

RESPONSE TO
MBIE Consultation Paper
New Zealand Grocery Code of Conduct

Submitted by:



United Fresh
New Zealand Incorporated

P.O. Box 66047, Beach Haven, Auckland 0749
0800 507 555 / 09 480 5057
info@unitedfresh.co.nz

Submitted to (competition.policy@mbie.govt.nz) on 4 August 2022

Introduction

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

United Fresh represents an industry that almost every New Zealander interacts with on a daily basis. The produce industry is a significant contributor to supermarket product ranges, with a typical retail store produce department contributing around 10% of store turnover.

On behalf of the New Zealand Produce Industry, United Fresh therefore wishes to make a submission on "*Consultation Paper - New Zealand Grocery Code of Conduct*".

United Fresh also welcomes the opportunity to comment on the proposed changes by way of this submission, as it provides us, as the pan-produce industry body, with the opportunity to enhance our membership's understanding of the changes that will occur as a result of the Commerce Commission's Retail Grocery Market Study.

Prepared by The United Fresh Technical Advisory Group,
Jacob Lawes, Projects Manager,
Dr Hans Maurer, Chair.

Situation Overview

This submission, and the Discussion Paper that called for it, form part of a much larger piece of work with many facets, resulting from the Commerce Commission Retail Grocery Market Study, in which United Fresh took an active part in, via multiple submissions to the Commerce Commission. These separate workstreams feed into a wider government effort to implement the recommendations made by the Commerce Commission, as well as further outcomes announced by the Minister for Commerce & Consumer Affairs.

The Final Market Study Report included fourteen recommendations, with MBIE tasked to implement several of these. The introduction of a Code of Conduct was one of the fourteen recommendations the Commerce Commission made.

United Fresh was pleased to be invited by MBIE onto the Code of Conduct Advisory Group, and to be able to discuss the impact on fresh produce that proposed Code of Conduct models would have. We also thank MBIE for the chance to respond here to the Code of Conduct Consultation Paper, and how the introduction of a Code of Conduct will impact upon the fresh produce value chain.

United Fresh has worked with MBIE before on weights & measures related activities, including collaborating to develop industry specific Guidelines on complying with the Weights & Measures Regulations. United Fresh hopes that this response to the Consultation Paper will contribute towards a robust & produce industry friendly Code of Conduct, that recognises the challenges of the fruit & vegetables category within the overall grocery range.

Question and Response Section

1) Question: Do you have any comments in relation to Chapter 2, in particular any comments on:

a) the objectives (section 2.2)?

The introduction of a Code of Conduct was one of 14 recommendations made by the Commerce Commission. The approach to developing a Code of Conduct was clearly influenced by existing Codes in both the UK and Australia. Whilst the objectives in those two jurisdictions were similar to the one identified by the Commerce Commission, i.e., the desire/need to regulate conduct between retail buyers and grocery product suppliers, the outcome in those countries differed.

Australia introduced a voluntary Code, whilst the UK opted for a mandatory Code. Given the fact that Aotearoa New Zealand is neither in the UK, nor a part of Australia, we are likely to emerge at the end of this consultation process with a unique New Zealand code, particularly as the additional responsibility of recognising the contractual agreement with an indigenous people, i.e., the Treaty of Waitangi, does not exist in either the UK or Australia.

From a fresh produce value chain perspective, it is also critical that the way fresh produce is managed throughout the value chain is not impeding on either producers or consumers in a negative way, through bureaucratic procedures that are not currently in place, but would create additional costs, were they to be introduced.

The objectives in developing this Code of Conduct therefore need to be sensitive to inherent fresh & perishable product requirements, regardless of the purchase & sale negotiations occupying buyers & seller minds.

b) evaluation criteria for the Code (section 2.3)?

In principle, United Fresh agrees with the criteria including effectiveness, efficiency, and durability.

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

It is understood that the New Zealand Code will be a mandatory Code. Option A is therefore not appropriate, as the future mechanism within that Option would create additional uncertainties, as the regulator would not be required to designate an additional retailer.

Option C is disproportionately substantial in its trigger value (\$1.5 billion), given the size of the New Zealand market.

Option B combines the mandatory starting point of mandating the two major grocery retailers with the regulator having to designate when further retailers reach a certain revenue level (\$750 million), or following an investigation/retailer request.

United Fresh therefore considers Option B to be more comprehensive, and therefore preferable from these three Options as they are presented.

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

United Fresh selects Option A, "Obligations on head office and some direct obligations on stores", as the most appropriate pathway forward on retailer obligations. With two exceptions, store buying is an ongoing occurrence within the intended designated retailers, subject to banner. The two exceptions are the Four Square and Countdown banners. Specifically mentioning the in-store buying operations as being a part of what retailer head offices are being held accountable for, will assist the head office teams with educating and guiding their teams, and meeting Code of Conduct obligations.

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

Retailer Designation Options – p.17

United Fresh suggests that the revenue trigger in Option B is reduced to \$250 million on a single year basis, particularly given the possibility that a third national retailer of significance may already be gearing up to expand its grocery offer, and/or the Minister's intent to consider existing major grocery retailers needing to divest stores.

