



## COVERSHEET

<b>Minister</b>	Hon Dr Duncan Webb	<b>Portfolio</b>	Commerce and Consumer Affairs
<b>Title of Cabinet paper</b>	Grocery Supply Code of Conduct – update on consultation and agreement on regulations	<b>Date to be published</b>	1 September 2023

### List of documents that have been proactively released

<b>Date</b>	<b>Title</b>	<b>Author</b>
August 2023	Grocery Supply Code of Conduct – update on consultation and agreement on regulations	Office of Minister of Commerce and Consumer Affairs
24 August 2023	Grocery Industry Competition (Grocery Supply Code) Amendment Regulations 2023 LEG-23-MIN-0168 Minute	Cabinet Office

### Information redacted

**YES / NO** (please select)

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**In Confidence**

Office of the Minister of Commerce and Consumer Affairs

Cabinet Legislation Committee

**Grocery Supply Code of Conduct – update on consultation and agreement on regulations**

**Proposal**

- 1 I seek Cabinet’s authorisation to submit to the Executive Council the following regulations and commencement order required to support the Grocery Industry Competition Act 2023 (the Act):
  - 1.1 The Grocery Industry Competition (Grocery Supply Code) Amendment Regulations 2023 (the Regulations);
  - 1.2 The Grocery Industry Competition Act Commencement Order 2023 (Commencement Order).

**Executive Summary**

- 2 On 23 May 2022, Cabinet agreed to implement a Grocery Supply Code of Conduct (the Code) as part of the Government’s response to the Commerce Commission’s (the Commission) competition market study into the retail grocery sector in New Zealand [CAB-22-MIN-0186 refers]. On 5 April 2023, Cabinet considered policy decisions and agreed to the release of an exposure draft of the Code for further consultation with stakeholders [DEV-23-MIN-0054 and CAB-23-MIN 0126 refers].
- 3 The Code aims to rebalance the relationship between major grocery retailers and their suppliers. It will help prevent retailers from using their strong negotiating power to force their suppliers to accept unfavourable terms, such as costs and risks that major grocery retailers are better placed to manage. The Code also will provide greater certainty and transparency for suppliers over the terms of supply.
- 4 The Code follows a series of other reforms implemented under the Grocery Industry Competition Act 2023 to improve competition and strengthen monitoring and oversight of the sector. The Act provides for the first Code be made through Order in Council. However, the Commerce Commission (the Commission) will be responsible for the Code in the long term. The Act allows the Commission to make amendments to the Code at any time after it is first made. It also requires that the Commission reviews the effectiveness of the Code, two years after it is has come into effect.

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- 5 The Ministry of Business Innovation and Employment (MBIE) ran initial consultation on policy options for the Code in July 2022. Feedback was generally positive, however some submitters asked to see the details of the Code before providing final comments. MBIE consulted on an exposure draft of the Code between 9 June to 5 July 2023. Submitters were generally supportive of the code, however, officials also received wide-ranging feedback on areas of potential improvement.
- 6 I have made a handful of minor policy decisions following the exposure draft phase of consultation, which do not differ substantially from Cabinet's previous decisions on the Code.
- 7 I am seeking Cabinet's agreement on the more material changes, as well as a few additional requirements set out below. These arose out of consultation and further analysis since Cabinet's last decisions on the Code on 5 April 2023.
- 8 The Regulations provide for the Code and give effect to the policy decisions made. The accompanying Commencement Order brings section 19 of the Act into force, requiring regulated parties to comply with the Code. I propose that the Regulations and Commencement Order take effect from 28 September 2023.

### Background

- 9 On 23 May 2022, Cabinet agreed to implement a Grocery Supply Code of Conduct (the Code) as part of the Government's response to the Commerce Commission's (the Commission) market study into the retail grocery sector in New Zealand [CAB-22-MIN-0186 refers]. On 5 April 2023, Cabinet considered policy decisions and agreed to the release of an exposure draft of the Code for further consultation with stakeholders [DEV-23-MIN-0054 and CAB-23-MIN 0126 refers].
- 10 The Act requires a new Grocery Supply Code to be made by Order in Council no later than 26 March 2024 (or 9 months after Royal Assent).
- 11 In line with the aims of the Government's overall response to the market study, the broad objectives of the Code are to promote competition and efficiency in the grocery sector for the long-term benefit of consumers, and to contribute to a trading environment in which businesses can participate confidently.
- 12 The Code is expected to benefit both consumers and suppliers by creating better incentives for suppliers to innovate and invest in new grocery products, which should contribute to better prices, range and quality of products on supermarket shelves. The Code will also help create a more sustainable supply chain.

