MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HIKINA WHAKATUTUKI

Submission form

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

June 2023

newzealand.govt.nz

Submissions process

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

Please send your submission form to:

- ***competition.policy@mbie.govt.nz*** with the subject line "Grocery Supply Code of Conduct Consultation 2023"

- Competition Policy
  Building, Resources and Markets
  Ministry of Business, Innovation & Employment
  PO Box 1473
  Wellington 6140
  New Zealand

Release of information

MBIE intends to upload copies of submissions received to MBIE's website at ***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.

Submissions remain subject to request under the Official Information Act 1982. Please set out clearly in the cover letter or email accompanying your submission if you have any objection to the release of any information in the submission, and in particular, which parts you consider should be withheld, together with the reasons for withholding the information. MBIE will take such objections into account and will consult with submitters when responding to requests under the Official Information Act 1982.

Private information

The Privacy Act 2020 establishes certain principles with respect to the collection, use and disclosure of information about individuals by various agencies, including MBIE. Any personal information you supply to MBIE in the course of making a submission will only be used for the purpose of assisting in the development of policy advice in relation to this review. Please clearly indicate in the cover letter or email accompanying your submission if you do not wish your name, or any other personal information, to be included in submissions that MBIE may publish.

Name (first and last name)
James Radcliffe

Email
Privacy of natural persons

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

Business name or organisation
Woolworths New Zealand Limited ("**WWNZ**")

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.
The part of WWNZ's response to question numbers 11, 12, 13, 21, 22, 23, 24, and 25 contained in square brackets and highlighted in yellow should be withheld on the basis the information is commercially sensitive and valuable information that is confidential to WWNZ, and disclosure would be likely to unreasonably prejudice the commercial position of WWNZ.

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.

Woolworths New Zealand Limited ("**WWNZ**") supports the establishment of a mandatory Grocery Supply Code of Conduct for New Zealand ("**Code**") and is committed to making it work well for suppliers, consumers, and the grocery sector.

It is important to bear in mind that the Code will be coming into force at a time of major regulatory and legislative change for the grocery sector, and there needs to be recognition that preparing for new regulations and legislation takes time and resources. Sufficient time needs to be allowed to enable the necessary preparation.

WWNZ considers that the six month grace period provided for in the transitional provisions may not be enough time to allow retailers to implement the necessary systems and for suppliers and retailers to negotiate and reach new grocery supply agreements that reflect the Code, are satisfactory to both parties, and ultimately provide long term benefits to consumers.

Accordingly, WWNZ submits that the grace period should be 12 months. That would be consistent with the transition period allowed for in relation to the Australian Food and Grocery Code of Conduct ("**Australian Code**") - namely to allow six months to offer/negotiate to vary agreements and six months to implement varied agreements once agreement is reached.[1]

WWNZ does not consider that the New Zealand transition period should be shorter than the Australian transition period, given the obligations and regime would be largely identical, and considers that the same reasons for allowing six months for each step (amounting to an overall grace period of 12 months) hold true in New Zealand also.

This aligns with the Government's intent, as stated in MBIE's consultation paper on the exposure draft of the Code ("**Consultation Paper**"), to achieve efficiencies and harmonisation for trans-Tasman operators by ensuring the New Zealand Code follows the Australian Code as closely as possible.[2]

[1] See clauses 5(2) and 5(3) of the Australian Code.

[2] Ministry of Business, Innovation and Employment *Consultation Paper: Exposure draft - New Zealand Grocery Supply Code of Conduct* (June 2023) ("**Consultation Paper**") at paragraphs 22-23.

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.

WWNZ supports the inclusion of a requirement for retailers to act in good faith when dealing with suppliers. WWNZ is also pleased to see that clause 6 replicates the equivalent obligation in the Australian Code.

