

# Consultation paper

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## Exposure draft - New Zealand Grocery Supply Code of Conduct

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The Ministry of Business, Innovation and Employment (**MBIE**) seeks written submissions on the issues raised in this consultation paper by 5pm on **5 July 2023**.

Your submission may respond to any or all of these issues. Where possible, please include evidence to support your views. For example, please include references to independent research, facts and figures, or relevant examples.

Please use the submission template provided at <https://www.mbie.govt.nz/have-your-say/draft-grocery-supply-code-of-conduct>. This will help us to collate submissions and ensure that your views are fully considered. Please also include your name and (if applicable) the name of your organisation in your submission.

Please include your contact details in the cover letter or email accompanying your submission.

You can make your submission by:

- sending your submission as a Microsoft Word document to [competition.policy@mbie.govt.nz](mailto:competition.policy@mbie.govt.nz) with the subject line "Grocery Code of Conduct Consultation 2023"

- mailing your submission to:

Market Performance  
Building, Resources and Markets  
Ministry of Business, Innovation & Employment  
PO Box 1473  
Wellington 6140  
New Zealand

Please direct any questions that you have in relation to the submissions process to [competition.policy@mbie.govt.nz](mailto:competition.policy@mbie.govt.nz).

## Use of information

The information provided in submissions will be used to inform MBIE's policy development process and advice to Ministers on a Grocery Code of Conduct for New Zealand. We may contact submitters directly if we require clarification of any matters in submissions.

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- indicate this on the front of the submission, with any confidential information clearly marked within the text
- provide a separate version excluding the relevant information for publication on our website.

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## List of Acronyms and Terms

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<b>Australian Code</b>	The Australian <i>Food and Grocery Code of Conduct</i> prescribed under the Competition and Consumer Act 2010. <a href="https://www.legislation.gov.au/Details/F2021C00201/Html/Text">https://www.legislation.gov.au/Details/F2021C00201/Html/Text</a>
<b>Commission</b>	The New Zealand Commerce Commission.
<b>Commission's Final Report</b>	The Commission's final report on the market study into New Zealand's retail grocery sector, published on 8 March 2022 <a href="https://comcom.govt.nz/about-us/our-role/competition-studies/market-study-into-retail-grocery-sector">https://comcom.govt.nz/about-us/our-role/competition-studies/market-study-into-retail-grocery-sector</a>
<b>Regulated grocery retailers</b>	Grocery retailers that will be required to meet the Code. It is proposed that all major grocery retailers will need to comply with the new Code initially. Other retailers also could be required to comply at later stages.
<b>Groceries / Grocery products</b>	As set out in Clause 5 of the Bill, groceries include fresh produce (fruit and vegetables), meat (and meat substitutes), seafood, dairy products, bakery products, chilled or frozen food, pantry goods or dry goods, packaged food, non-alcoholic drinks, personal care products (eg toiletries), household consumables (eg cleaning products) and per care products.
<b>Major grocery retailers</b>	Includes Foodstuffs North Island, Foodstuffs South Island and Woolworths NZ, together with their cooperative members and franchisee retail grocery stores.
<b>Market study</b>	The Commission's market study into the retail grocery sector. A market study (also called a competition study) is an in-depth study undertaken by the Commerce Commission into the factors affecting competition for particular goods or services. They find out how well competition is working and whether it can be improved.
<b>MBIE</b>	Ministry of Business, Innovation and Employment.

# Introduction

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1. On 8 March 2022, the Commerce Commission (the **Commission**) published its final report on the market study into the retail grocery sector in New Zealand<sup>1</sup>. It found that competition in the retail grocery sector was not working well for consumers and recommended changes to increase competition and help improve the price, quality and range of groceries and services available to New Zealanders.
2. One of the problems identified by the Commission is that there is an imbalance in negotiating power between the major grocery retailers and their suppliers. As a result of this imbalance, suppliers are often forced to accept unfavourable terms, including costs and risks that retailers are better placed to manage. Suppliers also report that they often have inadequate transparency and certainty about the terms of supply. This impacts suppliers' ability and incentives to invest and innovate, including developing new grocery products. In extreme cases, it may result in suppliers being forced to exit the market.
3. Poor conditions for suppliers can also create flow-on consequences for consumers, including higher grocery prices (due to supply shortages where suppliers are forced to exit the market) as well as lower quality and a more limited range of grocery offerings available at supermarkets (due to lack of innovation in the sector).
4. The Commission recommended a mandatory grocery code of conduct to govern relationships between the major grocery retailers and their suppliers. This would constrain the major grocery retailers' ability to use their strong negotiating power to secure suppliers' agreement to unfavourable supply terms and conditions.<sup>2</sup>
5. On 30 May 2022, the Government announced that it would establish a mandatory Grocery Supply Code of Conduct for New Zealand (**Code**) as part of its response to the market study.