Whilst the preliminary score of +1.5 is 3 times the value of the scores assigned to Options A and C, implementing Option B with a reduced threshold to \$250 million on a single year basis would further increase the effectiveness of the option.

Obligation Options – p.20

Option C, duration, has in United Fresh's view, received a higher score than it deserves. Centralised focus works well where centralised structures are in place that also work well. A centralised focus works less well when applied to decentralised structures.

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

United Fresh agrees with Option 3 (Alternative Code), as this is more reflective of New Zealand reality than the other Options.

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

a) address any impacts of the major grocery retailers' trading relationship with the supplier on other grocery retailers, or

The overarching intent of the proposed Code is to "improve the dealings between the major grocery retailers and suppliers and competition in the market for the acquisition of groceries", with the emphasis on additional obligations under the Code being placed upon the retailer, rather than the supplier.

The core objective of retailers and suppliers engaging with each other must be to achieve a supply agreement between both parties, that is economically sustainable for both, as well as any sub-suppliers, that the supplier might be acting for. That is the area the Code needs to focus on.

The impact of each grocery retailers' trading relationship with their suppliers is a matter for the supply agreement, and not the Code. "Addressing" relationship impacts between the parties to an agreement, and other retailers, would most likely lead to regulatory elements beyond matters such as health & safety, employment, and food safety legislation, finding their way into supply agreements.

The risk is that supply agreements may become unworkable if Government attempts to extend the scope of the Code directly into these agreements. Suppliers to the major grocery retailers are not one large homogenous mass, but can be segmented across various criteria, including by product category, supermarket department, size, shelf life & perishability, packaging type, and so on.

Particularly in the fresh produce area, the supply position can change from one day to the next, as a result of circumstances neither the retailer, nor the supplier, is able to influence. Changes in the supply position of a perishable volume of product requires a degree of nimbleness in approach, that is second nature to produce suppliers, as well as those retailer category managers and buyers, tasked with ensuring that supermarket customers are able to purchase the full range of fruit & vegetables at their stores.

Pace and rhythm of produce supply agreements beat to a different tune compared to supply agreements covering shelf stable FMCG products, capable of being stored for weeks or months at a time.

b) support any wholesale supply arrangements?:

United Fresh does not see any risk if the Code were to "support (or at the least not hinder) supplier participation in any wholesale supply arrangements by the designated retailer".

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

United Fresh sees Option 3 (Alternative Code) as the appropriate Option, as a combination of Good Faith and Fair Dealing obligations are more effective than a Good Faith obligation on its own.

Good Faith is more intent orientated, whereas Fair Dealing addresses the process retailers and suppliers engage in.

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

Both tikanga Māori and Te Ao Māori can cover broad and far-reaching concepts and topics, linked to Māori culture, history, traditions, people, and ways of life. While both are extremely important concepts in New Zealand, the Consultation Paper discusses how they may be applied to a Code of Conduct. This response from United Fresh must therefore, by the necessity of the Consultation scope, focus on the details of tikanga Māori and Te Ao Māori with respect to the Code.

The definitions discussed may not encompass the full scope of the words and what they represent in Te Reo Māori, but merely defines these concepts in a manner that United Fresh understands they are likely to be applied to within the Code.

Based on the limitations above, United Fresh has therefore used the following definitions for tikanga Māori and Te Ao Māori :

- Tikanga Māori: the ethical and common law issues that underpin the behaviour of members of whānau, hapū, and iwi, including the cultural, social, ritual and economic aspects. Tikanga varies between tribal regions, and may involve different practices in different regions. (Mead, H. M. (2016). *Tikanga Māori (revised edition): Living by Māori values*. Huia publishers.)
- Te Ao Māori: the overarching Māori world view (Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity. (2011). Te Taumata Tuarua. Volume 2.).

Under these definitions, Te Ao Māori and tikanga Māori do not just impact on Māori and Māori businesses, but also Pākehā and Pākehā businesses, who may not directly follow Te Ao Māori and tikanga Māori, but who live and do business with Māori and Māori businesses, and exist within a country which has in various forms incorporated Te Ao Māori and tikanga Māori into both regulations and legislation.

United Fresh notes here that tikanga and te ao differ from hapū to hapū, and specific acts of tikanga may be slightly different across Aotearoa New Zealand. As such, the incorporation of Te Ao Māori and tikanga Māori would in any implementation need to be at a principles level.

Consulting vs Partnership

United Fresh has identified two points of discussion that MBIE has created, in asking this question, both of which need to be considered in how they shape our overall view on incorporating tikanga Māori or Te Ao Māori:

1. United Fresh, like the other industry bodies and commercial respondents, are not experts in Te Ao Māori, as that is not our core focus. While one of the authors responding here is of Māori descent, and does have connections into their local marae, iwi, and tupuna, the author is not an expert on tikanga, and cannot properly discuss this topic at more than a general level.

2. The wording of the Consultation Document surrounding this question, and the following question (Question 9), make no reference to working in partnership with Māori interests, which should be occurring under Treaty of Waitangi considerations, and under the Government Guidelines published by the Office for Māori Crown Relations, to incorporate and follow tikanga Māori or Te Ao Māori, in any of the three situations where United Fresh expected this to be occurring as a matter of course:

- a. during the development of the code, in a manner that would incorporate tikanga Māori or Te Ao Māori,
- b. during the implementation of the code by the businesses who will be covered by the Code, or,
- c. partnering with Māori to ensure the work of the regulator and the regulations & enforcement of the Code follow tikanga Māori or Te Ao Māori.