WWNZ has two submissions on how this obligation could be improved:

- WWNZ submits that it should be made clear in the Code that the discretionary factors set out at clause 6(3) are to be assessed objectively. Namely, WWNZ submits that clause 6(3) should be amended as follows:

  > "In determining whether the retailer has acted in good faith in dealing with a supplier, an objective assessment of the following may be taken into account:"

  It is important to recognise that grocery retailers are negotiating with suppliers to ultimately achieve competitive grocery outcomes for consumers. It would result in adverse consequences for consumers if grocery retailers were concerned that they could be vulnerable to subjective allegations of bad faith conduct by suppliers. For example, a supplier may allege that a retailer unfairly leveraged its negotiating power in a negotiation, when an objective assessment of the retailer's conduct would show it was fair and reasonable in the circumstances (for example, negotiating to resist a proposed cost increase from a large multinational supplier where that cost increase is not objectively justifiable in the circumstances). That could result in adverse outcomes for consumers if grocery retailers end-up being reluctant to robustly negotiate for competitive prices and terms with suppliers (some of which are among the largest companies in the world) due to the fear of unwarranted allegations being made.

- As raised by WWNZ in its previous submission on MBIE's grocery supply code consultation, for the obligation of good faith to achieve the intended outcomes, it is necessary that the Code also has an overarching principle of good faith that applies to suppliers.[3] In other areas of New Zealand law (e.g. employment relationships and insurance contracts), the mutuality of good faith obligations is seen as critical to achieving good faith relationships (indeed the Courts have observed that the obligation of good faith necessarily flows both ways and a one-way good faith obligation would not make sense).[4] It is the total relationship that needs to be conducted in good faith (not just a one-way relationship of good faith where, for example, on the other side of the relationship, a large multinational supplier could be acting in bad faith). Retailers need to have trust that they are being treated in good faith by suppliers (some of which are among the largest companies in the world), so that they can be confident that the information they are being provided is accurate and they are being dealt with in an honest and transparent manner.

[3] WWNZ's submission on MBIE's Consultation paper on the New Zealand Grocery Code of Conduct (July 2022) at page 6.

[4] *Young v Tower Insurance Limited* [2016] NZHC 2956 [7 December 2016] at paragraph 163.

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.

WWNZ supports clauses 7 and 8 of the Code and believes that the clauses, as currently drafted, will be effective in achieving their intent.

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.

WWNZ supports clause 9 of the Code and believes that the clause, as currently drafted, will be effective in achieving its intent.

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.

WWNZ supports clause 10 of the Code and believes it is unlikely that it will result in any unintended consequences. WWNZ does not believe that there is any need for retrospective variations to be permitted under the Code.

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.

WWNZ supports the intention of clause 11, which is to prevent retailers from forcing suppliers to use the retailers own transport or logistics services. WWNZ notes that an equivalent obligation is not found in the Australian Code and, therefore, this is a clause without overseas precedent to draw on in terms of how it may apply in practice.

In that context, WWNZ is concerned that this clause may create uncertainty for retailers who offer transport and/or logistics services to suppliers, in circumstances where, once a supplier chooses to use that service, the transport and/or logistics service itself will be fulfilled by a subcontractor of the retailer (due to the potential ambiguity in the use of the words "directly or indirectly").

It is important that retailers can continue to offer transport and/or logistics services which may offer competitive terms and efficiencies to suppliers, and then sub-contract the fulfilment of those services to third parties, so long as suppliers are not forced to use the retailer's transport and/or logistics services.

Accordingly, clause 11 should be clarified by the addition of a new subclause (3) that states:

> "Where a supplier chooses to use a transport or logistics service offered by a retailer, subclause (1) does not prevent a retailer from subcontracting the fulfilment of that transport or logistics service to a third party that the supplier is then required to use to receive its chosen transport or logistics service."

It is also important that, where a supplier chooses to use transport and/or logistics services offered by a retailer, clause 11 is not interpreted as preventing minimum durations of commitment or the enforcement of contractual terms in relation to the provision of that service. For example, where a supplier chooses to use transport and/or logistics services offered by a retailer for, say, a period of 12 months, then:

- the retailer should be able to require the supplier to use that service for the period of time that it has committed to (given the retailer may need to invest in establishing that relationship, for example determining optimum network runs and changing delivery schedules); and

- the retailer should be able to require the supplier to adhere to the terms of the transport and/or logistics services agreement, as those will be necessary to achieve the efficiencies and benefits contracted for (for example, meeting pick-up windows and minimum delivery quantities).

