



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



Submission form

New Zealand Grocery Code of Conduct

August 2022

1 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 10 August 2022.

Please send your submission form to:

competition.policy@mbie.govt.nz with the subject line “Grocery Code of Conduct Consultation 2022”

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

Release of information

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Name (first and last name)

Mike Brooker

Email

Privacy of natural persons

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

On behalf of an organisation

Business name or organisation

Foodstuffs North Island Limited and Foodstuffs South Island Limited (together "Foodstuffs")

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

No

2 The approach to developing a Code of Conduct

QUESTION 1: Do you have any comments in relation to **Chapter 1**, in particular any comments on: the objectives (**section 2.2**)? evaluation criteria for the Code (**section 2.3**)?

Please type your submission below.

Consistent with its approach during the Commerce Commission's market study, Foodstuffs fully supports the development of a mandatory grocery code of conduct. We accept the challenge to improve our conduct in dealings with our suppliers and support having a clear set of rules and expectations that both parties can work within. Consequences should follow for failure to adhere to the code.

Foodstuffs endorses the Commission and MBIE's focus on 'how' businesses in the market for the acquisition of grocery products 'behave' (rather than substantive regulation which risks contributing to higher costs for consumers).

The objectives and evaluation criteria set out in Chapter 2 appear appropriate. In terms of the code's objectives, reference back to the purpose of the Commerce Act (to promote competition in markets for the long-term benefit of consumers) may be helpful. This is consistent with the consumer focussed options 2 and 3 relating to the code's proposed purpose statements.

One attribute of a durable and effective code which is not expressly referred to in this section is an appropriate review and change process, to cater for changing market conditions and circumstances.

Regarding the policy options, Foodstuffs' view is that the more prescriptive approach, albeit tailored to local New Zealand conditions where appropriate, is best. This approach is favoured because it provides all participants (including those at the 'coalface' of the supplier/retail interaction) with the greatest degree of certainty as to the obligations under the code, thereby enhancing the likelihood of compliance. It also more closely aligns with the Australian code which is familiar to many participants in the New Zealand grocery market, both suppliers and retailers.

Consistent with this view, in the remainder of this submission Foodstuffs generally supports option 2 or 3 (either as recommended by MBIE, or in an alternative form proposed by Foodstuffs in this submission). Ultimately, once a decision to follow the more prescriptive approach has been made, Foodstuffs anticipates that a key area of focus and further work will be on the extent and content of the relevant tailoring to local market conditions.

Finally, the detailed text of the code is obviously important. Accordingly, the views set out in this submission are provided by Foodstuffs subject to its review of the text of the draft code, once that draft is prepared and made available for comment.

3 Which retailers should be bound by the Code?

QUESTION 2: In relation to **section 3.3**, which of the three **Designation Options** do you think is best, and why?

Please type your submission below.

Foodstuffs has consistently supported the creation of a mandatory grocery code for the major grocery retailers with good faith obligations at the heart of all dealings between suppliers and retailers.

In terms of the Designation Options, option B best achieves an outcome by ensuring that all retailers of groceries of a significant size and scale in the New Zealand market are bound by the provisions of the code in a consistent manner. Also, the lower threshold contemplated by option B (when compared to option C), appears to best give effect to the objectives of the code. This is because any consequences of power imbalances that the code is designed to address (particularly in the case of smaller suppliers) may be viewed as arising between suppliers and a grocery retailer which turns over \$750m per two sequential financial years. Option B also has the flexibility to ensure the designation of other retailers following an investigation if such designation is justified.

We agree that suppliers will not be directly regulated by the code (i.e., they will not be designated by the code). However, we believe it is important that the code incentivises suppliers to conduct themselves in good faith in their dealings with retailers (by making this a relevant consideration when determining whether a retailer has acted in good faith). This is discussed further in response to question 7.

QUESTION 3: In relation to **section 3.4**, which of the three **Options** do you think is best, and why?