Absent MBIE proactively working in partnership with Māori, United Fresh is concerned that any attempt to incorporate tikanga Māori or Te Ao Māori into the Code will, at best, be not fit for purpose, and at worst may potentially be actively detrimental to the goals of enabling & encouraging the industry to be able to work towards & within a framework that incorporates tikanga Māori or Te Ao Māori.

United Fresh therefore suggests that for the question of if this Code should incorporate tikanga Māori or Te Ao Māori, MBIE should not be consulting on this topic, but instead should be adhering to the Treaty of Waitangi by partnering with a wide range of Māori leaders on this topic, and only incorporating tikanga Māori or Te Ao Māori in the Code under Māori guidance, if Māori deem this the correct pathway to follow.

Our View of tikanga Māori & Te Ao Māori

While United Fresh are not experts on tikanga Māori & Te Ao Māori, United Fresh believes our industry benefits from the opportunities presented by incorporating tikanga Māori & Te Ao Māori.

United Fresh therefore believes that Te Ao Māori and tikanga Māori should be incorporated in some form into the Code. This would be an important step towards our obligations to the Treaty of Waitangi as a produce industry, and as a wider food industry. However, incorporating Te Ao Māori and tikanga Māori into the Code beyond a principles level is not an effective way of encouraging Treaty of Waitangi compliant processes, nor is it viable to engender a practical system that enables Te Ao Māori and tikanga Māori to be followed. A durable and sustainable system is needed, and not one that puts in wording just to pay lip service to an idea. Being overly prescriptive risks harming Te Ao Māori, not supporting it.

United Fresh looks forward to a Code being implemented that reflects the realities of Aotearoa New Zealand, and that incorporates the principles of Te Ao Māori and tikanga Māori into the principles of the Code, which the designated grocery retailers & their suppliers can realistically follow.

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

United Fresh, like the other industry bodies and commercial respondents, are not experts in Māori economic development, as that is not our core focus. United Fresh therefore suggests that MBIE adheres to the Treaty of Waitangi by partnering with a wide range of Māori experts on this topic, under the Government Guidelines published by the Office for Māori Crown Relations. However, United Fresh can comment on the general principles of supply agreements, and how economic objectives may impact on these.

The interdependency between retailers and suppliers is not just a one-way street in favour of the retailer. If suppliers aren't able to deliver their product, retailers can only present their customers empty spaces on their shelves, a situation customers typically take a dim view of, as they do when meeting higher prices than expected.

It can therefore be assumed that retailers who are interested in ensuring a supplier's ability to consistently deliver a product, as per a supply agreement, will support any economic development strategy that makes sense from their perspective. After all, this would improve the ability of the preferred supplier to perform & deliver.

In other words, provisions made potentially in the Code about incorporating economic development objectives, should not impose themselves onto existing supply agreements that already work for both parties. Instead, these provisions should focus in an aspirational way on potential suppliers whose economic development curve is in its early stages. It cannot be the role of the Code to mandate retailer subsidies that drive supplier economic development. Given the right conditions, retailers and suppliers who want to work together will make it happen.

From that point of view, the issue is not how Māori economic development objectives can be integrated into Code provisions, but the extent to which the Code governing a relationship between commercial partners would be the right vehicle to drive supplier economic development objectives as a separate activity.

Another way of looking at this issue in terms of Māori enablement, is moving away from the point-to-point Code assumption, which is the need to manage the relationship between retailer and supplier, but looking at improvements necessary within the various Māori supply chains into food retail.

For example, Māori are not only involved in growing kiwifruit, but are also substantial shareholders in at least one, and possibly more, onshore supply managers, packing, storing and positioning kiwifruit for export under the single-desk Zespri brand. Zespri does not differentiate in terms of its marketing whether fruit was grown by Māori or Pakeha growers, and payments made are performance based.

Yet by extending their investment into the supply management side, Māori kiwifruit growers are occupying an additional "baseplate" in the kiwifruit value chain, that provides them with the opportunity to be better heard within the regulated onshore supply manager relationship with Zespri.

Another example is the fisheries situation, where Māori not only own a significant part of the fishing quota allocated to the New Zealand fleet, but also own significant stakes in downstream companies such as Sealord.

So, United Fresh believes a more appropriate question to ask would be:

"What can Government learn from the way examples of Māori economic development in food production & management have evolved, and how can Government offer a supporting structure for other sectors that emulate these examples, as major grocery retailers will always engage with those who can provide them with supply"?

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

Given this Code is going to be an Aotearoa New Zealand Code, Option 3 (Alternative Code) is the only Option that is realistic, due to the way Tangata Whenua rights are enshrined within the provisions of the Treaty of Waitangi. Option 1 and 2, as they do not consider the Treaty, are therefore not suitable at all for Aotearoa New Zealand.

Having said this, the provision of Māori economic development into the Code provisions, "may" not only add extra costs to some retailers as outlined in the efficiency column of the preliminary options analysis table (4.4), but most certainly **will**. This then raises the question of cost recovery, which is not a dirty word, but a legitimate element of commercial business processes that end at a consumer.

