

Matthews Law competition law guide for grocery suppliers & their advisors

Background & overview

1. In November 2020, the Commerce Commission (**Commission**) was directed to carry out a study into competition in the grocery sector. The Commission found that competition was not working well for consumers in the retail grocery sector, and recommended a suite of changes to increase competition and help improve the price, quality and range of groceries and services available to New Zealanders.
2. These reforms include:
 - a. A Grocery Supply Code (Code) to govern relationships between regulated grocery retailers (**RGR**) and suppliers.
 - b. A dispute resolution regime to resolve disputes with RGR.
 - c. Extension of the Fair Trading Act's UCT regime to grocery supply contracts.
3. Retailers, like all businesses in trade in New Zealand, are also subject to existing obligations under the Commerce Act and Fair Trading Act, including prohibitions on:
 - a. Misuse of substantial market power that has the purpose or effect of substantially lessening competition in a relevant market.
 - b. "Unconscionable conduct", which in Australia has been interpreted to be serious misconduct that is so far outside accepted standards of commercial conduct as to be against good conscience. More guidance can be found on the Commission's website: <https://comcom.govt.nz/business/your-rights-as-a-business/unconscionable-conduct>.
 - c. Unsubstantiated representations. A representation is unsubstantiated if the person making the representation does not, when the representation is made, have reasonable grounds for the representation, irrespective of whether the representation is false or misleading. This does not apply to a representation that a reasonable person would not expect to be substantiated. More guidance from the Commission can be found here: https://comcom.govt.nz/_data/assets/pdf_file/0030/89850/Unsubstantiated-representations-Fact-sheet-July-2018.pdf
 - d. Misleading or deceptive conduct.
 - e. False or misleading representations.
4. This guide explains these protections and how they might be applied to common supplier issues. If you have further questions you can contact andrew.matthews@matthewslaw.co.nz.

A. Grocery Supply Code

Scope of the Code

5. **Who does the Code apply to?** Regulated grocery retailers (**RGR**) (as defined in [section 8](#)) and related parties (as defined in [section 18](#)) must comply with the Code. The RGR are currently Foodstuffs North Island Limited, Foodstuffs South Island Limited and Woolworths New Zealand Limited, including all subsidiaries, successors, franchisees and transacting shareholders.
6. **Who does the Code cover?** The Code covers RGRs' dealings with anyone supplying them with groceries, or actively seeking to supply them with groceries. Groceries are: fresh produce (eg fruit, vegetables, and mushrooms), meat, seafood, or meat substitutes, dairy products (eg milk, cheese, and butter), bakery products, chilled or frozen food, pantry goods or dry goods (eg eggs), manufacturer-packaged food, non-alcoholic drinks, personal care products (eg toiletries, first aid, and medicine other than prescription medicine), household consumables (eg cleaning products, laundry products, and stationery), and pet care products (eg pet food).
7. **Does the Code cover alcohol?** No. Alcohol is not a "grocery" for the purposes of the Code.
8. **Does the Code apply to past conduct?** No, the Code only applies to conduct from 28 September 2023.
9. **Does the Code apply to existing agreements?** Yes, but there is a 6-month grace period (to 28 March 2024). If your existing agreement is inconsistent with a requirement in the Code:
 - a. Within the grace period, the RGR must offer in writing variations to the agreement that would, if accepted, make the agreement consistent with the Code.
 - b. That requirement of the Code does not apply until the date the agreement is so varied. (The rest of the Code (except clause 9) does still apply during the grace period, including the RGR's obligation to act in good faith.)
10. **Are there any other exceptions during the grace period?** Yes, clause 9 on unilateral variations does not apply during the grace period. See our 2-page guide on the Code [here](#).
11. Most significantly, **the good faith obligation applies now.**

