



## Grocery Industry Competition (Grocery Supply Code) Amendment Regulations 2023

Cindy Kiro, Governor-General

### Order in Council

At Wellington this 28th day of August 2023

Present:

Her Excellency the Governor-General in Council

These regulations are made under section 196 and clause 4 of Schedule 1 of the Grocery Industry Competition Act 2023—

- (a) on the advice and with the consent of the Executive Council; and
- (b) on the recommendation of the Minister of Commerce and Consumer Affairs made in accordance with sections 12(2) and 13 (except section 13(1)(b)) of that Act.

### Contents

		Page
1	Title	2
2	Commencement	2
3	Principal regulations	2
4	New Part 1 heading inserted	2
<b>Part 1</b>		
<b>Application of Act to franchisees and transacting shareholders of interconnected body corporate of regulated grocery retailer</b>		
5	New Part 2 inserted	2

<b>Part 2</b>		
<b>Grocery supply code</b>		
	7 Interpretation	2
	8 Grocery supply code	3
	9 Tier 2 penalties apply to certain contraventions of code	3
	10 Tier 4 penalties apply to certain contraventions of code	4
6	Schedule 1 amended	4
7	New Schedule 2 inserted	4
<b>Schedule 1</b>		
<b>New Part 2 inserted into Schedule 1</b>		
<b>Schedule 2</b>		
<b>New Schedule 2 inserted</b>		
		9

## Regulations

- 1 Title**  
These regulations are the Grocery Industry Competition (Grocery Supply Code) Amendment Regulations 2023.
- 2 Commencement**  
These regulations come into force on 28 September 2023.
- 3 Principal regulations**  
These regulations amend the Grocery Industry Competition Regulations 2023.
- 4 New Part 1 heading inserted**  
After regulation 4, insert:

**Part 1**  
**Application of Act to franchisees and transacting shareholders of interconnected body corporate of regulated grocery retailer**

- 5 New Part 2 inserted**  
After regulation 6, insert:

**Part 2**  
**Grocery supply code**

- 7 Interpretation**  
In this Part, unless the context otherwise requires,—

**code** means the grocery supply code set out in Schedule 2.

**8 Grocery supply code**

The first grocery supply code for the purpose of Part 2 of the Act is the code set out in Schedule 2.

**9 Tier 2 penalties apply to certain contraventions of code**

The following provisions of the code give rise to a pecuniary penalty under section 127 of the Act:

*Obligation to offer to vary existing agreements so that they are consistent with code*

(a) clause 5(2):

*Good faith*

(b) clause 6(1) and (2):

*Grocery supply agreements*

(c) clause 7(1) and (2):

(d) clause 8:

(e) clause 9(1):

(f) clause 10:

*Conduct generally*

(g) clause 11(1):

(h) clause 12(1) and (2):

(i) clause 13(1):

(j) clause 14(1) and (5):

(k) clause 15(1):

(l) clause 16(1):

(m) clause 17(1):

(n) clause 18(1):

(o) clause 19(1):

(p) clause 20(1), (2), and (3):

(q) clause 21(2), (3), (4), (5), (6), (7), and (8):

(r) clause 22:

(s) clause 23:

(t) clause 24(1) and (3):

(u) clause 25(2) and (3):

(v) clause 26(1), (2), (3), (4), and (5):

(w) clause 27(1):

- (x) clause 28(2), (3)(b), (5), and (6):
- (y) clause 29(1) and (2).

**10 Tier 4 penalties apply to certain contraventions of code**

The following provisions of the code give rise to a pecuniary penalty under section 129 of the Act:

- (a) clause 9(5):
- (b) clause 12(4):
- (c) clause 14(3):
- (d) clause 15(4):
- (e) clause 16(7):
- (f) clause 17(5):
- (g) clause 19(3), (4), and (5).

**6 Schedule 1 amended**

In Schedule 1,—

- (a) insert the Part set out in Schedule 1 of these regulations as the last Part;  
and
- (b) make all necessary consequential amendments.

**7 New Schedule 2 inserted**

After Schedule 1, insert the Schedule 2 set out in Schedule 2 of these regulations.

## Schedule 1

### New Part 2 inserted into Schedule 1

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#### Part 2

#### Transitional provisions relating to code when first made

##### *Existing agreements: preliminary provisions*

#### 1 Interpretation

In this Part, unless the context otherwise requires,—

**commencement** means 28 September 2023

**existing agreement** has the same meaning as in clause 1(3)(a) of Schedule 1 of the Act

**grace period** means the period ending on 28 March 2024

**inconsistency** means an inconsistency between an existing agreement and the code of either of the following types:

- (a) an existing agreement does not specify something that clause 7 or 8 of the code requires:
- (b) an existing agreement specifies something that is inconsistent with the code.

#### 2 Main rule: code applies to supply of groceries under existing agreements except during grace period

- (1) The code applies in relation to the supply of groceries under an existing agreement.
- (2) In accordance with clause 1 of Schedule 1 of the Act, the code—
  - (a) regulates or prohibits conduct, or specifies other requirements, in connection with an existing agreement, with any necessary modifications, as if the agreement were entered into or arrived at after commencement:
  - (b) specifies requirements about the content or form of an existing agreement, with any necessary modifications, as if the agreement were entered into or arrived at after commencement.
- (3) This clause is subject to clauses 3 and 4.