Please type your submission below.

In responding to this set of options it is important to understand the relevant differences between a true corporate retailer (acknowledging that Woolworths New Zealand is a hybrid model with both corporate stores and franchised stores) and a pure franchised cooperative like Foodstuffs. Each of Foodstuffs' retail stores is individually owned and operated with autonomy over its own staff and some operational discretion. However, to trade as a Foodstuffs store and operate under a Foodstuffs brand (PAK'nSAVE, New World, Four Square and the like), it must have a current Franchise Agreement with Foodstuffs. This requires strict compliance with brand standards, operational standards, legal requirements, policies determined by Foodstuffs, ranging, purchasing and much, much more. Foodstuffs also has complete control over who has the opportunity to become a store owner, the ability to ensure compliance, and ultimately, to exit owners for non-compliance.

Foodstuffs (in its role as a support centre/office or 'head office' as it is referred to in the consultation paper) conducts a huge number of functions for all stores, including buying, ranging, logistics, retail strategy, marketing, payments to suppliers, and the like. All of these are potentially impacted by the code. There are also some interactions directly between buyers in stores

(particularly larger stores) and suppliers, and things like wastage and shrinkage are handled at store level. These matters will have code consequences.

In a pure corporate model, there is likely to be one operational entity and all functions of that entity would be carried out by employees of that entity. All matters governed by the code would apply to one entity and any internal consequences for individuals would be measured out (appropriately) through the employment relationship.

Foodstuffs thinks the code should be agnostic to corporate structure and apply to all organisations 'equivalently', regardless of corporate structure. We are prepared for all of our organisation to be bound, regardless of store size (which is arbitrary and not a true reflection of supplier interactions). However, for efficiency and practicality, a breach of the code by a store employee (who is not a Foodstuffs employee) should be visited upon Foodstuffs and not the individual store. This would be much more sensible as Foodstuffs is the steward of the brand(s) and can address the internal consequence appropriately.

It may be tempting, but it is not realistic to say that Foodstuffs will 'ignore' a store's behaviour and 'absorb' any consequence at the support centre/office level. This is because Foodstuffs is a cooperative owned solely by its retail members with no external shareholders. So, to 'absorb' a consequence at the support centre/office level would simply be to pass it on to other members. It is in Foodstuffs' absolute interest to ensure the integrity and performance of its brands and to ensure that any non-compliant behaviour is dealt with promptly and appropriately. In the past, we may not have been privy to or not been provided with evidence of conduct which may in the future be considered to be in breach of the code. The adoption of a clear and prescriptive code with consequences will aid us in promptly addressing any concerns and ensuring compliant behaviour.

Accordingly, Foodstuffs favours option C (all obligations on 'head office'). As discussed, option C secures compliance regardless of the internal structure of each major grocery retailer. Compliance and enforcement cannot be avoided by structural changes in existing major grocery retailers, or by innovative structures of new entrants. Putting responsibility at the centre of each major grocery retailer ensures that compliance with the code is central to their leadership, management and culture. Further, complaints and enforcement action can be simply and quickly directed to 'head office' rather than there being a need to identify any other legal entity.

As noted above, where a store is owned by the major grocery retailer's central corporate entity, even actions at individual store level are actions of the major grocery retailer's 'head office'. Compliance by employees within each such store will be managed and ensured by their employer, the 'head office'. Where a store is owned by a franchisee of the major grocery retailer, responsibility for actions at individual store level will still lie with the major grocery retailer's 'head office'. Compliance by the franchisee and its employees will be managed and ensured by their franchisor, the 'head office'. Specifically, Franchise Agreements already require franchisees to comply with all applicable laws. Given the importance of the code, it can be expected that new Franchise Agreements will specifically refer to the code. Franchisees/members are highly incentivised to avoid the consequences of non-compliance with their Franchise Agreements and therefore highly incentivised to comply with the code. Responsibility for failure to comply will rest with Foodstuffs as 'head office'. Non-compliance will not be tolerated.

