



**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 **[19 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)

Privacy of natural persons

Email

Privacy of natural persons

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

Organisation

Business name or organisation

LeaderBrand Produce Ltd

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

1 Executive Summary

LeaderBrand is one of the country's largest producers of broccoli, corn, buttercup squash, asparagus and wine grapes. We are also the leading growers of spinach as well as lettuce and bagged salads.

We have four farms in Pukekohe, Matamata, Chertsey in the South Island and our largest and where our head office is based in is Gisborne. We have heavily invested in our own assets including a nursery in Gisborne that sends seedlings to Pukekohe and Matamata and a nursery in Chertsey. We have built a state-of-the-art salad house which washes, dries, processes and bags spinach, baby leaf salad leaves, and coleslaw.

We recently opened our new fresh distribution centre and cooling centre which now allows us to streamline our processes and easily distribute to the rest of the country.

In 2019, we secured a loan of \$15 million by Kānoa Provincial Fund to invest in the country's largest under covered greenhouse and a chance to make Gisborne the salad capital of the country.

We employ approximately 450 people, more in harvesting and planting seasons and these numbers can increase to approximately 100.

We supply fresh produce to Countdown, Foodstuffs, Subway, Pita Pit, My Food Bag, Bidfood, Turner and Growers and several other independent sellers and food suppliers throughout the country.

We play an important role in the communities in which we operate and one of the largest private employers in Gisborne. We take our responsibilities as a large farming business and employer very seriously.

We were encouraged by the review on the Grocery sector in New Zealand and agree that a Code of Conduct is needed to ensure transparency.

Key points from our submission:

- **Fresh margins** – We suspect that the retailer's fresh margins are higher than any other sector of the supermarket. For the benefit of the health of New Zealanders, we'd like to see more transparency around the margin of fresh produce and whether these margins can be consistent across all categories of the supermarket. We feel that this is an opportunity for the government to make fresh more obtainable for all Kiwis'.
- **Management of the Code** - We want an independent impartial ombudsman or adjudicator appointed, that can make a blinding judgement.
- **Contractual changes cannot be unilateral and have to be agreed by all parties**
- **Transparency around promotions** - equal opportunity for all promotions across all brands, this includes both supplier brand as well as supermarket brands (private label). If a promotion opportunity is accepted by the supermarket it must be passed onto consumers.
- **Retailers suppliers, without any opportunity to negotiate** - We require a clause within the code for situations where the retailer dictates what supplier/service must be used, and they set pricing and terms.

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.

Yes, we agree with the need for a Grocery Code of Conduct.

We support option three the alternative code suggested.

We want equity and transparency in our transactions with retailers. Currently, there is limited transparency within the whole supply chain and an imbalance of power. We agree that there are far more benefits than cost associated with the introduction of the Code of Conduct.

We think that there are merits for both the UK and Australian code of conduct. However, we think that we should align more closely to the Australian version, as it is similar to our market. However, we do hope that the benefits from both codes are incorporated into the NZ version and that it reflects our unique market.

We agree with the criteria used to evaluate the options as necessary metrics. However, the weighting may create some bias, as efficient is trying to address the power imbalance that currently exists in the market.

We agree that suppliers should not be directly regulated by the Code of Conduct. We would like to see added to the Code of Conduct, both wholesalers, retailers and any other high-volume entity including membership organisations such as Hello Fresh, My Food Bag and Costco.

We would like clarity on how this will be managed, whether there will be an ombudsman or adjudicator appointed, and how will they be elected. Will it be similar to other codes of conduct such as banking sector or telecommunications? It is our belief, that this role should be impartial, but the person needs to have industry knowledge.

We think that the code should not be a set of rules rather a best practise or guidelines document, that can be referred to and used throughout negotiations and, in particular, for dispute resolutions.

At LeaderBrand, we operate, both internally and externally, on a policy that we treat everyone equally with integrity and honesty. We think that the code should reflect equals rights for everyone across the sector that is fair and equal, that cannot be exploited.

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.

We believe that the code does not go far enough. We would like included in the code wholesalers, retailers and any other high-volume entities such as The Warehouse, Super Liquor, Fruit World. This should also include membership models such as My Food Bag, Costco, Supie, Foodbox, Hello Fresh etc.