#### Example

A retailer has an existing agreement with a supplier for the supply of cereal. The agreement does not cover many things that are covered by the code.

This clause provides that the retailer is bound by all of the provisions of the code except to the extent that clauses 3 and 4 give the retailer a grace period to resolve inconsistencies between the agreement and the code.

*Existing agreements: during grace period*

**3 Grace period for existing agreements that are inconsistent with clause 7 or 8 of code**

- (1) This clause applies if an existing agreement is inconsistent with a requirement of clause 7 or 8 of the code.
- (2) During the grace period, that requirement of the code does not apply in relation to the supply of groceries under the agreement until the date on which the provision of the agreement is varied under clause 5 of the code.

**Example**

An existing agreement applies to the supply of biscuits but does not specify any circumstances in which the retailer may reject biscuits. Clause 8(b) of the code provides that an agreement must specify any such circumstances.

This clause provides that the retailer has a 6-month grace period before the requirement of clause 8(b) of the code applies to the retailer.

Clause 5(2) of the code requires the retailer to offer to vary the agreement to make it consistent with clause 8(b) of the code if there are any circumstances in which the retailer may reject the biscuits.

**4 Grace period for existing agreements that are inconsistent with Part 4 of code**

- (1) This clause applies if an existing agreement is inconsistent with a requirement of Part 4 of the code.
- (2) During the grace period, that requirement of the code does not apply in relation to the supply of groceries under the agreement until the date on which the provision of the agreement is varied under clause 5 of the code.

**Example**

An existing agreement provides that the retailer may reject fresh fruit only within 48 hours of delivery. Clause 21(4) of the code provides that the retailer may reject fresh produce only within 24 hours of delivery.

This clause provides that the retailer has a 6-month grace period before the requirement of clause 21(4) applies to the retailer. Until then, the code will apply with necessary modifications (that is, the rejection rule remains at 48 hours for 6 months or until the agreement is varied (whichever is earlier)).

Clause 5(2) of the code requires the retailer to offer to vary the agreement to make it consistent with clause 21(4) of the code.

*Existing agreements: after grace period***5 Effect of inconsistent existing agreements after grace period if variation offer made but rejected**

- (1) Subclause (2) applies after the grace period ends if—
  - (a) a retailer complies with clause 5(2) of the code in respect of an inconsistency between an existing agreement and a requirement of clause 7 or 8 of the code; and
  - (b) the offer is a reasonable offer; and
  - (c) the supplier rejects the offer.
- (2) A contravention of that requirement of clause 7 or 8 of the code by the retailer does not give rise to a pecuniary penalty.
- (3) Subclause (2) applies despite regulation 6.

**Example**

An existing agreement does not specify the period within which the retailer must pay the supplier for fresh fruit, as required by clause 8(c) of the code. The retailer offers to vary the agreement to specify that the retailer must pay the supplier within 3 months of the supplier's invoice. The supplier thinks that this is unreasonably long and rejects the variation offer.

The retailer would not be in breach of clause 8 of the code (by reason of being a party to an existing agreement that is inconsistent with the code) if the retailer has made a reasonable variation offer.

However, Part 4 of the code applies after the grace period ends. If the retailer waits to pay the supplier until just before the 3-month period expires, the retailer may be liable for a pecuniary penalty for failure to comply with clause 12(1)(b) of the code. Clause 12(1)(b) requires retailers to pay suppliers within a reasonable time after receiving the supplier's invoice, regardless of the time frame set out in the agreement.

The supplier may refer the dispute to the dispute resolution process provided for in the Act, because the dispute (about the period within which the retailer must pay the supplier for the groceries) arises from requirements under the grocery supply code.

**6 Effect of other inconsistent existing agreements after grace period**

- (1) Subclause (2) applies after the grace period ends if there continues to be an inconsistency between a provision of an existing agreement and a requirement of Part 4 of the code.
- (2) A contravention of that requirement of the code by the retailer in respect of that provision may give rise to a pecuniary penalty.

**Example**

An existing agreement specifies that the supplier is required to make payments as compensation for shrinkage (the loss of grocery products due to theft or accounting error). Clause 13 of the code prohibits such payments.

The retailer would not be in breach of clause 8 of the code (by reason of being party to an existing agreement that is inconsistent with the code) if the retailer has made a reasonable variation offer (see clause 5).

However, if the retailer continues to require such payments, the retailer may be liable for a pecuniary penalty for failure to comply with clause 13 of the code.

The supplier may refer the dispute to the dispute resolution process provided for in the Act because the dispute arises from requirements under the grocery supply code if the amount in dispute (that is, the amount of the payment that the retailer is requiring for shrinkage) is less than \$5 million.

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*Existing agreements: miscellaneous provisions*

**7 Clause 9 of code**

Clause 9 of the code does not apply during the grace period.

**8 Other remedies**

*See* also clause 1(2) of Schedule 1 of the Act.

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**Example**

An existing agreement specifies that the supplier is required to make payments as compensation for shrinkage. Clause 13 of the code prohibits such payments.

The retailer continues to require such payments after the grace period ends. The supplier refuses to pay. The supplier is not in breach of the agreement, so the retailer has no remedy for breach of contract. The retailer cannot charge a penalty under the agreement for what the retailer considers to be an unpaid amount.

