and inserted into the current clause 15(2) for assisting in the application of 15(2)(ii), United Fresh would have further concerns. The current wording, in United Fresh's view, does not

describe a “new” product, but rather niche products or small suppliers, which may not be sold widely for a variety of reasons. For example, a capsicum supplier may be one of several capsicum suppliers to a retailer, and their product may go in to 20-24% of a retailer’s stores, while selling in significant quantities, consistently, for two decades. This would count as “new” under this definition. Additionally, under this wording, if the supplier continues to serve less than 25% of the stores, United Fresh sees no wording in the current draft that would prevent the retailer from charging the stocking fees to the supplier on a regular basis, which United Fresh believes is not the intent of this section.

This definition will therefore lead to substantial unintended consequences, and needs to be revised. Additionally, we note that attempting to use time or store percentages will result in further unintended loopholes where exact time or percentage requirements may lead to retailers performing changes only once the limit has been passed (e.g., if the limit is a year, setting a process for stocking fees after a year and a day).

United Fresh therefore suggests that “new” be defined in a revised 15(2)(ii), should only apply to a product or product variety (e.g., a new variety of apples being sold), which has never been sold before by the retailer, and should not have any further constraints.

19. Question: Should clause 17 include an additional restriction which prohibits retailers from requiring suppliers to fully fund the cost of promotions?

Yes, prohibiting retailers from requiring suppliers to fully fund the cost of promotions should be a part of clause 17. Retailers gain an economic benefit from promotions and therefore should not be able to pass the full costs of a promotion elsewhere, to leave them with “all of the reward, none of the risk”.

20. Question: Do you have any other comments on clauses 15, 16 and 17?

With the exception of the points raised in Questions 17-19, United Fresh has no further comments of clauses 15, 16, and 17, finding them appropriate from a produce perspective.

21. Question: Are there any ways in which clauses 18 and 19 could be improved to provide greater certainty and transparency regarding delisting decisions?

From a produce perspective we cannot add anything to improve clauses 18 and 19.

22. Question: Will requiring a range review, ahead of any delisting decisions, be an effective way of ensuring fair and transparent delisting decisions?

Yes, requiring a range review ahead of any delisting decisions, would be a reasonably effective way of ensuring delisting decisions are fairer, and more transparent, than at present.

23. Question: Does providing six-month notice of delisting fresh fruit and vegetables provide sufficient warning for such suppliers?

Six months provides ample warning for such suppliers.

24. Question: Will there be any issues in complying with the process requirements set out in clause 19?

United Fresh does not foresee any issues in complying with the process requirements set out in clause 19, for goods other than fresh fruits and vegetables.

However, United Fresh notes that, for produce, delisting is slightly different to other products, and requires a realisation.

The realisation that needs to be had, is that the timing of a delisting will have a significant impact on fresh produce. This is because fresh fruit and vegetables are not manufactured, but are grown, with the process of growing potentially taking several months. For example, apple trees may flower in

September/Spring, but the full harvest of the apples may not occur until March to May/Autumn (6-8 months difference).

Given this, United Fresh suggests that the 6-month timeframe be altered to read "6 months, or prior to the beginning of the next production cycle, whichever is longer".

25. Question: Are there any aspects of clauses 18 and 19 which may have unintended consequences?

United Fresh does not foresee any aspects of clauses 18 and 19 which may have unintended consequences.

26. Question: Are there any ways in which clause 20 could be improved?

United Fresh sees one particular way in which clause 20 could be improved. A supplier needs a method by which they can confirm that a retailer is sticking to the requirements of clause 20. As such, United Fresh suggests, a subclause 20(2)(d) which requires that when a retailer sells overordered product under 20(2)(c), that the retailer also provide written confirmation to the supplier of the volumes sold at the promotional price, and that sold outside the promotional price, as written evidence of the actions taken under 20 (2)(c).

27. Question: Do you have any other concerns regarding investment buying which are not addressed by this draft section of the Code?

Investment buying is not an option for produce, being a perishable product, and so we have no further concerns.

