

New Zealand Grocery Code of Conduct Consultation 2022

Submission by Christians Against Poverty

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To:
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Executive Summary

Tēnā koe Consumer and Competition Policy Team,

Christians Against Poverty (CAP) welcomes the opportunity to comment on the Ministry of Business, Innovation and Employment's (MBIE) Grocery Code of Conduct Consultation Paper.

CAP agrees with the objective of the Code of Conduct to improve the dealings between major grocery retailers and suppliers in the grocery market. From the market study of the grocery sector, issues caused by the imbalance of negotiating power between retailers and suppliers need to be addressed to create healthy competition in this sector. CAP also looks forward to seeing how the Code will help suppliers innovate and invest in new grocery products.

CAP supports an alternative code that considers Māori economic development and tikanga Māori. As stated by MBIE, the Māori economy is estimated to be worth between \$50-60 billion. Māori own a substantial share of assets in the primary industries, including 50% of fishing quota, 30% beef, lamb, and sheep production, 10% of kiwifruit production and 10% of dairy. In addition, a growing base of food and grocery businesses are run by Māori. However, Māori have limited involvement in governance and management of the food and grocery retail sector. Therefore, the Code of Conduct must support Māori economic development and tikanga Māori.

Thank you for the opportunity to provide input, and I welcome any questions.

Nāku noa, nā



Matilda Gaby

Introduction to Christians Against Poverty

Free debt counselling and money education

CAP's free nationwide Debt Help service has helped thousands of New Zealanders live on a budget over the last 12 years, pay off debts, and grow in financial capability.

CAP visits approximately 100 households each month. As a result, CAP constantly comes face-to-face with the crushing despair and misery created by debt. Over half of CAP clients could not provide three meals a day for their children. Over 65% of clients owe money for utilities and housing.¹ Before coming to CAP, 1 in 4 clients had contemplated or attempted taking their lives.²

CAP has helped thousands of clients pay off over 38 million dollars of debts and bills and enabled the write-off of over \$30 million of debt through negotiations with creditors and insolvency. The fruits of this work mean that over 2,000 whānau have become debt-free.

In response to the vast need that we saw in families struggling in debt, Christians Against Poverty also developed the CAP Money course in March 2009. Over 15,000 people have completed a CAP Money course to learn how to take control of their finances.

Consultation Paper Questions

Q1. Do you have any comments in relation to Chapter 1, in particular any comments on:

- **the objectives (section 2.2)?**
- **evaluation criteria for the Code (section 2.3)?**

CAP agrees with the objective of the Code of Conduct to improve the dealings between major grocery retailers and suppliers in the grocery market. From the market study of the grocery sector, issues caused by the imbalance of negotiating power between retailers and suppliers need to be addressed to create healthy competition in this sector. CAP also looks forward to seeing how the Code will help suppliers innovate and invest in new grocery products.

CAP supports the evaluation criteria for the Code. The Code needs to be effective, efficient, and durable to uphold the Code's objective and ensure the grocery market is working well for grocery retailers, their suppliers, and consumers. It is also essential to reflect the economic considerations connected to the Code and ensure that it is flexible enough to adapt to changes in the grocery market over time.

¹ Christians Against Poverty New Zealand. (2020). *Below Zero: Living in unmanageable debt in Aotearoa*.

² Ibid.

Q2. In relation to section 3.3, which of the three Designation Options do you think is best, and why?

The designation of major grocery retailers should incorporate a reasonable revenue threshold. CAP supports Option B, where the revenue threshold is more than \$750 million. Option B also includes powers of investigation for the industry watchdog, which is vital in keeping the industry accountable. Most importantly, Option B will mean that potential new entrants into the grocery market will not see the Code as a barrier to entry until they are making reasonable profits.

Q3. In relation to section 3.4, which of the three Options do you think is best, and why?

CAP thinks Option B is best, where obligations are placed on head office and some stores (but excludes smaller stores). As the paper outlines, option B is the most effective and durable option.

