

Webinar on the Grocery Code of Conduct

Answers from the Commerce Commission | February 2024

What are these questions and answers?

These are answers provided by the Commerce Commission Grocery Team in response to questions from HortNZ's webinar on 14 February 2024.

Questions and Answers

Webinar Questions	Commerce Commission Grocery Team Answers
Markets control the supply of certain products into retailers, making it really hard to get direct supply to retailers unless your product goes through the markets. Will this be looked at?	We are still learning about the dynamics in this part of the wider grocery sector and are interested in hearing more about this. You could provide information through the complaints or anonymous reporting tool channels, or this might be a topic that Horticulture NZ could help gather information on to support a conversation.
Does the Code apply if you don't have a contract with the supermarket? E.g. does the fresh produce rejection clause apply to all suppliers, or just those with formal supply contracts?	The Code requires that Regulated Grocery Retailers (RGR) put all their supply agreements in writing, including existing agreements that haven't been written down. They have until 28 March 2024 to make offers that comply with this and with the rest of the Code (there is no requirement to accept the offer by this date). If there are arrangements that continue outside of this, we are interested in understanding why. If, for example, it is because you are selling through a wholesaler, and do not have a direct agreement with the RGR, then the Code would not cover this arrangement.
How can we address suppliers that sell directly to the store and don't meet product specifications. Is there a whistleblower forum e.g. around costly compliance requirements or meeting quality and shelf life specifications - Foodstuffs DC's having much stricter specs than individual stores - but must they (DC & Store) now be aligned?	Clause 21 requires that the retailer ensure any fresh produce standard or specifications are reasonable and provided to the supplier in clear, unambiguous, and concise written terms. If you have examples (including names of stores) that you consider to be unreasonable this would be really useful to us. You can contact us through Horticulture NZ or through the anonymous reporting tool if you are concerned about revealing your identity. There will also soon be a grocery dispute resolution scheme which will provide another avenue, independent of the Commerce Commission, for raising specific disputes. That scheme is currently being established by New Zealand Dispute Resolution Centre and Hort NZ has recently submitted on

	<p>the proposed rules of the scheme. Updates on the scheme will be provided at www.nzdrc.co.nz. We will also provide updated info about the scheme when it is up and running.</p>
<p>Are requests for certain types of transport allowed if it is linked to a quality standard? i.e. temperature controlled truck</p>	<p>Clause 11 prohibits the Regulated Grocery Retailer from requiring you to use their transport but it does allow the retailer to impose reasonable service standards for transport and logistics. What constitutes "reasonable" is likely to depend on the context. For example why does the retailer consider a temperature controlled truck is needed and could the same risk be addressed another way. Or it might be that it is reasonable to require a temperature controlled truck but unreasonable to set a certain temperature requirement. We may be able to develop guidance on these types of matters but first we need to understand what the issues are, so we would appreciate any examples.</p>
<p>Good to see clause 21 and the 24-48hour time frames on rejections. What about settlement of credits e.g. 96 hours later one regulated retailer had a quality issue and use an "off setting" practice to just take money off us, when they are actually outside their rejection timeframes. Are their time protections on credits - and any thoughts on things like off setting and indemnity clauses?</p>	<p>Clause 12 prevents the retailer from setting off any amount against a supplier's invoice or remittance unless the supplier has either consented in writing to that set-off, or the supply agreement provides for the set-off and the set-off is reasonable in the circumstances. This is an example of a clause where the default position is that the retailers won't be able to do something, but the Code does allow for you to "contract out" or agree that it can happen. As we discussed in the presentation, you should only be contracting out if it is in your best interest.</p>
<p>The code is designed to increase bargaining power or to keep contracts more transparent - if we don't have a contract or agreement with the Big3 RGRs and only supply via marketers (ie our contracts are with MGs, T&G etc) then this code will have little effect for many fresh produce growers in negotiating terms or in recall situations... Is this correct?</p>	<p>Yes this is correct. The Grocery Supply Code currently only applies to direct trade with Regulated Grocery Retailers. Supply via marketers or wholesalers is a gap that would require further policy work by MBIE and legislation to address. We would appreciate information about issues under the status quo so we can feed this back.</p>
<p>How are you going to ensure that growers are getting a fair price for their produce? All growers production costs have gone up and so it is only fair that their prices increase to cover these ongoing costs. Supermarkets are making multi-million dollar profits yet some growers are selling their produce at a loss or are just cutting even.</p>	<p>The Grocery Supply Code does not control price, and we expect robust negotiations between the supplier and retailer with regard to price to occur. However, provisions in the Code are intended to improve the way this trading relationship operates including Clause 28 which sets out a process that must be followed when the supplier informs an RGR of a price increase. There is also a provision in the Act to allow for collective bargaining under certain circumstances, but this would require the making of further</p>