Additionally, option C has the advantage of being simpler to draft and therefore simpler to understand and apply for market participants and the regulator. Ultimately, Foodstuffs agrees with MBIE's assessment that option C is the most effective, efficient and durable.

One matter which may require further consideration is the issue of pecuniary penalties. Cabinet minute CAB-22-MIN-0259, released on 4 July 2022, records that Cabinet has agreed that the Grocery Industry Competition Bill will provide for civil penalties (including penalties based on percentage of turnover). If a 'head office' approach is adopted, then the maximum potential penalty will be very significant. MBIE may wish to consider the extent to which this very significant maximum penalty is appropriate for all breaches of the code, including at store level. Foodstuffs welcomes the opportunity for further dialogue on this topic, both as part of the development of the code and the Bill.

QUESTION 4: Do you have any comments on the preliminary assessment of the options against the criteria in **Chapter 3**?

Please type your submission below.

We agree with and endorse the preliminary assessment of the options against the criteria in Chapter 3. With regard to the options for designation, the assessment appears to capture the relevant pros and cons of each option. With regard to how the code could apply to major grocery retailers, MBIE's assessment aligns with Foodstuffs' views on this topic as discussed in response to question 3.

4 Including a purpose statement within the Code and overarching obligations

QUESTION 5: In relation to 4.2 purpose of the Code, which of the three options do you agree with, and why?

Please type your submission below.

With regard to the purpose statement in the code, we agree with option 2 (with a modification that we believe it may well be possible to incorporate reference to the promotion of principles of tikanga Māori in trading relationships).

We largely agree with option 2 because:

- it has a long-term consumer welfare focus, consistent with the purpose of the Commerce Act (which is absent in option 1).
- It references the well understood concept of good faith.
- It is generally consistent with the purpose of the Australian code which ultimately may aid with interpretation.
- It reflects that, while promotion of economic development including Māori economic development is of critical importance and supported by Foodstuffs, this should be an indirect benefit of an effective code rather than a primary purpose.

Promotion of wholesale access (as provided in option 3) will be addressed in its own regulatory regime (rather than needing to be promoted through the code). See also our response to question 6 below.

We do think the code may provide an opportunity to reflect or otherwise incorporate certain tikanga Māori/te ao Māori principles or values into trading relationships. As discussed in our response to question 8, Foodstuffs supports exploring this opportunity in partnership with the appropriate stakeholders and experts.

QUESTION 6: Do you see any risks if the purpose of the Code was to:

- address any impacts of the major grocery retailers' trading relationship with the supplier on other grocery retailers, or
- support any wholesale supply arrangements?

If yes, please explain the risks.

Please type your submission below.

We see no risks per se arising from the inclusion of these matters in the purpose statement, on the basis that the process obligations in the code, for example, good faith dealing and processes around deletion, should ultimately support these matters. Similarly, any obligation in the code to act lawfully will also be relevant here (in light of section 27 and the amended section 36 of the Commerce Act which addresses misuse of market power).

However, it is critical that the code retains its focus on the process by which retailers and suppliers interact with each other, rather than imposing prescriptive rules with limited or no exceptions. For example, as was canvassed during the market study, Foodstuffs does see MFN or exclusivity arrangements being requested by suppliers, and they are always mutually agreed. Provided such

arrangements do not substantially lessen competition, they should remain available to retailers and suppliers.

With regard to support for wholesale arrangements, Foodstuffs' view is that such support is best referenced and dealt with as part of the wholesale regulatory regime, rather than attempting to expressly link to the purpose of the grocery code. Obviously, the provisions of the code (such as good faith) will apply to all retailer/supplier interactions irrespective of whether the goods are to be on-sold at wholesale or retail.

QUESTION 7: In relation to **4.3 overarching obligations**, which of the three options do you agree with, and why?

Please type your submission below.