**Schedule 2**  
**New Schedule 2 inserted**

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**Schedule 2**  
**Grocery supply code 2023**

r 8

**Contents**

Page

**Part 1**

**Preliminary**

1	Title	10
2	Purpose of code	10
3	Interpretation	10
4	When this code applies	11
5	Obligation to offer to vary existing agreements so that they are consistent with code	11

**Part 2**

**Good faith**

6	Obligation to deal with suppliers in good faith	12
---	---	----

**Part 3**

**Grocery supply agreements**

7	Grocery supply agreement must be in writing and retained	13
8	Matters to be covered by agreement	13
9	Unilateral variation of agreement	13
10	Retrospective variation of agreement	14

**Part 4**

**Conduct generally**

Subpart 1—Transport or logistics services

11	Transport or logistics services	14
----	---------------------------------	----

Subpart 2—Paying suppliers

12	Payments to suppliers	15
----	-----------------------	----

Subpart 3—Requiring payments from suppliers

13	Payments for shrinkage	15
14	Payments for wastage	16
15	Payments as condition of being supplier	17
16	Payments for retailer's business activities	17
17	Funding promotions	18

## Subpart 4—Other conduct

18	Delisting products	19
19	Process requirements relating to delisting	20
20	Funded promotions	20
21	Fresh produce standards and quality specifications	21
22	Unduly hindering or obstructing supply to competitors	22
23	Business disruption	22
24	Intellectual property rights	22
25	Confidential information	22
26	Product ranging, shelf space allocation, and range reviews	23
27	Transfer of intellectual property rights	23
28	Price increases	24
29	Freedom of association	25

## Part 1 Preliminary

### 1 Title

This code is the grocery supply code 2023.

### 2 Purpose of code

*See* section 16 of the Act for the purpose of this code.

### 3 Interpretation

(1) In this code, unless the context otherwise requires,—

**Act** means the Grocery Industry Competition Act 2023

**code** means the code set out in this schedule

**delists** has the meaning given by clause 18(2)

**groceries** has the same meaning as in section 5(1) of the Act

**grocery supply agreement** has the same meaning that **supply agreement** has in section 17 of the Act

**group** means a group consisting of—

(a) a person (**A**) referred to in section 8(a) to (d) of the Act; and

(b) each person that is any of the following:

(i) an interconnected body corporate of A:

(ii) a franchisee of A or of an interconnected body corporate of A:

(iii) a transacting shareholder of A or of an interconnected body corporate of A

**private label product** has the same meaning as in section 5(1) of the Act

**promotion** means—

- (a) any offer for sale (whether or not accompanied by some other benefit to a customer)—
  - (i) at an introductory or reduced price, or involving non-standard sales activity; and
  - (ii) as agreed between a retailer and a supplier; and
  - (iii) that is intended to last only for a specified period; or
- (b) any advertising or other in-store or online marketing activity (including a giveaway or an in-store product placement or promotional display)—
  - (i) as agreed between a retailer and a supplier; and
  - (ii) that is intended to last only for a specified period

**regulated grocery retailer** has the same meaning as in section 8 of the Act

**retailer** means a regulated grocery retailer

**shrinkage** means a loss of grocery products that—

- (a) occurs after a retailer has taken possession of them; and
- (b) arises from theft, other loss, or accounting error

**supplier** means a person carrying on (or actively seeking to carry on) a business of supplying groceries for sale by another person (whether or not that other person is the person supplied)

**wastage** means groceries that are unfit for sale.

- (2) Any term or expression that is defined in the Act and used, but not defined, in this code has the same meaning as in the Act.

#### **4 When this code applies**

- (1) This code applies to every regulated grocery retailer.
- (2) This code also applies to a person (**P**) that is a franchisee or transacting shareholder of an interconnected body corporate of a regulated grocery retailer (**A**) as if P were a franchisee or transacting shareholder of A.

#### **5 Obligation to offer to vary existing agreements so that they are consistent with code**

- (1) This clause applies to an existing agreement within the meaning of clause 1(3)(a) of Schedule 1 of the Act to the extent that it is inconsistent with the requirements of this code.
- (2) Within 6 months after this clause comes into force, the retailer must offer in writing variations to the agreement that would, if accepted by the supplier, make the agreement consistent with the requirements of this code.

- (3) *See also* Schedule 1 of these regulations (which apply the code after 6 months irrespective of whether the existing agreement is varied).

Compare: Food and Grocery Code of Conduct cl 5 (Aust)

## Part 2

### Good faith

#### 6 Obligation to deal with suppliers in good faith

- (1) The retailer must at all times deal with suppliers in good faith.
- (2) The retailer must ensure that their grocery supply agreements do not contain a provision that limits or excludes the obligation to act in good faith but, if it does, the provision does not limit that obligation.
- (3) In determining whether the retailer has acted in good faith in dealing with a supplier, the following may be taken into account:
- (a) whether the retailer has acted honestly:
  - (b) whether the retailer has co-operated to achieve the purposes of the relevant grocery supply agreement (including being responsive and communicative with the supplier):
  - (c) whether the retailer has not acted arbitrarily, capriciously, unreasonably, recklessly, or with ulterior motives:
  - (d) whether the retailer has not acted in a way that constitutes retaliation against the supplier for past complaints and disputes:
  - (e) whether the retailer's trading relationship with the supplier has been conducted without duress:
  - (f) whether the retailer's trading relationship with the supplier has been conducted in recognition of the need for—
    - (i) certainty regarding the risks and costs of trading, particularly in relation to production, delivery, and payment; and
    - (ii) provision of information to the supplier in a timely manner:
  - (g) whether the retailer has observed any confidentiality requirements relating to information disclosed or obtained in dealing with or resolving a complaint or dispute with the supplier:
  - (h) whether the retailer has avoided unreasonable discrimination or distinction between suppliers:
  - (i) whether, in dealing with the retailer, the supplier has acted in good faith.
- (4) Subclause (3) does not limit subclause (1).