Therefore, clause 11 should be clarified by the addition of a new subclause (4) that states:

> "Where a supplier chooses to use a transport or logistics service offered by a retailer, subclause (1) does not prevent a retailer from requiring the supplier to adhere to the terms of any agreed transport or logistics services agreement."

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.

WWNZ supports clause 12 of the Code and considers that providing for "reasonable" payment terms is a sufficiently flexible and objective standard that can be applied across multiple different trading relationships to achieve fair outcomes as between suppliers and retailers and enables suppliers to choose and negotiate payment terms that best suit their business requirements. That approach is also consistent with the approach taken in the Australian Code.

WWNZ is strongly opposed to the introduction of a prescribed maximum payment period to clause 12 of the Code. Any such prescribed maximum payment period is unnecessary, and risks significant adverse unintended consequences, including for suppliers and consumers. That is for the following reasons:

- **A prescribed maximum payment period is unnecessary**:
    - WWNZ adopts a tailored approach to its relationships with its suppliers. Where suppliers wish to negotiate payment terms of 20 days or shorter, they are already able to do so.
        - [ ] of WWNZ's suppliers are already on payment terms that are 20 days or shorter (with [ ] of WWNZ's suppliers on payment terms of 14 days or shorter). The way WWNZ partners with its suppliers is tailored to reflect the fact that those suppliers come from a diverse range - from large multinational corporations to small New Zealand family owned businesses (including 120 produce growers).[5] WWNZ, therefore, tailors its approach to reflect the differences between its suppliers, and to reflect the nature of a particular product and the circumstances of each supplier relationship (see further below), to achieve outcomes that meet the requirements of suppliers and deliver competitive offerings (both in terms of range and price) for consumers.
        - In the context of payment terms, an example of this tailored approach is that WWNZ has implemented a shorter payment term for smaller suppliers, offering them the ability to choose 14-day payment on standard

[5] WWNZ's submission on the New Zealand Commerce Commission's preliminary issues paper regarding the market study into the retail grocery sector (4 February 2021) ("**WWNZ's Submission on the Market Study Preliminary Issues Paper**") at page 41.

settlement terms.[6] This applies to New Zealand suppliers from whom WWNZ buys less than $250,000 of goods each year and whose total annual turnover is less than $1 million per annum. WWNZ offers even shorter payment terms to fresh produce suppliers, allowing those suppliers to choose a 7-day payment term. Each of these options allows small suppliers to decide whether they want a shorter payment term (based on their individual business needs) and takes into account the nature of each type of product.

- The success of WWNZ's tailored approach to its relationships with its suppliers, and the fact that WWNZ is achieving the right balance between delivering the products customers want at competitive prices and supporting the success of its suppliers,[7] is evidenced by WWNZ's ranking as the best supermarket retailer to do business with by its suppliers for the past three years.

- WWNZ has also invested heavily in its electronic invoicing (e-invoice) systems and has transitioned over 1,600 suppliers to e-invoice methods in the past four years. These e-invoice methods mean that manual processes are removed, which has a direct correlation to a higher level of on-time payments. Over the last year, WWNZ has achieved a [ ] on time payment performance for suppliers. Furthermore, WWNZ has also invested in new technology to support an industry leading payment dispute system, under which [ ] of payment disputes relating to trade supplier payments are received, investigated and resolved within 24 hours. These measures provide further support to WWNZ's suppliers.