28. Question: What effect will clause 20 have on current practice regarding investment buying and funded promotions? Will there be flow-on impacts for retail prices?

Investment buying does not occur within fresh produce, and so we cannot comment further.

Regarding funded promotions, from a produce perspective, we do not foresee flow-on impacts for retail prices, if retailers take due care of volumes ordered during promotional periods.

The opportunity to benefit from forward buying activities, in relation to time limited promotions, is relatively limited in the produce category, due to fruit and vegetables' natural level of perishability.

29. Question: 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?

If the requirement for retailers to sell overordered product at the price listed during the promotional period was to be a potential part of clause 20, United Fresh suggests that this is offered as an alternative option determined by the grocery supply agreement with the consent of both parties.

30. Question: Do you have any other comments on this clause or the practice of investment buying generally?

United Fresh has no further comments.

31. Question: Does clause 21 effectively address issues faced by suppliers of fresh fruit and vegetables?

Yes, however for further clarification we would recommend that 4(b) includes the word "verbally" between "produce" and "within 24 hours".

32. Question: Is the 24-hour cut off proposed for accepting fresh produce appropriate? If not, why not?

In answering this question, United Fresh must first clarify an aspect of the delivery process of fresh produce, as this is a critical piece of knowledge in understanding our answer.

When produce is delivered to a store or a distribution centre managed by a retailer, the product is unloaded at the inwards goods entrance. At this point, the inwards goods team will count the overall volume of crates and pallets has been delivered, and that this matches the delivery docket. If these match, a "receipt of delivery" will be signed, confirming to the logistics company that the correct volume of crates and pallets was received by the store. However, this "receipt of delivery" is not acceptance of the product. This is a process step for managing inwards goods delivery and truck movements, including monitoring for over/under supply. Inspection of the delivery, and its acceptance, is performed by another team.

Once received, the fresh produce delivery will be moved from the inwards goods management area to the fresh produce inspection area. The timing of this will depend on the volume of pallets/crates, and the workload of the inwards goods team and the fresh produce inspection team. This movement may therefore occur up to an hour or so after the actual physical delivery, and often after the delivery truck may have left.

The fresh produce inspection area is typically temperature controlled, and exists for the purpose of holding stock until it can be inspected by an inspector to confirm it meets the necessary standards and specifications set out with the supplier, such as size, colour, levels of rot/mould/insect damage, and overall condition of the produce (e.g., no wilting, sugar levels, or other standards set out in the supply agreement). At large distribution centres and stores, there may be several loads due for inspection simultaneously, and these may each be of a sufficient size that it takes tens of minutes to an hour to inspect. A received delivery may therefore sit in the inspection area for some time, up to a period of two to three hours, depending on the workload and delivery schedule.

Once a load has been fully inspected, the results of the inspection are then sent to a senior person, who is responsible for accepting or declining the delivery on the basis of the inspection. Here, timeframes have the potential to extend, as this person can be on a different section of the fresh produce team, and may work a day-shift schedule (e.g., 6am-2pm, or 12pm-8pm). However, as deliveries and inspections occur when the produce is delivered, which at some sites may be any time (24 delivery schedules), this means that if an order is inspected and considered inadequate for the specifications at 11.30pm, the person responsible for rejecting the delivery may not see the information necessary to make their decision until the following morning.

This process is a typical process in the industry, and has long been accepted. Within this structure, it is therefore possible, and expected, that the timeframe, between physical delivery of the product to the inwards goods team, and the fresh produce team making the decision on accept/reject, that this may commonly be a period of up to 12 hours or more.

However, this assumes a fully functional inwards goods and inspection team process, with a fully functioning temperature-controlled storage system to manage the produce between delivery and the final acceptance decision. If a breakdown in the process occurs, and a delivery, either direct to store, or to a distribution centre, is not handled properly, there exists the potential that the load could deteriorate between delivery and inspection.