Good faith

12. **What is good faith?** Good faith is a broad concept which is dependent on the context. It encompasses honesty and sticking to the spirit of agreements. In colloquial terms it can be described as "*playing fair*" or "*putting one's cards on the table*". It does not prevent usual commercial "hard bargaining". The Code lists many factors which can be considered in determining if a RGR has acted in good faith including:
 - 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**.
13. The ACCC has examples like the below on dealing and not dealing in good faith:
<https://www.accc.gov.au/business/industry-codes/food-and-grocery-code-of-conduct/acting-in-good-faith-under-the-food-and-grocery-code>

Example of delisting a product

Scenario

A supplier of packaged confectionary agrees to pay a retailer of the product \$20,000 upfront to fund a marketing campaign for the product. This is covered in the grocery supply agreement and in line with code requirements. The campaign is to run over 8 weeks.

Two weeks into the campaign, the retailer notifies the supplier that it will be delisting the confectionary product. The product has not been meeting the retailer's profit targets in the grocery supply agreement. The retailer had started considering this product for delisting during the time that they were seeking funding from the supplier for the marketing campaign.

Factors relevant to good faith

Asking the supplier to fund the marketing of a product that was being actively considered for delisting, and delisted not long afterwards, is behaviour that is unlikely to be acting in good faith. The retailer may have acted dishonestly or unreasonably in their dealings with the supplier.

Grocery supply agreement (GSA)

14. **What is a GSA?** Any agreement between a RGR and a supplier. This will likely be multiple documents, including all emails with agreed terms etc. The RGR must ensure that the GSA is written in plain language and a copy has been provided to the supplier.
15. **Are there terms required to be in the GSA?** Yes, the GSA must specify:
 - a. Any requirements the RGR has in respect of the delivery of the groceries.
 - b. Any circumstances in which the RGR 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.

Common issues

16. **Can the RGR require me to use their merchandising services and charge for this?** There may be relevant legal protections, potentially depending on what exactly the RGR is proposing to charge you for. Potential legal issues raised could include:
 - a. Unsubstantiated representations (FTA) – eg if the RGR said they would be undertaking services that they could not and / or it was represented that the fee represented a cost that was not being incurred and they did not have “reasonable grounds” for making that representation when they made it irrespective of whether the representation is false or misleading.
 - b. Misleading and / or deceptive conduct / representations (FTA) – if statements were inaccurate and / or incomplete and conveyed a misleading perception.
 - c. Possibly competition arguments (CA) if the RGR was “bundling” their non-contestable services (grocery wholesaling / retailing) and contestable services (potentially merchandising), although this is not straightforward.
 - d. Is the RGR acting in good faith?
 - e. Is the charge unreasonable? The Code prohibits payments toward the costs of any activity that is undertaken by the retailer in the ordinary course of carrying on a business as a retailer (the **retailer’s business activity**). The Code specifies merchandising (for example, stocking shelves and setting up displays) is a retailer’s business activity. An exception applies if the GSA provides for the payment and the payment is reasonable in the circumstances. If the RGR relies on the exception, it must give a clear and full written explanation to the supplier.
 - f. Is the merchandising in connection with a promotion? The Code prohibits requiring a supplier to fund part or all of the costs of a promotion unless the GSA provides for the

funding and the funding is reasonable in the circumstances. You can send a written request to the RGR asking for a written explanation as to why it considers the funding is reasonable and the GSA provides for the funding. If you do agree to make a payment in support of the promotion of a product, the RGR must give you reasonable written notice before holding the promotion.

17. **Can the RGR require me to use their logistics services?** The Code prohibits the RGR from requiring a supplier to use a particular transport or logistics service. The RGR also cannot impose unreasonable service standards in respect of transport or logistics.
18. **Can the RGR delist me just because I raised a complaint?** No. The RGR can only delist a supplier's grocery product in accordance with the terms of the GSA and for genuine commercial reasons. Delisting as a punishment for a complaint, concern, or dispute raised by a supplier is not a genuine commercial reason. It also would probably not be in good faith. Do note that a decision not to extend or enter a new GSA is not a decision to delist.
19. **What rules are in the Code?**
 - a. You can read the Code here: <https://www.legislation.govt.nz/regulation/public/2023/0193/latest/LMS912575.html>.
 - b. The Commission also has a fact sheet summary: https://comcom.govt.nz/_data/assets/pdf_file/0022/329710/Commerce-Commission-Grocery-supply-code-factsheet-28-September-2023.pdf.
 - c. We also have a 2-page guide on the Code: <https://www.matthewslaw.co.nz/wp-content/uploads/2023/11/295-230907-04-Grocery-Supply-Code-summary.pdf>.