This would suggest to United Fresh that the Code should limit itself to overarching principles in this area, and leaving the process of gaining the competencies and capacities needed to develop relationships with major grocery retailers to other programmes and levers that sit outside the proposed Code, and which are more appropriate.

11) Question: 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?

United Fresh considers that Option 1 is insufficient, and that the requirements for Options 2 and Options 3 are called for.

With regards to paragraph 88 of the Consultation Paper, we comment as follows:

- a) Quantity Standards. There is no reason why any supply agreement should limit itself to minimum supply volumes. Produce is typically sold, purchased, and delivered, to exact quantity levels.
- b) Quality Standards. The Commerce Commission recommendation was for "retailer specifications". This is a totally different concept to a "quality standard". We have provided a suitable definition of "standard" in our answer to Question 15. Standards are tools by which specific crops are managed over extended time periods. Retailer specifications are always subject to change, based on retailers expectations changing, for whatever reasons there might be. The majority of fruit & vegetables sold in the New Zealand domestic market are not covered by quality standards developed & signed off by the relevant product group, nor codified within New Zealand legislation.
- c) Delivery Requirements. Agreed.
- d) Grocery Rejections. United Fresh presumes that "**when** groceries may be rejected", as paragraph 88 d. is phrased, this means the circumstances in which groceries may be rejected. From a produce perspective, the process that occurs, after a decision to reject has been taken, is more critical due to perishability, than if a pallet of baked beans were to be rejected. This post decision management process for produce rejections needs to be spelled out in more detail.
- e) Maximum Payment Period. United Fresh recommends a provision that doesn't just specify maximum payment periods, but also aligns all payments due to a supplier along a minimum payment period level, covering both DC as well as store deliveries by the same supplier. Currently, produce suppliers are typically paid weekly, two weeks in arrears, for DC deliveries. In the case of suppliers also delivering to stores directly, payment terms are 4 weeks in some instances, for the same produce, purchased from the same supplier. United Fresh would also not like to see the typical weekly payment term for the industry to be extended, as that would be detrimental to current business arrangements, and impact existing banking covenants, etc.
- f) Circumstances for withholding payment. United Fresh believes that full payment cannot be reasonably withheld, if suppliers meet all conditions as set out in the supply agreement. As far as deductions are concerned, these should be a matter of negotiation between retailer and supplier, if the situation arises that a dispute on quality occurring on the day of delivery can be solved by way of reduced price. Unilateral deductions are typically not acceptable.

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

United Fresh would like to see the wording attributed to Option 2 (Prescriptive Code) and Option 3 (Alternative Code) utilised. Option 1 would do nothing other than codify the existing imbalance in the supply relationship.

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

At first read, the overall score for the two options is closer than anticipated. The assumption that durability suffers in Options 2 and 3 is, in United Fresh's view, overstated.

But, even if this was not to be the case, some things simply can't be measured by quantification, but on the basis of common sense and what lies at the heart of a supply partnership. And that includes finding joint solutions to solving challenges, and not acting unilaterally.

14) Question: 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?

United Fresh believes that Option 3 is the most appropriate Option to be included in the Code.

However, United Fresh suggests that the conditions are extended to also include, "or, a produce supplier shifting to a retailer preferred service provider, generating internal inefficiencies and increased costs as a result of such a change".

Specifically, we are referring to the situation where a supplier's preferred service combines delivering packed produce to a DC or store, and the empty truck then backloading empty produce crates needed at the packing facility to pack the next days' crop.

15) Question: 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?

Yes, the Code should include specific provisions about fresh produce.

There are several points United Fresh needs to make in relation to Section 6.3.

Produce Standards and Quality Specifications

Produce standards and quality specifications are not two phrases that are readily interchangeable.

The term standard has multiple meanings, and numerous definitions. The most relevant definition of "standard" within the context of trade between two or more parties is, in the view of United Fresh, as follows:

A standard is "something set up and established by authority as a rule for the measure of quantity, weight, extent, value, or quality"¹.

Authorities who have established produce specific standards include the OECD, the EU, Codex Alimentarius, USDA, MPI (in relation to Import Health Standards) and others. "Authorities" does not include retailers – retailers are a trading party, expected to work with standards issued by authorities.

A quality specification is a specific expectation, generated by a purchaser/retailer with a sufficient degree of leverage, to have their demand for a certain volume of produce be accompanied by very specific requirements, that are a variation from, an enhancement of, or a specific focus within, a fresh produce standard.

Three examples for this would be as follows:

- A standard for a particular fruit category will include an acceptable brix level (a measure of the total soluble solids [TSS] present in fruit. TSS is mainly made up of sugars, but may also include other compounds). A retailer specification may quantify a minimum acceptable brix level, that is higher than the minimum considered acceptable as per the standard, and therefore limits the pool of fruit a specific retailer is prepared to purchase from. Depending on the size of the retailer, and their leverage in the market, such a call has the potential to impact upon market prices.
- A standard for a leafy vegetable category includes maximum chemical residue levels (MRLs) acceptable. These would have been set by MPI on the basis of international agreements through the Codex Alimentarius mechanism. A retailer specification may go beyond national MRLs, because the retailer has a different view on the risk profile associated with the crop.

