

EXPOSURE DRAFT



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Competition and Consumer (Industry Codes— Food and Grocery) Amendment Regulations 2019

I, General the Honourable Sir Peter Cosgrove AK MC (Ret'd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulations.

Dated 2019

Peter Cosgrove
Governor-General

By His Excellency's Command

Stuart Robert **DRAFT ONLY—NOT FOR SIGNATURE**
Assistant Treasurer

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1 Name

This instrument is the *Competition and Consumer (Industry Codes—Food and Grocery) Amendment Regulations 2019*.

2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Sections 1 to 4 and anything in this instrument not elsewhere covered by this table	The day after this instrument is registered.	
2. Schedules 1 and 2	The day after this instrument is registered.	
3. Schedule 3, items 1 to 26	The day after this instrument is registered.	
4. Schedule 3, items 27 and 28	The day after the end of the period of 3 months beginning on the day this instrument is registered.	
5. Schedule 3, items 29 to 32	The day after this instrument is registered.	
6. Schedule 4	The day after this instrument is registered.	

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under section 51AE of the *Competition and Consumer Act 2010*.

4 Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

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Schedule 1 Extension of Part 3 of the Code to wholesalers

Schedule 1—Extension of Part 3 of the Code to wholesalers

Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015

1 Clause 3 of Schedule 1 (definition of *grocery supply agreement*)

Omit “between a retailer or wholesaler and a supplier”, substitute “between a retailer and a supplier (other than a wholesaler), or between a wholesaler and a supplier,”.

2 Clause 3 of Schedule 1 (definition of *own brand product*)

After “retailer” (wherever occurring), insert “or wholesaler”.

3 Clause 3 of Schedule 1 (at the end of the definition of *supplier*)

Add “(whether or not that other person is the person supplied)”.

4 Subclause 4(2) of Schedule 1 (note 1)

Repeal the note.

5 Subclause 4(2) of Schedule 1 (note 2)

Omit “Note 2”, substitute “Note”.

6 Clause 11 of Schedule 1

Repeal the clause, substitute:

11 Application of this Part

This Part does not apply in relation to supplies to a retailer by a wholesaler.

7 Subclauses 12(1), (2) and (4) and 13(1) and (2) of Schedule 1

After “retailer”, insert “or wholesaler”.

8 Subclause 14(1) of Schedule 1

Repeal the subclause, substitute:

- (1) The retailer or wholesaler must not directly or indirectly require a supplier to make any payment to cover any wastage of groceries incurred at premises of:
 - (a) the retailer or wholesaler; or
 - (b) a contractor or agent of the retailer or wholesaler; or
 - (c) any other entity that is a retailer or wholesaler.

9 Paragraph 14(2)(a) of Schedule 1

After “retailer”, insert “or wholesaler”.

10 Paragraph 14(2)(d) of Schedule 1

After “retailer’s”, insert “or wholesaler’s”.

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Extension of Part 3 of the Code to wholesalers **Schedule 1**

11 Paragraph 14(2)(e) of Schedule 1

After “retailer”, insert “or wholesaler”.

12 Subclauses 14(3) and 15(1) of Schedule 1

After “retailer”, insert “or wholesaler”.

13 Subclause 15(2) of Schedule 1

After “apply”, insert “in relation to the retailer”.

14 After subclause 15(2) of Schedule 1

Insert:

(2A) Subclause (1) does not apply in relation to the wholesaler 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 or listed by the wholesaler during the preceding 365 days in 25% or more of its distribution centres; and
 - (iii) is reasonable having regard to the costs and risks to the wholesaler in stocking or listing the grocery products.

15 Subclause 15(3) of Schedule 1

Omit “Paragraph (2)(a) has effect”, substitute “Paragraphs (2)(a) and (2A)(a) have effect”.

16 Subclause 15(4) of Schedule 1

After “retailer”, insert “or wholesaler”.

17 At the end of subclause 15(4) of Schedule 1

Add “or (2A)”.

18 Clause 16 of Schedule 1 (at the end of the heading)

Add “—retailers”.

19 At the end of clause 16 of Schedule 1

Add:

- (4) This clause does not apply to a corporation to the extent that it is bound by this code as a wholesaler.

20 Clause 17 of Schedule 1 (heading)

After “retailer’s”, insert “or wholesaler’s”.

21 Subclause 17(1) of Schedule 1

After “retailer”, insert “or wholesaler”.

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Schedule 1 Extension of Part 3 of the Code to wholesalers

22 Subclause 17(1) of Schedule 1

After “*retailer’s*”, insert “*or wholesaler’s*”.

23 Paragraphs 17(1)(e) and (3)(a) of Schedule 1

After “*retailer’s*”, insert “*or wholesaler’s*”.

24 Paragraph 17(3)(b) of Schedule 1

Omit “*from the retailer’s activities*”, substitute “*or wholesaler from the retailer’s or wholesaler’s activities*”.