Escalation

20. **How can I escalate issues?** The first step is usually to try negotiate with the RGR, elevating to a senior level if appropriate. If a resolution can't be reached, escalation options include:
 - a. Complain to the Grocery Commissioner.
 - b. Refer the dispute to dispute resolution. A formal dispute resolution scheme will be set up for grocery, and you can check your GSA to see if you have any additional dispute resolution options.
 - c. Issue court proceedings. Going to court may not always be cost-effective. But you are entitled to directly take the RGR to court if you believe they are in breach of the Act. Remedies that can be sought include compensatory orders, cancellation and variation orders, and injunctions. (Only the Commission can seek pecuniary penalties though.) It can be more cost effective for the Grocery Commissioner to first seek a declaration of contravention from the court, which suppliers can piggy-back off to seek remedies from the court without needing to prove breach (though you may still need to prove loss).
 - d. You could also bring these issues up with the NZFGC or other industry association, which can aggregate and anonymise concerns.
21. **How do I complain to the Grocery Commissioner?** *"Anyone can make a complaint to the Commission about a party in the grocery sector at any time. This could be about a breach of the new rules introduced by the Act or the Fair Trading or Commerce Acts. You can make a complaint*

through our website at <https://comcom.govt.nz/make-a-complaint>. Alternatively, you can call us on 0800 943 600 or email contact@comcom.govt.nz.”¹

22. **Will the Commission keep my information confidential?** The Commission is subject to the Official Information Act, meaning it is compelled to disclose information unless there are legitimate reasons to withhold it, such as the information is commercially sensitive and confidential. The Commission understands if you want to complain confidentially and recommends you flag that the information is confidential at the start.
23. **What can the Grocery Commissioner do?**
- a. Issue a corrective notice requiring the RGR to take corrective action.
 - b. Issue a warning. It can also issue a notice requiring a warning to be disclosed (eg prominently on the RGR’s website).
 - c. Change the Code.
 - d. Seek pecuniary penalties from the court. Most of the Code has a “tier 2” maximum penalty of \$200K for individuals, and the higher of \$3M/the commercial gain or if commercial gain cannot be readily ascertained, 3% of turnover of the RGR group for firms.
 - e. Seek a declaration of contravention from the court, or other remedies on behalf of the supplier: compensatory orders, variation or cancellation orders, and injunctions.
 - f. Tell the Minister.
24. **When can / how do I refer disputes to dispute resolution?** The formal dispute resolution scheme is still to be set up – the Commission’s website says the scheme is being established by MBIE and is expected to be in place by the end of 2023.² At that time more guidance should be available. What we know so far is:
- a. [New Zealand Dispute Resolution Centre Limited \(NZDRC\)](#) has been approved to deliver a dispute resolution scheme for the grocery industry.
 - b. NZDRC will need to issue rules for the dispute resolution scheme. NZDRC will consult on its proposed rules with relevant stakeholders before applying to the Minister of Commerce and Consumer Affairs to approve the rules. The consultation is expected to begin around the end of November and the period for making submissions will make allowance for the Xmas/New Year period.
 - c. Suppliers will be able to refer disputes arising under the Code to the dispute resolution scheme if the amount claimed does not exceed \$5M and the dispute has not been finally resolved by proceedings in any court or tribunal.
 - d. A binding settlement agreement agreed by the parties under the dispute resolution scheme is binding.
 - e. An order or other decision of the adjudicator under the dispute resolution scheme is binding. The adjudicator’s decision may only be appealed on a question of law.