¹ Merriam Webster Dictionary. <https://www.merriam-webster.com/dictionary/standard>

- A standard for, as an example, tomatoes, may consider tomatoes in the range from 30-80mm diameter as being an acceptable size for sale. A retailer may decide that they would like to see a tighter size range of tomatoes on their shelves, with this limiting size expectation requiring an additional size grading run in the packhouse.

A retailer quality specification should therefore not be considered as an acceptable substitution for a produce standard.

The New Zealand reality is that not every crop is enjoying the benefit of a standard having been developed, which is particularly the case for any crops that are only sold within the New Zealand domestic environment.

Comparisons with Australia

- Paragraph 119 outlines the timing requirements for rejections and notification used in the Australian Horticulture Code of Conduct. These timelines are not appropriate for New Zealand conditions, as our transport distances are typically shorter, with the exception of produce such as avocados or citrus that are not grown in the South Island, and have to be transported from the area north of Taupo. Nevertheless, having a system for ensuring such notifications are carried out within a reasonable timeframe is advisable in New Zealand, particularly in the case where stores are purchasing produce directly, with the produce being delivered directly to stores. Unlike DCs, individual stores do not have quality inspection teams, and are therefore not able to turn their attention to produce received, from a quality perspective, as consequently and rapidly as their DC based colleagues.
- United Fresh agrees with MBIE's footnote 23 on page 35, that relates to the Australian specific produce quality provisions, connected with the Australian Horticulture Code of Conduct. MBIE is correct in stating that these provisions do not constitute ASNZS or ISO standards. United Fresh does note, however, that:
 - The Fresh Produce Specifications (FreshSpecs) were developed by the Australian Wholesale Market Association, in conjunction with the mandatory Horticulture Code of Conduct, which came into effect in 2006.
 - The FreshSpecs detail the general appearance criteria; major defects; minor defects; and consignment criteria, of crops.
 - The FreshSpecs section of the Fresh Markets Australia website² states that "The Government has **codified** FreshSpecs® as the default produce specification in the new Code". The term "new Code" within this sentence is a reference to the updated Horticulture Code of Conduct 2017.
 - The voluntary Australian Supermarket Code of Conduct requires "fresh produce standards and quality specifications to be provided to the supplier in clear, unambiguous, and concise terms".

On balance, United Fresh recommends the use of Option 2, but replacing the 24 hour rejection limit with 18 hours, and the written notice requirement of 48 hours with 24 hours.

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

United Fresh believes that Option 2 is the most appropriate Option in this instance. Any business that is involved in either retail or wholesale selling constantly needs to assess the performance of its products in their portfolio, in order to ensure that the organisation meets its sales objectives, ideally grows its market share, remains competitive, and gives its customers what they are seeking.

Any business that does not follow this pathway is increasing its risk of going out of business, sooner rather than later.

² <https://www.freshmarkets.com.au/fresh-specs/>

Linking delisting to the supply agreement recognises this reality.

Option 3 is in United Fresh's view not appropriate, as the decision on whether a retailer wants to continue selling a product as part of their range is directly connected to the range review process, and to "Prohibit any notice or advance warning of delisting to be provided prior to, or as part of, a range review process" lacks logic.

17) Question: 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?

United Fresh believes Option 1 (Principle-based Code) is likely to be the best Option, as the prescriptive requirements in this instance would need to go beyond what Option 2 currently states. However, United Fresh suggests that 3 extra principles could be added to Option 1, to strengthen it further, these being:

- Not acting in a manner that is contrary to Māori principles.
- Not acting in bad faith with regards to information.
- Not acting in a manner that would be prejudicial to supplier decision options.

Whistleblower protection is already covered by the *Protected Disclosures (Protection of Whistleblowers) Act 2022*.

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

As we have stated throughout the Commerce Commission's proceedings, our earlier submissions, and the MBIE Advisory Group on the Code of Conduct, there are significant differences between the way perishable products sold in supermarkets, i.e., fruit & vegetables, and the way shelf stable FMCG products are managed.

Most importantly, the fresh produce industry, in New Zealand and elsewhere, has originally, from its infancy, been familiar with wholesale supply concepts. The traditional way of wholesaling fresh produce in New Zealand, until 1989, was the produce auction. Major grocery retailers then started to explore direct supply arrangements, in favour of auction participation, as a consequence of auctions no longer being able to provide the consistency of product, in terms of quality and price, consumers were expecting from supermarkets every day of the week, and the supermarkets themselves were looking for, in order to ensure cost-effective product management across their growing number of branches and stores.

Today, one of the major grocery retailers aims to buy directly from grower/packers wherever possible, while the other two operators are operating more of a hybrid strategy, and buying some product direct, and other lines from wholesalers, for direct delivery into their DCs or stores, without that product touching the wholesale trading floor in the first instance.

Parallel to the purchasing methodologies of the major grocery retailers, a competitive wholesale market environment exists, where greengrocers, fruiterers, niche supermarket operators, and online meal ingredient suppliers are able to view and purchase produce delivered by growers to wholesale market floors prior to purchasing.

Any potential new entrants to the New Zealand supermarket industry have, therefore, viable wholesale options at their disposal for the purchase of fresh produce.