25 Paragraph 17(3)(c) of Schedule 1

Omit “*for the retailer’s activities*”, substitute “*or wholesaler for the retailer’s or wholesaler’s activities*”.

26 Subclauses 17(5) and 18(1) of Schedule 1

After “*retailer*”, insert “*or wholesaler*”.

27 Paragraphs 18(3)(b) and (c) of Schedule 1

After “*retailer*”, insert “*or wholesaler*”.

28 Subclauses 18(5) and 19(1) of Schedule 1

After “*retailer*”, insert “*or wholesaler*”.

29 Paragraphs 19(2)(b) and (c) of Schedule 1

After “*retailer’s*”, insert “*or wholesaler’s*”.

30 Paragraph 19(6)(b) of Schedule 1

After “*retailer*”, insert “*or wholesaler*”.

31 Subclause 19(7) of Schedule 1

After “*retailer’s*” (first occurring), insert “*or wholesaler’s*”.

32 Subclause 19(7) of Schedule 1

After “*retailer*”, insert “*or wholesaler*”.

33 Subclause 19(7) of Schedule 1

After “*retailer’s*” (last occurring), insert “*or wholesaler’s*”.

34 Subclauses 19(8) and (9) of Schedule 1

After “*retailer*”, insert “*or wholesaler*”.

35 Clause 20 of Schedule 1 (at the end of the heading)

Add “*—retailers*”.

36 At the end of clause 20 of Schedule 1

Add:

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Extension of Part 3 of the Code to wholesalers **Schedule 1**

- (5) This clause does not apply to a corporation to the extent that it is bound by this code as a wholesaler.

37 After clause 20 of Schedule 1

Insert:

20A Funded promotions—wholesalers

- (1) If a supplier agrees to make a payment in support of the promotion of a product, the wholesaler may hold the promotion only after giving the supplier reasonable written notice.
- (2) If the wholesaler orders a grocery product from a supplier at a promotional price (whether calculated by way of discount, rebate, credit, allowance or otherwise), the wholesaler must:
 - (a) ensure that the basis on which the quantity of the order is calculated is transparent; and
 - (b) not over-order; and
 - (c) if the wholesaler sells any over-ordered product other than at, or below, the promotional resale price—pay the supplier the difference between the supplier’s promotional price and the supplier’s full price for the product.
- (3) If the wholesaler has placed an order for a grocery product with a supplier in connection with a promotion, the wholesaler must not do either of the following without the supplier’s written consent:
 - (a) cancel the order;
 - (b) reduce the order by more than 10%.
- (4) Subclause (3) does not apply if:
 - (a) the wholesaler gives the supplier reasonable written notice of the cancellation or reduction; or
 - (b) the wholesaler compensates the supplier for any net resulting costs, losses or expenses incurred or suffered by the supplier as a direct result of the wholesaler failing to give reasonable notice of the cancellation or reduction.
- (5) This clause does not apply to a corporation to the extent that it is bound by this code as a retailer.

38 Subclauses 21(1) to (7) and 22(1) and (2) of Schedule 1

After “retailer” (wherever occurring), insert “or wholesaler”.

39 Clause 23 of Schedule 1

After “retailer”, insert “or wholesaler”.

40 Subclauses 24(1), (3), (4) and (5) and 25(1) to (4) of Schedule 1

After “retailer” (wherever occurring), insert “or wholesaler”.

41 Clause 26 of Schedule 1 (heading)

Repeal the heading, substitute:

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Schedule 1 Extension of Part 3 of the Code to wholesalers

26 Product ranging, shelf space allocation and range reviews

42 Subclause 26(1) of Schedule 1

Repeal the subclause, substitute:

- (1) The following must be published or provided to all suppliers with whom the retailer or wholesaler has grocery supply agreements:
 - (a) the retailer's or wholesaler's product ranging principles;
 - (b) in the case of a retailer—the retailer's shelf space allocation principles.

43 Subclauses 26(2), (3) and (4) of Schedule 1

After “retailer”, insert “or wholesaler”.

44 Subclause 26(4) of Schedule 1

After “retailer's”, insert “or wholesaler's”.

45 Subclause 26(5) of Schedule 1

Repeal the subclause, substitute:

- (5) The retailer or wholesaler must apply:
 - (a) its product ranging principles; and
 - (b) in the case of a retailer—its shelf space allocation principles;without discrimination (including without discrimination in favour of its own brand products).

46 Subclauses 27(1) and (2) of Schedule 1

After “retailer” (wherever occurring), insert “or wholesaler”.

Schedule 2—Dispute resolution

Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015

1 Clause 3 of Schedule 1

Insert:

Code Arbiter means a Code Arbiter appointed under subclause 31(1).

2 Clause 3 of Schedule 1 (definition of *code compliance manager*)

Repeal the definition.