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<sup>1</sup> Commerce Commission, *Market study into the retail grocery sector: Final report*, 8 March 2022 (the **Commission's Final Report**). Accessed at <https://comcom.govt.nz/about-us/our-role/competition-studies/market-study-into-retail-grocery-sector#projecttab>.

<sup>2</sup> Commission's Final Report, para 9.148-9.155.

## Objectives of the Code

1. The Bill sets out the purpose of the Code at clause 13. That is to promote competition and efficiency in the grocery industry for the long-term benefit of consumers in New Zealand by:
  - a. promoting fair conduct, and prohibiting unfair conduct, between regulated grocery retailers, the related parties referred to in section 14A, and suppliers; and
  - b. promoting transparency and certainty about the terms of agreements between regulated grocery retailers, the related parties, and suppliers; and
  - c. contributing to a trading environment in the grocery industry in which businesses compete effectively and consumers and businesses participate confidently; and that includes a diverse range of suppliers.

## We consulted on requirements to be included in the Code in 2022

2. In July 2022, we released a consultation paper titled 'New Zealand Grocery Code of Conduct' and invited submissions from interested parties.<sup>3</sup>
3. We received 20 responses. Submitters provided wide support for the Code, and for most of the preferred requirements proposed in the consultation document. However, there were some aspects of the Code which attracted differing views from submitters, and areas where some submitters preferred to see more detail, before providing comprehensive feedback.

## We are seeking feedback on an exposure draft of the Code

4. We are now seeking submissions on an exposure draft of the Code. We are undertaking this additional round of consultation for the following reasons<sup>4</sup>:

*To provide stakeholders with information on the decisions the Government has made on the Code to date*

5. Following consultation in 2022, the Government has agreed the broad content of the Code. This consultation document explains these decisions, which are reflected in the attached exposure draft. These decisions are not final, and further refinements may be made to the Code following consultation.

*To ensure the Code is workable, and adequately reflects policy decisions made*

6. We are seeking feedback on whether the obligations, restrictions and responsibilities in the draft Code achieve the intent of the policy decisions made to date. We are also seeking feedback to ensure the Code is workable and does not cause practical issues for compliance.

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<sup>3</sup> <https://www.mbie.govt.nz/have-your-say/grocery-code-of-conduct/>

<sup>4</sup> Consultation on the draft Code is also a statutory requirement under the Bill

*To seek further feedback on specific issues*

7. In many areas, the exposure draft adopts the preferred options set out in the 2022 consultation document. However, there are some areas which diverge slightly from these original proposals, and some areas which attracted differing views. We are seeking further feedback from stakeholders on these.

### Timing and next steps

8. Consultation on the exposure draft is open until 5 July 2023.
9. After submissions close, MBIE will undertake further analysis and make recommendations before final Cabinet decisions on the Code.

### What is in this consultation paper

10. **Part A** of this consultation contains a high-level description of the Code, how it will be enforced, implemented, and ongoing arrangements for review.
11. **Part B** contains a short description of each of the policy decisions made on the Code, and where each of these policy decisions are outlined in the exposure draft.
12. **Part C** contains a description of a few policy proposals which are not included in the draft Code, where we would like further advice from stakeholders.

# Part A – How the Code will work

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The Code will be implemented as secondary legislation under the Bill

13. Government is currently progressing the Grocery Industry Competition Bill (**the Bill**). We expect parliament to pass the Bill into Law soon.
14. The Bill allows for the creation of a Grocery Supply Code. The first Code will be made by Cabinet, through Order in Council. After this first Code is made, the Commission will become responsible for making any subsequent amendments.
15. As indicated above, the Bill sets out a purpose for the Grocery Supply Code and processes that must be followed for the making of a Grocery Supply Code.

The Code will initially apply to the regulated grocery retailers set out in clause 8 of the Bill

16. Initially, the Code will apply to Foodstuffs North Island, Foodstuffs South Island and Woolworths New Zealand, including franchises and other bodies connected to these businesses. The Code will therefore apply to the majority of New Zealand's supermarket brands, including Countdown, Pak'nSAVE, New World and Four Square.
17. The Bill allows other retailers to be designated as a regulated grocery retailers for the purposes of the Code, on the recommendation of the Minister of Commerce and Consumer Affairs.