Foodstuffs supports the imposition of a duty to deal with suppliers in good faith (with a corresponding duty on suppliers to do likewise). The application of good faith principles is well understood and ultimately, when combined with other requirements under the code, will likely result in outcomes viewed as fair. Regarding suppliers, we agree that there are minimal risks from expecting suppliers to conduct themselves in good faith if that is the obligation on retailers, and it is important that the good faith provisions of the code are drafted accordingly. Requiring both parties to act in good faith should enhance the likelihood of successful trading outcomes (which are in the long-term interests of consumers).

Accordingly, Foodstuffs agrees with option 1 or 2. With regard to the requirement to 'avoid discrimination or distinction between suppliers' noted in both option 2 and 3, it is important to note that neither the UK nor Australian code impose this as a general requirement. Rather as part of the fair dealing obligation, a retailer must conduct its trading relationships with suppliers 'without distinction between formal or informal arrangements'. A general rule prohibiting discrimination between suppliers on any basis would materially impact a retailer's ability to deal with suppliers based on genuine commercial reasons, and ultimately would not benefit consumers.

QUESTION 8: Do you have any views on how to incorporate tikanga Māori or Te Ao Māori in the Code?

Please type your submission below.

Foodstuffs fully supports exploring ways to incorporate tikanga Māori and te ao Māori values and principles in the code in partnership with appropriate stakeholders and experts. Foodstuffs looks forward to working on this topic further over the course of the code's development.

QUESTION 9: How can the Code best incorporate economic development objectives, including those of Māori

Please type your submission below.

Foodstuffs is fully supportive of economic development objectives, including those of Māori.

However, it is unclear to Foodstuffs as to how these objectives can be incorporated into an effective, efficient and durable code. This is consistent with the proper focus of the code on behaviour rather than substantive regulation. If the code is genuinely effective, efficient and durable, we would expect the resulting benefits for suppliers in the markets for the acquisition of groceries to lead to enhanced economic development outcomes, including for Māori businesses.

QUESTION 10: Do you have any comments on the preliminary assessment of the options against the criteria in **Chapter 4**?

Please type your submission below.

Consistent with our answers in response to questions 5 and 7, Foodstuffs' view is that MBIE has likely:

- overstated the effectiveness of option 3 (particularly when compared with option 2); and
- understated the durability of option 2.

5 Requirements for supply agreements

QUESTION 11: In relation to **5.2 Requirements for supply agreements to be written and contain minimum content**, which of the options do you agree with, and why?

Is there any content that you think should be required in grocery supply agreements but is not mentioned?

Please type your submission below.

Foodstuffs agrees with option 2/3 for the reasons MBIE has set out in the consultation paper, being that the option may be more effective and efficient given it has less scope for interpretation and requires minimum necessary content to be in every supply agreement.

Further, option 2/3 aligns more closely with the Australian position, which Foodstuffs suggested during the market study would be the best starting point to inform discussion on the content of the code (provided it is carefully tailored to New Zealand market conditions).

QUESTION 12: In relation to **5.3 limiting unilateral and retrospective variations**, which of the options do you agree with, and why?

Please type your submission below.

Foodstuffs does not generally seek to impose unilateral or retrospective variations. Accordingly, we favour option 2/3 on the basis that it provides the parties with adequate flexibility and aligns with the Australian position.

QUESTION 13: Do you have any comments on the preliminary assessment of the options against the criteria in **Chapter 5**?

Please type your submission below.

Foodstuffs generally agrees with the preliminary assessment. Any concerns around durability of the preferred options should be able to be addressed if there is an appropriate review and change process built into the legislation establishing the grocery code framework.

6 Obligations in relation to product supply and placement

QUESTION 14: In relation to **6.2 Changes in supply chain processes**, which option do you think is best, and why?

Are suppliers being pressured to use a retailer's own logistics services and if so, what is the impact?

Please type your submission below.