3 Clause 3 of Schedule 1

Insert:

Independent Reviewer means the Independent Reviewer appointed under clause 37.

proposed remedy has the meaning given by subclause 36(1).

4 Paragraph 30(1)(b) of Schedule 1

Omit “code compliance manager”, substitute “Code Arbiter”.

5 Division 1 of Part 5 of Schedule 1 (heading)

Repeal the heading, substitute:

Division 1—The Code Arbiter

6 Clauses 31 and 32 of Schedule 1

Repeal the clauses, substitute:

31 Code Arbiter

Appointment of Code Arbiter

- (1) The retailer or wholesaler must appoint a Code Arbiter for the retailer or wholesaler in relation to this code.
- (2) The Code Arbiter must not be engaged by the retailer or wholesaler in any capacity other than as Code Arbiter.
- (3) The retailer or wholesaler must notify the Commission and the Independent Reviewer of:
 - (a) the Code Arbiter’s appointment; and
 - (b) contact details for the Code Arbiter to be used by suppliers to raise a complaint with the Code Arbiter.

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Schedule 2 Dispute resolution

Obligations of retailer or wholesaler in relation to Code Arbiter

- (4) The retailer or wholesaler must pay costs of the Code Arbiter as necessary to ensure the Code Arbiter is sufficiently resourced to perform the Code Arbiter's functions.
- (5) The retailer or wholesaler must not influence, or attempt to influence, the Code Arbiter in the performance of the Code Arbiter's functions.
- (6) The retailer or wholesaler must ensure that the Code Arbiter has access to:
 - (a) all documentation held by the retailer or wholesaler in relation to any dispute with a supplier relating to the retailer's or wholesaler's obligations under this code; and
 - (b) the retailer's or wholesaler's buying team for the purposes of discussing issues relating to the retailer's or wholesaler's obligations under this code.
- (7) The retailer or wholesaler must give the Code Arbiter authority to enter into an agreement on behalf of the retailer or wholesaler to settle a dispute relating to the retailer's or wholesaler's obligations under this code.

Obligation of Code Arbiter to act in accordance with documented procedure

- (8) The Code Arbiter must act in accordance with a written complaints handling procedure that:
 - (a) has been developed by the Code Arbiter; and
 - (b) has been provided to the Independent Reviewer; and
 - (c) is reviewed annually and updated as necessary.

7 Division 2 of Part 5 of Schedule 1

Repeal the Division, substitute:

33 Referral of complaints

- (1) A supplier may direct a complaint relating to a matter covered by this code to the Code Arbiter. The complaint must be in writing.
- (2) The complaint must also include the following:
 - (a) the supplier's identification details, including business or trading name;
 - (b) contact details for the supplier, or the person dealing with the complaint on behalf of the supplier, including the name, title and telephone number of that person;
 - (c) details of the conduct giving rise to the complaint, including any documents or other information that would assist the investigation of the complaint.

34 Investigation by Code Arbiter

- (1) The Code Arbiter must take all reasonable steps to investigate the complaint.

Investigation not required for vexatious etc. complaints

- (2) Subclause (1) does not apply if the Code Arbiter:
-

- (a) is satisfied that the complaint is vexatious, trivial, misconceived or lacking in substance; and
 - (b) gives the supplier written notice to that effect.
- (3) However, if the complaint relates to clause 9 (unilateral variation of agreement) or 10 (retrospective variation of agreement), the Code Arbiter must not be satisfied that the complaint is vexatious, trivial, misconceived or lacking in substance only because the supplier's only ground in relation to the complaint is detriment to the supplier.
- (4) A notice under paragraph (2)(b) must set out:
- (a) the Code Arbiter's reasons for being satisfied that the complaint is vexatious, trivial, misconceived or lacking in substance; and
 - (b) that the supplier may take further action in relation to the matter under clause 37B (independent review request) or 38 (mediation or arbitration).

Investigating the complaint

- (5) If the Code Arbiter investigates the complaint, the Code Arbiter must conclude the investigation within 20 business days, or a longer period as extended under subclause (6).
- (6) With the written agreement of the supplier, the period referred to in subclause (5) may be extended by a period of a specified number of days.

Matters that must or may be considered in the investigation

- (7) The Code Arbiter's investigation of the complaint must include consideration of the retailer's or wholesaler's obligation to deal lawfully and in good faith (see clause 6C).
- (8) The Code Arbiter's investigation of the complaint may include consideration of whether the retailer or wholesaler has acted fairly in dealing with the supplier.
- (9) In considering for the purposes of subclause (8) whether the retailer or wholesaler has acted fairly in dealing with a supplier, the Code Arbiter may take the following into account:
- (a) whether the retailer or wholesaler has not acted in a way that denied the supplier the benefits of the contract, or undermined those benefits for the supplier;
 - (b) whether the retailer or wholesaler has acted in accordance with the legitimate and reasonable expectations of the supplier;
 - (c) whether the retailer or wholesaler has had due regard to:
 - (i) the nature of the relationship between the retailer or wholesaler and the supplier; and
 - (ii) the individual characteristics of the supplier that were known, or ought to have been known, by the retailer or wholesaler.