The Commerce Commission will be responsible for monitoring and enforcing compliance with the Code and making subsequent versions of the Code

18. The Bill provides powers for the Commission and the new Grocery Commissioner to monitor the performance of New Zealand's retail grocery sector and enforce compliance with the Code. One of the more significant enforcement powers is the ability of the Commission to issue court proceedings seeking pecuniary penalties for breaches of the Code (more information on these penalties is provided in paragraph 79).
19. Outside of the Commission's enforcement powers, the Bill also provides for a dispute resolution scheme to resolve disputes related to the Code. The scheme may hear disputes relating to the Code brought by suppliers and is able to employ both consensual dispute resolution processes that result in an agreement (such as mediation) and determinative processes (such as adjudication).
20. Once the first Code is made by Order in Council, the Commission is responsible for making any subsequent versions of the Code. There is no time limit on when the Commission may make a determination setting out a Code, so long as it follows the relevant provisions in the Bill.

21. The Bill also requires that the Commission complete a review the Code within two years of it coming into force. This ensures that the effectiveness of the Code will be evaluated promptly. It also provides an opportunity for the Commission to make any amendments to improve the Code, if it has not already done so.

#### The Code is closely modelled on the Australian Code

22. The Code is largely modelled on the Australian Food and Grocery Code of Conduct (Australian Code). The Australian Code has been in place since 2015 and has proved to be beneficial. Adopting an approach to the Code that broadly aligns with requirements in Australia means that much of the Code will be based on tried and tested interventions.
23. We also consider that there are efficiency benefits with aligning the Code with the Australian Code, due to the close economic relationship between New Zealand and Australia. Several businesses that will be affected by the Code operate in both countries.
24. There are, however, some key differences. As examples, the Australian Code is not mandatory, is not subject to the same regulatory oversight that will provided by the Grocery Commissioner and does not provide for civil pecuniary penalties as an enforcement mechanism and deterrence against non-compliance.

# Part B – Policy proposals included in the Draft Code

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This part of the consultation document describes the key parts of the Grocery Supply Code.

## Schedule 1 – transitional, savings and related provisions

### Part 1 – Transitional provisions

25. The transitional provisions describe how the Code will apply to grocery supply agreements which were agreed prior to the Code coming into effect (existing agreements). A grace period is provided for existing agreements. During this period, most of the provisions within the Code will not apply.
26. This grace period lasts for six months, or until the agreement is varied to ensure consistency with the Code. After this grace period, the Code applies to existing agreements as if they were entered into after the Code was implemented. The grace period does not apply to the good faith obligations, which will come into effect in relation to all agreements, from the day the Code takes effect.
27. After the six-month period ends, the requirements of the Code will apply regardless of any provisions of existing agreements to the contrary.

## Schedule 2 – Grocery Supply Code

### Clause 5 – application to existing agreements

28. Clause 5 builds on the transitional provisions noted above. This section requires a retailer to offer to vary any existing supply agreements that do not comply with the Code. Retailers must offer to vary such agreements within six months of the Code coming into force.
29. This part does not require any amended agreement to be signed by the supplier. Retailers will not be in breach of the Code for being party to any non-compliant, existing agreement, so long as they make reasonable offers of variations described above.
30. The Code contains several examples of how these transitional provisions will apply under different scenarios.

1.	Are there any ways the transitional provisions could be improved?
2.	Will there be any unintended consequences as result of the transitional provisions as drafted?

## Part 2 – good faith

31. This part of the Code imposes general obligations on retailers to act in good faith when dealing with suppliers. It provides a list of factors which may be taken into account when considering whether a retailer has acted in good faith.
32. The intent of including an overarching good faith obligation in the Code is to ensure that retailers engage in fair processes when dealing with suppliers, and do not leverage their negotiating power to coerce suppliers into accepting unfavourable terms. The obligation directs fairness of processes, for clarity and objectiveness. It does not include any specific requirements for fairness of outcomes.