The threshold level turnover needs to be lower to take into consideration that many retail organisations operate as franchisees. The code needs to stipulate both head office and stores equally. Particularly in the fresh sector, many growers have relationships with head office and individual stores. The threshold should be considered from \$10 million turnover a year.

We consider profit/turnover to be a better measure for inclusion in the code rather than footprint/size of the store.

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.

We think that the best option is A.

As mentioned previously, the threshold level turnover needs to be lower. We consider profit/turnover to be a better measure for inclusion in the code rather than footprint/size of the store

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.

Agree with option A.

As mentioned previously, the threshold level turnover needs to be lower. We consider profit/turnover to be a better measure for inclusion in the code rather than footprint/size of the store

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.

We consider option 3: alternative code is the best option because it aligns most accurately with the fresh sector.

We consider the following points to be critical for inclusion in the code:

- Provisions for good faith and fair-trading relationships
- Transparency within the supply chain/terms of trade agreements
- Conduct that limits transfer of cost and risk to suppliers
- Economic development of the produce category for all suppliers, including Maori
- Disputes resolution mechanism that covers all parts of the supply chain and terms of trade agreements (this is key to the code being successful)

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.

The code needs to include, equal opportunity for all promotions across all brands, this includes both supplier brand as well as supermarket brand. We think that this will help to enhance both consumer choice and competitiveness.

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.

We support option 2: The Prescriptive Code

We would like to see the inclusion of a private label clause that ensures that there isn't any bias or advantages for the retailers towards their own private labels.

This includes promotion of their product, free availability of consumer data within category or as far as deranging products to advance their own. There needs to remain a fair playing ground that isn't anti-competitive to any suppliers.

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.

The code should consider everyone equally and fairly including Maori.
All business should be treated equally without prejudice or bias.

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

Please type your submission below.

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.

We would like to see a clause or consideration within the code for situations where the retailer dictates what supplier/service must be used, and the retailer sets pricing and terms. How this is managed and the ability for this supply/service to be exploited. For example, suppliers have no ability to negotiate directly with the retailer's stipulated returnable packaging suppliers.

The retailers have the ability to add complexity and cost to our industry with no genuine consideration or mitigation of cost. Suppliers have no transparency of the deal with the service/supplier and no opportunity to negotiate directly or use another supplier/service.

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.

We prefer option 2 the hybrid of both alternative and prescriptive codes.

We also agree with the Australian Code, and in particular, the points about quantity and quality requirements to be clear terms.

Other considerations for supplier agreements need to include: quantity and quality for fresh; non-conformance/provisions for rejections, delivery timelines, payment terms, deductions or with held payments

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.

We agree with Option 2 - a hybrid of both alternative and prescriptive codes.

There should be no unilateral variations to a contract.

All contractual changes need to be agreed with by all parties.

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.

There should be no unilateral variations to a contract.

All contractual changes need to be agreed with by all parties.

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.

We support option 3: the alternative option

We support the need for fairness and transparency of supplier agreements as defined by a mutual understanding of associated costs of logistics and supply. All changes to the agreement must be negotiated and agreed.

The retailer should not have the ability to enforce their logistic provider on any supplier. Retailers must ensure the on-charging of fair market rates to suppliers for any logistics services

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.

Yes, we agree that fresh produce should have specific provision because of the perishable element.

Fresh producers are already working to quality-set specifications/standards required by the supermarkets. The supermarket specifications have more specifics and details, than what is proposed in the code. We think that the code should represent the same specifications.

Fresh producers need to know within three hours whether the product is rejected to allow the producer time to on-sell the product to other opportunities. Any claims for damaged products also need to be informed within seven days.

We support the need for all parties to respect confidentiality and intellectual property.

We support the rights of whistle blower, and prohibit any action which exerts duress or coercion on the party in relation to the supply agreement.

We support option 2 – the prescriptive code but think that the current standards set by the supermarkets are better than the suggested specifics in the code. The code needs to reflect the supermarket specifications.

Other Comments:

Fresh margins – We suspect that retailer's fresh margins are higher than any other sector of the supermarket. For the benefit of the health of New Zealander's, we'd like to see more transparency around the margin of fresh produce and whether these margins can be consistent across all categories of the supermarket. We feel that this is an opportunity for the government to make fresh more obtainable for all Kiwis'.