With regard to changes in supply chain processes, Foodstuffs supports option 2. It is essential that retailers retain an ability to operate an efficient supply chain (with consequential long-term benefits for consumers). For example, this includes retaining flexibility as to the delivery destination for supplier products (individual store or distribution centre). Option 2 is favoured because it allows for changing circumstances while protecting the supplier by, among other things, requiring that the relevant changes must be reasonable and come into effect following a reasonable notice period.

With regard to choice of logistics company, Foodstuffs' view is that concerns regarding retailer pressure are already addressed in other parts of the code, for example the good faith obligations. Accordingly, a prescriptive rule such as the one proposed in option 3 is not required.

QUESTION 15: In relation to **6.3 fresh produce standards and quality specifications**, do you think the Code should include specific provisions about fresh produce and if yes, please explain what you think it should include?

Please type your submission below.

Foodstuffs is generally supportive of inclusion of specific provisions about fresh produce if this is supported by growers. In broad terms, the Australian code provides a useful guide as to the appropriate provisions (e.g. acceptance and rejection processes and standards and quality specifications). The specific content of a code, including relevant timeframes for rejecting products will require detailed analysis, dialogue and input from all stakeholders to ensure that it is practical and does not have unintended consequences. Foodstuffs welcomes the opportunity to discuss these issues further as part of development of any fresh produce provisions in the code.

QUESTION 16: In relation to **6.4 Obligations in relation to ranging, shelf allocation, and delisting**, which option do you think is best, and why?

Please type your submission below.

Foodstuffs favours option 3 on the basis that the requirements mirror the Australian code, and Foodstuffs has no concerns with limiting its ability to notify or warn in advance of delisting during a range review if this is considered necessary.

QUESTION 17: In relation to **6.5 Other obligations**, which option do you think is best, and why? Please comment on the range of different areas – confidential information, intellectual property, business disruption, freedom of association, whistle-blower protections, pressure to opt out of wholesale supply arrangements, exclusive supply clauses and ‘most favoured nation’ price clauses.

Please type your submission below.

Foodstuffs’ view is that option 2 is best as it mirrors the provisions on misuse of confidential information, intellectual property, business disruption and freedom of association in the Australian code.

Foodstuffs has no concerns regarding whistle-blower protections or prohibiting pressure on suppliers to opt out of wholesale supply arrangements (however, queries whether this latter requirement would be best dealt with under the separate wholesale regime).

With regard to exclusive supply clauses and MFN clauses, Foodstuffs uses these only in very large supply contracts and only very rarely. MFNs are used to ensure Foodstuffs remains competitive over time and can continue to offer the best prices for consumers. As discussed in our response to question 6, exclusive supply arrangements are mutually agreed, and sometimes put in place at the request of suppliers. Foodstuffs considers these arrangements carefully under the existing Commerce Act framework to ensure that they do not have the purpose or effect of substantially lessening competition. To the extent that such arrangements are unlawful, or suppliers are pressured to enter into such arrangements, this would breach the general obligations under the code.

QUESTION 18: Do you have any other comments about issues relating to product supply and placement?

Please type your submission below.

No additional comments.

QUESTION 19: Do you have any comments on the preliminary assessment of the options against the criteria in **Chapter 6**?

Please type your submission below.

Foodstuffs has no particular comments on or concerns with the preliminary assessment of the options assessed against the criteria in Chapter 6.

7 Obligations in relation to payment, price increases, and promotions

QUESTION 20: In relation to 7.2 Payment terms and set-offs, which option do you think is best, and why?

Please type your submission below.

Generally, Foodstuffs wishes to emphasise that it is committed to paying its suppliers in full and on time (according to terms). This is monitored and reported, and we are continually working to improve the supplier experience.

Detailed review with specific suppliers who have raised this complaint have also highlighted to them that incidences of late payment are actually infrequent and typically explainable.