Compare: Food and Grocery Code of Conduct cl 6B (Aust)

### Part 3

## Grocery supply agreements

#### 7 Grocery supply agreement must be in writing and retained

- (1) The retailer must ensure that—
  - (a) their grocery supply agreements are written in plain language; and
  - (b) a copy has been provided to the supplier.
- (2) The retailer must keep the original or a copy of each grocery supply agreement to which the retailer is a party while this code applies (including any document comprising the agreement, and any document made from time to time under the agreement that forms part of the agreement)—
  - (a) during the term of the agreement; and
  - (b) for 7 years after the agreement ends.

Compare: Food and Grocery Code of Conduct cls 7, 42(1) (Aust)

#### 8 Matters to be covered by agreement

The retailer must ensure that their grocery supply agreements specify all of the following:

- (a) any requirements the retailer has in respect of the delivery of the groceries:
- (b) any circumstances in which the retailer may reject the groceries:
- (c) the period within which the retailer must pay the supplier for the groceries and the circumstances in which any payment, or part of a payment, may be withheld or delayed:
- (d) the term of the agreement (whether fixed or indefinite):
- (e) in clear terms, any quantity and quality requirements relating to the groceries:
- (f) if the agreement provides for cancellation by 1 or more parties to it, the circumstances in which it may be cancelled:
- (g) any terms that apply if the retailer decides to delist the groceries.

Compare: Food and Grocery Code of Conduct cl 8 (Aust)

#### 9 Unilateral variation of agreement

- (1) The retailer must not vary a grocery supply agreement without the consent of the supplier concerned.
- (2) Subclause (1) does not apply if—
  - (a) the agreement—
    - (i) provides expressly for the retailer to make the variation; and

- (ii) sets out clearly the changed circumstances in which the variation can be made; and
  - (iii) sets out the basis or methodology for calculating the adjustment, when the variation involves a quantitative adjustment to the terms of supply; and
  - (b) the variation is made in accordance with the agreement; and
  - (c) the variation is reasonable in the circumstances; and
  - (d) the supplier is given reasonable notice, in writing, of—
    - (i) the variation; and
    - (ii) the terms of the variation; and
    - (iii) the retailer's reasons for making the variation.
  - (3) In determining whether the variation is reasonable in the circumstances, regard must be had to the benefits, costs, and risks (if any) for the supplier and retailer.
  - (4) Subclause (3) does not limit subclause (2)(c).
  - (5) The retailer's notice under subclause (2)(d)(iii) must include a clear and full written explanation as to why the retailer considers that—
    - (a) the variation is reasonable in the circumstances; and
    - (b) the other matters in subclause (2) are satisfied.
- Compare: Food and Grocery Code of Conduct cl 9 (Aust)

#### **10 Retrospective variation of agreement**

The retailer must not vary a grocery supply agreement with retrospective effect.

Compare: Food and Grocery Code of Conduct cl 10 (Aust)

## **Part 4 Conduct generally**

### Subpart 1—Transport or logistics services

#### **11 Transport or logistics services**

- (1) The retailer must not directly or indirectly—
  - (a) require a supplier to use a particular transport or logistics service; or
  - (b) impose unreasonable service standards in respect of transport or logistics.
- (2) Subclause (1) does not prevent a retailer imposing reasonable service standards in respect of transport or logistics.

## Subpart 2—Paying suppliers

**12 Payments to suppliers**

- (1) The retailer must pay a supplier for all grocery products delivered and accepted in accordance with a grocery supply agreement—
  - (a) within the time frame set out in the agreement; and
  - (b) in any case, within a reasonable time after receiving the supplier's invoice for the products.
- (2) The retailer must not—
  - (a) set off any amount against a supplier's invoice or remittance unless the supplier has consented in writing to the set-off of the amount; or
  - (b) require a supplier to consent to set off such an amount.
- (3) Subclause (2) does not apply if—
  - (a) the grocery supply agreement provides for the amount to be set off; and
  - (b) the set-off is reasonable in the circumstances.
- (4) A retailer that relies on subclause (3) must, after receiving a written request from the supplier, give a clear and full written explanation to the supplier as to—
  - (a) how the set-off was calculated; and
  - (b) why the retailer considers that the set-off is reasonable in the circumstances; and
  - (c) why the retailer considers that the other matters in subclause (3) are satisfied.

Compare: Food and Grocery Code of Conduct cl 12 (Aust)

## Subpart 3—Requiring payments from suppliers

**13 Payments for shrinkage**

- (1) The retailer must not—
  - (a) directly or indirectly require a supplier to make any payment as compensation for shrinkage; or
  - (b) have a grocery supply agreement under which a supplier is required to make such payments.
- (2) Subclause (1) does not prevent the retailer from raising, discussing, or agreeing with a supplier proposals and procedures to mitigate the risk and occurrence of shrinkage.
- (3) In this clause, **payment** includes payment in kind.