- **A prescribed maximum payment period undermines trans-Tasman harmonisation and risks increased costs in dealing with large multinational suppliers compared to Australia**: WWNZ supports the Government's intent, as stated in the Consultation Paper, to achieve efficiencies and harmonisation for trans-Tasman operators by ensuring the New Zealand Code follows the Australian Code as closely as possible.[8] Adding a prescribed maximum payment period would represent a major divergence from the Australian Code, and WWNZ does not consider there are differences in New Zealand market conditions that could justify that divergence. In fact, it would have the effect that large multinational suppliers would likely have shorter payment terms in New Zealand than in Australia, which would increase the costs of New Zealand retailers in dealing with such multinational suppliers compared to Australian retailers, which risks unintended adverse consequences for New Zealand consumers.

- **A prescribed maximum payment period is unnecessarily inflexible and risks unintended consequences (including reduced range for consumers)**: The inflexibility of a prescribed maximum payment period (including whether it was for 20 days, or otherwise) applied to a diverse range of commercial relationships risks significant unintended consequences and adverse outcomes for both suppliers and consumers. WWNZ negotiates payment terms with its suppliers, based on the nature of a particular product and the circumstances of each supplier relationship. It is necessary for there to be flexibility with trading relationships to reflect the specific circumstances of the relationship. A prescribed maximum payment period of 20 days does not reflect the commercial dynamics of the grocery sector, nor the vast array and variety of the products sold in supermarkets. Some products have a shelf life of a few days, some products have a shelf-cycle of a month, and

[6] WWNZ's Submission on the Market Study Preliminary Issues Paper at page 42.
[7] At page 40.
[8] Consultation Paper at paragraphs 22-23.

some products can take more than 20 days to be delivered from the supplier to the retail store. It does not make sense to require the same payment terms for all of these types of products. Retailers and suppliers need to retain the ability to tailor payment terms to the shelf-life, shelf-cycle, and lead times of particular products. A prescribed maximum payment period is inflexible and would be very different to the approach taken elsewhere in the Code, which generally allows for commercial negotiation to take place within principle-based restrictions. That inflexibility would also risk reduced range for consumers. This is because if retailers are required to comply with a prescribed maximum payment period for all products, regardless of the varying shelf lives, shelf-cycles and lead times, sales cycles of products will not always be aligned with the payment cycles. Retailers would have a reduced incentive to stock products that have a longer than 20 day shelf-cycle or lead time if there is a requirement to pay the supplier within 20 days. As a result, consumers may see a reduced range of products available on the shelves.

- **There are acknowledged challenges with prescribed maximum payment periods**: The imposition of general maximum payment periods was considered by MBIE, in its proposals to improve business-to-business payment practices, which led to the introduction of the Business Payment Practices Bill. MBIE originally proposed and consulted on legislation that would specify a maximum payment period of 20 days and would apply to contracts for the supply of goods and services between entities in trade (subject to limited exceptions).[9] However, the Government ultimately decided that a disclosure regime that requires large entities to report on payment practices was more appropriate than a prescribed maximum payment period.[10] Significant challenges with a prescribed maximum payment period were identified by the Government and included the following:

- **It risks lengthening payment terms**: It was identified that there was a risk that a prescribed maximum payment period could inadvertently increase payment terms in some cases, as the prescribed maximum payment period becomes the norm.[11] For example, evidence from the EU found that businesses may see a prescribed maximum payment period as a 'recommended' term and will adjust payment terms accordingly (sometimes upwards).[12] In Sweden, average payment terms increased in all sectors since the introduction of a prescribed maximum 60 day payment period.[13] The Consultation Paper reflects similar sentiments, noting that there is a risk of the maximum payment period specified in the Code becoming the industry norm.[14] As noted above, given that WWNZ currently already offers shorter payment terms of 14 days to smaller suppliers and even shorter terms for fresh produce suppliers ([ ] of WWNZ's suppliers are already on payment terms that are 20 days or shorter, with [ ] of WWNZ's suppliers on payment terms of 14 days or shorter), the 20 day prescribed term may result in longer payment terms for some suppliers.