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

United Fresh would prefer Option 1 (Principle-based Code), with additional principles (as per our answer to question 17 for example) being added, without turning this into a prescriptive Code.

Any change that can already be identified as leading to extra compliance costs should be avoided, as that approach does nothing assist consumers to enjoy cheaper prices.

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

United Fresh believes that the specific wording used in Option 3 (Alternative Code) is most appropriate.

Many produce suppliers already get paid weekly, and that is not something these suppliers should lose to a vaguely worded principles-based Option. United Fresh also agrees that linking payment to a time specified in the supply agreement would avoid arguments about the definitions of what represents "reasonable time".

Set-offs must only occur with supplier approval, based on provisions in the supply agreement.

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

This represents a classic example of where the produce category differs from the rest of the store.

In terms of the two options presented, Options 2 & 3 would be totally unworkable, because as perishable commodities, fruit & vegetables can experience the need for price changes several times a week.

United Fresh therefore would like to see Option 1 (Principle-based Code) implemented, and expanded to read:

Rely on good faith, "knowledge & expertise, and commitment to an ongoing supply relationship".

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

United Fresh believes Option 3 is most appropriate, with reservations. Wastage is more of an issue for produce than shrinkage. Produce being perishable, and with the plant physiology of each fruit & vegetable product being unique, suppliers may not necessarily be aware that what they are delivering is possibly going to incur a higher level of wastage than anticipated, and retailers may not necessarily spot that this is the case at the point of receipt, particularly with direct to store deliveries.

Today, produce suppliers & major produce buyers typically arrive at pragmatic solutions to deal with these issues, which often revolve around product replacement, as having something to sell is more important to the retailer than having received some financial compensation.

United Fresh does not want to see pragmatic solutions, that work for both supplier and retailer, being made more difficult to be reached in future, as a result of too prescriptive an option being opted for. At least, an amended provision for produce should be introduced.

23) Question: 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?

United Fresh believes Option 3 (Alternative Code) is the most appropriate Option. Genuine activity needs to be funded somehow, and if the activity relates to a marketing strategy agreed to by both supermarket & supplier, and the agreement is reasonable and anchored in the supply agreement, then there should be no debate.

As far as fresh fruit & vegetables are concerned, placement fees are not typically prevalent in the produce department, as the perishable nature of the produce, availability on the day, and a common-sense approach to layout (apples with apples, bananas in areas where customers can stop without blocking aisles, in season strawberries being highly visible, etc.) are the primary drivers on how a produce department is presented to the consumer.

24) Question: 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?

There are three ways where produce promotional activity differs from that of the wider FMCG offer available in major grocery retailer stores. These are:

- In summer, supermarket fliers & online equivalents often promote the availability of, for example, cherries, strawberries, and peaches/nectarines, without a retail price actually being mentioned.
- There are certain times in a year, where product available on the shelf is simply not being promoted, i.e., potatoes in the middle of winter.
- When produce is promoted, then it is being purchased by the retailer at a promotional price arrived at with the supplier.

The summer and winter exceptions discussed above highlight the fact that setting promotional prices for perishable products at a time of high demand and uncertain supply in terms of weather (e.g., the potential of hail for cherries, or floods for potatoes) is simply too much of a risk to take, several weeks ahead of the time when the product is meant to be instore.

Regardless of how much produce the retailer is buying at a promotional price, forward investment buying is the last thing on their minds. Unlike FMCG products, fresh produce is typically not stored for long periods of time on retailer premises. Buyers purchase produce to meet sales forecasts.

The issue of recompensing due to promotional stock being sold at promotional prices in non-promotional weeks is also something that is not an issue in the produce category. All three Options refer to ‘reasonable notice’ or ‘reasonable circumstances’, which from a produce perspective is the key driver in this instance.

With this in mind, United Fresh is refraining from selecting a proposed Option as a preference, as the major focus is clearly on the FMCG stock sold in the centre aisles of the supermarket.

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

United Fresh believes that this issue probably deserves a bit more attention than it is given in the sole paragraph included within the Consultation Paper (Paragraph 201).

Data needs to be considered the “lifeforce” of any meaningful discussions leading to realistic, pragmatic, and mutually beneficial supply agreements. Major grocery retailers operate integrated purchasing, distribution, and retail software, that enables accurate data capture at checkout, as long as the retailer is using genuine barcodes and internationally codified Produce Look-Up Numbers (PLUs), in the case of fruit & vegetables.

An effective and efficient retailer will therefore always be in a position of advantage compared to their supplier, as the supplier’s data sets are limited to the amount of product initially delivered to a

store/DC, as well as frequency & volume by which repeat orders occur. If the supplier supplies a supermarket DC, then this data is only available to them in consolidated form, unless they are being asked to assemble individual store orders.

The question that arises in the first instance is:

To what extent is the retailer obliged to share the sales data they have available with suppliers, in order to create a more balanced approach to factual supply agreement negotiations?

Retailers value negotiating supply agreements on the basis of factual knowledge being available to both parties. They, however, are also firmly of the belief that the sales data they generate at the checkout is something they have proprietary ownership over.