Q4. Do you have any comments on the preliminary assessment of the options against the criteria in Chapter 3?

Option B is the most preferred option based on the criteria. For example, Option B is effective as new entrants must comply with the Code once they reach a moderate size. This option is also flexible for any future changes needed. We note that Option B may result in higher administrative costs for the government. However, the other two options also result in new entrants facing compliance costs.

Q5. In relation to 4.2 purpose of the Code, which of the three options do you agree with, and why?

CAP agrees with Option 3, the alternative Code. The purpose of the Code should be to increase competition in the market for long-term benefit of consumers. As well as supporting economic development in the grocery industry, the alternative Code considers Māori economic development and tikanga Māori. As stated by MBIE, the Māori economy is estimated to be worth between \$50-60 billion. Māori own a substantial share of assets in the primary industries, including 50% of fishing quota, 30% beef, lamb, and sheep production, 10% of kiwifruit production and 10% of dairy. In addition, a growing base of food and grocery businesses are run by Māori. However, Māori have limited involvement in governance and management of the food and grocery retail sector. Therefore, the Code of Conduct must support Māori economic development and tikanga Māori.

Q6. Do you see any risks if the purpose of the Code was to:

- address any impacts of the major grocery retailers' trading relationship with the supplier on other grocery retailers, or
- support any wholesale supply arrangements?

If yes, please explain the risks.

N/A

Q7. In relation to 4.3 overarching obligations, which of the three options do you agree with, and why?

CAP agrees with Option 3, the alternative Code. The combined good faith and fair dealing obligation in Option 3 are likely to be the most effective. It provides more protection for suppliers by requiring a designated retailer to consider the characteristics of the supplier.

Q8. Do you have any views on how to incorporate tikanga Māori or Te Ao Māori in the Code?

CAP supports tikanga Māori such as manaakitanga and whānaungatanga to be incorporated in the Code, particularly to encourage fair dealing and effective dispute resolution outcomes.

Q9. How can the Code best incorporate economic development objectives, including those of Māori?

- Māori need to be involved in the governance and management of the food and retail sector.
- Māori must be given more opportunities to supply products to grocery retailers.
- The Code should support Māori economic development, e.g., access to data about consumer preferences and market opportunities.

Q10. Do you have any comments on the preliminary assessment of the options against the criteria in Chapter 4?

We support the preliminary assessment of the options in Chapter 4. Please see the responses to Questions 5 to 9.

Q11. In relation to 5.2 Requirements for supply agreements to be written and contain minimum content, which of the options do you agree with, and why?

Is there any content that you think should be required in grocery supply agreements but is not mentioned?

CAP agrees that Option 2 or 3 are more effective and efficient than Option 1 as Option 1 may result in variable content of grocery supply agreements. All supply agreements should be written in clear and concise language and contain certain minimum content. Increasing the use of written grocery supply agreements will ensure that suppliers are not pressured to accept unfavourable supply terms and conditions. Ensuring minimum content also improves transparency across the industry and ensures that any changes are made in writing. In addition, Options 2 and 3 are close to the requirements in Australia and somewhat aligned with the United Kingdom. This ensures that New Zealand is keeping up with best practices internationally.

Q12. In relation to 5.3 limiting unilateral and retrospective variations, which of the options do you agree with, and why?

N/A

Q13. Do you have any comments on the preliminary assessment of the options against the criteria in Chapter 5?

CAP agrees that options 2 and 3 are the most preferred options against the criteria. Option 2 and 3 are effective as they outline the minimum content requirements for grocery supply agreements, giving suppliers certainty of supply terms. It also protects suppliers from unexpected or unreasonable unilateral variations that may impose costs or risks. We note that requiring minimum content of grocery supply agreements does mean that Options 2 and 3 are less durable over time as the content is fixed. Option 2 and 3 would also result in implementation costs. However, Option 1 would also result in these same costs.