3.	Are there any ways that clause 6 could be improved to be more effective in supporting fair conduct between suppliers and retailers?
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## Part 3 – content of grocery supply agreements and variations to supply agreements:

33. This part of the Code imposes general requirements and minimum content which grocery supply agreements must contain and limits the circumstances where a retailer may vary the agreement without the consent of the supplier. The intention of this part is to ensure that suppliers have transparency and certainty around the terms of supply.
34. Clause 7 requires supply agreements to be written in plain English, provided to the supplier, and retained by the retailer during the term of the agreement and for up to seven years after the agreement expires.
35. Clause 8 prescribes minimum content which all grocery supply agreements must contain.
36. Clause 9 restricts the circumstances where retailers can make unilateral variations (variations made without the consent of the supplier) to supply agreements. It allows for unilateral agreements to be made in specific circumstances, where the variation is provided for in the supply agreement and is reasonable in the circumstances.
37. Clause 10 requires that retailers must not make retrospective variations (variations that modify something in the past) to supply agreements in any circumstances.

4.	Are there any ways in which clause 7 and 8 could be improved to provide greater transparency and certainty to suppliers?
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5.	Is clause 9 flexible enough to allow for reasonable unilateral variations to be made to supply agreements?
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6.	Will clause 9 be effective in preventing retailers from using their negotiating power to make unreasonable unilateral variations?
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7.	Is clause 10 fit for purpose? Are there any circumstances where retrospective variations should be permitted?
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8.

Will there be any unintended consequences as result of how these provisions are drafted?

#### Part 4 – general conduct provisions

38. This part of the Code prohibits retailers from engaging in a range of specific conduct, which the Commission heard is detrimental to suppliers. It covers the following matters:

#### Clause 11 – transport or logistics services

39. Retailers may profit from requiring suppliers to use a particular logistics or transport service to deliver goods to the retailer. This service can be an in-house logistics service (owned by the retailer), or a third-party service which provides a payment to the retailer. Requiring the use of such services may come at the expense of the supplier, where such services could be more expensive, less convenient, or of poorer quality than alternatives.
40. This clause seeks to address this issue, by preventing retailers from requiring suppliers to use a particular transport or logistics service to deliver goods to the retailer. It is not intended to prevent retailers from imposing service standards which the supplier's chosen transport or logistic service must meet.

9.

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

10.

Will there be any unintended consequences as result of how this provision is drafted?

#### Clause 12 – payment to suppliers

##### *Payment terms*

41. Some suppliers have raised concerns that payment terms in the industry significantly favour major grocery retailers. Some suppliers have reported waiting up to 60 days to be paid, and the retailer may still receive a settlement discount.<sup>5</sup> Delayed payment can cause cash flow issues for suppliers and can force them to spend valuable time chasing payments.
42. Clause 12 seeks to address this issue by requiring retailers to pay a supplier's invoice within the time set out in the supply agreement. It also requires that any payment time set out in the agreement must be 'reasonable'.
43. Though it is not included in the exposure draft, the Code could also set a maximum time within which invoices must be paid. This would provide greater certainty regarding what may

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<sup>5</sup> See Commission's Market study at 8.129

be reasonable. However, it would be a less flexible option. It also comes with a risk that the maximum payment period specified becomes the industry norm.

44. We are seeking feedback on whether a maximum payment period of 20 calendar days from when a retailer receives an invoice should be set out in the Code. We consider that this period strikes a good balance between allowing enough time for retailers to make payment, while ensuring suppliers are paid promptly.

*Set-offs*

45. A set-off is where a retailer deducts an amount it is owed by a supplier when paying a supplier’s invoice. This practice can be an efficient way of reducing the number of payments between a retailer and supplier. However, some suppliers have raised concerns about retailer’s automatically deducting amounts from a payment.<sup>6</sup> Set-offs can result in a supplier receiving less money than expected if not done transparently. If the supplier disagrees with the amount deducted, it can require them to spend time seeking the correct payment from retailers. This can interrupt a supplier’s cash-flow, which may have flow on impacts for their business.
46. Clause 12 seeks to address this by placing some restrictions around when a set-off may be applied by the retailer. It requires that a supplier gives written consent before a set-off is applied by the retailer, except where the supply agreement provides for the set-off and the set-off is reasonable.

11.	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?
12.	Do you think a maximum payment period should be set by the Code?
13.	If a maximum payment time is set, do you think 20 calendar days from receipt of invoice is appropriate?