- **No improvement in payment practices**: In the UK and EU, there was no evidence of improved business-to-business payment practices as a result of legislation that allowed businesses the right to charge and collect interest if payment is not made within the

[9] Ministry of Business, Innovation and Employment *Discussion Paper: Improving business-to-business payment practices in New Zealand* (February 2020) ("**Business Payment Practices Discussion Paper**") at pages 10-12.
[10] Cabinet Paper *Better Business Payment Practices Disclosure and Publication regime* (8 November 2022) ("**Business Payment Practices Cabinet Paper**") at paragraphs 22-23.
[11] Business Payment Practices Discussion Paper at page 10.
[12] At page 10.
[13] At page 10.
[14] Consultation Paper at paragraph 43.

mandated payment periods.[15] Survey data showed that most (~90%) businesses would not enforce their right to charge interest on late payments due to a fear of harming the business relationship and a lack of cost-effective remedy procedures.

- **No benefit to small businesses**: It was identified that small businesses may be most negatively impacted and receive few (if any) benefits from mandatory maximum payment periods.[16] For example, smaller suppliers may find it more difficult to fund the additional working capital requirements.

- **Other regulatory tools are more appropriate**: A range of other regulatory and non-regulatory tools were identified as being available to drive improvements in payment practices.[17] These alternative tools were deemed to pose less regulatory risk and burden than mandated maximum payment periods. It was determined that, based on the evidence available, a disclosure and publication regime of businesses' payment performance will deliver the greatest benefit and uplift in behaviour for the lowest cost. WWNZ submits that clause 12 as it stands is the correct regulatory tool to deliver benefits in the grocery sector.

- **The Business Payment Practices Bill will introduce reporting obligations**: The Business Payment Practices Bill will introduce a disclosure regime for large entities that meet the prescribed payment threshold test. The Government anticipates that this regime will "incentivise larger businesses, conscious of their reputation, to improve their payment practices," and expects that ultimately the bill "will have an impact on how business is conducted and create a fairer business environment that is more conducive to healthy competition."[18] It is therefore evident that the policy intent of this disclosure regime aligns with what is ultimately sought by MBIE - i.e. to achieve shorter payment terms from larger businesses.[19] WWNZ believes that it would be counterproductive for the Code to impose additional obligations given that the disclosure obligations under the Business Payments Practices Bill, combined with the requirements under clause 12 as currently drafted, would be sufficient to achieve both transparency and reasonable payment terms (without the unintended consequences associated with a prescribed maximum payment period).

- **A prescribed maximum payment period would have a significant cost to WWNZ. It would also necessitate additional banking facilities to manage the additional working capital requirements and risk unintended consequences**: WWNZ's initial high level estimates are that the financial impact of the prescribed maximum payment period of 20 calendar days would impose a significant additional cost to WWNZ. This would be the interest cost of aligning all payment terms that are currently greater than 20 days with a prescribed payment period of 20 days. This could result in:
    - the potential for higher grocery prices for consumers, given the impact that retailers costs have on grocery prices; and
    - a lower level or deferral of capital investment into WWNZ's supermarket business, due to the adverse impact on cash flows.

[15] Business Payment Practices Cabinet Paper at paragraph 17.
[16] At paragraph 19.
[17] At paragraph 23.
[18] Ministry of Business, Innovation and Employment *Business Payment Practices Regulations: Discussion Document* (October 2022) at page 7.
[19] Consultation Paper at paragraph 41.

Further Consideration

WWNZ, therefore, submits that clause 12 of the Code should be left in its current form for the implementation of the Code. This will allow time to assess the impacts of the principles-based approach in clause 12 of the Code (based on reasonableness), and the disclosure regime under the Business Payment Practices Bill on payment practices. In addition:

- The Commission also has the discretion to use its information-gathering powers under section 182 of the Grocery Industry Competition Act 2023 ("**Act**") to assess the current state of retailer payment practices once the Act is in force;
- The Commission could also consider this issue as part of its first annual report under sections 175 - 178 of the Act; and
- The Commission is required to conduct a review of the Code under section 20 of the Act within two years after the Code comes into force, which provides another avenue for the Commission to consider this issue.