35 Action following investigation

- (1) Within 5 business days after the conclusion of the investigation, the Code Arbiter must:

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Schedule 2 Dispute resolution

- (a) determine what (if any) action should be taken by the retailer or wholesaler in response to the complaint; and
 - (b) give notice of the matters determined as required by subclause (2).
- (2) The Code Arbiter must give the retailer or wholesaler, and the supplier, a notice stating the matters determined under paragraph (1)(a). The notice must:
- (a) be in writing; and
 - (b) state either:
 - (i) that no action is required to be taken in response to the complaint; or
 - (ii) that the retailer or wholesaler should take specified action in relation to the supplier in response to the complaint.
- (3) Without limiting subclause (1), the Code Arbiter may determine that the retailer or wholesaler should do one or more of the following:
- (a) pay compensation to the supplier;
 - (b) vary, subject to clause 9 (about unilateral variation of agreement), a grocery supply agreement with the supplier.
- (4) If the Code Arbiter considers that the retailer or wholesaler should consider modifying its business practices, the Code Arbiter may recommend this in the notice.
- (5) The Code Arbiter must keep the following for at least 6 years:
- (a) a record of the complaint;
 - (b) if the Code Arbiter gives notice under paragraph 34(2)(b) that a complaint is vexatious, trivial, misconceived or lacking in substance—a copy of the notice;
 - (c) a record of the investigations undertaken to investigate the complaint;
 - (d) a summary of any action taken in response to the complaint.

36 Proposed remedies, and when they lapse

- (1) If a notice under clause 35 states that the retailer or wholesaler should take specified action in relation to the supplier in response to the complaint, that action is the *proposed remedy* for the supplier in relation to the complaint.
- (2) The supplier may accept the proposed remedy by written notice given to the Code Arbiter at any time before the remedy lapses.
- (3) The proposed remedy lapses at the end of the period of 20 business days beginning on the day the supplier receives the notice under subclause 35(2) unless, within that period, the supplier:
 - (a) requests the Independent Reviewer to review the Code Arbiter's process in dealing with the complaint under clause 37B; and
 - (b) notifies the Code Arbiter that the supplier has done so.
- (4) If the Independent Reviewer decides not to conduct an independent review, the proposed remedy lapses 10 business days after the day the supplier receives notice of the decision under subclause 37C(3).
- (5) If the Independent Reviewer completes the independent review, the proposed remedy lapses 10 business days after:

- (a) the supplier receives notice of the outcome of the review under subclause 37D(7), unless paragraph (b) applies; or
- (b) for a case where the Independent Reviewer recommends that the Code Arbiter reconsider the complaint—the supplier receives notice under subclause 36B(2) of the outcome of the reconsideration.

36A Accepting the proposed remedy

- (1) If:
 - (a) the supplier notifies the Code Arbiter that the supplier accepts a proposed remedy that has not lapsed; and
 - (b) the retailer or wholesaler has given the Code Arbiter authority to enter into an agreement on behalf of the retailer or wholesaler as required by subclause 31(7);the Code Arbiter must enter into an agreement on behalf of the retailer or wholesaler with the supplier under which the retailer or wholesaler agrees to take the specified action that is the proposed remedy.
- (2) The retailer or wholesaler must comply with the agreement.

36B Reconsideration by Code Arbiter

- (1) This clause applies if:
 - (a) a supplier has made an independent review request under clause 37B in relation to the complaint; and
 - (b) the Independent Reviewer has:
 - (i) conducted an independent review; and
 - (ii) recommended under subclause 37D(6) that the Code Arbiter reconsider the complaint.
- (2) The Code Arbiter must, within 10 business days of the recommendation:
 - (a) reconsider what (if any) action should be taken by the retailer or wholesaler in response to the complaint; and
 - (b) notify the retailer or wholesaler, the supplier, and the Independent Reviewer, accordingly.
- (3) The notice must comply with subclause 35(2).
- (4) If the notice states that the retailer or wholesaler should take specified action in relation to the supplier in response to the complaint, clause 36 applies in relation to the notice in the same way that clause applies to a notice under clause 35, except that the reference in subclause 36(3) to 20 business days is taken instead to be a reference to 10 business days.

