

12 September 2014

Manager
Competition Policy Unit
Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent
Parkes ACT 2600
AUSTRALIA

Email: grocerycode@treasury.gov.au

Dear Sir/Madam

The New Zealand Food & Grocery Council welcomes the opportunity to comment on the ***Food and Grocery Code Consultation Paper – Improving commercial relationships in the food and grocery sector.***

The NZFGC represents the major manufacturers and suppliers of food, beverage and grocery products in New Zealand. This sector is a major contributor to New Zealand's export revenue particularly from the opportunity to supply into Australia. Food and beverage manufacturing is the largest manufacturing sector in New Zealand, representing 46% of total manufacturing income and 34% of all manufacturing salaries and wages. Our members directly or indirectly employ 370,000 people, one in five of the workforce.

Many of our members are either exporting to Australia or are trans-Tasman companies headquartered in either country or in third countries and operating in both countries. Our organisation is a sister organisation to the Australian Food & Grocery Council. We support and endorse all submissions by the AFGC in this consultation.

NZFGC is strongly supportive of measures that assist suppliers in their negotiations and relationships with the major supermarket chains. The draft Australian Food and Grocery Code of Practice (the draft Code) is an important step towards addressing certain aspects of supermarket conduct.

As we understand it, the draft Code has drawn much from the UK developments over the last decade and to that extent goes further than the 2002 UK Supermarkets Code of Practice which had legislative backing under the UK Fair Trading Act 1973 but not as far as the current UK model. The current UK model features a legislatively appointed and independent adjudicator and significant financial penalties that can be applied.

The independence of the UK adjudicator means that complaints and related information can be dealt with confidentially and without fear of retribution to the suppliers. It balances the power of the retailers. The availability of financial penalties do not mean imposition. The

existence of substantial financial penalties are considered incentive enough to encourage compliance.

Comparisons between the UK Code and the draft Code show parallel coverage in most other areas.

One of the purposes of the draft Code is to “promote and support good faith in commercial dealings between retailers and suppliers”. This is expanded to some extent in clause 25 *Obligation to deal lawfully and in good faith* which sets out expectations relating to duress and the need by suppliers for certainty. Further provisions concerning expectations of ‘good faith’ or agreed guidance could assist the operation of the Code, particularly to provide suppliers with an appreciation of the expectations they might have of retailers. The questions that provisions or commonly understood guidance might cover is whether ‘good faith’ is about any or all of the following:

- a duty to act reasonably in negotiating
- treating others in the way you would like to be treated, with respect
- neither party treating the other in a degrading or humiliating manner
- acting honestly, openly, and without hidden or ulterior motives
- being constructive and cooperative
- being proactive in providing each other with relevant information and consider all information provided
- responding promptly and thoroughly to reasonable requests and concerns
- keeping an open mind, listening to each other and being prepared to change opinion about a particular situation or behaviour

Good faith generally involves using practical common sense. It is likely that the key outcome of promoting good faith is that it reduces the risk of conflict and problems.

Specific comments

Importantly, the draft Code has provisions concerning the obligations of supermarkets about their home/own Brands such as intellectual property, confidentiality, transparency of range and shelf space allocation although no provisions for obligations relating to the resolution of consumer complaints and any associated payments. We support these provisions.

It is of interest that many of the protections in the draft Code can be overridden if the ‘relevant grocery supply agreement provides’ otherwise. These and similar clauses would seem to undermine the intent of the protections. They relate specifically to clauses 12, 13, 14, 16, 17, 18, and 19.

Retrospective payments (clause 11)

Retrospective payments are a current topic of interest in both Australia and New Zealand. Governments can generally not apply fees, levies or charges retrospectively and it is therefore disconcerting that retrospective payments can still be applied to the supplier, even though the criteria require that the circumstances for such payments must be beyond the control of the retailer. There is no countervailing criteria for the retailer to make payments to the supplier for circumstances that might be beyond the suppliers’ control. A force majeure clause might have addressed this concern in part for suppliers.

Limited circumstances for payments as a condition of being a supplier (clause 13)

The retailer can require a supplier to make any payment as a condition of stocking or listing the supplier’s grocery products so long as such a payment reflects a reasonable estimate by the retailer of the costs and risks to the retailer of stocking, displaying or listing. This provision seems heavily weighted in the retailer’s favour without any balancing criteria for the

supplier or independent assessment of the retailer's estimates of costs and risks. The only test is 'reasonableness' and there is no indication of what is reasonable or what factors might be taken into account in reaching a 'reasonable estimate' that would translate to a 'reasonable payment'. Inclusion of factors that might be considered could balance this provision.

De-listing products (clause 15)

This provision means that de-listing can be undertaken for 'genuine commercial reasons'. It is helpful for the provision to make clear what are not genuine commercial reasons but the real test of the effect of this clause would be following a first complaint. The weakness arises with a supplier complaint being assessed by the retailers own senior buyer. Presumably, if this was still considered unsatisfactory, arbitration is available. In the United Kingdom we are aware that complaints are dealt with by someone who is not in the buying team and this might be a worthwhile consideration.

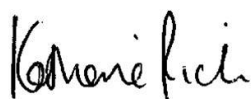
Dispute resolution (Part 5)

One of the challenges for the draft Code is in the dispute resolution area. Since the 'code compliance manager' for the retailer is most likely to be an employee of the retailer (although this could be a contractual arrangement), independence of scrutiny is weighted against the supplier. Not only that, but the 'code compliance manager' is not at a senior level of management (a term that is undefined). After two rounds of investigation/review by the retailer, of the retailer's own actions, the matter can progress to mediation or arbitration. It seems remote that any matter would make it that far and still have the retailer at the table, but it's important to be optimistic.

Conclusion

The NZFGC applauds the efforts of the AFGC and the Australian supermarkets to negotiate a Code of Practice. However, the extent of overrides to the protections in the draft Code, the lack of an independent complaints avenue and the absence of financial penalties will test certainly the effectiveness of the draft Code's application over time. We are optimistic that this Code is major progress for the Australian market and look forward to seeing the results of its implementation.

Yours sincerely



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