	<p>regulation. Feedback on the need for collective bargaining should be provided to MBIE potentially through Hort NZ.</p>
<p>The code of conduct looks to prevent retailers dictating using their own preferred transporters because of the money they make via this alternative business channel. All of the retailers dictate which crates are allowed or not allowed in their sites, despite the terrible supply performance of some of them. Will these types of agreements be looked at?</p>	<p>It would be helpful for us to have examples of how this is included within your agreements. Requirements for crates is not something that is explicitly discussed in the Code but this is the type of thing that we could look at within the review of the Code next year.</p>
<p>What requirements are on supermarkets to display information about irradiated produce? In my local supermarket, signage about irradiated produce and its country of origin is tiny and way below eye level. Is that allowed?</p>	<p>There are no requirements/regulations under the Fair Trading Act (FTA), or other legislation that the Commission enforces, relating specifically to irradiated produce. Although, requirements may exist under other legislation, for example, industry specific legislation. However, the FTA generally prohibits claims made by businesses that could mislead or deceive consumers, for example, about food content, or its nature, manufacturing process, characteristics, quality or quantity. Claims which cannot be substantiated are also prohibited (i.e. claims must be able to be backed up).</p> <p>Any food labelling claim which is factually incorrect is likely to be misleading or deceptive. Consumers may also be misled where claims are made and differing interpretations can be taken from the information. If one of those interpretations has the potential to lead the recipient into error, it risks being misleading. What needs to be assessed is the overall impression that is provided to the audience, through statements/words, pictures, logos, symbols, graphics or images. A statement may be literally true but still be misleading where an overall misleading impression is created on a label/in an advertisement.</p> <p>The Consumer Information Standards (Origin of Food) Regulations introduced (under the FTA) a mandatory labelling regime for single ingredient and minimally processed fruit, vegetables, meat, seafood and cured pork. Irradiation is a process that does not prevent a food from being considered as only minimally processed. Therefore, the Regulations would apply to irradiated foods that are covered by the Regulations. There are requirements in the Regulations relating to how country of origin information is to be displayed, i.e. in clear and legible text in English or</p>

	<p>Maori and in a way that that makes the connection between the food item and the origin information clear. However, the Regulations do not prescribe the font size for the country of origin information nor the location of that information on packaging and signage</p>
<p>New Zealand growers have strict requirements about how much they pay their workers and all of the environmental standards that they have to meet. What is to prevent supermarkets from just importing the same fruits or vegetables from an overseas country that pays their workers terribly and has no environmental requirements instead of buying New Zealand product first?</p>	<p>Those issues are outside the scope of our powers but it is useful for us to understand what is happening in the sector and the pressures that you are facing.</p>
<p>Can you provide insights into recent trends or patterns observed in pricing strategies within the grocery industry?</p>	<p>We don't have that sort of information available currently. Our monitoring work is underway and will include an Annual Report that seeks to provide more transparency within the sector. The first of these reports will be published this year. While pricing will be covered in the first report it is not the main focus.</p>
<p>Does the Code of Conduct or the Grocery Team have the authority to ensure retailers are acting as levy collectors under the Commodity Levies Act?</p>	<p>No. That legislation is administered by the Ministry for Primary Industries and is outside of our scope. However if it is having an impact on the sector it is useful for us to understand the issues.</p>
<p>What methodologies are being employed to ensure fair competition within the grocery sector?</p>	<p>The Market Study into the Retail Grocery Sector recognised that there are a number of contributing issues and made a range of recommendations which were then implemented by the Government. For example amending the Commerce Act to prevent the use of restrictive grocery-related covenants and requiring major grocery retailers to open wholesale offerings to other grocery retailers. We will be continuing to monitor competition and considering the need for further interventions.</p>
<p>How are you addressing concerns related to market dominance or anti-competitive behavior among grocery retailers?</p>	<p>A strong focus currently is to implement the requirements of the new grocery regime, however a really important aspect of this is that we will be monitoring the sector and seeking to highlight areas or behaviours that suggest the need for more regulatory intervention.</p>
<p>How do you assess the impact of mergers and acquisitions on market competitiveness within the grocery sector?</p>	<p>Mergers are assessed using the substantial lessening of competition test. If you would like to read more about this process, there is more information here -</p>

	https://comcom.govt.nz/business/merging-or-acquiring-a-company
<p>What measures are in place to safeguard consumer interests, particularly regarding pricing transparency and product quality?</p>	<p>The Fair Trading Act (FTA) prohibits businesses from making false or misleading representations about the price of any goods or services. Any claims made must be accurate, clear and unambiguous. This also applies to any price promotions, where pricing techniques are used to promote goods or services. Techniques used include savings and special offers, sales promotions, or making pricing comparisons with competitors. Such promotions represent special buying opportunities and consumers expect to receive genuine savings.</p> <p>Unit Pricing Regulations (under the FTA) came into effect as of 31 August 2023. There is a transition period for complying with the Regulations. Physical stores must comply by 31 August 2024 and online stores by 31 August 2025. Not all grocery retailers will need to comply with the Regulations – the Regulations apply to any grocery retailer who has an internal floor space of over 1,000sqm and sells in ten specified product categories, as well as to any online retailer that sells the ten specified product categories. The Regulations require regulated grocery retailers to display the unit price for goods clearly and legibly, at no less than 25% the size of the marked price. This applies to in store, online and some advertised prices. The Commission is developing guidance for these new Regulations.</p> <p>We note that the Consumer Guarantees Act (CGA) sets out consumer rights if there is a problem with a product or service. It sets minimum guarantees for products and services, including a guarantee of acceptable quality for goods. The Commission does not enforce the CGA (rather it is self-enforcing). Information about how the CGA protects consumers can be found at https://www.consumerprotection.govt.nz/general-help/consumer-laws/consumer-guarantees-act/</p>

WHERE TO GO FOR MORE INFORMATION

- [Commerce Commission website](#)
- HortNZ contact: Emily Levenson, Emily.levenson@hortnz.co.nz