36C Report by Code Arbiter

- (1) A Code Arbiter must prepare a written report in respect of each period of 12 months beginning on 1 July.
- (2) The report must set out the following:
 - (a) the number of complaints received for investigation in the reporting period;

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Schedule 2 Dispute resolution

- (b) in general terms and without identifying a complainant—the nature of the complaints received;
 - (c) the time taken to investigate each complaint;
 - (d) the outcome of each investigation;
 - (e) whether or not each complaint was resolved to the satisfaction of the complainant.
- (3) The Code Arbiter must give a copy of the report to the following:
- (a) the retailer or wholesaler;
 - (b) the Commission;
 - (c) the Independent Reviewer.
- (4) The Code Arbiter must prepare the report, and give copies of it as required by subclause (3), within 30 business days after the end of the period.
- (5) Within 1 business day of being given a copy of the report, the retailer or wholesaler must publish a copy of the report on the retailer's or wholesaler's website.

8 Before Division 3 of Part 5 of Schedule 1

Insert:

Division 2—The Code's Independent Reviewer

37 Independent Reviewer

- (1) The Minister is to appoint an Independent Reviewer by written instrument.
- (2) A person is not eligible for appointment as the Independent Reviewer unless the Minister is satisfied that the person:
 - (a) has appropriate qualifications, knowledge or experience in procedural fairness; and
 - (b) has experience working in Australian industry.

37A Role of the Independent Reviewer

The role of the Independent Reviewer is:

- (a) to consider requests to review Code Arbiters' processes in dealing with complaints; and
- (b) to identify emerging and systemic issues in the grocery supply chain relating to the operation of this code.

37B Supplier may request an independent review of Code Arbiter's process

- (1) If:
 - (a) a supplier has directed a complaint (the *original complaint*) relating to a matter to a Code Arbiter; and
 - (b) the supplier is dissatisfied with the steps taken by the Code Arbiter under clause 34;

the supplier may request the Independent Reviewer to review the Code Arbiter's process in dealing with the complaint. The request must be in writing.

- (2) A request under subclause (1) (an *independent review request*) must also include the following:
 - (a) the supplier's identification details, including business or trading name;
 - (b) contact details for the supplier, or the person dealing with the independent review request on behalf of the supplier, including the name, title and telephone number of that person;
 - (c) details of the process giving rise to the independent review request, including any documents or other information that would assist the Independent Reviewer to review the Code Arbiter's process.

37C Independent Reviewer's discretion to conduct an independent review

- (1) The Independent Reviewer must consider the independent review request and decide within 10 business days of the request:
 - (a) to conduct an independent review of the Code Arbiter's process in dealing with the complaint; or
 - (b) not to conduct an independent review of the Code Arbiter's process in dealing with the complaint.

Deciding not to conduct an independent review

- (2) Without limiting the Independent Reviewer's discretion under subclause (1) to decide not to conduct an independent review, circumstances in which the Independent Reviewer might decide not to conduct an independent review include:
 - (a) where the supplier accepted a proposed remedy in relation to the original complaint;
 - (b) where the Independent Reviewer considers that the independent review request is vexatious, trivial, misconceived or lacking in substance;
 - (c) where the Independent Reviewer considers that the independent review request does not relate to the Code Arbiter's process in dealing with the complaint;
 - (d) where the Independent Reviewer considers that conducting the independent review is unlikely to significantly assist the Independent Reviewer in identifying emerging and systemic issues in the grocery supply chain.
- (3) If the Independent Reviewer decides not to conduct the independent review, the Independent Reviewer must notify the supplier and the Code Arbiter in writing. The notice must:
 - (a) be in writing; and
 - (b) set out the Independent Reviewer's reasons for deciding not to conduct the independent review.

37D The independent review

- (1) If the Independent Reviewer decides to conduct the independent review, the Independent Reviewer must notify the supplier, the retailer or wholesaler, and the Code Arbiter in writing.

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Schedule 2 Dispute resolution

- (2) If the Independent Reviewer decides to conduct the independent review, the Independent Reviewer must take all reasonable steps to:
 - (a) consider the independent review request; and
 - (b) complete the review within 20 business days of giving the supplier the notice referred to in subclause (1).
- (3) Without limiting subclause (2), the steps the Independent Reviewer may take include requesting information relating to the original complaint from one or more of the following:
 - (a) the Code Arbiter;
 - (b) the supplier;
 - (c) the retailer or wholesaler.
- (4) A retailer, wholesaler or Code Arbiter who is requested by the Independent Reviewer to provide information relating to the original complaint must comply with the request within 10 business days of receiving it.
- (5) The 20 business day period referred to in paragraph (2)(b) (including the period as extended by a previous application of this subclause) is extended by the number of days during that period in relation to which the following paragraphs apply:
 - (a) on or before the day, but during the period, the Independent Reviewer requested information under subclause (3);
 - (b) the Independent Reviewer does not receive the requested information before the day.
- (6) Following the consideration, the Independent Reviewer may make one or more recommendations to the Code Arbiter. Unless the supplier has accepted a proposed remedy in relation to the original complaint, the Independent Reviewer may recommend that the Code Arbiter reconsider the original complaint.
- (7) Within 5 business days of completing the review, the Independent Reviewer must give the retailer or wholesaler, the supplier, and the Code Arbiter, a notice:
 - (a) stating that the independent review is complete; and
 - (b) setting out the recommendations (if any) made to the Code Arbiter under subclause (6).
- (8) If the Independent Reviewer becomes aware, in connection with the independent review request, that a breach of this code may have occurred, the Independent Reviewer may give particulars of the breach to the Commission.