¹ https://comcom.govt.nz/data/assets/pdf_file/0018/322047/Open-letter-to-the-grocery-sector-Commencement-of-the-Grocery-Industry-Competition-Act-2023.pdf

² <https://comcom.govt.nz/regulated-industries/grocery>

- f. Parties may not contract out of the dispute resolution scheme, except if the provision imposes a stricter duty on the RGR.

B. Grocery UCT regime

25. Retailers must not use contract terms which have been declared to be unfair in **standard form** specified trade contracts.
26. Specified trade contracts are:
 - a. Grocery supply contracts entered into, varied, or renewed on or after **10 July 2023** with consideration worth **\$1M** or lower (including contracts between the same parties on the same or substantially similar terms)
 - b. Small trade contracts entered into, varied, or renewed on or after **16 August 2022** with consideration worth **\$250K** or lower (including contracts between the same parties on the same or substantially similar terms)
27. For small trade contracts, only the Commission can seek a court declaration that the term is unfair. For grocery supply contracts, anyone can seek a declaration.
28. The court can only declare a term is **unfair** if:
 - a. The term would cause a significant imbalance in the parties' rights and obligations arising under the contract,
 - b. The term is not reasonably necessary to protect the legitimate interests of the party would be advantaged by it, and
 - c. The term would cause detriment (whether financial or otherwise) to a party if it were applied, enforced or relied on.
29. Some terms cannot be declared unfair, ie are exempt from the regime. Terms are exempt to the extent they:
 - a. Define the main **subject matter** of the contract.
 - b. Set the **upfront price** payable under the contract.
 - c. Are **required or expressly permitted** by any enactment.
30. It is an offence to include unfair contract terms in a standard form contract (unless allowed by the court), or apply, enforce or rely on the unfair contract term. The maximum fine *per breach* for individuals is \$200K, and for companies and body corporates \$600K.
31. More information on the UCT regime can be found in the Commission's guidelines: https://comcom.govt.nz/_data/assets/pdf_file/0021/290190/Unfair-contract-terms-guidelines-August-2022.pdf

C. Collective bargaining

32. **Can I join with other suppliers to collectively bargain against the RGR?**

33. Collective bargaining can be in breach of cartel laws as this typically involves agreeing with your competitor on the price of goods you supply in competition – which would likely be a price fixing cartel. See our 1-page cartel guide [here](#).
34. Authorisation can be sought to collectively bargain and will be granted if the proposal will likely result in net public benefits. Authorised conduct is not in breach of cartel laws. For example, the Commission authorised the News Publishers Association to engage in collective negotiations with Google and Meta for a 10 year period. But it took almost a year for authorisation to be granted. Interim authorisation can also be sought which would allow you to give effect to the collective bargaining agreement while the authorisation application is still being decided. For more information see the Commission's [Authorisation Guidelines](#).
35. The Minister also has the power to recommend exemptions for the purpose of enabling persons to agree to collectively negotiate supply agreements with 1 or more RGR. However, to our knowledge, no action has been taken to start the process to make such an exemption yet.

D. Practical tips

- ✓ Communicate clearly
- ✓ Seeking written clarity now can avoid disputes in the future
- ✓ Keep good records and follow up in writing
- ✓ Try to avoid disclosing your confidential information if possible
- ✓ Know what your rights are under the Code and other legislation; remember the RGR must deal with you in good faith
- ✓ Have a copy of your GSA; if you don't have your own copy you can request a copy from the RGR
- ✓ You can also consider...
 - Raising concerns with a more senior person within the retailer
 - Raising concerns with the Commission:
 - <https://comcom.govt.nz/make-a-complaint>
 - 0800 943 600
 - contact@comcom.govt.nz
 - Reaching out to the NZFGC, NextGen Group, or Matthews Law or other legal advisor