Compare: Food and Grocery Code of Conduct cl 13 (Aust)

**14 Payments for wastage**

- (1) The retailer must not directly or indirectly require a supplier to make any payment to cover any wastage of groceries incurred while the groceries are under the effective control of—
  - (a) the retailer; or
  - (b) a contractor or agent of the retailer; or
  - (c) any other entity that is a retailer.
- (2) Subclause (1) does not apply if—
  - (a) the relevant grocery supply agreement sets out expressly and unambiguously the circumstances, which could include negligence by the supplier, in which the supplier will be required to make payments to cover wastage of the supplier's groceries incurred while the groceries are under the effective control of a person or entity referred to in subclause (1); and
  - (b) the wastage occurs in such circumstances; and
  - (c) the wastage was mainly the result of actions or omissions by the supplier; and
  - (d) the basis of the payment is set out in the grocery supply agreement; and
  - (e) the payment is reasonable having regard to the retailer's costs incurred by the wastage; and
  - (f) the retailer takes reasonable steps to mitigate those costs; and
  - (g) the retailer's claim for payment by the supplier is made no later than 6 months after the goods were received by the person or entity referred to in subclause (1).
- (3) A retailer that relies on subclause (2) must give a clear and full written explanation to the supplier as to why the retailer considers that—
  - (a) the payment is reasonable in the circumstances; and
  - (b) the other matters in subclause (2) are satisfied.
- (4) Subclause (5) applies if—
  - (a) the relevant grocery supply agreement provides for the supplier to make payments to cover wastage of the supplier's groceries; and
  - (b) the supplier seeks to negotiate a variation of the agreement relating to payments of that kind.
- (5) The retailer must not, in the course of the negotiations or as a precondition to entering into the negotiations, seek to negotiate other variations of the agreement unrelated to payments of that kind.
- (6) In this clause, **payment** includes payment in kind.

Compare: Food and Grocery Code of Conduct cl 14 (Aust)

**15 Payments as condition of being supplier**

- (1) The retailer must not require a supplier to make any payment as a condition of stocking or listing grocery products.
- (2) Subclause (1) does not apply in relation to the retailer if—
  - (a) the payment is made in relation to a promotion; or
  - (b) the payment—
    - (i) is required under the relevant grocery supply agreement; and
    - (ii) is made in respect of groceries that have not been stocked, displayed, or listed by the retailer during the preceding 365 days in 25% or more of its stores; and
    - (iii) is reasonable, having regard to the costs and risks to the retailer in stocking, displaying, or listing the grocery products.
- (3) Subclause (2)(a) has effect subject to clause 17 (funding promotions).
- (4) A retailer that relies on subclause (2) must give a clear and full written explanation to the supplier as to why the retailer considers that the matters in subclause (2) are satisfied.
- (5) In this clause, unless the context otherwise requires,—

**25% or more of its stores**, in the case of a retailer that is part of a group, means 25% or more of the retail stores owned or operated by the group

**payment** includes payment in kind.

Compare: Food and Grocery Code of Conduct cl 15 (Aust)

**16 Payments for retailer's business activities**

- (1) The retailer must not directly or indirectly require a supplier to make any payment towards the costs of any activity (the **retailer's business activity**) that is undertaken by the retailer in the ordinary course of carrying on a business as a retailer.
- (2) The retailer's business activity includes the following:
  - (a) a buyer's visit to the supplier:
  - (b) artwork or packaging design:
  - (c) consumer or market research:
  - (d) the opening or refurbishing of a store:
  - (e) hospitality for the retailer's staff:
  - (f) merchandising (for example, stocking shelves and setting up displays):
  - (g) the transport of goods within a retailer's business, which may include transport between distribution centres and retail stores.
- (3) Subclause (1) does not apply if—
  - (a) the relevant grocery supply agreement provides for the payment; and

- (b) the payment is reasonable in the circumstances.
- (4) In determining whether the payment is reasonable in the circumstances, regard must be had to the following:
  - (a) the likely benefits to the supplier from the retailer's business activity;
  - (b) the likely benefits to the retailer from the retailer's business activity;
  - (c) the costs borne, or contributions made, by the retailer for the retailer's business activity.
- (5) Subclause (2) does not limit subclause (1).
- (6) Subclause (4) does not limit subclause (3)(b).
- (7) A retailer that relies on subclause (3) must give a clear and full written explanation to the supplier as to why the retailer considers that—
  - (a) the payment is reasonable in the circumstances; and
  - (b) the other matter in subclause (3) is satisfied.
- (8) In this clause, **payment** includes payment in kind.  
Compare: Food and Grocery Code of Conduct cl 17 (Aust)

## 17 Funding promotions

- (1) The retailer must not directly or indirectly require a supplier to fund part or all of the costs of a promotion.
- (2) Subclause (1) does not apply if—
  - (a) the relevant grocery supply agreement provides for the funding; and
  - (b) the funding is reasonable in the circumstances.
- (3) In determining whether the funding is reasonable in the circumstances, regard must be had to the following:
  - (a) the likely benefits to the supplier from the promotion; and
  - (b) the likely benefits to the retailer from the promotion; and
  - (c) the costs borne, or contributions made, by the retailer for the promotion.
- (4) Subclause (3) does not limit subclause (2)(b).
- (5) A retailer that relies on subclause (2) must, after receiving a written request from the supplier, give a clear and full written explanation to the supplier as to why the retailer considers that—
  - (a) the funding is reasonable in the circumstances; and
  - (b) the other matter in subclause (2) is satisfied.
- (6) In this clause, **fund** includes payment in kind.  
Compare: Food and Grocery Code of Conduct cl 18 (Aust)