If the information gathered through the mechanisms above suggests that the Code's provisions are not working effectively to ensure that fair and reasonable payment practices are being used across the industry, mandatory requirements regarding payment terms could be considered at that point.

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.

WWNZ supports clauses 13 and 14.

However, WWNZ does not consider that the six month time limit under clause 14(2)(g) is sufficiently long. In particular, for products that have a long shelf life, issues may only become apparent after the six-month time limit. It would be unfair for retailers to be unable to claim payments for wastage if a batch of products was faulty, including due to negligence of the supplier, simply because an arbitrary six-month period had elapsed. This time limit risks placing costs on retailers that properly sit with suppliers (for example, costs of supplier negligence). Furthermore, there is no need for a prescribed time limit given suppliers will be protected against any unfair aged claims (ie unwarranted claims made six months after goods were received) due to the requirement to prove that any payments being required are reasonable in the circumstances and consistent with the overarching good faith obligations. Accordingly, WWNZ submits that there should be no time limit. That approach would be consistent with the Australian Code, and WWNZ does not consider there are differences in the New Zealand industry that justify a departure from this approach. An approach that shifts risks of supplier conduct onto retailers (including risks of supplier negligence) risks moral hazard and higher grocery prices for consumers.

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.

WWNZ supports clauses 15, 16, and 17 and believes that the clauses, as currently drafted, will be effective in achieving its intent.

WWNZ submits that clause 17 should not include an additional restriction which prohibits retailers from requiring suppliers to fully fund the cost of promotions. WWNZ agrees with MBIE's view, that the reasonableness test set out in 17(3) is sufficient to ensure better sharing of costs. A supplier may be willing to agree to fully fund promotions in certain situations (for example, to drive volumes and sales in their business, or achieve some other supplier commercial imperative) and, as long as this is something a supplier freely chooses to do, WWNZ does not believe that this practice is contrary to effective competition in the industry.

In fact, prohibiting suppliers from being able to fully fund promotions that they wish to run (in circumstances where a retailer does not wish to fund a promotion) would likely be averse to suppliers' interests (by reducing their ability to fund promotions to achieve their commercial imperatives).

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 are any aspects of these clauses which may have unintended consequences?

Please type your submission below.

WWNZ supports clauses 18 and 19, subject to the comments below.

WWNZ notes that the requirement that a range review be conducted before a product is delisted is a departure from the Australian Code, is in WWNZ's view unnecessary, and could result in unintended consequences, including:

- **Significant additional internal compliance costs**: It is important to note that within WWNZ's business a standard category review generally takes [ ] weeks to carry out (this includes a full review of the category, using a broad set of tools, such as consumer insights and analysis of product performance data, to optimise the decision making and final outputs). A properly conducted range review which could be more significant (as it would include a number of categories), and therefore, would require considerable resources and dedicated time from many individuals within WWNZ's business (and, as noted, even a standard category review can take [ ]). Hence, this obligation risks adding unnecessary compliance costs, which may ultimately flow through to consumers in higher grocery prices.

- **Limits opportunity for new suppliers and limits retailers' ability to be responsive to consumer demands**: A retailer's shelf space and supply chain capacity is limited, and there is room for only a certain number of products. This means that as consumers' preferences evolve and new products emerge and become popular (recent examples include products like kombucha or paleo bread), other products that no longer meet customers' needs and are therefore not in demand must be removed. The obligation to conduct a full range review will mean retailers cannot be nimble as new consumer tastes emerge (noting above the resource and time required to conduct a range review) and will hence limit the opportunities for new suppliers and new products until range reviews are complete.