Clause 13 – payment for shrinkage and clause 14 – payment for wastage

47. As defined in the Code, shrinkage is the loss of grocery products due to theft or accounting error that occurs after a retailer or wholesaler has taken possession of them. Wastage is the loss of grocery products that are unfit for sale.
48. Suppliers have suggested they can be asked to contribute to shrinkage and wastage that occurs after the retailer has taken possession of the products. This is despite the supplier having little ability to manage such loss.
49. Clauses 13 and 14 seek to address this issue by:

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<sup>6</sup> See the Commission’s report at 8.145

- a. prohibiting retailers from requiring payment for shrinkage
  - b. restricting the circumstances where a retailer can require payment for wastage that occurs once the retailer (or any contractor or agent of the retailer) has taken possession of the products.
50. Clause 13 mirrors the Australian Code. Clause 14 follows the Australian Code, but also includes two additional requirements in relation to wastage:
- a. 14(2)(c) requires that the wastage be mainly the result of the actions or omissions of the supplier, before the retailer may claim for wastage which occurs while the products are under the retailer's control
  - b. 14(2)(g) requires that the retailer must submit any claim for wastage no later than six months after the goods are received.

14.	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?
15.	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)?

Clause 15 – payments as condition of being a supplier; clause 16 - payments for a retailer's business activities and clause 17 – funding of promotions

51. The Commission heard examples of suppliers bearing a disproportionate share of costs for other things which benefit both parties. Clauses 15, 16 and 17 seek to address this by:
- a. prohibiting payments as a condition of supply, except in relation to new products<sup>7</sup>, and on the condition that such payments are reasonable
  - b. prohibiting payments for the retailer's own business activities except where reasonable, and when set out in the supply agreement
  - c. requiring that supplier payments with respect to promotions, or a retailer's own business activities, be allowed only when set out in the supply agreement and where these payments are reasonable.
52. Clauses 15 and 17 largely mirror the Australian Code. Clause 16 follows the Australian Code closely but includes some additional examples of what a retailer's business activity might include (see 16(2)(f), which relates to merchandising and 16(2)(g) which relates to the transport of goods within a retailer's distribution network).

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<sup>7</sup> See 15(2)(b)(ii)

53. We considered whether clause 17 should also include an additional restriction which prohibits retailers from requiring suppliers to fully fund the cost of promotions. However, we consider the reasonableness test set out in 17(3) to be sufficient in ensuring better sharing of costs. We also note that such a requirement will also be relatively easy to circumvent by, for example, the retailer providing nominal payments towards the promotion.
54. We understand that some suppliers prefer to undertake their own merchandising of products within a retailer's store. These clauses are not designed to prevent this from occurring.

16.	Are there any ways in which clauses 15,16 and 17 could be improved to ensure more efficient and equitable sharing of costs?
17.	Should payments as a condition of supply be allowed in cases other than for new products?
18.	Is the description of what constitutes a new product, set out in clause 15(2)(ii), appropriate?
19.	Should clause 17 include an additional restriction which prohibits retailers from requiring suppliers to fully fund the cost of promotions?
20.	Do you have any other comments on clauses 15, 16 and 17?

#### Clause 18 – delisting products and clause 19 – process requirements relating to delisting

55. Delisting refers to decisions made by retailers to stop stocking certain products. It is a critical issue for suppliers, as having a product delisted can significantly impact their business.
56. Clauses 18 and 19 seek to provide greater certainty to suppliers regarding delisting decisions. It requires such decisions be made only in accordance with the supply agreement and for genuine commercial reasons.
57. Clauses 18 and 19 closely follow the Australian Code, but include two additional provisions which require:
- a. retailers to provide six-months' notice before delisting fresh fruit and vegetables
  - b. retailers to undertake a range review before delisting a product.

21.	Are there any ways in which clauses 18 and 19 could be improved to provide greater certainty and transparency regarding delisting decisions?
22.	Will requiring a range review, ahead of any delisting decisions, be an effective way of ensuring fair and transparent delisting decisions?

23.	Does providing six-month notice of delisting fresh fruit and vegetables provide sufficient warning for such suppliers?
24.	Will there be any issues in complying with the process requirements set out in clause 19?
25.	Are there any aspects of clauses 18 and 19 which may have unintended consequences?