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- 13 The Code will:
- 13.1 apply to Regulated Grocery Retailers under the Act (Foodstuffs North Island Limited, Foodstuffs South Island Limited, and Woolworths New Zealand Limited). Other retailers can be designated under the Act in the future;
  - 13.2 place requirements on Regulated Grocery Retailers when they buy groceries from suppliers, whether the groceries are for retail sale or for wholesale;
  - 13.3 be progressively phased in over 6 months;
  - 13.4 be monitored and enforced by the Commerce Commission.
- 14 The Act provides for the first Code be made through Order in Council. However, the Commission will be responsible for the Code in the long run. The Act allows the Commission to make amendments to the Code at any time after it is first made. It also requires that the Commission reviews the effectiveness of the Code, two years after it is in force.
- 15 The Code has been largely based on the Australian Food and Grocery Code of Conduct, which has now been in place for a number of years, and has proved to be beneficial based on reviews undertaken by the Australian Treasury, and its Independent Reviewer (a statutory role set up under the Australian Code).

### *Previous consultation*

- 16 The Ministry of Business Innovation and Employment (MBIE) held initial consultation on the Code in July 2022. Feedback was generally positive, however some submitters asked to see the details of the Code before providing final comments.
- 17 On 5 April 2023, Cabinet authorised me to release an exposure draft of the Code for consultation and noted I will seek final Cabinet confirmation on the content of the Code after consultation on the exposure draft of the Code [DEV-23-MIN-0054 and CAB-23-MIN 0126 refers].
- 18 Consultation on the exposure draft ran between 9 June and 5 July 2023. MBIE received submission from 16 stakeholders including retailers (Foodstuffs, Woolworths and the Warehouse) and organisations representing suppliers (Horticulture New Zealand, United Fresh, and the New Zealand Food and Grocery Council). A small number of submissions were received from individual suppliers.

### **Outcome of consultation**

- 19 Consultation revealed general support for the Code. I am confident that initial drafting, including the changes I am suggesting, will result in a Code which is workable and effective.

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- 20 MBIE has also engaged with the Commission on consultation feedback and on the amendments I propose to the Code. The Commission has not raised any significant concerns regarding the enforceability and workability of the Code.

*I propose a few adjustments to the Code since Cabinet decisions in April 2023*

- 21 Cabinet authorised me to make policy decisions, consistent with the proposals initially agreed on issues that arise during drafting of the Code and after consultation on the exposure draft [CAB-22-MIN-0186 refers].
- 22 I am seeking Cabinet's agreement on the more material changes, as well as a few additional requirements set out below. These arose out of consultation and further analysis since Cabinet's last decisions on the Code on 5 April 2023.

### **Changes I am proposing due to further consultation on the Code**

*Changes relating to delisting (clause 18)*

- 23 Clause 18 seeks to provide greater certainty and transparency to suppliers and requires decisions on delisting to be made only in accordance with the supply agreement and for genuine commercial reasons. The exposure draft included the requirement for a Regulated Grocery Retailer to carry out a range review before de-listing a product.
- 24 Suppliers supported the requirement for a retailer to undertake a range review before delisting and noted it would improve fairness and transparency and would also allow suppliers time to re-negotiate to retain the listing. Retailers opposed the range review requirement on the basis that it would add significant compliance costs and would reduce their ability to respond to consumer demand.
- 25 On balance, I recommend removing the requirement to undertake a range review. I believe this may add further unnecessary compliance costs. I consider that the other protections provided in the Code (such as the duty to provide reasonable notice, for the retailer to have genuine commercial reasons, and for the retailer to review delisting decisions on request of the supplier) are sufficient.