37E Reports by Independent Reviewer

- (1) The Independent Reviewer must prepare a written report in respect of each period of 12 months beginning on 1 July.
- (2) The report must:
 - (a) be prepared by the first 30 November after the end of the period; and
 - (b) set out the Independent Reviewer's activities in the reporting period.
- (3) The Independent Reviewer must:
 - (a) give a copy of the report to the Commission; and

(b) publish the report on the Independent Reviewer’s website.

9 Subclause 38(2) of Schedule 1

Omit “Division 2 (complaints)”, substitute “Division 1 (about the Code Arbiter) or Division 2 (about the Independent Reviewer)”.

10 At the end of subclause 38(5) of Schedule 1

Add:

; or (c) the supplier has accepted a proposed remedy in relation to the complaint or dispute and the retailer or wholesaler has taken the specified action that is the proposed remedy.

11 Subclause 39(1) of Schedule 1

Omit “the rules of the Institute of Arbitrators and Mediators Australia”, substitute “Resolution Institute Arbitration Rules 2016, as in force on the day Schedule 2 to the *Competition and Consumer (Industry Codes—Food and Grocery) Amendment Regulations 2019* commences”.

12 Subclause 39(2) of Schedule 1

Omit “Institute of Arbitrators and Mediators Australia”, substitute “Resolution Institute”.

13 Subclause 39(4) of Schedule 1

Omit “rules of the Institute of Arbitrators and Mediators Australia”, substitute “rules referred to in subclause (1)”.

14 Subclause 39(5) of Schedule 1

Repeal the subclause.

15 At the end of clause 39 of Schedule 1

Add:

(6) This clause does not apply in relation to a complaint directed to a Code Arbiter.

16 Part 6 of Schedule 1 (heading)

Repeal the heading, substitute:

Part 6—Compliance

17 Clause 41 of Schedule 1

Repeal the clause.

18 Paragraphs 42(2)(i), (j) and (k) of Schedule 1

Repeal the paragraphs, substitute:

- (j) a summary of action that has or will be taken in response to a complaint;
- (k) a copy of a Code Arbiter’s report prepared under subclause 36C(1).

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Schedule 3 Other amendments

Schedule 3—Other amendments

Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015

1 Regulation 4 (note)

Omit “Note”, substitute “Note 1”.

2 At the end of regulation 4

Add:

Note 2: The Commonwealth has expressed the view that retailers and wholesalers that have an annual revenue of \$5 billion or more, or a market share of 5% or more, should agree to be bound by the code.

3 Subregulation 5(1)

Omit “a review”, substitute “reviews”.

4 Subregulation 5(2)

Omit “review”, substitute “first review”.

5 After subregulation 5(2)

Insert:

(2A) A further review must start before the end of the period of 3 years after the commencement of the *Competition and Consumer (Industry Codes—Food and Grocery) Amendment Regulations 2019*.

6 Subregulation 5(3)

Omit “review”, substitute “reviews”.

7 Subregulation 5(4)

Repeal the subregulation.

8 Clause 3 of Schedule 1 (definition of *delist*)

Repeal the definition, substitute:

delist has the meaning given by subclause 19(1A).

9 Clause 3 of Schedule 1 (definition of *grocery supply agreement*)

Omit “for the supply”, substitute “that relates to the supply”.

10 Clause 3 of Schedule 1 (definition of *grocery supply agreement*)

After “supermarket business”, insert “(whether or not the agreement is the principal agreement between them relating to the supply of groceries)”.

11 Subclause 5(4) of Schedule 1

Omit “, 5”.

12 Subclause 6(2) of Schedule 1

Omit “18 months after being bound by this code”, substitute “the offer period provided by subclause (2A)”.

13 After subclause 6(2) of Schedule 1

Insert:

(2A) For the purposes of subclause (2), the offer period is:

- (a) if the wholesaler becomes bound by this code on or after the commencement of the *Competition and Consumer (Industry Codes—Food and Grocery) Amendment Regulations 2019*—the 6 months after the wholesaler becomes bound; or
- (b) if the wholesaler becomes bound by this code before that commencement—the 18 months after the wholesaler becomes bound.

14 Subclause 6(4) of Schedule 1

Omit “5”, substitute “3”.

15 Paragraph 6(4)(b) of Schedule 1

Repeal the paragraph, substitute:

- (b) the following period ends:
 - (i) if the wholesaler becomes bound by this code on or after the commencement of the *Competition and Consumer (Industry Codes—Food and Grocery) Amendment Regulations 2019*—the 12 months after the wholesaler becomes bound;
 - (ii) if the wholesaler becomes bound by this code before that commencement—the 24 months after the wholesaler becomes bound.