### Clause 20 – funded promotions

58. The Commission heard that it is common for some retailers to stockpile products at a reduced price during a supplier’s buy-in period for a promotion.<sup>8</sup> After the promotional period ends, the retailer may then have left-over stock which it bought from the supplier at the discounted promotional rate, which it can sell at a higher price, outside of the promotional period. This practice is referred to as investment or forward buying.
59. Clause 20 is modelled off the Australian Code. Among other things, it requires retailers to take care when ordering product in connection with a funded promotion. If the retailer over-orders, and sells that product above the promotional price, it requires the retailer to pay the difference between the supplier’s promotional price and the supplier’s full price for the product.
60. Like other promotional activities, investment buying may have benefits to consumers. Any restrictions around such practices must therefore be carefully framed to manage any undesirable impact on consumers if the restrictions result in reducing the frequency of such activity. We are interested in how the restrictions at clause 20 (particularly those described above) might impact current practices regarding investment buying and funded promotions.

26.	Are there any ways in which clause 20 could be improved?
27.	Do you have any other concerns regarding investment buying which are not addressed by this draft section of the Code?
28.	What effect will clause 20 have on current practice regarding investment buying and funded promotions? Will there be flow-on impacts for retail prices?
29.	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?

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<sup>8</sup> See the Commission's Market Study at 8.109

30.

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

#### Clause 21 - fresh produce standards and quality specifications

61. The Commission heard that suppliers of fresh fruit and vegetables are particularly vulnerable to retailers misusing their bargaining power<sup>9</sup>. Aside from export markets, many suppliers have few alternative buyers for their produce on the scale of the major grocery retailers. Fresh produce is also highly perishable, and growers cannot pause production because demand is low. As a result, suppliers of fruit and vegetables have limited ability to delay supply while seeking to negotiate better terms.
62. Clause 21 seeks to provide additional transparency and certainty for suppliers of fruit and vegetables by requiring retailers to have specific standards for fresh produce. These standards must include any quality standards, and retailers would be required to accept any produce that meets these standards within 24 hours of receiving the produce. Where a retailer rejects fresh produce, it must notify the supplier in writing within 48 hours of receiving the produce. Clause 21 closely mirrors the Australian Code.

31.

Does clause 21 effectively address issues faced by suppliers of fresh fruit and vegetables?

32.

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

33.

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

34.

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

#### Clause 22 No duress about supplying to competitors, Clause 23 – business disruption and Clause 28 – freedom of association

63. Significant imbalances in negotiating power can mean that suppliers are reluctant to come forward with complaints, or take other action in their interest, for fear of retaliation. Clauses 22, 23 and 28 seek to address this by:
- a. prohibiting retailers from placing suppliers under duress, in an attempt to prevent them from supplying other parties (see clause 22)

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<sup>9</sup> See the Commission's Market Study at 8.59

- b. prevent retailers from threatening to disrupt a supplier’s business or terminate a grocery supply agreement without reasonable grounds (see clause 23)
- c. preventing suppliers for hindering any lawful association of suppliers (see clause 28).

35.	Will clause 22 be effective in preventing retailers from pressuring suppliers to desist from supplying other parties?
36.	Will clause 22, 23 and 28 cause any unintended outcomes?

### Clause 24 – intellectual property rights and clause 25 – confidential information

- 64. The Commission heard that some suppliers face pressure to provide their own products under a retailer’s private label<sup>10</sup>. Suppliers have also raised concerns that confidential information regarding their products have been used by the retailer to develop the retailer’s own private label products. These issues may reduce incentives for suppliers to invest in product development.
- 65. Clauses 24 and 25 seek to address these issues by requiring retailers to respect suppliers’ intellectual property. They also seek to ensure any confidential information the retailer obtains about a supplier’s product is only used for the purpose for which it was obtained and is not shared with parts of its business which may be involved in developing its own brands.
- 66. Clauses 24 and 25 mirror the same protections provided in the Australian Code.

#### *Taonga and mātauranga Māori<sup>11</sup>*

- 67. There may be aspects of a supplier’s product, or the way it is made, which may hold significance for the supplier but not meet the legal definition of intellectual property. One such example could include knowledge of production techniques which may be considered taonga or cultural treasure.
- 68. We would like to hear from suppliers whether they consider any part of their current business practices, or their products, taonga. If so, we would be interested to know whether there may be any issues connected with the supply of groceries which may mean that the Code should recognise taonga, and ensure it is treated appropriately by a retailer.

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<sup>10</sup> See the Commission's Market Study at 8.186-8.193

<sup>11</sup> Taonga refers to a treasured possession, including property, resources, and abstract concepts such as language and cultural knowledge. Māori “Traditional Knowledge” is called mātauranga Māori. Mātauranga Māori is central to te Ao Māori (the Māori world view). It forms the basis for many aspects of our unique national identity, for both Māori and non-Māori in Aotearoa. Iwi, hapū and whānau are the owners, inheritors and kaitiaki of this taonga.

