



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



Submission form

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

June 2023

Submissions process

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

Please send your submission form to:

- competition.policy@mbie.govt.nz with the subject line “Grocery Supply Code of Conduct Consultation 2023”
- Competition Policy
Building, Resources and Markets
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington 6140
New Zealand

Release of information

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If your submission contains any information that is confidential or you otherwise wish us not to publish, please send a separate version of this form excluding the relevant information for publication on our website.

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Name (first and last name)

Erin Vercoe

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

The Warehouse Group Limited

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

Transitional provisions for the Grocery Supply Code of Conduct

Questions 1 and 2 - Do you have any comments in relation to **the transitional provisions** in the Code, in particular any comments on:

- whether the transitional provisions could be improved? (see Schedule 1)
- whether there may be unintended consequences as a result of the transitional provisions?

Please type your submission below.

We remain of the view that there should be a transition period of 1 year whenever any new retailers become regulated grocery retailers. Such a period would reduce barriers to new or existing retailers entering or expanding in the market.

We suggest amending clause 4 of the Code to provide:

This code applies to:

- (i) every regulated grocery retailer that is a regulated grocery retailer at commencement; or
- (ii) any other regulated grocery retailer from the date which is 12 months after the date on which a person becomes a regulated grocery retailer.

In addition, as currently drafted, clause 5 of the Code only applies to variations of agreements prior to the Code coming into force. We consider that clause 5 should also apply to agreements that are in place when a new retailer becomes a regulated grocery supplier.

Part 2 - Requirement for retailers to act in good faith

QUESTION 3: Schedule 2, Part 2, clause 6 (obligation for retailers to act in good faith when dealing with suppliers).

- Are there any ways in which this clause could be improved?

Please type your submission below.

No comments.

Part 3 - Content of Grocery Supply Agreements and variations to supply agreements

QUESTION 4: Schedule 2, Part 3, clause 7 (requirement for supply agreements to be in writing and to be retained) and **clause 8** (matters to be covered by supply agreements).

- Are there any ways in which clauses 7 and 8 could be improved to provide greater transparency and certainty to suppliers?

Please type your submission below.

No comments.

QUESTIONS 5 AND 6: Schedule 2, Part 3, clause 9 (unilateral variations to grocery supply agreements)

- Is this clause flexible enough to allow for reasonable unilateral variations to be made to supply agreements?
- Will this clause be effective in preventing retailers from using their negotiating power to make unreasonable unilateral variations?

Please type your submission below.

No comments.

QUESTIONS 7 and 8: Schedule 2, Part 3, clause 10 (retrospective variations to grocery supply agreements).

- Will there be any unintended consequences as result of how these provisions are drafted?
- Are there any circumstances where retrospective variations should be permitted? If so, please explain these circumstances.

Please type your submission below.

We do not agree that retrospective variations to contracts should be unlawful per se. As with unilateral changes, we recommend that retrospective variations to contracts should be treated in the same way as unilateral changes, i.e., subject to the conditions in clause 9(2).

Part 4 - General conduct provisions

QUESTIONS 9 and 10: In relation to **Schedule 2, Part 4, clause 11** (transport or logistics services).

- Are there any ways in which this clause could be improved to support transport and logistics arrangements which suit both parties?
- Will there be any unintended consequences as result of how these provisions are drafted?

Please type your submission below.

No comments.

QUESTIONS 11, 12 and 13: **Schedule 2, Part 4, clause 12** (payments to suppliers).

- Are there any ways in which this clause could be improved to help ensure timely payments and give appropriate clarity over payments terms for suppliers?
- Do you think a maximum payment period should be set by the Code?
- If a maximum payment time is set, do you think 20 calendar days from receipt of invoice is appropriate?

Please type your submission below.

We agree that retailers should pay a supplier's invoice within the time set out in the supply agreement. And while we also agree that any payment time set out in the agreement must be 'reasonable', the best evidence of what is reasonable is what is agreed between the parties.

We do not support mandating a time period in which invoices must be paid, and do not support that time period being 20 calendar days. This would be a very difficult target for retailers to meet given the breadth of invoices received and would impose a significant working capital and administrative costs on retailers. Overall, such a requirement may act as a barrier to expansion for a new retailer and increase costs to consumers.

QUESTIONS 14 and 15: Schedule 2, Part 4, clauses 13 and 14 (payments for shrinkage and wastage)

- Are there any ways in which this clause could be improved to ensure more efficient and fairer allocation of costs due to shrinkage and wastage?
- Is the six-month timeframe set out in clause 14(2)(g) appropriate? Do you consider that this timeframe should be shorter (for example, 30 days) or longer (for example, 12 months)?