- **Prolongs the stocking of products that are no longer demanded by consumers or are no longer at an attractive price point for consumers (due to supplier cost increases)**: This obligation will require a retailer to continue to stock a product that is no longer demanded by consumers for reasons outside the retailer's control. For example, there could be situations where a supplier changes the formulation/recipe of a product that means it is no longer in demand by consumers and sales numbers consequentially reduce or cease altogether. In those situations, it should not be necessary for a retailer to conduct a review of the entire range in order to cease stocking a product that consumers no longer wish to purchase. That risks shelf-space being taken up by products that consumers no longer wish to purchase, denying consumers the opportunity for new products. Furthermore, where a supplier seeks to increase the cost price of a product to a retailer to a level that means it is uneconomic for a retailer to continue stocking the product (ie because the consequential retail price will be unattractive to consumers), the retailer should not be required to conduct a range review to determine that such a product will no longer be demanded by consumers.

Accordingly, WWNZ submits that this range review requirement should not be included in the Code as it will increase costs to retailers (which risks higher retail prices), and risks limiting consumers' ability to access products that resonate with them. In any event, the overarching obligation to act in good faith in relation to all dealings with suppliers under clause 6 will apply when retailers are making delisting decisions, and this will provide the necessary protection to suppliers, in that retailers cannot unreasonably delist a supplier's product.

Furthermore, while WWNZ believes that the six month warning required prior to delisting fruit and vegetables under clause 19(1)(c) will provide growers with sufficient notice before any delisting occurs, WWNZ submits that the exclusion to this requirement under clause 19(2)(a) should be broadened beyond situations where "time is of the essence" to clearly include situations involving quality issues, food safety, unsafe or unethical working conditions, or force majeure circumstances, such as natural disasters (noting that retailers' fresh fruit and vegetable suppliers include both domestic and overseas based suppliers).

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.

WWNZ supports clause 20 of the Code.

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.

WWNZ supports clause 21 of the Code. WWNZ believes the 24 hour cut-off for accepting fresh fruit and vegetables is appropriate, as is the 48 hour cut-off for notifying suppliers of any rejected fruit or vegetables. WWNZ does not consider that other perishable produce, such as meat and seafood, should be subject to similar provisions as for fresh fruit and vegetables, noting that no such arrangements exist under the Australian Code. Meat and seafood producers have more options for their stock, with greater potential for stock to be exported, frozen, and /or stored longer-term than is possible for fresh produce. Protections already exist under the Code to ensure that meat and seafood suppliers do not have their products unfairly rejected, including the requirement in clause 8(b) for any grocery supply agreement to specify any circumstances in which the retailer may reject groceries, and the overarching good faith obligation under clause 6.

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.

WWNZ supports clauses 22, 23 and 28 of the Code and does not anticipate the clauses causing any unintended consequences.

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

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

Please type your submission below.

WWNZ supports clauses 24 and 25 of the Code. WWNZ does not see any need to improve the clause beyond its current approach, which is consistent with the Australian Code. WWNZ believes that the protections offered to suppliers under clauses 24 and 25 of the Code will support greater investment in product development.

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

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

Please type your submission below.

N/A - WWNZ is not a supplier.

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.

WWNZ supports clause 26 and believes that it will help to ensure the transparency and consistency of decisions relating to range reviews and shelf allocation.

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.

WWNZ generally supports clause 27 of the Code, including supporting the requirement to respond within 30 days to price increase requests. WWNZ does not consider that any specific classes of produce would require a shorter time period for a response.

That said, WWNZ considers that sub-clause 27(6) could result in adverse consequences, including risking higher retail prices for consumers. In particular, clause 27(6) states that a retailer cannot require a supplier to disclose commercially sensitive information about price increases or negotiations about price increases. In many cases, the information that will be relevant to the retailer in determining whether to accept the price increase could be deemed to be "commercially sensitive" (for example, information relating to increases in the suppliers' costs). This requirement that suppliers cannot be required to disclose commercially sensitive information in relation to a price increase can be contrasted to the requirement in clause 19(3) that a retailer must provide any requested information to a supplier about information relating to a delisting. This is one-sided and will result in information asymmetry, which could result in adverse consequences for consumers, given it is retailers that are ultimately negotiating for competitive prices on behalf of consumers. WWNZ submits that obligations to request/disclose information should be symmetrical on both sides of the trading relationship, as should the obligations of good faith. With symmetrical information and good faith obligations (see WWNZ's response to question 3 above), WWNZ's concern in relation to this clause will be resolved.