16 At the end of Part 1 of Schedule 1

Add:

6A Transitional application—Part 5 of this code

- (1) If a retailer or wholesaler becomes bound by this code on or after the commencement of the *Competition and Consumer (Industry Codes—Food and Grocery) Amendment Regulations 2019*, Part 5 of this code does not apply in relation to the retailer or wholesaler until one of the following (an ***application event***) occurs:
 - (a) the retailer or wholesaler appoints a Code Arbitrator;
 - (b) the period of 6 months after the retailer or wholesaler becomes bound ends.
- (2) However, this clause does not apply unless, on and after becoming bound, the retailer or wholesaler has an internal dispute resolution process at all times until an application event occurs.

6B Transitional application—amendments of this code

- (1) This clause applies if:
 - (a) one or more amendments of this code are made; and

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Schedule 3 Other amendments

- (b) immediately before the amendments commence, a retailer or wholesaler:
 - (i) was a party to a grocery supply agreement; and
 - (ii) was bound by this code; and
 - (c) as a result of the amendments, the agreement does not conform with the requirements of this code in relation to making grocery supply agreements.
- (2) Within 6 months after that commencement, the retailer or wholesaler must offer in writing to vary the agreement so that it conforms with the requirements of this code (as so amended) in relation to making grocery supply agreements.
 - (3) If the supplier concerned accepts the offer, the retailer or wholesaler must so vary the agreement within 6 months after the offer is accepted.
 - (4) Parts 2, 3 and 6 of this code (as so amended) do not apply in relation to the supply of groceries under the agreement until one of the following occurs:
 - (a) the agreement is varied under subclause (3);
 - (b) the period of 12 months that begins when the amendments commence ends.
 - (5) However, this clause does not affect any provision of Part 7 of this code.

17 After Part 1 of Schedule 1

Insert:

Part 1A—Good faith

6C Obligation to deal lawfully and in good faith

- (1) The retailer or wholesaler must at all times deal with suppliers lawfully and in good faith within the meaning of the unwritten law as in force from time to time.
- (2) The retailer or wholesaler must not enter into a grocery supply agreement that contains a provision that limits or excludes the obligation to act in good faith, and, if it does, the provision has no effect.
- (3) In determining whether the retailer or wholesaler has acted in good faith in dealing with a supplier, the following may be taken into account:
 - (a) whether the retailer or wholesaler has acted honestly;
 - (b) whether the retailer or wholesaler has cooperated to achieve the purposes of the agreement;
 - (c) whether the retailer or wholesaler has not acted arbitrarily, capriciously, unreasonably, recklessly or with ulterior motives;
 - (d) whether the retailer or wholesaler has not acted in a way that constitutes retribution against the supplier for past complaints and disputes;
 - (e) whether the retailer's or wholesaler's trading relationship with the supplier has been conducted without duress;
 - (f) whether the retailer's or wholesaler's trading relationship with the supplier has been conducted in recognition of the need for certainty regarding the risks and costs of trading, particularly in relation to production, delivery and payment;

(g) whether, in dealing with the retailer or wholesaler, the supplier has acted in good faith.

(4) Subclause (3) does not limit subclause (1).

18 Subclause 10(1) of Schedule 1

Omit “(1)”.

19 Subclauses 10(2) to (6) of Schedule 1

Repeal the subclauses.

20 At the end of clause 14 of Schedule 1

Add:

(4) 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;

the retailer or wholesaler 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.

21 After subclause 19(1) of Schedule 1

Insert:

(1A) A supplier’s grocery product is *delisted* if:

- (a) the product is removed from the retailer’s or wholesaler’s range of grocery products; or
- (b) the retailer or wholesaler reduces the distribution of the product across the retailer’s stores or the wholesaler’s distribution centres, and that reduction has or is likely to have a material effect on the supplier.

22 Subclause 19(5) of Schedule 1

Repeal the subclause, substitute:

- (5) Prior to delisting a supplier’s grocery product, the retailer or wholesaler must provide reasonable written notice to the supplier of the retailer’s or wholesaler’s decision to delist the product. The notice must:
 - (a) include the reasons for delisting; and
 - (b) inform the supplier of the supplier’s right to have the decision to delist the product reviewed by the retailer’s or wholesaler’s senior buyer for the supplier.

23 After subclause 19(6) of Schedule 1

Insert:

- (6A) The retailer or wholesaler’s senior buyer for a supplier must promptly comply, in writing, with any written request from the supplier for:
 - (a) a statement of the retailer or wholesaler’s reasons for the delisting; or

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(b) information (or additional information) relating to the delisting.

This subclause applies whether or not the retailer or wholesaler complied (or was required to comply) with subclause (5).