At the same time, they also want to understand their own position vis-à-vis their competitors better, who are also generating sales data at their checkouts. Therefore, from the late 1970s and early 1980s onwards, supermarkets globally started to sell their aggregated scan data to companies specialising in data analysis, e.g., Nielsen and others, to allow these companies to not only analyse the data, but to provide the insights supermarkets were seeking.

These data management & analysis companies were then authorised to recover some of their costs, by selling the consolidated market information, based on original scan data, to suppliers on a commercial basis, which in turn assisted these suppliers to prepare for supply negotiations & category reviews.

The consumers who contributed the sales data, by way of making purchases instore, remained anonymous throughout this process.

Just as they do with product suppliers, retailers from time to time chose to change third-party data management providers, but the principle of this process outlined here remained the same, regardless of who supplied the data services.

The situation changed as a result of two separate evolutionary processes within the food supply envelope, which, whilst related, did not start off as a strategic intent, but have nevertheless changed the retail landscape.

The first of these to occur was the arrival of loyalty card schemes which individualised a supermarket's relationship with specific customers. This marketing innovation did initially cause significant distress operationally from a data management view, as millions of additional bytes of data needed to be stored and analysed in a manner that had not occurred before. This process not only took time to evolve, but also brought supermarkets to the realisation that their marketing staff were often not qualified sufficiently to deal with such non-core retail opportunities.

Supermarkets therefore hired senior staff from their data analysis suppliers, to augment their inhouse marketing teams. The presence of these people led to an entirely different approach towards targeted consumer marketing, and in addition, led to retailers cooperating with both data management companies & university marketing departments, in order to explore further optimisation opportunities for their customer loyalty programme data.

Tesco, for example, used a company called Dunnhumby to assist with the launch of its loyalty programme, and formed a relationship with the University of Kent specifically to help with the analysis of perishable category sales data, i.e., produce & meat. By 2006, Tesco owned 84% of Dunnhumby stock. Since then, Dunnhumby has undergone several mutations, but United Fresh notes that it arrived in New Zealand in 2018.

The second occurrence that led to major supermarkets changing pace in relation to data management was the arrival of online shopping. All of a sudden, sales data capture was no longer limited to checkouts in brick & mortar stores, but could actually be automated to occur the moment an online shopper had placed their order.

United Fresh takes the position that the question, as posed in this Consultation Paper, does not need to be asked. A retailer is entitled to own the data that is generated on their premises. A professional supplier, interested in a long-term relationship with a supermarket, should enter supply agreement negotiations, having in their possession the most accurate data available to them. Given that the retailer owns the data generated, they are also entitled to sell this data. There is no law against this.

A retailer who is interested in a long-term supply relationship understands that generating bankable income from selling data is not a retailer's core activity; but, if data sales happen within a reasonable price framework, it has the potential to generate additional sales revenue and profit, for both retailer and supplier, in the pursuit of what is their core activity, namely buying & selling of FMCG & related products.

26) Question: 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?

United Fresh is not aware of any additional issues that are related to this question.

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

United Fresh believes that Option 3 (Alternative Code) is most appropriate. Payments are an activity that should be prescriptive, rather than principle based, and aligning payment mechanisms against specific New Zealand requirements is advisable as well.

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

There are no formal dispute resolution structures in place, within the wider New Zealand fresh produce industry. Major grocery retailers operate to quality specifications with their produce suppliers, where the possibility of disputes is discussed & addressed.

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

Overall, United Fresh agrees with the variation of the GCDR principles used in Paragraph 223.

United Fresh does however want to draw MBIE's attention to the fact that a "timely response to issues", under the Efficiency principle, operates in a different time dimension for produce as it does to other products on supermarket shelves.

If any potential dispute therefore revolves around product supply in an operational sense, then time is of the essence, and requires both an immediate response, as well as produce supply chain expertise.

United Fresh therefore envisages that very few direct produce supply disagreements between retailers and suppliers would end up maturing into disputes requiring adjudication. Such disagreements would need to be solved within 24 hours, typically between supplier and retailer.

The ability of supplier & retailer to sort out any disagreement effectively & efficiently within a timeframe that suits the product, should therefore not be impeded upon by the dispute resolution scheme to be implemented.

Another matter altogether is produce suppliers, who supply, at retailer request, both DC, and direct to store, receiving different payment terms for the same product, with deliveries to stores generating an excessive delay in receiving payment, compared to the same product being delivered to the DC.

Such produce category related matters are potential dispute candidates, under the proposed Code, and the Independent & Fair element of the principles becomes the major principle of interest.

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

United Fresh believes Option C (Negotiate-Adjudicate) is the most effective Option under New Zealand conditions.

With a population of just over 5 million, the wider grocery industry, as well as its category components such as produce, are in the main, relationship focused. People know each other. The early self-resolution option included in Option C therefore appeals, and has essentially been practiced within the produce sector for decades.

The inclusion of a Māori component with regards to cultural sensitivity is entirely appropriate given Treaty of Waitangi considerations, which also suggests Option C as appropriate.

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

United Fresh is pleased to note that the preliminary Options Analysis scoring of Chapter 8 supports United Fresh's view that Option C (Negotiate-Adjudicate) should be pursued.

32) Question: 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?