*Changes relating to delisting fresh produce (clause 19)*

- 26 Fresh produce takes time to grow and if delisted, can lead to food wastage and significant costs for growers. Reflecting this, the exposure draft of the Code required retailers to give 6-months' notice before delisting fresh produce.

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- 27 Some suppliers fed back support for this protection, given the extra certainty it provides fresh produce suppliers. Foodstuffs had significant concerns about this requirement and submitted that it should be removed because it would be unworkable. Foodstuffs further commented that fresh produce markets are dynamic with seasonal variation and variations in price and quality affecting the size and frequency of a retailer's order in a way that could meet the definition of delisting in the Code.
- 28 I recommend that this requirement be removed as it may not fit well with the dynamic nature of the fresh produce market. Retaining the provision carries a risk of unintended consequence that reduces flexibility around the purchase of fresh fruit and vegetables. This may impact the range of produce available to consumers.
- 29 Though I am recommending this duty be removed, the supply of fresh produce will be subject to the generic delisting provisions in the Code, which require retailers to provide reasonable notice before delisting a product. The Code also requires supply agreements to be in place which must contain terms which apply when delisting products. These other protections should go some way in addressing issues regarding the delisting of fresh produce.

*Penalty levels*

- 30 The Act provides four different tiers of civil penalty levels for breaches of the legislation. The Act allows for the Code to set out which of Tiers 1, 2 or 4 may apply for breaches of the Code (Tier 3 does not apply to the Code).
- 30.1 Tier 1 – the maximum is the greater of \$10 million, or three times the value of any commercial gain, or 10% of annual turnover <sup>1</sup>.
- 30.2 Tier 2 – the maximum penalty the greater of \$3 million, or the value of any commercial gain, or 3% of annual turnover <sup>2</sup>.
- 30.3 Tier 4 – the maximum penalty is \$300,000 <sup>3</sup>.
- 31 In April, Cabinet agreed to set Tier 2 as the maximum penalty level which applies to breaches of the Code. This was on the basis that retailers regulated by the Code are large businesses with high annual turnover. Maximum penalty levels need to be set at a level which takes this into account and ensures there is sufficient incentive to dissuade non-compliance.
- 32 Suppliers generally supported Tier 1 penalties, while Retailers supported a scaled back scheme. The Commission supports at least Tier 2 penalties across all of the provisions in the Code.

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<sup>1</sup> maximum penalty is \$500,000 for an individual.

<sup>2</sup> maximum penalty is \$200,000 for an individual.

<sup>3</sup> maximum penalty is \$30,000 for an individual.

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- 33 I recommend that Tier 2 penalties should apply to all of the substantive obligations set out in the Code. However, I recommended a small number of Tier 4 penalties, for provisions which are more administrative in nature, and are unlikely to result in significant economic harm if breached. These include:
- 33.1 requirements to provide written explanations to suppliers when making certain decisions, or undertaking certain actions regulated by the Code (this appears in 8 different places across the Code)
- 33.2 a duty to review delisting decisions after a request from a supplier – 19(4).

### *Protections for taonga*

- 34 Clauses 24 and 25 require that a retailer respects supplier's intellectual property, and protects the confidential business information it receives from their suppliers. Cabinet agreed that these protections should also recognise that for some Māori suppliers, the knowledge behind the production of a product may be taonga, or a cultural treasure.
- 35 The consultation document sought views from stakeholders on this matter, however, MBIE did not receive any specific feedback. After further consideration, I do not recommend including specific protections for taonga in the Code at this time. The intersection of current intellectual property law and the protection of taonga is a complex issue, that may not be appropriately addressed through these Regulations.
- 36 I note that Te Puni Kōkiri (TPK) is leading *sui generis* (unique) intellectual property policy and legal system for taonga and mātauranga Māori. It may better to wait for the completion of this work, before attempting to include protections for taonga in the Code. The Code is also a living document, which the Commission is required to review on a regular basis. There are opportunities to reassess this position at a later date, should further consultation with iwi and additional information suggest that it be required.

### **Additional requirements I am recommending**

- 37 I consulted on two proposals in the exposure draft which were not previously agreed to by Cabinet. I am now seeking agreement to include these requirements in the Code. These are described below.