Q14. In relation to 6.2 Changes in supply chain processes, which option do you think is best, and why?

Are suppliers being pressured to use a retailer's own logistics services and if so, what is the impact?

N/A

Q15. In relation to 6.3 fresh produce standards and quality specifications, do you think the Code should include specific provisions about fresh produce and if yes, please explain what you think it should include?

Suppliers should be responsible for supplying fresh and high-quality fresh produce. At the same time, retailers must be transparent regarding their produce standards and quality specifications. CAP supports Option 3 compared to Option 1 as it will likely be more effective because of the stronger good faith and fair dealing provisions.

Q16. In relation to 6.4 Obligations in relation to ranging, shelf allocation, and delisting, which option do you think is best, and why?

Option 3 is best against the effective, efficient, and durable criteria concerning product ranging, shelf space allocation, range reviews and delisting. For example, as well as requiring consistent treatment of all suppliers against a retailer's product ranging and shelf space allocation principles, the alternative Code also prohibits any notice of delisting to be provided before or as part of a range review process.

We also believe Option 3 will address concerns about the sale of private label brands by the major retailers. We support Consumer NZ's view that private brands may have an anti-competitive effect overall and prevent the introduction of lower priced goods.

Q17. In relation to 6.5 Other obligations, which option do you think is best, and why? Please comment on the range of different areas – confidential information, intellectual property, business disruption, freedom of association, whistle-blower protections, pressure to opt out of wholesale supply arrangements, exclusive supply clauses and 'most favoured nation' price clauses.

CAP supports Option 2, the prescriptive Code. This is because it recognises that for Māori suppliers, some knowledge that underpins intellectual property may be a taonga – a cultural treasure – and should be respected. Taonga have importance to Māori that extends beyond sentiment to spiritual value. Taonga includes a sacred regard for the whole of nature and a belief that resources are gifts from ancestors for which current generations of Māori are responsible stewards.

Q18. Do you have any other comments about issues relating to product supply and placement?

CAP would like to reiterate that product placement significantly impacts product sales. CAP advocates for value-priced products to be at eye level for the benefit of consumers, particularly those that are on a budget or are experiencing material hardship.

Q19. Do you have any comments on the preliminary assessment of the options against the criteria in Chapter 6?

N/A

Q20. In relation to 7.2 Payment terms and set-offs, which option do you think is best, and why?

CAP agrees with MBIE's views that Option 3 is the most effective because it provides a positive obligation on designated retailers to make prompt payments, with a backstop (of the grocery supply agreement) to avoid extended payment times.

Q21. In relation to 7.3 Responses to price increases, which option do you think is best, and why?

CAP supports Options 2 and 3 as they are effective at providing transparency of the process for suppliers, with relatively low administrative costs. A prompt response time should be regulated, and a 30-day maximum response time should improve the promptness of responses for most suppliers.

Q22. In relation to 7.4 Payments for shrinkage and wastage, which option do you think is best, and why?

Suppliers must be responsible if they do not supply fresh and high-quality products. At the same time, a prospective code must protect suppliers from untrue claims, especially those

resulting from products that have failed to sell or were damaged on the retailers' premises. The Alternative Code is, therefore, the best option as it includes a sunset clause prohibiting claims for wastage after six months.

Q23. In relation to 7.5 Payments for retailer's business activities, product placement, and as a condition of being a supplier, which option do you think is best, and why?

CAP supports MBIE's views that Option 3 is likely to be most effective (and equally durable as option 2) because it prohibits payments that are not directly linked to services and requires refunds (or even compensation) where the relevant services are paid for but not provided.

Q24. In relation to 7.6 Payments for promotions and promotional buying, which option do you think is best, and why?

What are your views on promotional buying and investment buying?

Option 3 is the most effective and efficient option because it provides transparency and clarity around a reasonable cost split while prohibiting a supplier from fully funding the promotion.

Q25. Do you think requests from retailers for payments for data services is an issue and if so, why?