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.

WWNZ considers the penalties imposed under the Code are manifestly disproportionate. That is for seven key reasons:

- The penalties are manifestly disproportionate relative to the level of harm that contraventions could cause (including the individual penalties). WWNZ notes that the Legislative Design and Advisory Committee ("**LDAC**") has set out that:[20]

  > "Legislation involves coercive power, and law making comes with responsibility to make legislation that is proportionate, reasonable, rational, and consistent with New Zealand's constitutional principles. Legislation that overreaches can do significant harm by inhibiting freedoms or undermining important values or institutions of our society."

  WWNZ does not consider that a proposal to implement Tier 2 penalties meets this proportionality requirement.

- The penalties are manifestly disproportionate in the context of a dynamic and fast-moving sector where retailers (such as WWNZ) are engaging with suppliers on a daily basis, so the risk of an inadvertent (including a very minor) breach is high.

- The penalties are manifestly disproportionate for a regime that is targeted at particular persons, and that does not apply to both sides of what is inevitably a two-way relationship (as between retailer and supplier).

- This is a new regime (including obligations that do not exist in the Australian Code) that could be subject to different interpretations. It is not appropriate to have significant penalties for an uncertain area of law.

- Such significant penalties risk unintended consequences, including the risk of higher grocery prices for consumers. In particular, WWNZ is concerned that the very serious penalties will constrain pro-competitive, robust commercial engagement, as retailers and individuals associated with retailers (such as employees) will likely become overly cautious to avoid any risk of breaching the Code. Ultimately, the chilling effect that high penalties

[20] Legislative Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021) at page 8.

may have on commercial negotiations could harm consumers if retailers are too hesitant to engage in robust negotiations with suppliers and therefore pay higher prices for products, which results in higher prices for the end consumer.

- Such significant penalties make the Code very different to the Australian Code, and no cogent policy rationale has been made for a departure from trans-Tasman harmonisation in this way.

- Such significant penalties are not necessary where conduct that breaches the Code could also likely breach other areas of law that are already subject to significant penalties, in particular under the Fair Trading Act 1986 (including new prohibitions on unfair contract terms and unconscionable conduct, and long-standing prohibitions on misleading/deceptive conduct, unsubstantiated claims, coercion, and harassment).

This is an aspect of the Code that WWNZ considers needs significant reconsideration - in particular given the significant risk of higher prices for consumers from the disproportionate penalty regime. WWNZ strongly submits that, to the extent there are penalties, they should be at most Tier 4 penalties.

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.

The obligations to provide written statements are (in the most part) obligations that do not exist in the Australian Code. WWNZ is concerned about the compliance complexity and cost that the requirement to provide a written statement when relying on exceptions may create. In particular, given the severe penalties for breaches of the Code, WWNZ anticipates that retailers will dedicate a significant number of resources to ensure that written statements are produced satisfactorily. Such compliance overhead costs risk higher grocery prices to consumers (given retail prices are necessarily influenced by a retailer's costs), and it is not clear what tangible benefits will be obtained from requiring the production of written statements. Accordingly, WWNZ submits against the requirements to provide written statements as currently drafted in the Code and considers that this is an area that requires further consideration.

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.

WWNZ agrees that there is no need for the restrictions relating to payments for shelf allocation to be included in the Code. While WWNZ considers the restrictions in the Australian Code to be workable, it is sometimes difficult to discern between standard and promotional shelf space. Excluding these restrictions from the Code avoids this confusion.

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.

WWNZ supports the decision not to include protections from the Australian Code regarding changes in supply chain procedures in the Code. WWNZ considers that clauses 8 and 9 are sufficient to protect suppliers against any unexpected or costly changes to supply chains.

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.

WWNZ supports the decision not to include the additional intellectual property protections from the Australian Code in the Code. WWNZ considers that clauses 24 and 25 are sufficient to protect suppliers' intellectual property and confidential information.

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.

No further comments.