As an example, deliveries close to periods of high intensity (public holidays, product buildup for significant promotions, etc.) may result in delayed timeframes where fresh produce may be sitting outside the inspection area for more than 1-2 hours, which may be in a non-temperature-controlled area, and may, in some cases, be left near the delivery docks, or even outside, until it can be moved to the inspection area. Additionally, there exists the potential for the temperature control systems to fail, with repairs awaiting the scheduling and timing of technicians who may not be able to repair

the system for several hours. This means that there exists the potential for temperature-controlled product to fall outside the necessary temperatures, and for product that must be insect free to be contaminated by the insects outside the inwards goods doorway. These would result in a delivery being rejected, through no fault of the supplier or the logistics provider.

Given the above points, United Fresh suggests that the proposed 24-hour cut-off for accepting fresh produce is appropriate, if the retailer receives, handles and stores the produce correctly between physical delivery and the official acceptance of the fresh produce. However, United Fresh is of the view that this section needs an additional clause relating to the possibility of a delivery being rejected as a result of inappropriate handling at the retailer's premises.

33. Question: Is the 48-hour cut off for notifying suppliers of the rejection of fresh produce appropriate? If not, why not?

Yes, the 48-hour cut-off for notifying suppliers with the written reasons for rejection of fresh produce is typically appropriate for that period of the trading week when buying and distribution staff are both present.

However, distribution centres and distribution staff operate 24/7, but the buying staff with the responsibility of client relationships and contacting the supplier in the event of a rejection may only work 5 days a week. The potential therefore exists for an issue to occur after the buyers have finished for the week, which would result in the 48-hour period occurring exclusively during that time when no buyers are available, i.e., their weekend.

United Fresh could therefore see that, on occasion, the 48 hours would not be enough.

34. Question: Should similar protections apply to suppliers of other perishable produce, such as seafood and meat?

United Fresh's core competency is in the fresh produce value chain. Not all comparisons between seafood, meat, and other perishable produce are relevant, but there is sufficient comparability related to perishability to suggest similar protections could be considered.

We would also like to note, the industry uses "perishable categories" rather than "perishable produce" when comparing these categories. One fundamental difference between fresh produce and seafood is when a grower harvests a potato paddock, he can reasonably expect that he will turn up potatoes from the soil. If a deep-sea fisher puts his nets out for snapper, there is no guarantee what he will haul up. Specifics in terms of what protections are required for the seafood industry should be directed at appropriate industry bodies.

35. Question: Will clause 22 be effective in preventing retailers from pressuring suppliers to desist from supplying other parties?

Yes, clause 22 will be more effective in preventing retailers from pressuring suppliers to desist from supplying other parties than the current situation.

36. Question: Will clause 22, 23 and 28 cause any unintended outcomes?

United Fresh does not foresee any unintended outcomes with clause 22 or clause 28. For clause 23, United Fresh is of the view that the "reasonable grounds" must be provided in written format to avoid unintended outcomes.

37. Question: Are there any ways in which clause 24 and 25 could be improved to adequately address issues relating to suppliers' intellectual property?

United Fresh is of the view that clauses 24 and 25 can protect supplier intellectual property, United Fresh cautions that the wording should be improved to ensure that retailer IP is also protected.

The IP related to a supplier's product should be protected, as this is a product which suppliers have spent time and money in developing (e.g., branding, recipes, advertising). Any IP a retailer may develop in the process of creating their own private label product also needs to be afforded such protection, as retailer IP may be put at risk when a retailer utilises third parties or suppliers to manufacture the private label product for them.

We suggest that the wording of the regulations be modified to specify that both supplier and retailer IP must be respected by the other party.

38. Question: Will clauses 24 and 25 support greater investment in product development?

Greater clarity of the ownership and available recourse of intellectual property always contribute to greater investment in product development. But Clauses 24 and 25, as they currently appear, do not in their own right, qualify as a key driver of product development.

39. Question: Is there any part of your product, or the production of your product, which holds special cultural significance for you as a supplier? If yes, are you aware of any issues with respect to the supply of your product that may require protection over and above those provided at clause 24 and 25? Do you have any advice for how the Code could address these issues?

United Fresh is not a supplier of Taonga, or indeed any other product, and therefore cannot comment further on this question.