With regard to the options proposed by MBIE, Foodstuffs believes option 2 is the best. This is because:

- Foodstuffs has no concerns with paying suppliers promptly (as contemplated by option 3). However, as noted by MBIE, there is no certainty as to what this would mean in practice and Foodstuffs is concerned that a one-size-fits-all reduces flexibility and is not in the interests of suppliers.
- It is important for all parties that there is absolute certainty as to when payments are due, and this is set out in the relevant supply agreement. A requirement of reasonableness is well-understood in the code environment, and flexible enough to cater for the fact that Foodstuffs offers a number of standard terms which are intended to create as even a playing field between suppliers as possible. For example, different standards will apply across different categories with a number of categories being settled on 7-day terms e.g., fresh suppliers are typically paid on shorter terms.
- The proposed set-off regime (which is the same for both option 2 and 3) generally appears workable from Foodstuffs' perspective. However, it is important to note that the Australian code does not require supplier consent where the set-off is provided for in the supply agreement and is reasonable in the circumstances. The Australian approach should be adopted in the New Zealand code.

QUESTION 21: In relation to 7.3 Responses to price increases, which option do you think is best, and why?

Please type your submission below.

This is an important topic in the current operating environment, where suppliers are submitting record numbers of price increase requests. On balance, Foodstuffs' view is that a modified option 2/3 is best. Option 2/3 as proposed helpfully provides all parties with greater certainty as to the process, and mirrors the Australian code. However, Foodstuffs believes it would be appropriate for the retailer (acting in good faith) to have the option of requesting additional information if it is not in a position to accept, partially accept or decline the request. This reflects that there will be situations where retailers are faced with complex price increase requests and avoids the situation where retailers are forced to make a decision (which is likely to be a decline) merely because there is inadequate information combined with a lack of time to properly assess the request.

QUESTION 22: In relation to 7.4 Payments for shrinkage and wastage, which option do you think is best, and why?

Please type your submission below.

Foodstuffs generally supports option 3. However, it is important that the relevant code provisions allow retailers and suppliers to continue to mutually agree reasonable and efficient alternative regimes to deal with wastage. For example, rather than seeking credits for specified low value wastage on a case-by-case basis (with resulting inefficiency and transaction costs), Foodstuffs currently has agreed a Minor Damage Allowance (MDA) as a trading term with some suppliers. The intent of an MDA is to reduce industry costs as a whole, and Foodstuffs's view is that the manner in which it currently structures its MDA is principled and efficient in terms of risk allocation (given the volume of products involved and potential administrative burden associated with alternative options).

QUESTION 23: In relation to 7.5 Payments for retailer's business activities, product placement, and as a condition of being a supplier, which option do you think is best, and why?

Please type your submission below.

Foodstuffs' view is that option 2 is best. This is because option 2:

- mirrors the Australian code, with associated benefits already discussed.
- provides protection for current and new suppliers while retaining flexibility through the use of supply agreements.
- is efficient, in contrast to option 3 which is inefficient, because it requires parties to agree specific activities and link payments to those activities. This involves investment by both parties in time and cost when the supplier may well be entirely comfortable (under a mutual agreement reached in good faith) with a more streamlined regime which is reasonable and meets the requirements of option 2.
- is more consistent with the Commission's recommendation regarding a focus on process and behaviour rather than substantive matters.

In light of the efficiency issues arising from option 3, we query the extent to which this option in practice will be more effective. Also, under option 2, suppliers and retailers would still be free to agree specific activities or deliverables. Failure to deliver such activities or deliverables would likely give rise to a breach of the good faith provisions of the code and/or amount to a breach of contract at law.

QUESTION 24: In relation to **7.6 Payments for promotions and promotional buying**, which option do you think is best, and why? What are your views on promotional buying and investment buying?

Please type your submission below.

As acknowledged by MBIE, the rules regarding promotions, and promotional buying, are fundamentally important to New Zealand consumers. In the New Zealand environment, suppliers are a key driver of promotional activity (with suppliers generally funding agreed promotional activity designed to increase sales volumes).