## Subpart 4—Other conduct

**18 Delisting products**

- (1) The retailer may only delist a supplier's grocery product—
  - (a) in accordance with the terms of the relevant grocery supply agreement (if any); and
  - (b) for genuine commercial reasons.
- (2) The retailer **delists** a supplier's grocery product if either of the following apply:
  - (a) the retailer removes the product from the range of grocery products sold by the group to which the retailer belongs; or
  - (b) the retailer makes a decision of either of the following types that has, or is likely to have, a material effect on the supplier:
    - (i) a decision to remove the product from the range of grocery products at 1 or more retail stores:
    - (ii) a decision to reduce the distribution of the product at 1 or more retail stores.

**Example 1**

The parent company (**A**) of a regulated grocery retailer group decides to stop selling a type of beans across all group stores. A is the entity that delists and that must comply with regulation 19.

**Example 2**

A franchisee of A (**F**) operates one retail store and has a supply agreement with a local supplier for the supply of beans (**B**). F decides to stop selling B's beans in its store. That decision is likely to have a material effect on B because B currently sells all its beans to F. F is the entity that delists and that must comply with regulation 19.

- (3) For the purpose of subclause (1), **genuine commercial reasons** for delisting a product include the following:
  - (a) failure of the supplier to meet reasonable quality or quantity requirements as agreed with the supplier in respect to the product:
  - (b) failure of the supplier's product to meet the retailer's reasonable commercial sales or profitability targets as notified to the supplier in, or in accordance with, the grocery supply agreement:
  - (c) persistent failure to meet the retailer's reasonable delivery requirements as notified to the supplier from time to time in accordance with the grocery supply agreement.
- (4) Subclause (3) does not limit subclause (1).
- (5) Delisting as a punishment for a complaint, concern, or dispute raised by a supplier is not a genuine commercial reason.

- (6) A decision by the retailer not to extend the agreement, or enter into a new grocery supply agreement, following the expiry of a fixed term grocery supply agreement is not a decision to delist a product.

Compare: Food and Grocery Code of Conduct cl 19(1) to (4), (8) (Aust)

### 19 Process requirements relating to delisting

- (1) Before delisting a supplier's grocery product, the retailer must provide reasonable written notice to the supplier of the retailer's decision to delist the product. The notice must—
- (a) include the genuine commercial reasons for delisting the product; and
  - (b) inform the supplier of the supplier's right to have the decision to delist the product reviewed by the retailer.
- (2) Subclause (1) does not apply if—
- (a) time is of the essence (including for product recalls, withdrawals, or safety issues); or
  - (b) there are persistent issues with supply that have resulted in the retailer being out of stock or stocked at significantly reduced levels.
- (3) The retailer must promptly comply, in writing, with any written request from the supplier for—
- (a) a statement of the retailer's genuine commercial reasons for the delisting; or
  - (b) information (or additional information) relating to the delisting. This subclause applies whether or not the retailer complied (or was required to comply) with subclause (1).
- (4) The retailer must, after receiving a written request from the supplier, promptly review any decisions regarding delisting made by the retailer and provide the supplier with written notice of the outcome of that review, including the basis for the retailer's decision.
- (5) A retailer that relies on subclause (2) must give a clear and full written explanation to the supplier as to why the retailer considers that the matters in that subclause are satisfied.

Compare: Food and Grocery Code of Conduct cl 19(5) to (7), (9) (Aust)

### 20 Funded promotions

- (1) If a supplier agrees to make a payment in support of the promotion of a product (the **funded promotion**), the retailer must give the supplier reasonable written notice before holding the promotion.
- (2) If the retailer orders a grocery product from a supplier in connection with the funded promotion at a promotional price (whether calculated by way of discount, rebate, credit, allowance, or otherwise), the retailer must—

- (a) ensure that the basis on which the quantity of the order is calculated is transparent; and
  - (b) agree with the supplier (in writing) on what happens to stock supplied at a promotional price but which remains unsold at the end of the promotional period.
- (3) If the retailer has placed an order for a grocery product with a supplier in connection with the funded promotion, the retailer must not do either of the following without the supplier's written consent:
- (a) cancel the order; or
  - (b) reduce the volume of the order by more than 10%.
- (4) Subclause (3) does not apply if—
- (a) the retailer gives the supplier reasonable written notice of the cancellation or reduction; or
  - (b) the retailer compensates the supplier for any net resulting costs, losses, or expenses incurred or suffered by the supplier as a direct result of the retailer failing to give reasonable notice of the cancellation or reduction.