40. Question: Are there any ways in which clause 26 could be improved, to help ensure greater transparency and consistency of decisions relating to range reviews and shelf allocation?

United Fresh does not see any other ways in which clause 26 could be improved from a produce perspective.

41. Question: Do you have any other comments on this clause?

United Fresh has no further comments on this clause.

42. Question: Will this clause [27] help improve the process for seeking price increases?

United Fresh considers this clause will help improve the process for seeking price increases.

43. Question: Is the timeframe for responding to a price increase appropriate? Are there classes of produce which may justify shorter time periods for response?

All things being equal, the proposed timeframe of 5 days in Clause 27(1)(c) is appropriate for produce. The 30-day time window in Clause 27(2) is not appropriate for produce across all categories, due to the perishable nature of produce and potential circumstantial changes occurring within the 30-day timeframe.

We would also like to confirm that this clause would not have been very helpful had it already been a part of the regulations during an event such as Cyclone Gabrielle, where produce-related timeframes on matters such as price and product availability tend to concertina, due to rapidly and unexpectedly changing conditions in a local environment, where crops that were saleable in the morning ended up being written-off three hours later. Such situations then created opportunities for more fortunate suppliers, whose crops survived, who were able to realise market prices they had not anticipated, due to the typical supply and demand fluctuations within the produce industry being replaced by a number of extreme new realities.

44. Question: Do you have any other comments on this clause?

United Fresh has no further comments on this clause.

45. Question: Do you think the maximum penalty is set at a level which will sufficiently deter non-compliance?

Regarding the maximum penalties for individuals, United Fresh is of the view that these are in line with the penalties imposed by other regulations and legislation. United Fresh is also of the view that the Tier 1 and Tier 4 penalties for non-individuals (i.e., businesses and other legal entities) are appropriate to deter non-compliance.

However, United Fresh suggests that the maximum penalty for Tier 2 non-individuals (i.e., the greater of \$3 million / the value of commercial gain / 3% of the annual turnover within the period in which the legislation and regulations were contravened) is, with regards to the 'value of commercial gain' option, not at a level which will sufficiently deter non-compliance.

Setting the penalty limit at the value of the commercial gain means that an organisation has the ability to gain a combination of direct and indirect value from the breaches of regulations, e.g., via delayed payments to suppliers, which would improve the retailers cashflow and financial position for the duration, negatively impacting the suppliers or other parties, and earning interest.

Following any detection of contravening the rules, there still exists the possibility of an organisation then spending further time in arguing the evidence in front of the Grocery Commissioner or another party, before a determination of whether there is a case to be made. This allows for significant periods of time in which an organisation can gain multiple indirect benefits, which would not be impacted by the 'value of commercial gain' penalty level.

46. Question: Do you think the maximum penalty level is proportionate to the level of harm which may be caused by non-compliance?

For Tier 1 and Tier 4, yes these are proportionate to the level of harm. For Tier 2, United Fresh refers to the challenge raised in Question 45 and suggests Tier 2 has the commercial gain value increased to 150% of the value of any commercial gain, to capture any indirect benefits from non-compliance.

47. Question: Do you think any parts of the Code should attract higher or lower tiers of penalty levels? If so, which parts, and why?

United Fresh considers that the penalty tiers are appropriate for the parts of the code they are targeted at.

48. Question: Do you have any other comment on the maximum penalty levels which will apply to breaches of the Code?

United Fresh has no further comment on the maximum penalty levels.

49. Question: Will requirements to provide written statements when relying on exceptions improve compliance and transparency in relation to the use of such exceptions?

Yes, requirements to provide written statements when relying on exceptions will improve the situation over the present situation, and increase compliance and transparency in relation to the use of such exceptions.

50. Question: Will there be any significant costs, or issues, in complying with these requirements?

There may be potential costs or issues in complying with these requirements. However, United Fresh is unable to determine these.

51. Question: Do you agree with the decision not to include restrictions from the Australian Code relating to payments for shelf allocation?