With regard to payments for promotions, it is not clear to Foodstuffs the practical differences between options 2 and 3. Foodstuffs supports the position in the Australian code which allows funding of promotions by suppliers where:

- the relevant supply agreement provides for the funding, and
- the funding is reasonable in the circumstances. In assessing what is reasonable, the factors considered are the allocation of costs borne, contributions made, and likely benefits to both supplier and/or retailer.

With regard to promotional buying, Foodstuffs' view is that option 3 is best. As Foodstuffs submitted during the market study, forward or investment buying, which takes place with agreement of the supplier, is a key tool in the current environment (with frequent promotions) to enable its members to achieve the best cost price in order to be able to provide low prices for its customers. Among other things, this is because in the current operating model as MBIE has noted, suppliers maintain high non-promotional cost prices (to retain effective control of promotional programmes) and enable promotional pricing through the application of specific discounts. Accordingly, the 'discount' a supplier agrees to apply for a limited time becomes critical in terms of reducing the cost of the product, and the key mechanism for Foodstuffs' members to maintain low prices for customers is to buy forward from one promotional discount to the next promotional discount.

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

The advantage of option 3 is that it allows the parties the flexibility to undertake efficient commercial transactions while safeguarding suppliers' interests through the requirement of reasonableness, and the general principles of the code to ensure that agreements are genuinely consensual.

QUESTION 25: Do you think requests from retailers for payments for data services is an issue and if so, why?

Please type your submission below.

Foodstuffs North Island Limited offers 'dunnhumby shop' for suppliers to purchase. This is voluntary, and participation is at the supplier's discretion.

QUESTION 26: Are there any other instances where requests for payments should be limited? If so, what are the issues and how should they be addressed in a Code?

Please type your submission below.

Foodstuffs is not aware of any other types of payments which should be limited in a code. Supplier relationship issues, including supplier payment obligations, were extensively canvassed during the market study process.

QUESTION 27: Do you have any comments on the preliminary assessment of the options against the criteria in **Chapter 7**?

Please type your submission below.

Chapter 7 deals with an extensive range of topics, many of which are independent of each other. The issues arising from each topic are complex, nuanced, and critical for consumers of groceries. For this reason, rather than grouping all the topics together in the manner set out in MBIE's preliminary analysis, MBIE may wish to consider a more granular assessment of the different topics. For example, promotional buying is an entirely discrete topic from shrinkage. Accordingly, a standalone assessment of the options proposed against the criteria may be more fruitful.

Broadly speaking, MBIE's assessment that options 2 and 3 score the highest generally aligns with Foodstuffs' views on each option as set out in its responses to the questions posed in this chapter.

QUESTION 28: Do you have any comments about the current state of dispute resolution (for example, the processes that are used or the nature of disputes)?

Please type your submission below.

Foodstuffs has operated a dispute resolution process for a number of years. Our current Supplier Relationship Charter sets out a conflict and dispute resolution process, contemplating eventual escalation to the Chief Executive Officer of the relevant co-operative. This largely mirrors an earlier complaint process agreed between Foodstuffs and the New Zealand Food and Grocery Council, pursuant to which any supplier complaint could be escalated within the business to the GM, Merchandise, Chief Executive Officer or General Counsel.

In the absence of a code, these processes represented Foodstuffs' bona fide attempt to provide a forum for suppliers to raise concerns and for those concerns to be resolved. Foodstuffs acknowledges that these processes are not a substitute for a mandatory code and associated dispute resolution process, which Foodstuffs fully supports.

QUESTION 29: Do you have any comments on the particular criteria in **Chapter 8.5** used to undertake the preliminary assessment of options for dispute resolution?

Please type your submission below.

The criteria used to undertake the preliminary assessment appear appropriate. Ultimately, the dispute resolution process should enhance the purpose of the code, including the promotion of competition for the long-term benefit of consumers.