Please type your submission below.

Wastage is a difficult issue given that:

- on many occasions product quality issues are not apparent upon receipt of stock; and
- it is inefficient (and may be impossible) to open every box of stock pre receipt.

As drafted, clause 14 practically removes the ability for retailers to make a claim for wastage once they have taken responsibility for stock, except in the clearest of circumstances. Simply put, a retailer will have no incentive to follow up on product quality issues unless they reach a very significant level due to the requirements of cl 14(2) and (3).

Ultimately, this will increase retailers' costs of doing business and harm consumers in two ways.

- First, consumer prices will reflect the additional risk taken on by retailers.
- Second, the incentives for suppliers to reduce wastage will be compromised.

We recommend that clause 14 is redrafted to allow for parties to agree to wastage payment terms freely, provided those are "reasonable" (i.e., the model in clauses 15-17).

QUESTIONS 16-20: Schedule 2, Part 4, clauses 15, 16 and 17 (payments as a condition of being a supplier, payments for a retailer's business activities and funding of promotions).

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

Please type your submission below.

We agree that explicitly prohibiting parties from agreeing to fully fund promotions is not justified.

QUESTIONS 21-25: Schedule 2, Part 4, clauses 18 and 19 (delisting of products and process requirements relating to delisting).

- Are there any ways in which these clauses could be improved to provide greater certainty and transparency regarding delisting decisions?
- Will requiring a range review, ahead of any delisting decisions, be an effective way of ensuring fair and transparent delisting decisions?
- Does providing six-month notice of delisting fresh fruit and vegetables provide sufficient warning for such suppliers?
- Will there be any issues in complying with the process requirements set out in clause 19?
- Are there any aspects of these clauses which may have unintended consequences?

Please type your submission below.

No comments.

QUESTIONS 26-30: Schedule 2, Part 4, clause 20 (funded promotions).

- Are there any ways in which this clause could be improved?
- Do you have any other concerns regarding investment buying which are not addressed by this draft section of the Code?
- What effect will clause 20 have on current practice regarding investment buying and funded promotions? Will there be flow-on impacts for retail prices?
- Instead of the requirements set out in clause 20(2)(c) – would it be better to require retailers to sell any over-ordered product, bought at the supplier’s reduced price, at the price listed during the promotional period?
- Do you have any other comments on this clause or the practice of investment buying generally?

Please type your submission below.

We understand that the intent of cl 20(2)-(4) is to prevent retailers from buying stock at a promotional price to sell at a non-promotional price in the future. In our view, this “investment buying” is likely to be rare and is different from a retailer, in good faith, simply overestimating its order (or allowing for contingency) for a promotion.

For example, retailers will likely seek to estimate on the higher side to ensure that customers do not miss out on the promotional price during the promotional period and to ensure compliance with the Fair Trading Act 1986. However, there are also commercial imperatives which provide retailers with an incentive to order as accurately as possible. If the products purchased for a promotion are not sold through during the promotional period, the retailer incurs additional costs to store products and may also have to manage expiry dates.

While we agree that “investment buying” is not justifiable, in any rare cases where it might be occurring, we believe that suppliers are already able to exert countervailing power by moderating the amount of product they are willing to supply at the promotional price.

We are concerned that as drafted, clause 20 does not recognise any difference between an investment buying strategy and good faith buying strategies that may result in a retailer overestimating their order. By not making this distinction and requiring a wash-up for stock not sold during a promotional period, retailers’ costs associated with operating promotions will increase and this may ultimately result in either fewer or more limited promotions being run or increased costs or reduced discounts available to consumers. Additionally, requiring a retailer to sell product not sold through at the price listed during the promotional period would potentially cause confusion for consumers as to the true end date of the promotion.

QUESTIONS 31-34: Schedule 2, Part 4, clause 21 (fresh produce standards and quality specifications).

- Does this clause effectively address issues faced by suppliers of fresh fruit and vegetables?
- Is the 24-hour cut off proposed for accepting or rejecting fresh produce appropriate?
- Is the 48-hour cut off for notifying suppliers when fresh produce has been rejected appropriate?
- Should the Code extend similar protections to suppliers of other perishable produce, such as seafood and meat?

Please type your submission below.

No comments.

QUESTIONS 35 and 36: Schedule 2, Part 4, clause 22 (no duress about supplying to competitors), clause 23 (business disruption) and **clause 28** (freedom of association)

- Will clause 22 will be effective in preventing retailers from pressuring suppliers to desist from supplying other parties?
- Will these clauses have any unintended consequences?