### *Requirements to provide written statements*

- 38 I consulted on a requirement for retailers to provide written statements to the supplier when relying on exceptions to certain obligations in the Code, or when making other decisions which are likely to have a material impact on the supplier. These written statements must set out why the retailer considers the exceptions apply, or the reasons for making certain decisions.

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- 39 Retailers fed back that these requirements were likely to add significant administrative burden and may reduce incentives for more constructive, face-to-face conversations with suppliers. Other submitters who commented on this requirement were supportive.
- 40 I consider there may be risks in including these requirements, which are not a feature of the Australian Code. Particularly, in the short term, there may be costs involved for retailers in developing and training staff on processes and standards for written statements.
- 41 However, I recommend these requirements are included in the Code, given their usefulness in terms of transparency and of enforcement. These requirements will help in establishing the basis of the retailer's actions in the event of any dispute or enforcement action taken by the Commission. They should also promote compliance with the code.

### *Changes relating to investment buying (clause 20 – funded promotions)*

- 42 Through its market study, the Commission heard that it is common for some retailers to stockpile products purchased at a promotional sale price. After the promotional period ends, the retailer may then sell excess stock bought from the supplier at the discounted promotional rate, at a higher price. This practice is referred to as investment or forward buying.
- 43 The exposure draft contained provisions, taken from the Australian Code, which seek to limit this practice. Most suppliers indicated support for some form of protection relating to investment buying. Foodstuffs was strongly opposed to the provisions set out in the exposure draft. It considers investment buying to be beneficial to suppliers (allowing them to move stock) and consumers because it allows lower retail prices. It would prefer that the Code allowed investment buying, if agreed between retailers and suppliers, and if set out in the supply agreement.
- 44 Through consultation, I also heard that the investment buying provisions in the Australian Code are untested, due to the way promotional funding is arranged in Australia.
- 45 I recommend removing the substantive provisions that seek to limit investment buying. At this stage, I don't consider there is enough evidence to support these requirements - it is unclear whether this practice is leading to significant issues that warrant these restrictions.
- 46 However, I recommend that the Code should contain provisions which provide greater transparency and clarity for suppliers regarding the investment buying. Therefore, I recommend including provisions which will support this aim. I also recommend an additional requirement, which requires retailers to agree with suppliers on what happens to stock ordered at the promotional price, but remains unsold after the promotion ends.



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- 47 I note that the Commission will monitor the activities of retailers and if further restrictions are needed, this can be addressed in later versions of the Code once further evidence has been analysed.

### **Submitters proposed a number of improvements which could be revisited later**

- 48 MBIE received feedback on a wide range of potential improvements, some of which may have value, but require further policy investigation and/or significant drafting to address.
- 49 I consider that these areas do not pose any major issues to the functioning of the Code. I consider that it would be better to revisit these issues once the Code has bedded in, when there will be better information about how the Code is working. I note that the Act allows the Commission to amend the code at any time and requires it to undertake a review of the Code after two years.

### **Timing and 28-day rule**

- 50 The Act requires that the section 19 obligation for regulated retailers to comply with the Code, either comes into force 9 Months after Royal Assent (26 March 2024), or any earlier date set by Order in Council.
- 51 I am proposing this earlier date be set through the Commencement Order. The Order brings section 19 of the Act into force on 28 September 2023. This provides sufficient time for the Regulations that set out the Code to be notified, in compliance with the 28-day rule.

### **Compliance**

- 52 These Regulations comply with the following:
- 52.1 the principles of the Treaty of Waitangi;
  - 52.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;
  - 52.3 the principles and guidelines set out in the Privacy Act 2020;
  - 52.4 relevant international standards and obligations;
  - 52.5 the Legislation Guidelines (2021 edition), which are maintained by the Legislation Design and Advisory Committee.