24 Before subclause 21(1) of Schedule 1

Insert:

(1A) This clause applies only in relation to fruit and vegetables.

25 Subclause 22(4) of Schedule 1

Omit “and clause 10 (retrospective variation of agreement)”.

26 After clause 27 of Schedule 1

Insert:

27A Negotiating price increases

- (1) This clause applies if a supplier asks the retailer or wholesaler to negotiate with the supplier an increase in the price of groceries that the supplier supplies to the retailer or wholesaler.
- (2) The retailer or wholesaler must not, in the course of the negotiations or as a precondition to entering into the negotiation, require the supplier to disclose commercially sensitive information.

27 At the end of clause 27A of Schedule 1

Add:

- (3) The retailer or wholesaler must conclude its position on the negotiations no later than the end of:
 - (a) the period of 30 days starting on the day (the *start day*) after the retailer or wholesaler agrees in writing with the supplier that the retailer or wholesaler has all of the information reasonably required to consider the case for the increase; or
 - (b) the period, starting on the start day, of such greater number of days that the retailer or wholesaler agrees in writing with the supplier are justified in the particular circumstances.

28 At the end of Part 3 of Schedule 1

Add:

27B Information about negotiating price increases

The retailer or wholesaler must give to its Code Arbiter, in sufficient time for the information to be included in the Code Arbiter’s annual report for a financial year under clause 36C, the following information relating to the financial year:

- (a) the number of occasions during the year on which the retailer or wholesaler concluded its position on negotiations with any supplier for an increase in the price of groceries that the supplier supplies to the retailer or wholesaler;

- (b) how many of those negotiations were negotiations in which the retailer or wholesaler did not conclude its position on the negotiations within the period of 30 days starting on the start day;
- (c) for each of those negotiations to which paragraph (b) applies, the number of days the retailer or wholesaler took from the start day to conclude its position on the negotiations.

29 Part 4 of Schedule 1 (heading)

Repeal the heading.

30 Clause 28 of Schedule 1

Repeal the clause.

31 Paragraph 42(2)(b) of Schedule 1

Omit “or 10(2)(d)”, substitute “or under former paragraph 10(2)(d)”.

32 After paragraph 42(2)(c) of Schedule 1

Insert:

- (ca) a request of a kind mentioned in subclause 19(6A), and any statement or information given as a result of such a request;

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Schedule 4 Transitional, saving and application provisions

Schedule 4—Transitional, saving and application provisions

Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015

1 At the end of Schedule 1

Add:

Part 7—Transitional, saving and application provisions

Division 1—Competition and Consumer (Industry Codes—Food and Grocery) Amendment Regulations 2019

43 Application—amended dispute resolution provisions

- (1) This clause applies to a retailer or wholesaler who is bound by this code on the commencement day.
- (2) Within 6 months after the commencement day, the retailer or wholesaler must appoint a Code Arbiter.
- (3) Subject to subclause (4), Part 5 of the old code continues in force in relation to the retailer or wholesaler until the Code Arbiter is appointed.
- (4) When the retailer or wholesaler appoints a Code Arbiter, complaints referred before that appointment to the code compliance manager must be transferred to the Code Arbiter, unless the code compliance manager was satisfied under subclause 35(2) of the old code that the code compliance manager was not required to investigate the complaint. The new code applies in relation to the transferred complaint as if it had been made to the Code Arbiter under clause 33 of the new code on the day on which it was actually made to the code compliance manager.
- (5) In this clause:

commencement day means the day on which Schedule 2 of the *Competition and Consumer (Industry Codes—Food and Grocery) Amendment Regulations 2019* commences.

new code means this code, as amended by the *Competition and Consumer (Industry Codes—Food and Grocery) Amendment Regulations 2019*.

old code means this code, as in force immediately before the commencement day.

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Transitional, saving and application provisions **Schedule 4**

44 Retrospective variation of grocery supply agreements

The amendments made to clause 10 by Schedule 3 to the *Competition and Consumer (Industry Codes—Food and Grocery) Amendment Regulations 2019* apply to:

- (a) grocery supply agreements that come into force on or after the commencement of those amendments; and
- (b) grocery supply agreements that were in force immediately before that commencement and that are varied, renewed or extended after that commencement.

45 Payments for wastage

The amendment made to clause 14 by Schedule 3 to the *Competition and Consumer (Industry Codes—Food and Grocery) Amendment Regulations 2019* applies in relation to:

- (a) grocery supply agreements that come into force on or after the commencement of that amendment; and
- (b) grocery supply agreements that were in force immediately before that commencement and that are varied, renewed or extended after that commencement.

46 Information about negotiation of price increases

Clause 27B, as inserted by Schedule 3 to the *Competition and Consumer (Industry Codes—Food and Grocery) Amendment Regulations 2019* does not apply, in relation to the first financial year to end after the commencement of that clause, to information about matters that occurred during that financial year but before that commencement.