Compare: Food and Grocery Code of Conduct cl 20 (Aust)

## **21 Fresh produce standards and quality specifications**

- (1) This clause applies only in relation to fresh produce.
- (2) The retailer must ensure that any relevant fresh produce standards or quality specifications—
- (a) are reasonable; and
  - (b) are provided to the supplier in clear, unambiguous, and concise written terms.
- (3) The retailer must accept all fresh produce delivered in accordance with relevant fresh produce standards and quality specifications.
- (4) The retailer must not reject fresh produce unless all of the following conditions are satisfied:
- (a) the produce fails to meet relevant fresh produce standards or quality specifications; and
  - (b) the retailer rejects the produce within 24 hours after the produce is delivered to the retailer; and
  - (c) the retailer does not reject the produce after the retailer has accepted the produce.
- (5) If the retailer rejects fresh produce because it does not meet relevant fresh produce standards or quality specifications, the retailer must provide written reasons for the rejection to the supplier within 48 hours.

- (6) The retailer must communicate any labelling, packaging, or preparation requirements for a grocery product to a supplier in clear, unambiguous, and concise written terms.
- (7) The retailer must provide a supplier with reasonable written notice of any required changes to packaging, labelling, or preparation standards (unless the change is required immediately by law) taking into consideration existing stock held by suppliers (where known) and any agreement as to stock coverage in the relevant grocery supply agreement.
- (8) The retailer must make any claim for damaged grocery products or shortfalls, or any similar claims, within a reasonable time of, and in any event no later than 30 days after, delivery of the groceries to the retailer (or the retailer's nominee).

Compare: Food and Grocery Code of Conduct cl 21 (Aust)

## **22 Unduly hindering or obstructing supply to competitors**

The retailer must not engage in any conduct that has the purpose, effect, or likely effect of unduly hindering or obstructing a supplier from supplying groceries to any other party.

## **23 Business disruption**

The retailer must not threaten a supplier with business disruption or termination of a grocery supply agreement without reasonable grounds.

Compare: Food and Grocery Code of Conduct cl 23 (Aust)

## **24 Intellectual property rights**

- (1) The retailer must respect the intellectual property held by suppliers in relation to grocery products, including intellectual property rights in branding, packaging, and advertising.
- (2) Subclause (1) does not create, confer, or extend any intellectual property rights in or of the supplier.
- (3) In developing or producing private label products, the retailer must not infringe the intellectual property rights held by a supplier in relation to grocery products, including rights relating to branding, packaging designs, or advertising.
- (4) In any dispute relating to a breach of this clause, any relevant actions of the supplier in relation to the intellectual property rights of the retailer must be taken into account.

Compare: Food and Grocery Code of Conduct cl 24 (Aust)

## **25 Confidential information**

- (1) This clause applies if a supplier discloses confidential information to the retailer in connection with the supply of grocery products, including confidential information relating to product development, proposed promotions, or pricing.

- (2) The retailer must not use that information other than for a purpose for which it was disclosed and may only disclose it or make it available or accessible to employees or agents of the retailer who need to have that information in connection with that purpose.
- (3) The retailer must establish and monitor systems to ensure compliance with subclause (2).
- (4) Information is not confidential information for the purposes of this clause if the information—
  - (a) is publicly available; or
  - (b) comes into the possession or knowledge of the retailer—
    - (i) independently of the supplier; and
    - (ii) without any breach of subclause (2) on the part of the retailer.

Compare: Food and Grocery Code of Conduct cl 25 (Aust)

## **26 Product ranging, shelf space allocation, and range reviews**

- (1) The retailer must publish or provide to all suppliers with whom the retailer has grocery supply agreements:
  - (a) the retailer's product ranging principles; and
  - (b) the retailer's shelf space allocation principles.
- (2) The retailer must act in accordance with the retailer's principles and keep them up to date.
- (3) Within a reasonable time before conducting a range review, the retailer must provide suppliers who might be affected by any outcome of the review with clearly expressed written notice of—
  - (a) the purpose of the range review; and
  - (b) the key criteria governing ranging decisions.
- (4) Following the range review, the retailer must provide affected suppliers with a reasonable period of time to discuss the outcomes of the review, including the basis for the retailer's final decisions.
- (5) The retailer must apply the retailer's product ranging principles, and the retailer's shelf space allocation principles, without discrimination (including without discrimination in favour of the retailer's private label products).
- (6) This clause does not limit clause 19.

Compare: Food and Grocery Code of Conduct cl 26 (Aust)

## **27 Transfer of intellectual property rights**

- (1) The retailer must not directly or indirectly require a supplier to transfer or exclusively license any intellectual property right held by the supplier in relation to a grocery product as a condition or term of supply of an equivalent private label product of the retailer.

- (2) Subclause (1) does not prevent the retailer from—
- (a) holding an intellectual property right in a private label product of the retailer; or
  - (b) having an exclusive right to the retail sale of a private label product of the retailer; or
  - (c) making the holding of a right referred to in paragraph (a) or (b) by the retailer a condition or term of supply by the supplier of a private label product of the retailer, to the extent that the product, recipe, or formulation of the product—
    - (i) was developed or formulated by or for the retailer; or
    - (ii) is customised by or for the retailer.