### *Purpose of the Code and consultation requirements*

- 53 Section 16 of the Act requires me to consider the purpose of the Grocery Supply Code when making recommendations. The purpose of the Code is to promote competition and efficiency in the grocery industry for the long-term benefit of consumers in New Zealand by:

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- 53.1 promoting fair conduct, and prohibiting unfair conduct, between regulated grocery retailers, the related parties referred to in section 18, and suppliers; and
- 53.2 promoting transparency and certainty about the terms of agreements between regulated grocery retailers, the related parties referred to in section 18, and suppliers; and
- 53.3 contributing to a trading environment in the grocery industry:
  - 53.3.1 in which businesses compete effectively and consumers and businesses participate confidently; and
  - 53.3.2 that includes a diverse range of suppliers.
- 54 I am satisfied that the Code aligns with the purpose set out in section 16 of the Act.
- 55 The Act also requires me to publish a draft version of the Code and consult with persons who may be affected, including on the penalty levels which apply. I am satisfied that the consultation carried out on the exposure draft meets these requirements.

### **Regulations Review Committee**

- 56 I am not aware of any grounds for the Regulations Review Committee to draw the Regulations to the attention of the House of Representatives.

### **Certification by Parliamentary Counsel**

- 57 The Regulations and Commencement Order have been certified by the Parliamentary Counsel Office as being in order for submission to Cabinet.

### **Impact Analysis**

- 58 A Regulatory Impact Statement was submitted at the time Cabinet made policy decisions in relation to the Code [DEV-23-MIN-0054 and CAB-23-MIN 0126 refers].

### **Publicity**

- 59 MBIE intends to notify stakeholders of the approval of the Regulations.

### **Proactive release**

- 60 I intend to release this paper proactively in whole within 30 business days. MBIE will publish a copy on its website.

## Consultation

- 61 The Commerce Commission, Ministry of Justice, Ministry of Foreign Affairs and Trade, Te Arawhiti, Treasury, Ministry for Primary Industries, Te Puni Kōkiri and the Department of the Prime Minister and Cabinet have been consulted on the proposals of this paper.
- 62 The Regulations were consulted on publicly and 16 stakeholders responded, including retailers and organisations representing suppliers. A small number of submissions were received from individual suppliers.

## Recommendations

I recommend that the Cabinet Legislation Committee:

- 1 **note** that on 23 May 2022 the Cabinet Economic Development Committee agreed to implement a Grocery Supply Code of Conduct as part of the Government's response to the Commerce Commission's market study into the grocery retail sector [CAB-22-MIN-0186 refers];
- 2 **note** that the Minister of Commerce and Consumer Affairs has made a handful of minor policy decisions in reliance on Cabinet authority [DEV-23-MIN-0054 refers];
- 3 **note** that the Grocery Industry Competition Act Commencement Order 2023 brings section 19 of the Grocery Industry Competition Act into force;
- 4 **note** the Grocery Industry Competition (Grocery Supply Code) Amendment Regulations 2023 provide for the Grocery Supply Code;
- 5 **authorise** the submission to the Executive Council of the:
  - 5.1 Grocery Industry Competition Act Commencement Order 2023;
  - 5.2 Grocery Industry Competition (Grocery Supply Code) Amendment Regulations 2023;
- 6 **note** that the Grocery Industry Competition (Grocery Supply Code) Amendment Regulations 2023 and the Grocery Industry Competition Act Commencement Order 2023 come into force on 28 September 2023;

### *Grocery Industry Competition (Grocery Supply Code) Amendment Regulations*

- 7 **agree** that the Code require retailers to provide written statements to suppliers when relying on certain exceptions in the Code, and when making decisions that have a material impact on suppliers
- 8 **agree** that the Code does not require a Regulated Grocery Retailer to undertake a range review when delisting a supplier's grocery product;

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- 9 **agree** that the Code does not require a Regulated Grocery Retailer to provide six months' notice to the supplier when delisting fresh fruit and vegetables;
- 10 **agree** that the Code includes requirements to improve transparency regarding the practice of investment buying, but does contain provisions which seek to significantly limit the practice
- 11 **agree** that Tier 4 maximum penalty levels apply to a small number of administrative obligations in the Code
- 12 **agree** that Tier 2 penalties apply across all other duties and obligations in the Code
- 13 **agree** that the Code should not include specific protections regarding taonga at this stage
- 14 **note** that there was feedback on issues that do not pose any major issues to the functioning of the Code, but which may be something the Commission looks into during their scheduled review of the Code.

Authorised for lodgement

Hon Dr Duncan Webb

Minister of Commerce and Consumer Affairs