69. Te Puni Kōkiri (TPK) is leading Te Tumu mō te Pae Tawhiti<sup>12</sup>, the all-of-government work programme relating to issues raised in the WAI 262 claim. Part of this work includes the development of a sui generis (unique) intellectual property policy and legal system for taonga and mātauranga Māori.
70. Given the work currently underway in this area, the purpose of the Code, and the complexity of the issues involved, any provisions within the Code relating to taonga would need to be carefully considered and specific to the trading relationships between suppliers and retailers. It would be inappropriate for the Code to create new intellectual property rights in this area. However, there may be other options for ensuring culturally significant practices are recognised in the Code.<sup>13</sup>

37.	Are there any ways in which clause 24 and 25 could be improved to adequately address issues relating to suppliers' intellectual property?
38.	Will clauses 24 and 25 support greater investment in product development?
39.	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?

#### Clause 26 – product ranging, shelf space allocation and range reviews

71. Product ranging refers to decisions made by designated retailers about which grocery products to stock. Different retailers will have different approaches to product ranging to provide the best competitive offering to consumers.
72. Shelf allocation is specifically about where stock is placed on the shelves in a retail store. The position of a product affects turnover because some positions on the shelf are more appealing to consumers.
73. A range or category review is a review of the products a designated retailer stocks in various product categories to evaluate how successful they are. This consultation paper refers to 'range reviews', but means any similar review undertaken by the designated retailer.

<sup>12</sup> <https://www.tpk.govt.nz/en/a-matou-whakaarotau/te-ao-maori/wai-262-te-pae-tawhiti>

<sup>13</sup> Further information and guidance regarding IP rights over creations that contain a te Reo Māori or Māori design elements, can be found at the Intellectual Property Office website at the following link <https://www.iponz.govt.nz/about-ip/maori-ip/>

- 74. Decisions relating to shelf allocation and product ranging affect how well a supplier’s product may sell. Requiring non-discrimination on product ranging and shelf allocation may help prevent designated retailers from using different approaches for their private label products and other suppliers.
- 75. Clause 26 requires retailers to publish, and act in accordance with principles relating to range reviews and shelf allocation. It requires that the retailer apply these principles without discrimination.
- 76. It also requires early, written warning of range reviews – including an opportunity for suppliers to discuss the outcome of such a review.

40.	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?
41.	Do you have any other comments on this clause?

#### Clause 27 – price increases

- 77. The Commission heard concerns from suppliers regarding the process for seeking price increases from retailers<sup>14</sup>. Clause 27 seeks to address these issues by requiring retailers to respond to price increases within 30 days.
- 78. This clause is modelled closely on the Australian Code. However, it includes one small modification at 27(3), which provides for situations where the retailer may require further information from the supplier to make an informed decision regarding the price increase. In such cases, the 30-day period does not begin until the supplier provides such information.

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

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<sup>14</sup> See the Commission's Market Study at 8.140

## Penalty levels

79. The Bill provides four different tiers of civil penalty levels for breaches of the legislation. The Bill allows for the Code to set out which of Tiers 1,2 or 4 may apply for breaches of the Code (Tier 3 does not apply to the Code).
- a. Tier 1 – the maximum is \$500,000 for an individual. In any other case it is the greater of \$10 million, or three times the value of any commercial gain, or 10% of annual turnover.
  - b. Tier 2 - the maximum penalty is \$200,000 for an individual. In any other case it is the greater of \$3 million, or the value of any commercial gain, or 3% of annual turnover.
  - c. Tier 4 – the maximum penalty under this Tier is \$30,000 for an individual or \$300,000 in any other case.
80. Maximum penalties need to be set at a level which sufficiently deters non-compliance and is proportionate to the level of harm which may be caused by the non-compliance.
81. The exposure draft sets Tier 2 as the maximum penalty level which applies to breaches of the Code. Retailers regulated by the Code are likely to be large businesses with high annual turnover. Maximum penalty levels need to be set at a level which takes this into account and ensures there is sufficient incentive to dissuade non-compliance.
82. However, MBIE will be undertaking further analysis on this approach, including on whether different tiers of penalty levels should apply to different breaches of the Code. Stakeholder feedback on penalty levels will be important for informing this analysis, ahead of final decisions on the Code.
83. We would like to know if you think there are any aspects of the Code that would have such a significant impact that they would merit a higher penalty than Tier 2.
84. Similarly, we seek your views on whether the Tier 2 penalty is appropriate for some of the more procedural elements in the Code, or provisions where a contravention would not have as significant an impact on competition.