Compare: Food and Grocery Code of Conduct cl 27 (Aust)

## 28 Price increases

- (1) This clause applies if—
- (a) the retailer has a grocery supply agreement with a supplier for the supply of groceries; and
  - (b) the supplier informs the retailer, in writing, of an increase in the price (the **price increase**) of groceries supplied under the agreement; and
  - (c) if the price increase is in respect of fresh produce that is supplied under the agreement and the agreement includes a mechanism to negotiate on a regular basis the price of that fresh produce, any negotiations about the price increase are not concluded within 5 working days after the supplier informs the retailer of the price increase; and
  - (d) if the price increase is in respect of a product other than fresh produce, the supplier has not informed the retailer of the same price increase in respect of the product within the last 6 months.
- (2) Within 30 days of being informed by the supplier of the price increase, the retailer must, in writing, notify the supplier whether the retailer—
- (a) accepts the price increase; or
  - (b) accepts an increase in the price of the groceries supplied under the agreement but does not accept the amount of the price increase; or
  - (c) does not accept the price increase.
- (3) If the retailer needs further information from the supplier in order for the retailer to make an informed decision under subclause (2),—
- (a) the 30-day notice period in subclause (2) does not start running until the supplier has provided that information to the retailer; and
  - (b) the retailer must request the further information within a reasonable time frame, in good faith, and must not make the request as a tactic to delay decisions regarding price increases.

- (4) If the supplier is notified of a matter referred to in subclause (2)(b) or (c), the supplier may request the retailer to enter into negotiations about an increase in the price for the groceries.
  - (5) A retailer that enters into such negotiations must engage in the negotiations in good faith and take all reasonable steps to conclude its position on the negotiations without delay.
  - (6) The retailer must not require the supplier to disclose commercially sensitive information in relation to the following:
    - (a) the price increase:
    - (b) negotiations about an increase in the price for the groceries.
- Compare: Food and Grocery Code of Conduct cl 27A (Aust)

## 29 Freedom of association

- (1) The retailer must not provide an inducement to prevent a supplier from—
    - (a) forming an association of suppliers; or
    - (b) associating with other suppliers for a lawful purpose.
  - (2) The retailer must not discriminate, or take any other action, against a supplier for—
    - (a) forming an association of suppliers; or
    - (b) associating with other suppliers for a lawful purpose.
- Compare: Food and Grocery Code of Conduct cl 29 (Aust)

Rachel Hayward,  
Clerk of the Executive Council.

## Explanatory note

*This note is not part of the regulations, but is intended to indicate their general effect.*

These regulations amend the Grocery Industry Competition Regulations 2023 to provide for the grocery supply code 2023 (the **code**). The purpose of the code, as set out in section 16 of the Grocery Industry Competition Act 2023 (the **Act**), is to promote the purpose of the Act by—

- promoting fair conduct, and prohibiting unfair conduct, between regulated grocery retailers, certain related parties, and suppliers; and
- promoting transparency and certainty about the terms of agreements between those parties; and
- contributing to a trading environment in the grocery industry in which businesses compete effectively and consumers and businesses participate confidently and that includes a diverse range of suppliers.

*Clause 2* provides for commencement. These regulations come into force on 28 September 2023. The code will also take effect on that date.

*Clause 3* provides that the Grocery Industry Competition Regulations 2023 are the principal regulations being amended.

*Clause 4* inserts a new Part heading into the principal regulations.

*Clause 5* inserts a *new Part 2* into the principal regulations, which provides that the first grocery supply code for the purpose of Part 2 of the Act is set out in *Schedule 2*. The code is largely based on the Australian equivalent code that is set out in the Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015. Most of the contraventions of the code give rise to tier 2 pecuniary penalties under the Act, of which the maximum is \$200,000 in the case of a contravention by an individual or, in any other case, is the greater of \$3 million and an amount related either to the value of any commercial gain resulting from the contravention or to the turnover of the person and all its interconnected bodies corporate (if any). Some minor contraventions of the code give rise to tier 4 pecuniary penalties under the Act, which are lower.

*Clause 6* inserts new transitional provisions into *Schedule 1* of the principal regulations. The new provisions relate to existing supply agreements as at commencement and provide a grace period until 28 March 2024 for certain matters. The main effect of the amendments is as follows:

- *Part 2* of the code, relating to good faith, applies from commencement in all cases:
- obligations which do not require retailers to modify supply agreements apply from commencement:
- retailers must provide suppliers with agreements which meet their obligations in the code, within 6 months of commencement. This will ensure that retailers have sufficient time to review the agreements they currently have in place with suppliers and make amendments to any agreements which may be out of step with the code:
- after that period of 6 months, the requirements of the code will apply regardless of any provisions of existing agreements to the contrary. The exception is that, after 6 months, a retailer is not in breach of the code simply for being party to an existing agreement that is inconsistent with the code, so long as the retailer has complied with the obligation in *clause 5(2)* of the code and has offered reasonable variations.

These regulations are accompanied by a companion order entitled the Grocery Industry Competition Act Commencement Order 2023. That order brings section 19 of the Act into force on 28 September 2023. Section 19 of the Act imposes a duty to comply with the code, and provides that a person that contravenes that section is liable to a civil liability remedy (including an order to pay a pecuniary penalty or compensation).

### Regulatory impact statement

The Ministry of Business, Innovation, and Employment produced a regulatory impact statement on 29 March 2023 to help inform the decisions taken by the Government relating to the contents of this instrument.

A copy of this regulatory impact statement can be found at—

- <https://www.mbie.govt.nz/assets/policy-approvals-for-grocery-supply-code-of-conduct-requirements-and-approval-to-consult-on-an-exposure-draft-proactive-release.pdf>
- <https://treasury.govt.nz/publications/informationreleases/ris>

Issued under the authority of the Legislation Act 2019.

Date of notification in *Gazette*: 31 August 2023.

These regulations are administered by the Ministry of Business, Innovation, and Employment.