CAP believes the retailers' requests for data services payments are an issue. Suppliers should not be forced to purchase data from designated retailers' data services as part of the supply agreement. Suppliers should have access to the same data designated retailers use when conducting range reviews.

Q26. Are there any other instances where requests for payments should be limited? If so, what are the issues and how should they be addressed in a Code?

N/A

Q27. Do you have any comments on the preliminary assessment of the options against the criteria in Chapter 7?

Option 3 seems to be the most effective as it aligns with New Zealand requirements.

Q28. Do you have any comments about the current state of dispute resolution (for example, the processes that are used or the nature of disputes)?

CAP is concerned that there are indications that the existing mechanisms are not used very often by suppliers. We believe that this suggests there are barriers to suppliers raising a dispute, thus making the dispute resolution services ineffective and inaccessible.

We also support MBIE's desire to design and deliver dispute resolution processes that are culturally responsive to Māori and accessible to any Māori supplier seeking dispute resolution.

This could include offering tikanga-based processes (such as having regard for the appropriate tikanga Māori and upholding the mana of the parties in a dispute), providing the opportunity for te reo Māori (or New Zealand sign language) to be used, having requirements for culturally competent practitioners, and reporting on outcomes for Māori.

Q29. Do you have any comments on the particular criteria in Chapter 8.5 used to undertake the preliminary assessment of options for dispute resolution?

CAP supports the criteria.

- User focussed and accessible: Dispute resolution must be easy for potential users to find, enter and use regardless of their capabilities and resources.
- Independent and fair: All dispute resolution functions need to be carried out objectively and unbiasedly.
- Efficient: Dispute resolution provides value for money through appropriate, proportionate, and timely responses to issues. They evolve and improve over time.
- Effective: Dispute resolution delivers sustainable results and helps minimise conflict and improve productivity.

Q30. In relation to Chapter 8.6 The options for New Zealand, which of the three options do you think will work best, and why?

CAP thinks Option 3 will work best. Retailers and suppliers should negotiate and attempt to resolve their conflict in the first instance. If self-resolution is unsuccessful, adjudication may be needed. It is important that throughout this process, the confidentiality of the retailer's representatives is upheld, costs of adjudication are met by the designated retailer, and provisions ensure the delivery of Māori culturally responsive dispute resolution processes cater to the parties' views.

Option 3 is desirable as adjudication would be accessible for suppliers, it is independent and impartial, and clear timeframes for negotiation and the adjudication process should deliver prompt and sustainable results.

Q31. Do you have any comments on the preliminary assessment of the options against the criteria in Chapter 8?

Please see the response to Question 30.

Q32. Do you have any views on the Australian and UK approaches to monitoring, compliance obligations, and enforcement, and which might be most effective for New Zealand?

CAP would like to see the same approaches to monitoring, compliance obligations, and enforcement implemented in New Zealand as they are in both Australia and the United Kingdom. CAP believes that staff need to be appointed for specific dispute resolution functions. Staff should also be required to attend ongoing training sessions so they comply

with the Code. CAP also encourages that there be a requirement to report on compliance with the Code.

We support Consumer NZ's statement that including strong enforcement provisions will give consumers the confidence that designated retailers are complying with the Code. Consumers may also benefit from improved conduct between the retailers and suppliers.

Q33. Do you have any comments on the potential compliance costs (for suppliers and designated retailers) from the proposed content of the Code of Conduct?

N/A

Q34. Do you have any views on how the Code should be implemented?

CAP supports the plan to stage the implementation of the Code. CAP is particularly supportive that provisions that do not require the modification of any existing contractual arrangements come into effect 30 days after any regulation is passed.

Q35. Do you have any other comments on the matters discussed in Chapter 9?

N/A

Closing Remarks

CAP would like to thank you for taking the time to review our submission. The Grocery Code of Conduct consultation is necessary to protect supplier and consumers' interests and ensure the grocery sector is effective and efficient.

We welcome any further discussion you may wish to have.