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.

We support option 2: the prescriptive code given its limited competitive environment.

The supermarket has a conflict of interest providing unbiased ranging, shelf allocation and delisting decisions because they can protect their own supermarket brands over supplier brand.

We expect the code to address challenges within this space.

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.

We support Option 2: the prescriptive code

The code needs to incorporate the potential of anti-competitive behaviour in relation to supermarket brands and supplier’s brands.

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

Please type your submission below.

The code needs to incorporate the potential of anti-competitive behaviour in relation to supermarket brands and supplier’s brands.

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.

Transparency around promotions - equal opportunity for all promotions across all brands, this includes both supplier brand as well as supermarket brands (private label). If a promotion opportunity is accepted by the supermarket it must be passed onto consumers.

Fresh margins – We suspect that the retailer’s fresh margins are higher than any other sector of the supermarket. For the benefit of the health of New Zealander’s, we’d like to see more transparency around the margin of fresh produce and whether these margins can be consistent across all categories of the supermarket. We feel that this is an opportunity for the government to make fresh more obtainable for all Kiwis’.

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.

We think option 3: the alternative code is best.

We require in line with governments recommendation, fresh produce businesses to be paid within 10 working days and the standardised practice of settlement discounts to be ceased.

We think that changes to the terms of trade or contractual changes need to be transparent and negotiable, so that it is fair and impartial. Notification of changes needs to be in writing and mutually agreed without passing costs onto suppliers.

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.

We think Option 2 the hybrid option prescriptive and alternative is best.

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.

We agree with Option 2.

Suppliers should not be required to accept wastage claims once the product has been received in good order by the retailer.

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.

We think that Option 3 the alternative code.

We want a clause or stipulation added to the code in relation to category funds where the supplier is contributing financially. Suppliers currently have no input to where to assign the funds and which product is being promoted. There is no transparency or retrospective information on how category funds are being spent.

QUESTION 24: In relation to 7.6 Payments for promotions and promotional buying, which option do you think is best, and why?

Please type your submission below.

We think that option 3 the alternative code is best.

Supplier should be able to promote supplier's own product. If supplier has good volume, customer demand, the supplier should be given access to all promotional tools.

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.

Yes, we think that payments for data is an issue because supermarkets are disproportionately charging all consumer data which disadvantages a supplier brand when compared to the supermarkets own brand.

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.

We want a clause or stipulation added to the code in relation to category funds where the supplier is contributing financially. Suppliers currently have no input to where to assign the funds and which product is being promoted. There is no transparency or retrospective information on how category funds are being spent.

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.

Same as above

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.

**We don't think the options go far enough.
At least Option B – the determinative code arbiters appoint an arbiter**

The dispute resolution mechanism is an essential requirement of the code.
It needs to ensure fairness, balance of power, independence and an unbiased approach
It needs to be timely and resolved quickly with undue cost to both parties
The decisions need to be binding

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.

Agree that disputes resolution is key to the code.

It needs to be conducted by an independent person with industry knowledge that is fair and unbiased. There needs to be an expectation that once there is a decision made and set, that after the conflict is resolved that the working relationship will continue in fair and good faith, without bias of the decision.

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.

**We don't think the options go far enough.
We agree with Option B the determinative code arbiters.**

We think that the person in the role must be impartial and have industry knowledge.

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.

We want an independent impartial ombudsman or adjudicator appointed, that can make a blinding judgement.

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.

The UK Code because it can act on a national head office and local store level and can conduct investigations without need of a court ruling

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.

This potentially could be funded by GST from FMCG sales.

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

Please type your submission below.

- It should be binding for both suppliers and a retailer to adhere to the code
- That the code is monitored for performance and continued to be improved and updated
- That the regulation is binding and mediation decisions are enforceable
- The retailer is also a supplier of brands which disadvantage suppliers
- We require an independent ombudsman or advisor that consists of someone with industry knowledge but not employed by the retailers
- That all of the retailer merchandisers and store teams are trained and tested on the code
- That there should be an annual industry survey conducted to give an indication if the code is being effective and members are compliant.

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

Please type your submission below.