45.	Do you think the maximum penalty is set at a level which will sufficiently deter non-compliance?
46.	Do you think the maximum penalty level is proportionate to the level of harm which may be caused by non-compliance?
47.	Do you think any parts of the Code should attract higher or lower tiers of penalty levels? If so, which parts, and why?

48.

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

### Requirements to provide written statements when relying on reasonableness exceptions

85. In several places, the Code provides exceptions for prohibited conduct if certain requirements are met (mainly, whether the conduct is reasonable and provided for in the supply agreement). These are necessary exceptions to ensure the Code is flexible enough to deal with the many types of scenarios that could arise between retailers and suppliers.
86. When relying on these types of exceptions, the Code requires the retailer to provide a written statement to the supplier which sets out why they consider the exception to apply. The aim of these requirements is to improve compliance with the Code and transparency regarding the use of such exceptions.
87. A list of the clauses where these requirements apply is set out below. For the more significant prohibitions in the Code, a statement is required each time the retailer relies on the exception. In other cases, it is required only at the request of the supplier.
- a. when making unilateral changes to a supply agreement – see clause 9(5)
  - b. at the request of the supplier, when setting-off a payment – see clause 12(4)
  - c. when requiring a payment for wastage – see clause 14(3)
  - d. when requiring payment as a condition of supply – see clause 15(4)
  - e. when requiring payments for a retailer’s business activities – see clause 16(7)
  - f. at the request of the supplier, when requiring payments for promotions – see clause 17(5)
  - g. at the request of the supplier, when making delisting decisions (which, in line with the Australian Code, also includes a requirement for the retailer to review the delisting decision on request of the supplier) – see clauses 19(3), 19(4) and 19(5).

49.

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

50.

Will there be any significant costs, or issues, in complying with these requirements?

# Part C – other proposals we are consulting on

There are some provisions in the Australian Code which are not included in the exposure draft. We are seeking feedback on whether these provisions should be included in the Code.

## Payments for better positioning of groceries

88. The Australian Code prohibits retailers from requiring payment for securing a more desirable position on its shelves, or an increase in shelf space, except where:
- a. the payment is reasonable
  - b. is required under the grocery supply agreement
  - c. the agreement sets out the circumstances when such payments are required.
89. The New Zealand Grocery Supply Code could include a similar clause. However, we are seeking feedback on whether such payments are a problem in New Zealand. Placing restrictions on such payments may have unintended consequences for suppliers and retailers who may like to come to such arrangements for their mutual benefit.
90. It is worth noting that clause 26 requires retailers to publish their shelf allocation principles, and act in accordance with those principles. This will provide better transparency and consistency regarding shelf allocation decisions.

51.	Do you agree with the decision not to include restrictions from the Australian Code relating to payments for shelf allocation?
52.	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?

## Changes to supply chain procedures

91. The Australian Code prevents retailers from making any material changes to supply chain procedures, except where reasonable notice is given. If reasonable notice is not given, then the retailer must compensate the supplier for any costs incurred as a result of the retailer failing to give notice.
92. Clause 8 of the Code requires all supply agreements to detail requirements about the delivery of groceries, and clause 9 places restrictions on unilateral changes to supply agreements. Read together, we consider this would prevent a retailer from unreasonably changing supply chain procedures. Further restrictions may therefore not be needed.

93. We are seeking feedback on whether submitters are aware of any particular issues arising from changes to supply chain procedures in New Zealand, and whether these would warrant additional protections in the Code.

53.	Do you agree with the decision not to include protections from the Australian Code relating to changes in supply chain procedures?
54.	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?

### Transfer of intellectual property rights

94. As noted in paragraphs 64 to 70 above, the draft Code contains protections which seek to ensure that retailers respect the intellectual property rights of suppliers and don't misuse or disclose confidential business information.
95. The Australian Code provides an additional protection. It prohibits retailers from requiring a supplier to transfer or exclusively licence any intellectual property held by the supplier, as a condition of supply of an equivalent home-brand product. We would like feedback from stakeholders on whether it would be beneficial for the Code to include a similar protection.

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

### Final Questions

57.	Do you have any further feedback on the consultation draft of the Code, in addition to the points you have already raised?
58.	Are there any other provisions which are included in the Australian Code which may be beneficial in New Zealand?
59.	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?