QUESTION 30: In relation to **Chapter 8.6 The options for New Zealand**, which of the three options do you think will work best, and why?

Please type your submission below.

Foodstuffs supports an efficient and effective two-step method to resolve disputes (self-resolution, followed by a determinative process).

Foodstuffs' view is that option C is best for New Zealand, with three modifications.

The first modification is that Foodstuffs believes that it is appropriate for the decision of the adjudicator to be final and binding, subject only to an appeal on matters of law. It will be in the interests of the parties and ultimately consumers for disputes to be determined as quickly as possible and without unnecessary risk of needing to unwind determinations. The dispute resolution expert will be able to adjust their process in light of the size and nature of any particular dispute, so there should be sufficient confidence in factual findings. Therefore, the 'broad appeal process' currently contemplated in option C could lead to unhelpful and inefficient delay. Foodstuffs considers that the appeal right should be limited to only matters of law. It would be

expected that any clarifications of the law required while the code is new would resolve issues to avoid future disputes.

The second modification is that in Foodstuffs' view it would be preferable for the dispute resolution service to be operated by the regulator. The regulator's expertise and knowledge would greatly assist the efficient and correct determination of disputes, and determination of disputes will enhance the regulator's expertise and knowledge for its other functions.

The third modification is that while ordinarily the costs of the dispute resolution service should be met by the major grocery retailer, there should be an ability for the dispute resolution expert to order the other party to make a contribution to costs. That would be in the limited circumstances where the other party has acted in bad faith or made allegations or arguments that are without any substantial merit.

QUESTION 31: Do you have any comments on the preliminary assessment of the options against the criteria in **Chapter 8**?

Please type your submission below.

Foodstuffs generally agrees with the preliminary assessment of the options against the criteria. Foodstuffs' view is that the effectiveness of the regime will be materially enhanced if the adjudicators are staff/representatives from the office of the regulator.

QUESTION 32: Do you have any views on the Australian and UK approaches to monitoring, compliance obligations, and enforcement, and which might be most effective for New Zealand?

Please type your submission below.

Regarding monitoring, Foodstuffs anticipates that some form of annual survey of suppliers and retailers will be undertaken and an associated report produced. This process could be set out in the applicable legislation, as per the Australian approach. Regarding compliance duties, Foodstuffs notes that there is little difference between the Australian and UK approaches. Foodstuffs generally supports the Australian approach to enforcement. This is on the basis that it is not appropriate for the regulator to have the ability to fine grocery retailers (without the need to prove a breach of the code before the appropriate New Zealand court). As far as Foodstuffs is aware, the UK approach (which does allow the Groceries Code Adjudicator to impose fines or penalties) would be unprecedented in the New Zealand legal environment.

QUESTION 33: Do you have any comments on the potential compliance costs (for suppliers and designated retailers) from the proposed content of the Code of Conduct?

Please type your submission below.

Inevitably, there will be some unavoidable compliance costs for designated retailers (and, to a more limited extent, for suppliers) arising from the proposed content of the code of conduct. However, provided that the code's focus remains on behaviour rather than substantive regulation, the costs should be relatively limited and within an acceptable range. Rigorous assessment of the various options against the efficiency criteria will also be critical to mitigate concerns regarding potential compliance costs.

QUESTION 34: Do you have any views on how the Code should be implemented?

Please type your submission below.

Foodstuffs agrees that implementation of the code needs to be considered carefully. Foodstuffs supports a staged implementation, and agrees that some parts of the code will take longer than others to implement. More specifically, the obligation to act in good faith could come into force with immediate effect, with other obligations coming into force over a 12 to 18-month period (which we understand was the approach taken in relation to the Australian code). It should be noted that new terms will need to be agreed with every supplier over the implementation period.

QUESTION 35: Do you have any other comments on the matters discussed in **Chapter 9**?

Please type your submission below.

No further comments.