The Australian and New Zealand retail environments are relatively similar, and Australian corporate retailers have been operating in New Zealand since 1988. There is probably a good reason why the Australian Grocery Code includes these restrictions relating to payments for shelf allocation. Whilst this is not an area of immediate concern to the New Zealand fresh produce industry, one would question why such a clause should be excluded in the New Zealand Code, given that the Australian Government determined it necessary?

52. Question: 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?

United Fresh refers the reader to our answer to Question 51.

53. Question: Do you agree with the decision not to include protections from the Australian Code relating to changes in supply chain procedures?

Yes, United Fresh agrees with the decision not to include protections from the Australian Code relating to changes in supply chain procedures.

54. Question: 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?

No, United Fresh is not aware of any changes to supply chain procedures which may require specific protections in the Code, beyond those discussed in our answers to the relevant questions earlier in this document.

55. Question: Do you agree with the decisions not to include protections from the Australian Code relating to the transfer of intellectual property rights?

United Fresh does not agree with the decision. Without these protections, a retailer has the ability to require the transfer or licensing of their IP to the retailer to become a private label supplier, which would then mean that the supplier would be permanently prevented from using their own IP to supply the private label retailer with their own product, or for supplying the other regulated retailers with their own product based on their own IP. Without this protection, the retailers are able to protect their private label products from competition.

United Fresh therefore suggests that these provisions be added to the New Zealand Code of Conduct.

56. Question: Are you aware of any issues relating to the transfer of intellectual property, beyond those included at clauses 24 and 25?

United Fresh is not aware of any issues relating to the transfer of intellectual property, beyond those included at clauses 24 and 25, beyond that raised in Question 55.

57. Question: Do you have any further feedback on the consultation draft of the Code, in addition to the points you have already raised?

United Fresh is not a trading party, i.e., neither a supplier, nor a retailer. Our position in commenting on this consultation document, and indeed our participation in the process that started with the Commerce Commission Market study, is to ensure that the new legislation and regulations being implemented are workable, for United Fresh's supplier and retailer members, with supplier members further segmenting into fruit and vegetable growers, packers, and wholesalers.

58. Question: Are there any other provisions which are included in the Australian Code which may be beneficial in New Zealand?

No, United Fresh does not see the need for any further provision from the Australian Grocery Code, with the exception of those we have discussed in earlier questions.

59. Question: 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?

One issue that we can identify as not having been addressed is the process and the expectations placed upon suppliers in relation to category or business relationship performance reviews with retailers.

Naturally, such reviews need to occur, but the questions that arise are:

1. To what extent do such reviews need to be standardised?
2. Should review structures be identical across all categories within a retail operator?
3. Are there areas within the retail operation where no structured reviews occur?
4. Should a minimum standard be required in areas where there is currently no structured review?
5. Should review structures be standardised across both retail operators?

The category and business review concepts are obviously closely related to supply agreements, but within the context of the draft regulations presented for consultation, too little can be learnt about the role of business or category reviews in the supply agreement.

Summary

Change happens in every generation. Some change is planned for, and some change is consequential. However, at the end of the day, the horticulture sector, and the overall fresh produce industry, play a significant part of getting food onto the nation's plates. Fruit and vegetables are healthy and nutritious, are wherever possible grown right here in New Zealand, and contribute substantially to achieving a sustainable food supply to the consumer, thus supporting New Zealand's food security requirements.

United Fresh agrees with the broad scope of the Code of Conduct, as well as the general intent behind the individual clauses. Where United Fresh has suggested changes to the wording, we have done so because of two reasons: firstly, that we believe that the current draft wording requires slight modification in order to improve clarity and ease of understanding; or, secondly, where we have noted that the realities of fresh produce, and how it differs to other grocery categories, might not have been appropriately considered, and how the wording of the final Code of Conduct regulations could most effectively encompass the realities of the fresh produce industry, which would ensure effective and workable regulations that endure.

United Fresh is of the view that the Grocery Code of Conduct, if developed appropriately, will help ensure a more level playing field for both retailers and suppliers, over the years to come.

United Fresh is available to provide further clarification, should MBIE consider this to be of benefit.