The Objectives of the Code are spelled out in the Consultation Paper. Accepting these Objectives, and accepting that the intent of this Code is to contribute towards greater competition & a fairer playing field between suppliers and retailers, the proof of the pudding will, nevertheless, lie in the eating. Therefore, degrees of monitoring, compliance management, behavioural adjustment if found wanting, are part of the package of being subjected to a mandatory Code.

The monitoring and compliance management of the Australian and UK Codes are aligned with their status, i.e., the Australian code being voluntary and the UK Code being mandatory. New Zealand typically likes to align its behaviours along Australian regulations & legislation, and typically this works. In this particular instance, our New Zealand monitoring & compliance management need to be more aligned with the UK Code, as opposed to the Australian Code, because voluntary Codes are fundamentally different to mandatory Codes.

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

The obvious answer that comes to mind is as follows:

- Costs need to be transparent.
- Excessive costs need to be avoided.
- Compliance costs are part of business costs.
- New Zealand is a growth industry as far as compliance costs are concerned.
- Business costs in their totality typically form the basis for margin calculations.

Government should therefore not be surprised if significant compliance costs generated by the Code would contribute to grocery prices not becoming cheaper for consumers!

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

The transitional arrangements impacting on the produce industry should be cognisant of the fact that produce is typically sold at present without a written supply agreement having been signed.

Should the Code extend to written supply agreements needing to be introduced into the produce supply chain, then United Fresh believes a transitional period of 6 months would be appropriate to allow the designated retailers and their suppliers to work through this process.

Enforcement methodology should be clear to all concerned, from the date the Code comes into force. However, United Fresh suggests in the first instance that the Regulator takes an educational/guidance approach for the first 6 months, in order for suppliers & retailers to get used to and become comfortable in operating within the new mandated supply framework that the Code creates.

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

The proposed additional focus in the New Zealand Code on tikanga and Te Ao Māori, would suggest that monitoring & compliance management would need to develop a distinctly New Zealand style, as neither the Australian nor UK Code cater for indigenous peoples' business development.

Summary

United Fresh was not an active advocate of the proposed major grocery retailer code of conduct, prior to the Commerce Commission Market Study being initiated. However, United Fresh was certainly aware that Codes of Conduct had been introduced or were in consideration overseas.

United Fresh initially engaged with the Commerce Commission in 2021, and with MBIE in 2022, with a focus on ensuring that the realities, concerns and needs of the entire fresh produce supply chain are reflected in the finalised Code. While shelf stable FMCG goods make up the majority of goods sold in a supermarket setting, they are comparatively straight forward to plan for and manage, when compared with their perishable fresh produce counter parts. As such, the finalised Code would not work effectively without taking the needs of perishable products into account.

In our submission, United Fresh analysed the following key points:

- It is critical that the introduced Code is managed throughout the value chain in such a way that it does not impede producers or consumers in a negative way. Costly additional bureaucratic procedures should be avoided.
- The two major grocery retailers the Code plans to designate from the outset have different ownership structures (one corporate with a franchisee appendix, and one cooperative). Obligations placed upon these retailers need to be structured so that produce suppliers can experience both designated retailers complying with the Code to the same extent, via all produce purchasing points operating across the entirety of their respective banners.
- The produce supply chain must not lose the ability to effectively & efficiently manage changes to supply outside of its control. Too prescriptive an approach for determining the structure of mandatory supply agreements under the Code risks doing so.
- United Fresh expects that tikanga Māori & Te Ao Māori will increasingly become integral influences on how the produce supply chain in New Zealand operates. After all, we are a land focused industry. However, United Fresh is concerned that the impact of linking tikanga Māori or Te Ao Māori into the Code has the potential to cause unintended challenges. All Code related work being undertaken needs to make sure such integration occurs in the spirit of partnership.
- United Fresh's answers provided here to MBIE's questions specifically asking respondents to express support for a preferred option, have, in the main, led to United Fresh supporting the alternative code option and/or the principles based option. This suggests for United Fresh that too close an alignment with the voluntary Australian code would not be desirable. The Australian Code is more prescriptive than the mandatory UK Code, and does not include a commitment to economic development objectives of indigenous Australian suppliers, unlike the proposed New Zealand Code.
- United Fresh continues to have concerns about the way dispute resolution will work within the produce supply chain under the Code. Produce industry knowledge is essential to the ability to adequately address any disputes arising within produce supply channels. Such knowledge is not gained by being familiar with how supermarket centre aisles and their shelf-stable product supply channels work.
- Industry standards and retailer quality specifications are two different entities altogether. These must not be confused with each other. Neither should retailer quality specifications be considered to be default industry standards. As industry standards do not exist for every fruit & vegetable type sold in the domestic market, United Fresh projects some challenges with dispute resolution aspects within the produce category.

United Fresh looks forward to being able to work with MBIE further on the Code of Conduct, to ensure it meets the complexities of the fresh produce industry. United Fresh also looks forward to being able to assist MBIE in understanding the impact other topics generated as a result of the Commerce Commission Grocery Market Study will have, when other related Discussion Papers are released.

United Fresh does not want to see any system implemented that has the potential to reduce the attractiveness of fresh produce to the consumer, or a system that makes consumers less likely to purchase and consume fruit & vegetables. Our interest as the pan-industry body is to continue to grow New Zealand's consumption of fruit & vegetables, regardless of how it reaches the consumer.