Please type your submission below.

No comments.

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

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

Please type your submission below.

No comments.

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

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

Please type your submission below.

N/A.

QUESTIONS 40 and 41: Schedule 2, Part 4, clause 26 (product ranging, shelf space allocation and range reviews).

- Are there any ways in which this clause could be improved, to help ensure greater transparency and consistency of decisions relating to range reviews and shelf allocation?
- Do you have any other comments on this clause?

Please type your submission below.

While we do not disagree with these requirements, we think that expectations of what these requirements will provide should be tempered. The complexity of setting criteria for all different product categories, and the need to make the best decision for each category, means we anticipate that any principles that retailers publish will be very high level.

QUESTIONS 42-44: Schedule 2, Part 4, clause 27 (responses to price increase requests from suppliers).

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

Please type your submission below.

Price increases ultimately harm consumers. Retailers play an important role (effectively on behalf of consumers as well as themselves) in ensuring that supplier price increases are justified.

In that context, we consider the requirement to reply to a price increase within 30 days is too short and puts the interests of suppliers above the interests of consumers. To ensure consumers' interests are protected, we recommend that the 30 day requirement be extended to 60 working days.

Other general questions

QUESTIONS 45-48: (penalty levels).

- Do you think the maximum penalty is set at a level which will sufficiently deter non-compliance?
- Do you think the maximum penalty level is proportionate to the level of harm which may be caused by non-compliance?
- Are there any parts of the Code which should attract higher or lower tiers of penalty levels? If so, which parts, and why?
- Do you have any other comment on the maximum penalty levels which will apply to breaches of the Code?

Please type your submission below.

We have no comments on penalty levels.

QUESTIONS 49 and 50: requirements to provide written statements when relying on the 'reasonableness' exemptions in the Code.

- Will requirements to provide written statements when relying on exceptions improve compliance and transparency in relation to the use of such exceptions?
- Will there will be significant costs or issues involved with complying with these requirements?

Please type your submission below.

We are not convinced that the requirements to provide written statements when relying on exceptions will improve compliance and transparency in relation to the use of such exceptions.

Our view is that the requirement for written statements may turn these processes into a relatively formal, legalistic, and expensive process and may also reduce the incentive for more constructive face to face discussions about these issues. In that scenario, the costs will ultimately be borne by New Zealand consumers.

Other proposals we are consulting on

QUESTIONS 51 and 52: payments for better positioning of groceries.

- Do you agree with the decision not to include restrictions from the Australian Code relating to payments for shelf allocation?
- Are you aware of any issues relating to payments for shelf positioning, or allocation, which may require specific protections in the Code, over and above those provided at clause 26?

Please type your submission below.

We agree that restrictions from the Australian Code relating to payments for shelf allocation are not necessary.

QUESTIONS 53 and 54: Changes to supply chain procedures.

- Do you agree with the decision not to include protections from the Australian Code relating to changes in supply chain procedures?
- Are you aware of any issues relating to changes to supply chain procedures which may require specific protections in the Code, beyond those included at clauses 8 and 9?

Please type your submission below.

We agree that these additional protections are not necessary.

QUESTIONS 55 and 56: Transfer of intellectual property rights.

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

Please type your submission below.

We agree that these additional protections are not necessary.

Final Questions

QUESTIONS 57 to 59: Final questions.

- Do you have any further feedback on the consultation draft of the Code, in addition to the points you have already raised?
- Are there any other provisions which are included in the Australian Code which may be beneficial in New Zealand?
- Are there any issues connected with supply of groceries to major retailers which are not addressed by the Code? If so, do you have any suggestions for how they should be addressed?

Please type your submission below.

While we support the Government introducing a Code of Conduct for the major grocers, we are concerned that the cumulative effect of the Code, together with the ability of suppliers to opt out of the wholesale regime, risks creating barriers to entry and expansion for small suppliers.

The provisions of the Code impose costs for retailers dealing with smaller volume suppliers. These costs may tip the balance between a retailer supporting a new supplier and not. Similarly, the ability for suppliers to opt out of the wholesale regime, could reinforce the incentive for a retailer to support large status quo suppliers. In fact, those two incentives could be reinforcing. Such an outcome would tend to favour the status quo at both the supplier and retailer level to the detriment of new entrants and consumers.

We therefore recommend that the impact of the Code on smaller suppliers be a topic the Commission pays particular attention to when reviewing the Code under s 20 of the Grocery Industry Competition Act 2023.

We also continue to hold that view that suppliers should not be able to opt out of the wholesale supply regime.